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Not Your Father's Marketplace of Ideas: Hate Speech and the Fraudulent Marketplace of Ideas Created by Social Media

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NOT YOUR FATHER'S MARKETPLACE OF IDEAS: HATE SPEECH AND THE FRAUDULENT MARKETPLACE OF IDEAS CREATED BY SOCIAL MEDIA

"It's all there specifically to kill people," Devon Arthurs told police after they found homemade bomb-making materials, two large boxes of live ammunition, a shotgun, an AK-47 assault rifle, a framed photograph of Oklahoma City Bomber Timothy McVeigh, a "trove of neo-Nazi and white-supremacist propaganda," and the bodies of Arthurs' two roommates.[1]

INTRODUCTION

The murder of Devon Arthurs's roommates was the culmination of Arthurs being radicalized into the world of white supremacist, neo-Nazis who dominated alt-right social media forums and websites where Arthurs spent a considerable amount of time.[2] Right-wing violence, white supremacy, and racially-motivated injustice hold a vital—but vile—place in the history of both the United States and Germany. Hate speech and dissemination of information advocating dogmas like white supremacy, however, are regulated differently in these two countries.

In recent years, racially-motivated, hate-based crimes have been on the rise, both in the United States and abroad.[3] From 2000 to 2016, white supremacists were responsible for more homicides than any domestic extremist group in the country.[4] From 2008 to 2016, right-wing—including white supremacist—attacks and violent events outnumbering such actions by Islamic extremists almost two-to-one.[5] The Global Terrorism Database operated by the University of Maryland defines right-wing extremism as, "violence in support of the belief that personal and/or national way of life is under attack" and is "[c]haracterized

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[1] Janet Reitman, *All-American Nazis*, ROLLING STONE (May 2, 2018, 8:00 AM), https://www.rollingstone.com/politics/politics-news/all-american-nazis-628023/ (explaining that Arthurs, 18, was a member of Atomwaffen, an American neo-Nazi group and self-proclaimed "terrorist organization" aimed at "build[ing] a Fourth Reich." Arthurs was a frequent visitor to sites like the *Daily Stormer* where contributors speak of leading "the youth in a rebellious cultural upheaval … [by] mold[ing] a social movement like the hippies did, that should give us a huge source of radicalized and militant recruits to bolster our ranks in the next five years.").

[2] *Id.* ("Between 2012 and 2016 … there was a 600 percent increase in American white-nationalist movements on Twitter alone; white-nationalist groups now outperform ISIS in nearly every social metric.").

[3] *See* JOINT INTELLIGENCE BULLETIN, WHITE SUPREMACIST EXTREMISM POSES PERSISTENT THREAT OF LETHAL VIOLENCE (2017); *see* Karsten Muller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* 16 (Univ. of Warwick Ctr. for Competitive Advantage in the Glob. Econ., Working Paper No. 373, 2018).

[4] JOINT INTELLIGENCE BULLETIN, *supra* note 3 at 4.

[5] David Neiwart et al., *Homegrown Terror*, REVEAL (June 22, 2017), https://apps.revealnews.org/homegrown-terror/.

by … racial or ethnic supremacy or nationalism … and/or belief in conspiracy theories that involve grave threat to national sovereignty and/or personal liberty."[6] From 2008 to 2016, left-wing motivated violent events made up less than ten percent of all domestic terror incidents.[7] Though they occur more frequently, violent incidents by right-wing and white supremacist groups were thwarted less often than Islamic motivated attacks, indicating a misapplication of resources.[8] Many theories behind the disparity may be envisaged; the pragmatic takeaway is that white supremacy poses a threat to the United States that is not being adequately addressed and law enforcement is devoting less than sufficient resources.[9]

Even before taking office, the Trump Administration began working on plans to "redirect national-security resources away from white supremacists to focus solely on Islamic terrorism."[10] In 2016, the Office of Community Partnerships, which houses the Countering Violent Extremism Task Force, created by President Barack Obama, had a 16 person staff, with 25 additional contractors, and a $21 million budget tasked with preemptively stopping acts of violent extremism.[11] By 2018, the office was reduced to eight employees working with less than $3 million meaning that "[e]ffectively, it no longer exists" according to a former Department of Homeland Security official.[12] Such a claw-back of resources is wholly inappropriate given the dangers of the digital world in which speech takes place today.

The "marketplace of ideas" envisioned by Justice Oliver Wendall Holmes in *Abrams v. United States*, in which the "test of truth is the power of the thought to get itself accepted in the competition of the market," is no longer limited to

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[6] Global Terrorism Database, *Ideological Motivations of Terrorism in the United States, 1970–2016*, NATIONAL CONSORTIUM FOR STUDY OF TERRORISM & RESPONSES TO TERRORISM (Nov. 2017), https://www.start.umd.edu/pubs/START_IdeologicalMotivationsOfTerrorismInUS_Nov2017.pdf. (Based on this definition, this paper will use the terms "white supremacy," "right-wing extremism," and any iteration interchangeably.)

[7] *See* Neiwart et al., *supra* note 5.

[8] *Id.*

[9] Among other organizations aimed at researching and combatting right-wing terrorism, the State Department under the Trump Administration, in the summer of 2018, discontinued funding for the University of Maryland's Global Terrorism Database after a researcher used the data provided to draw attention to the rise and disproportionate incidents of right-wing terrorism relative to other forms. Emily Atkin, *A Database Showed Far-Right Terrorism on the Rise. Then Trump Defunded it.*, THE NEW REPUBLIC, (Jan. 3, 2019), https://newrepublic.com/article/152675/database-showed-far-right-terror-rise-trump-defunded-it.

[10] Abigail Tracy, *"We Are at a Turning Point": Counterterrorism Experts Say Trump Is Inspiring a Terrifying New Era of Right-Wing Violence*, VANITY FAIR (Nov. 2, 2018, 8:38 AM), https://www.vanityfair.com/news/2018/11/trump-administration-tree-of-life-shooting-domestic-terrorism.

[11] *Id.*

[12] *Id.*

newspapers, radio and television broadcasts, and in-person word-of-mouth.[13] The internet and social media can connect and foster interactions and communications with people and points of view in previously unimaginable ways. The ability to connect with others around the world, however, is not without drawbacks. For all of the good that can come from the diversity of thought and exposure to different ideals, the Internet also includes "the depraved."[14] The Internet is seemingly anonymous by default and thus has become a "valuable means of communication for those of ill will."[15] According to George Selim, the former head of the Countering Violent Extremism Task Force, the "technical capability" and "social media savvy" have coincided with an increase in extremism, and "the mainstreaming of hate and extremism as part of our political discourse … allows for … bigots to better connect and organize online."[16]

This is not your father's marketplace of ideas.[17]

In Germany, Holocaust denial and similar hate speech are not protected under the German Constitution.[18] This Comment will address whether similar white supremacist and Nazi hate speech, when spread through social media companies like Facebook, are an unprotected form of speech subject to content-neutral time, place, and manner regulation by Congress.[19] This Comment will then address how white supremacist hate speech, distributed and circulated through social media platforms, can be regulated under the Commerce Clause if their information distribution mechanism, like the "newsfeed" on Facebook, algorithmically displays content based on user engagement instead of, for example, the time at which a post was published.

Part I details the background and history of hate speech in the United States and Germany, the rising importance of the internet, and in particular social media, compared with the information dissemination methods and capabilities of the past, the theory and function behind user-generated algorithms in social

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

14 Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y REV. 361, 362 (2010).

15 *Id.*

16 Tracy, *supra* note 10.

17 *See Oldsmobile: Victim of Its Own Brand*, SLATE (Dec. 13, 2000, 2:31 PM), https://slate.com/business/2000/12/oldsmobile-victim-of-its-own-brand.html.

18 *See* Robert Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 188–93 (2006).

19 *See generally* Yulia Timofeeva, *Hate Speech Online: Restricted or Protected–Comparison of Regulations in the United States and* Germany, 12 J. TRANSNAT'L L. & POL'Y 253 (2003) (comparing hate speech regulations in the United States and Germany).

media, and the Commerce Clause as it relates to the transmission of data. Part III will discuss the rise of an insular right-wing media ecosystem that has come about in recent decades. Part IV details a November 2018 district court opinion addressing the use of social media by white supremacists.

Part IV will address the similarities between American and German jurisprudence regarding hate speech, and how American jurisprudence is primed to adopt a view similar to that of Germany. This section will show that white supremacist and Nazi hate speech is not a protected class of speech in the United States and is subject to content neutral time, place, and manner regulation. Part V will then discuss how white supremacist and Nazi hate speech on social media platforms could be regulated under the Commerce Clause.

I. BACKGROUND

A. The History of Hate Speech Regulation in the United States and Germany

Regulation of hate speech in both the United States and Germany grew out of the worldwide geopolitical shift after World War II. However, forms and categories of hate speech as well as the reasons and bases upon which hate speech can be regulated in each country differ. Despite this divergent evolution, both the American and German philosophies regarding freedom of speech grow partly out of each countries' history and relationship with oppressive governmental regimes. This reliance on history has led to similar thinking and reasoning that has ultimately been interpreted differently by each countries' courts.

This Section will detail the evolution of hate speech regulation in the United States with particular emphasis on the doctrines of imminent lawless action, fighting words, content neutrality, and true threats. This section will then address the development of hate speech regulation in Germany with emphasis on the outlawing of Holocaust denial and other Nazi-related speech.

1. Hate Speech in America

The modern era of hate speech regulation arose in the midst of the Vietnam War. In 1969, the Supreme Court in *Brandenburg v. Ohio* held that an Ohio law criminalizing the advocacy of violence for political purposes violated the First Amendment.[20] In *Brandenburg*, the Court overturned the conviction of a Ku

[20] Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

Klux Klan leader who was filmed using racist and anti-Semitic speech in the presence of firearms.[21] In a *per curium* opinion, the Court created the imminent lawless action test under which the First Amendment generally does not allow a State to ban or prohibit one from advocating for the "use of force or law violation."[22] However, the Court carved out an exception for when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[23]

Prior to *Brandenburg*, in *Chaplinsky v. New Hampshire*, the Court indicated that there is no absolute right to freedom of speech.[24] The Court asserted that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected classes of speech because they are not an "essential part of any exposition of ideas."[25] The Court considered those classes of speech to be "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[26]

The next significant development in hate speech-related First Amendment jurisprudence came in *R.A.V. v. City of St. Paul*—the test of content-neutrality.[27] The Court declared unconstitutional a Minnesota statute that banned acts of cross-burning because the Government cannot arbitrarily draw content-based distinctions in its regulation of speech.[28] The majority created the "content neutrality" doctrine which stand for "the idea that the government has no right to discriminate against speech on the basis of its content."[29] According to content neutrality, there is a presumption against content-based regulations, though, exceptions do exist.[30] Justice Scalia, writing for the majority, detailed two instances in which content-based distinctions are permissible.[31] One, "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable" there is "no significant danger of idea or

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21 *Id.* at 444–45.
22 *Id.* at 447.
23 *Id.*
24 Chaplinsky v. State of New Hampshire 62 S. Ct. 766, 769 (1942).
25 *Id.*
26 *Id.*
27 R.A.V. v. St. Paul, 505 U.S. 377 (1992).
28 *Id.* at 377.
29 Kahn, *supra* note 18 at 172.
30 *R.A.V.*, 505 U.S. at 382.
31 *Id.* at 388–89.

view-point [sic] discrimination."[32] Two, if the purpose of the regulation was to limit the "secondary effects" of the speech.[33] The Court stated content-based regulations of "a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."[34]

In *Renton v. Playtime Theatres*, a city ordinance prohibiting "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school" was found to not violate the First Amendment because the ordinance did not "ban adult theaters altogether," but merely circumscribes where in the town they may be located and was thus aimed secondary effects of the film "on the surrounding community" rather than the content.[35] As such, the ordinance was content-neutral because it was "*justified* without reference to the content of the regulated speech," and thus was a "time, place, and manner regulation" rather than a content-based regulation aimed at suppressing the content displayed by adult movie theaters.[36] Additionally, regulatory response can address different kinds of speech based upon differing degrees of "special and overriding interest."[37]

Content-neutral time, place, and manner regulations are constitutional if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[38] The Court found that the ordinance was narrowly tailored despite it ostensibly targeting adult theaters because it potentially would regulate "other kinds of adult businesses" that may be prone to producing similar secondary effects despite it not doing so at the time.[39] The Court also found that alternative avenues of communication were left open because not only was there plenty of acreage and retail space available in parts of the city where the theaters could be located, but respondents were required to "fend for themselves … on an equal footing with" competitors.[40]

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[32] *Id.* at 388.

[33] *Id.* at 389 (citing Renton v. Playtime Theaters, 106 S.Ct. 925, 929 (1986) et. al).

[34] *Id.*

[35] *Renton*, 106 S.Ct. at 929.

[36] *Id.* at 929 (citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

[37] *Id*. at 930 (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 509–11 (1969)).

[38] *Id.* at 928.

[39] *Id.* at 931 ("That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggest that the city has 'singled out' adult theaters for discriminatory treatment.").

[40] *Id.* at 932 ("[the ordinance] sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas.").

R.A.V. has been criticized as applying the content neutrality doctrine "too rigidly."[41] In his concurring opinion, Justice White accuses the Court of ignoring precedent in this area of the law and chastises the majority saying contextual interpretation is paramount.[42] In Justice White's view, the categorical approach is "firmly entrenched" in the First Amendment.[43] Critics argue that by failing to address the historical context in which cross-burning and the Klan occurred in America, "Scalia failed to distinguish himself, and by extension all American citizens, from the taint of racism."[44]

A little over a decade later in *Virginia v. Black*, the court was again confronted with a statute prohibiting cross-burning.[45] A Virginia law that made it "unlawful for any person, … with intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place" was the basis for the conviction of Ku Klux Klan members who had burned a cross on a farm and two men who had burned a cross on the lawn of an African-American family.[46] Holding that a cross burning conducted with the intent to intimidate is not a protected class of speech under the First Amendment, the Court created the true threats doctrine whereby "'[t]rue threats' encompass those statements where the speaker means to communicate a serious [expression of an] intent to commit an act of unlawful violence to a particular individual or group of individuals."[47] The Ku Klux Klan members who had burned the cross on the farm were not punished because, due to the lack of spectators, their actions fell short of the statute's reach.[48] The Court did, however, view the burning of the cross in the front yard of the African-American family as a true threat due to the presence of spectators and the clear political symbolism that is present when a cross is burned in the front yard of an African-American family, unlike a Ku Klux Klan rally where like-minded members of a group are gathered.[49]

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41 Kahn, *supra* note 18, at 173.

42 R.A.V. v. St. Paul, 505 U.S. 377, 400 (1992) (White, J., Concurring) (internal citations omitted) ("such clear statements 'must be taken in context' and are not 'literally true.'")

43 *Id.*

44 Kahn, *supra* note 18, at 173, n. 56.

45 Virginia v. Black, 538 U.S. 343, 347 (2003).

46 *Id.* at 348.

47 *Id.* at 359.

48 *Id.* at 366.

49 *See id.* at 365. "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate…. Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus." *Id.* at 362.

Under the true threats doctrine, the perpetrator or speaker does not have to actually intend for their speech to go unprotected by the First Amendment.[50] The prohibition protects against: (1) the "possibility that the threatened violence will occur," (2) "from the *fear of violence*," and (3) "from the disruption that fear engenders."[51]

In *Boos v. Barry*, the Court refined *Renton* by clarifying that the "secondary effects" that were the object of the ordinance were those "almost unique to theaters featuring sexually explicit films, i.e., prevention of crime … and protection of residential neighborhoods" and that the regulations "appl[ied] to a particular category of speech because the regulatory targets happen to be associated with that type of speech."[52] The portion of a District of Columbia statute prohibiting the "display of any sign within 500 feet of a foreign embassy" if the sign is protesting the policies that embassy's government was found to violate the First Amendment.[53] The statute was not justified by a compelling government interest and was inherently content-based because whether the sign was banned depended entirely upon what it said.[54] The Court was careful to clarify, however, that listener reaction was not the "secondary effect" referred to in *Renton*.[55]

The second part of the statute prohibiting "any congregation of three or more persons within 500 feet of a foreign embassy" was found constitutional if interpreted according to the limitations imposed by the Court of Appeals.[56] The Court of Appeals limited the statute to permit "the dispersal only of congregations that are directed at the embassy" and "only when the police reasonably believe that a threat to the security or peace of the embassy is present."[57] Narrowed in this manner, the statute withstood overbreadth concerns

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[50] *Id.* at 360.

[51] *Id.* (emphasis added).

[52] Boos v. Barry, 485 U.S. 312, 320 (1988) ("So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.").

[53] *Id.* at 315, 332–33.

[54] *Compare id.* at 330–31 (where the congregation clause "merely regulate[d] the place and manner of certain restrictions"), *with R.A.V.*, 505 U.S. at 393 (where the regulation can be justified if "based on the very reasons why the particular class of speech at issue … is proscribable"). This would be the case if the statute banned all display signs in front of foreign embassies. *Boos*, 485 U.S. at 330–31.

[55] *Boos*, 485 U.S. at 319–21. *See also id.* at 321–23 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment."). This language is very similar to the freedom to form and hold opinions in Germany. *Compare id. with supra* II.A.2.

[56] *Id.* at 315–16, 332–33.

[57] *Id.* at 329–31. Finzer v. Barry, 255 U. S. App. D. C., at 40, 798 F. 2d, at 1471.

because it is only a place and manner regulation; constitutionally protected conduct was not implicated.[58]

At issue in *Hill v. Colorado* was a state statute making it unlawful within "100 feet of the entrance to any healthcare facility … to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of a passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.… "[59] Petitioners in the case claimed that the statute abridged their ability to approach persons walking towards or entering establishments performing abortions.[60] The Court stated that the statute in question concerns only regulations that "protect listeners from unwanted communication[,]" not speech aimed at those who are willing, and that even though freedom of speech "includes the right to attempt to persuade others to change their views" the "protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[61] The Court emphasizes that an unwilling listener has an interest in "avoiding unwanted communication" which is a part of "the broader 'right to be let alone'"[62] This right to be let alone is weighed against the right to communicate and is of particular weight when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[63] According to the Court, the first assessment in an analysis of content neutrality and time, place, and manner regulations is determining whether disagreement with the speech's message is the reason for adoption.[64]

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[58] *Id.* at 1169 ("The congregation clause does not prohibit peaceful congregations; its reach is limited to groups posing a security threat. As we have noted, 'where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.'") (internal citation omitted).

[59] Hill v. Colorado, 530 U.S. 703, 707 (2000).

[60] *Id.* at 708 (The court referred to the practice as "sidewalk counseling." "'Sidewalk counseling' consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.'").

[61] *Id.* at 716 (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)); *see also* Erznoznik v. Jacksonville, 422 U.S. 205, 210–11, n.6 (1975) (citation and brackets omitted) ("Indeed 'it may not be the content of the speech, as much as the deliberate "verbal or visual assault," that justifies proscription.").

[62] *Id*. at 716 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); Madsen v. Womens Health Center, Inc., 114 S.Ct 2516, 2528 (1994)) (The "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

[63] *Hill*, 503 U.S. at 718 (internal quotation and citation omitted).

[64] *Id*. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) ("The statute applies to all persons who 'knowingly approach' within eight feet of another person for the purpose of leafletting or displaying signs; for such persons, the content of their oral statements is irrelevant. With respect to persons who are neither leafletters nor sign carriers, however, the statute does not apply unless their approach is 'for the purpose of … engaging in oral protest, education, or counseling.'").

The statute only minorly restricted an "extremely broad category of speech" related to unwilling listeners, not an absolute ban on speech.[65]

In the United States, the content of the speech in question is of paramount importance when questions of restriction and regulation of speech are presented, even if the speech has the potential, or in fact does, offend, intimidate, threaten, or harm others. In Germany, however, more emphasis and consideration are put on the effects of one's speech and the actual or potential offense, intimidation, or harm that occurs as a result.

2. Hate Speech in Germany

The philosophy of German courts regarding the freedom of speech, and hate speech, in particular, is partly a function of Germany's role in World War II and the Nazi regime. The German Constitution grants all persons the right to freely "express and disseminate his opinions in speech, writing, and pictures and freely to inform himself without hindrance from generally accessible sources."[66] Like the United States, this right is not unlimited. The exercise of one's freedom of speech is "limited in the provisions of the general laws … and in the right to inviolability of personal honor."[67] Each person has the right to the "free development of [their] personality insofar as he does not violate the rights of others or offend against the constitutional order[.]"[68]

The concept of human dignity is the benchmark against which all rights are measured.[69] Germany views "dignity and equality" as deserving a "higher degree of protection" than the "verbally aggressive speech" used to attack those qualities in others.[70] Section 130 of the German Criminal Code emphasizes the hierarchy of values by making illegal acts which "assault[ ] the *human dignity* of" or "incite[ ] hatred against a national, racial, religious group or a group defined by their ethnic origins" or "segments of the population … because of their belonging to one of these aforementioned groups" which are undertaken in "a manner capable of disturbing the public peace."[71] This prohibition extends to

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[65] *Id.* at 723 ("Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.").

[66] GRUNDGESETZ [GG] [BASIC LAW], Art. 5(1), *translation* https://www.btg-bestellservice.de/pdf/80201000.pdf.

[67] *Id*. art. 5(2).

[68] *Id*. art. 2(1).

[69] Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 GERMAN L. J. 1 (2003).

[70] *Id.*

[71] STRAFGESETZBUCH [STGB] [PENAL CODE], § 130.

acts that lead to: "(1) incitement of hatred; (2) provocation of violence or lawlessness against personal freedom; and (3) insult, ridicule, and defame (not including mere expression of disrespect or disparaging assertions whose truth or untruth cannot be proven)."[72]

German courts, similar to American courts, classify protected classes based on whether a distinct group is or was at a time marginalized, victimized, or persecuted, such as those of the Jewish religion under the Nazi regime.[73] Hate speech directed at a group with "clearly defined characteristics that distinguish it from the rest of the population" is not presumptively protected.[74] The German Constitutional Court, in *Lüth*, limited the distribution of films made by a popular World War II era filmmaker because it would mean "nothing had changed in German cultural life since the National Socialist period …" if such films could still be freely disseminated.[75] The Court balanced economic and freedom of speech interests stating, "where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield."[76]

In 1959, after a distributor of anti-Semitic pamphlets was found not to have targeted all Jews but "International Jewry" by a judge who, it was later discovered, had authored an anti-Semitic law journal article during the Nazi period, the state brought a case against the pamphlet which was found to have endangered the state due to its "racial hatred" and its threatening nature to "regular constitutional order."[77]

Holocaust denial is not afforded protection in Germany.[78] In the *Zionist Swindle* case, the Federal Supreme Court ruled that Holocaust denial is not protected by one's right to freedom of speech because the "spreading of untrue statements" is not a protected interest.[79] The perpetrator of the denial, "[b]y

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[72] Chris Henry, *Wider Vision: Hate Speech Law, Public Opinion and Homosexual Rights in Germany and the United* States, 30 CONN. J. INT'L. L. 123, 184 (2015) (citing Bradley A. Appleman, *Hate Speech: A Comparison of the Approaches Taken by the United States and* Germany, 14 WIS. INT'L J. 422, 432 (1996)).

[73] Kahn, *supra* note 18, at 185 ("When someone today speaks disparagingly about 'the Jews,' then it is generally to be accepted that he intends that group of persons against when the National Socialist persecution of Jews was directed.").

[74] *Id.*

[75] Henry, *supra* note 72, at 132 (citing Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003)).

[76] *Id.*

[77] Kahn, *supra* note 18, at 186 (quoting BGHSt, 13, 32 (Ger.) (1959)).

[78] BVerfG, 1BvR23/94, Apr. 13, 1994, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621.

[79] Kahn, *supra* note 18, at 187.

characterizing the Holocaust as a Zionist swindle," had directly attacked the "self-conception of those singled out for persecution as Jews" and thus his speech impacted all Jewish people, not just Holocaust survivors.[80] As such, all Germans have a duty to do whatever is required to avoid falling back into the cultural conditions that allowed the Nazi regime to sprout up and flourish.[81]

In 1994, the German Constitutional Court again addressed the issue of Holocaust denial when a British Holocaust denier David Irving, a "revisionist of the extreme right wing," was prevented from giving a lecture in Munich.[82] The Court found that the denial of the Holocaust is not protected because, like in *Zionist Swindle*, denial is an untrue fact and thus unprotected by the freedom of opinion.[83] The Constitutional Court acknowledged that while speech is presumptively free, protection and this presumption end where "[the statements] cease to contribute anything to the formation of opinion that is presupposed in constitutional law."[84] The Constitutional Court specified that Holocaust denial was an opinion, and not a fact, because the "persecution of Jews in the Third Reich is an assertion of fact" that is proved to be true "according to innumerable eye witness [sic] reports and documents, the verdicts of courts in numerous criminal proceedings, and the findings of history."[85] The word "opinion," in this context, can be equated with freedom of expression and freedom of thought in American legal culture because it includes both "the formation of opinion and artistic or scholarly ideas" and the "expression of opinion and creation of works of art or science."[86] Additionally, "opinion" includes consideration of the "effect of opinion, art, or science on the addressee or audience;" a consideration that has, at times, been of less concern to American courts.[87]

The Constitutional Court emphasized that speech asserted to be fact is open to evaluation and criticism based on its truth because "the objective relationship between the statement and reality predominates"[88] This objectivity means that factually incorrect information "is not an interest worthy of protection" and thus a factual assertion "known or prove[n] to be untrue" is not covered by the

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[80] Kahn, *supra* note 18, at 187.

[81] *Id.* at 188.

[82] BVerfG, 1BvR23/94, Apr. 13, 1994, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621.

[83] *Id.*

[84] *Id.* (internal citation omitted).

[85] *Id.*

[86] Brugger, *supra* note 69, at 4.

[87] *Id. See generally R.A.V.*, 505 U.S. 377.

[88] BVerfG, 1BvR23/94, Apr. 13, 1994, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621.

freedom of opinion protection.[89] The Constitutional Court was careful to clarify that the "duty to be truthful" must not chill the freedom of opinion out of fear of punishment.[90]

B. The History of the Commerce Clause as It Pertains to Aggregate Economic Impact

Article I, § 8 of the United States Constitution authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States," has a turbulent history.[91] Beginning just before the start of the New Deal and the end of World War II, the Supreme Court began to usher in a new era of Commerce Clause jurisprudence that it only recently began limiting. In *Wickard v. Filburn*, the Court upheld application of the Agricultural Adjustment Act to a farmer who had grown more than his allotted amount of wheat.[92] The Court found that by growing wheat for personal use, the farmer was affecting the national market for wheat which in the aggregate, had a substantial effect on interstate commerce even though individually, a single farmer's personal wheat was ostensibly negligible.[93]

Like many other areas of the American jurisprudence, the Commerce Clause is inherently tied to racial animus and the oppression of people of color which pervades U.S. history. Relying on *Wickard*, the Court, in *Heart of Atlanta, Inc. v. U.S.*, found that the Civil Rights Act of 1964's prohibition of refusal of service to customers on the basis of race was justified under the Commerce Clause because discrimination by hotels has a detrimental effect on interstate commerce.[94] During this period, African-Americans published books and pamphlets informing minority families of towns and hotels where it was safe to stop while traveling in addition to hotels and restaurants that would serve them.[95] The Court in *Heart of Atlanta, Inc. v. U.S.*, held that the threat of being unsafe or unable to stop at certain hotels and motels in certain parts of the country significantly deterred interstate commerce as whole groups of people were disincentivized from traveling across state lines.[96] The Court specified that the

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89 *Id.*

90 *Id.*

91 U.S. CONST. art. I, § 8, cl. 3.

92 Wickard v. Filburn, 317 U.S. 111, 133 (1942).

93 *Id.* at 127–28.

94 Heart of Atlanta, Inc. v. U.S., 379 U.S. 241, 253 (1964).

95 Jacinda Townsend, *How the Greenbook Helped African-American Tourists Navigate a Segregated* South, SMITHSONIAN MAG. (Apr. 2016), https://www.smithsonianmag.com/smithsonian-institution/history-green-book-african-american-travelers-180958506/.

96 *See generally Heart of Atlanta, Inc*, 379 U.S. at 252–53.

fact that though "Congress was legislating against moral wrongs … rendered its enactments no less valid."[97] In the Court's view, it was irrelevant that the obstruction of interstate commerce encompassed a "moral and social wrong.[98]

The Court began limiting the scope of the Commerce Clause in 1995 in *United States v. Lopez*.[99] The Court found that the Gun-Free School Zones Act of 1990 was unconstitutional because a student bringing a loaded .38-caliber handgun to school did not fall under Congress's ability to regulate those activities having a substantial relation to interstate commerce.[100] The Court reached this conclusion because, *inter alia*, the statute's application was not restricted to cases where the gun had been in interstate commerce.[101]

The substantial effects test elucidated in *Lopez* was further limited in *United States v. Morrison* where the civil damages provision of the Violence Against Women Act was found unconstitutional despite evidence that domestic violence and violence against women have a substantial effect on the economy.[102] Chief Justice Rehnquist claimed that the Court did not need to "adopt a categorical rule against aggregating the effects of noneconomic activity."[103]

C. Social Media and the Proliferation of User-Generated Algorithms

Facebook had 214 million users in the United States and over 2.23 billion active users as of the second quarter of 2018.[104] This is larger than the population of China which stands at 1.427 billion for 2018.[105] For much of Facebook, and other social media companies' histories, the focus has been on growth.[106] "Daily Active Users" is the metric which social media companies live and die by.[107]

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[97] *Id.* at 257.

[98] *Id.*

[99] United States v. Lopez, 514 U.S. 549, 567 (1995).

[100] *Id.* at 567–68.

[101] *Id.*

[102] United States v. Morrison, 529 U.S. 598, 619 (2000).

[103] *Id*. at 613.

[104] *Number of Facebook users in the United States as of January 2018, by age group (in millions)*, STATISTA https://www.statista.com/statistics/398136/us-facebook-user-age-groups/ (last visited Sept. 21, 2018); *Number of monthly active Facebook users worldwide as of 2nd quarter 2019 (in millions)* STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Sept. 21, 2018).

[105] *China Population*, WORLDOMETERS, https://www.worldometers.info/world-population/china-population/ (last visited Sept. 21, 2019).

[106] Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy*, NEW YORKER (Sept. 10, 2018), https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy.

[107] *Id.*

Since most social media companies depend on outside investment—which typically depends on Daily Active User rates—the success or failure of a social media company, particularly in the early stages of life, depends on constant growth of active users.[108] As a result, much of Facebook's corporate strategy has been aimed at growth without as much focus on the content of what is being published on the website.[109]

In January of 2018, Facebook announced that it would be altering the way information is organized and displayed to the user.[110] The order in which posts and published material will be displayed will depend both upon the amount of "likes, comments, and shares" a post gets and whether it is posted or published by a friend or a business.[111] The "Newsfeed" is the information display mechanism on the Facebook homepage where one's Facebook friend's posts and advertisements are displayed as semi-identical looking posts.[112] The more likes, comments, and shares a post gets, the further to the top of the Newsfeed it gets pushed, especially if posted or published by a person in a person's friends list.[113]

The problem with this model of information distribution is that "[p]osts that tap into negative, primal emotions like anger or fear . . perform best and so proliferate."[114] Additionally, social media sites, many of which are free and require no identity verification, present no barrier to entry.[115] One only needs an internet connection to log into begin posting in these communities.[116]

According to Princeton University social psychologist Betsy Paluck, people's behavior adapts instinctively to social norms which can stop someone from engaging in behavior that violates those norms.[117] This process is interrupted by Facebook because it "siphons us into like-minded groups and,

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[108] *Id.*

[109] *Id.*

[110] Mark Zuckerberg, FACEBOOK, (Jan. 11, 2018), https://www.facebook.com/zuck/posts/10104413015393571 (last visited Sept. 21, 2019).

[111] Jose Angelo Gallegos, *Why Facebook's New Algorithm Means You Need to Invest in UGC Right Now*, TINUP (Feb. 2, 2018), https://www.tintup.com/blog/facebooks-new-algorithm-means-need-invest-ugc-right-now/.

[112] Vangie Beal, *Facebook News Feed*, Webopedia (2019) https://www.webopedia.com/TERM/F/Facebook_News_Feed.html.

[113] Gallegos, *supra* note 111.

[114] Amanda Taub & Max Fischer, *Facebook Fueled Anti-Refugee Attacks in Germany, New Research Suggests*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/world/europe/facebook-refugee-attacks-germany.html.

[115] *Id.*

[116] Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet Under International Law*, 39 N.C.J. INT'L L. & COM. REG. 701, 722–23 (2014).

[117] Taub & Fischer, *supra* note 114.

through its algorithm, promotes content that engages our base emotions" by positioning content which has received the most "likes" at the top.[118] This can give the "impression that there is widespread community support for violence" which may change an individual's belief that if they acted, they "wouldn't be acting alone."[119] Heavy social media users may begin equating insincere "trolling" and "sincere hate" meaning "Facebook can provide a closed environment with its own moral rules."[120]

The more often someone posts on Facebook, the more likely they are to be "more extreme," according to Princeton University social scientist Andrew Guess, which can lead casual users to see a "world shaped by superposters."[121] The world which Facebook users see appears to be more extreme and dangerous because the traditional practice of "professional gatekeepers such as editors" deciding what gets published gets overridden by user-generated content.[122] There is no editorial process whereby false or extreme ideas get filtered out.[123] Such superposters and their distorted casual user's worldview into reevaluating hostility towards refugees and distrust of authority as new social norms despite no widespread support for these positions .[124]

According to a study conducted by the University of Warwick, social media is not only "fertile soil for the spread of hateful ideas," but it "motivates real-life action."[125] Analyzing "detailed local data on Facebook usage with user-generated content," the study found that the connection between "users' internet or Facebook access" and anti-refugee violence "reflects a causal effect" indicating that far-right and white supremacist content, when grouped with user-generated algorithms, causes violence to rise in the real world.[126] Indeed, an increase of one standard deviation of Facebook use coincided with a fifty percent increase in attacks on refugees.[127] The research estimates with a high degree of certainty that in the absence of anti-refugee Facebook posts on a single far-right German Facebook page, thirteen percent fewer anti-refugee incidents would have taken place in Germany.[128] Additionally, the study found that "Facebook

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118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 Müller & Schwarz, *supra* note 3, at 42.
126 *Id.* at 4, 42.
127 Taub & Fischer, *supra* note 114.
128 Müller & Schwarz, *supra* note 3, at 41.

disruptions" caused by internet outages in a municipality "*fully* undo the effect of social media propagation[;]" such disruptions in areas with high Facebook usage were accompanied by a drop in attacks on refugees equal to the rate at which heavy use is predicted to increase attacks.[129]

II. THE RIGHT-WING MEDIA ECOSYSTEM AND THE INCREASED PREDISPOSITION OF OLDER AND CONSERVATIVE AMERICANS TO SHARE FAKE NEWS

In a separate study, Guess and his colleagues found that Republicans were more likely than Democrats to share fake news stories with their friends on Facebook; those who identified as "very conservative" shared the most fake news articles.[130] Additionally, the study found that Facebook users over the age of sixty-five shared almost seven times as many fake articles as the youngest group in the study.[131] The study also found that "more fake news stories … offered pro-Trump or anti-Clinton content, aimed specifically at Republicans and conservatives."[132] This suggests that more false or misleading information exists in the right-wing than in the left-wing media ecosystem.

The online right-wing media ecosystem, grounded in websites like Breitbart.com, has used social media to create a "distinct, [] insulated … [and] hyper-partisan perspective to the world."[133] A study by the *Columbia Journalism Review* found "asymmetric" polarization between the conservative and liberal media worlds, thereby giving the "conservative media sphere" the ability to great affect the entire media world.[134] The study found that "many of the most-shared stories" can be described as "disinformation: the purposeful construction of true or partly true bits of information into a message that is, at its core, misleading" which turns the "right-wing media system into an internally coherent, relatively insulated knowledge community, reinforcing the shared worldview of

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129 *Id.* at 29; *see* Taub & Fischer, *supra* note 114.

130 Andrew Guess et al., *Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook*, 5 SCI. ADVANCES MAG. 1, 5 (Jan. 9, 2019), *available at* http://advances.sciencemag.org/content/5/1/eaau4586/tab-pdf.

131 *Id.* at 2.

132 Andy Guess et al., *Who Was More Likely to Share Fake News in 2016? Seniors.*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/09/who-shared-fake-news-during-the-2016-election-campaign-youll-be-surprised/?utm_term=.6b2f9e8c40f0; *see* Andrew Guess et al. *supra* note 130.

133 Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php.

134 *Id.*

readers[.]"[135]

When compared with more traditional media, the most notable aspects of the right-wing media ecosystem are: (1) the lack of "center-right sites" that tend to draw mostly conservatives and a substantial number of liberals; and (2) that right-wing media, in its current iteration, is still in its infancy.[136] For example, only "the *New York Post* existed when Ronald Reagan was elected" in 1980 and only the *Washington Times* had been created by the 1992 election of Bill Clinton.[137] The substantial increase in right-wing partisan websites which "exceeds the number of sites in the clearly partisan left" exemplifies the lack of center-right sites such as the *Wall Street Journal*.[138] Additionally, there was a "dramatic increase" in the "levels of attention" that clearly partisan right-wing websites receive that does not exist on the left.[139]

During the 2016 election, these hyper-partisan websites were adjusting the broader media conversation to conservative points, causing mainstream media coverage to capitulate and discuss predominately what the right-wing media wanted.[140] These points of interest were then framed "in terms of terror [and] crime" by the right-wing media.[141]

The *Columbia Journalism Review* study found a "network of mutually-reinforcing hyper-partisan sites that revive what Richard Hofstadter called 'the paranoid style in American politics,' combining decontextualized truths, repeated falsehoods, and leaps of logic to create a fundamentally misleading view of the world."[142] This right-wing insulation is created and reinforced through a "potent mix of verifiable facts … familiar repeated falsehoods, paranoid logic, and consistent political orientation within a mutually-reinforcing network of like-minded sites."[143]

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135 *Id.*

136 *Id.* The term "traditional media" in this sense denotes the media outlets that the study uses as points of comparison in order to perform its analysis including The New York Times and The Washington Post. *See id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*; *see* Richard Hofstadler, *The Paranoid Style in American Politics*, HARPER'S MAG. (Nov. 1964), https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/. "I call it the paranoid style simply because no other word adequately evokes the sense of heated exaggeration, suspiciousness, and conspiratorial fantasy that I have in mind…. It is the use of paranoid modes of expression by more or less normal people that makes the phenomenon significant." *Id.*

143 Benkler et al., *supra* note 133. "By repetition, variation, and circulation through many associated sites, the network of sites make their claims familiar to readers, and this fluency with the core narrative gives credence to the incredible." *Id.*

The vast network of sites available to conservatives who are more likely to share fake news make these fake claims identifiable and familiar thus giving them credence through "repetition, variation, and circulation."[144]

III. *GERSH V. ANGLIN*

In November of 2018, a district court in Montana heard a lawsuit filed by a Jewish real estate agent against the publisher of the neo-Nazi site the *Daily Stormer* accusing the publisher of "coordinating a 'terror campaign' of online harassment."[145] The case concerned whether a *Daily Stormer* post which targeted Gersh was protected speech.[146] The post claimed that Gersh was "acting in furtherance of a perceived Jewish agenda and using Holocaust imagery and rhetoric."[147] The court found that the publisher, Andrew Anglin, "incited his followers to harass her as part of a personal campaign."[148]

Drawing on *Virginia v. Black*, the court acknowledged that freedom of speech protections are not without limits and speech can be regulated in certain instances.[149] Through this lens, the court clarified that although freedom of speech protections are:

> particularly strong when the speech at issue involves "matters of public concern. "'[N]ot all speech is of equal First Amendment importance,' however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." This is so because the regulation of "speech on matters of purely private concern" does not "threat[en] the free and robust debate of public issues" or "potential[ly] interfere[ ] with a meaningful dialogue of ideas."[150]

Whether speech is of public concern depends upon the "'content, form, and context' of the speech, i.e., 'what was said, where it was said, and how it was said.'"[151] This encompasses an inquiry into the speech's relation to matters of

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144 Benkler et al., *supra* note 133; *see also* Casey Newton, *People Older than 65 Share the Most Fake News, a New Study Finds*, VERGE (Jan. 9, 2019, 2:00 PM), https://www.theverge.com/2019/1/9/18174631/old-people-fake-news-facebook-share-nyu-princeton.

145 Karen Zraick, *Neo-Nazis Have No First Amendment Right to Harassment, Judge Rules*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/daily-stormer-anti-semitic-lawsuit.html.

146 Gersh v. Anglin, 353 F. Supp. 3d 958, 962–63 (D. Mont. 2018).

147 *Id.*

148 Zraick, *supra* note 145.

149 *Gersh*, 353 F. Supp. 3d at 964 (quoting Virginia v. Black, 538 U.S. 343, 358 (2003)).

150 *Id.* (internal citations omitted).

151 *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 454 (2011)) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).

"political, social, or other concern to the community."[152] The inquiry is satisfied when the speech is of "general interest and of value and concern to the public."[153]

The court then asserted that the publisher was attempting to use ostensibly public speech "to mask" an attack and insulate speech from liability.[154] The court found that Anglin's attempt to insulate his speech were ineffective because it "did nothing to inform the public about any aspect" of public concern.[155] He not only published information about the real estate dispute, but also the personal contact information of Gersh and people associated with her in "'an attempt to turn' Anglin [and his followers'] personal hostilities into 'a cause celèbre.'"[156]

The court then stated that although initially the speech seemed to be public based on the context—an easily accessible "alt-right 'news' blog," that works with political issues, "albeit from an extremist viewpoint" can be seen as "strictly private" because the speech involved "unrelated personal attacks" which "drew heavily on his readers' hatred and fear of ethnic Jews."[157] The online posts created "more than a colorable claim" the posts' purpose was harassment rather than to inform.[158] The court asserted that "the public context of the *Daily Stormer* posts cannot 'transform the nature of [Anglin's] speech.'"[159]

Finally, the court stated that although it could not prohibit such posts because of their "morally and factually indefensible worldview," a state does, in fact, have the power to "protect its residents from 'repeated unwanted telephone calls that are harassing due to their sheer number and frequency.'"[160] The Court clarified that the repugnant, anti-Semitic views espoused in the posts and directed at Gersh did not go unnoticed.[161]

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[152] *Id.* (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

[153] *Id.* at 964–65 (quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (1983)).

[154] *Id.* at 965 (quoting Snyder v. Phelps, 562 U.S. 443, 455 (2011)).

[155] *Id.* (quoting City of San Diego v. Roe, 543 U.S. 77, 84 (2004)).

[156] *Id.* at 965–66 (citing Connick v. Myers, 461 U.S. 138, 148 (1983)), Anglin's posts provided the "phone numbers, email addresses, and social media profiles of [Gersh], her husband, twelve-year-old-son, friends, and colleagues;" [and asked his readers to] 'Tell them you are sickened by their Jew agenda to attack and harm the mother of someone whom they disagree with.'" *Id.* at 962. The posts resulted in Gersh receiving over "700 disparaging and/or threatening messages[.]" *Id.* at 963.

[157] *Id.*

[158] *Id.* at 966 (citing Snyder v. Phelps, 562 U.S. 443, 454 (2011)).

[159] *Id.* (citing Snyder v. Phelps, 562 U.S. 443, 454 (2011)).

[160] *Id.* (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); United States v. Osinger, 753 F.3d 939, 954 (9th Cir. 2014)).

[161] *Id.*

IV. WHITE SUPREMACIST AND NAZI HATE SPEECH ON SOCIAL MEDIA IS NOT A PROTECTED CLASS OF SPEECH AND THUS CAN BE REGULATED UNDER THE COMMERCE CLAUSE

The interpretations of free speech doctrines in the United States and Germany differ drastically enough that scholars have assigned them to different schools of treatment.[162] Yet the language, and oftentimes the reasoning, employed by each countries' courts are remarkably similar.

Justice Oliver Wendell Holmes and his "marketplace of ideas" philosophy may be equated to the freedom to form one's personality and the freedom to form an opinion enumerated in Articles 2 and 5 of the German Constitution, respectively.[163] Just as, according to Justice Holmes, the "test of truth is the power of the thought to get itself accepted in the competition of the market," in Germany expression and formation of opinion through "constant intellectual debate [and] the clash of opinions" is "one of the foremost human rights."[164] In neither country, though, are these freedoms absolute.[165]

The U.S. Supreme Court's opinion in *Chaplinsky* excepted "fighting words" from First Amendment protection because they are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[166] This language and reasoning parallel the German Constitutional Court in *Lüth* which held the "presumption in favour of free speech" ends when statements "cease to contribute anything to the formation of opinion" and "where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield."[167]

A. Proposed Statutory Requirements

The language and reasoning behind both the United States' and Germany's regulation of freedom of speech, regarding white supremacist speech on social media, are nearly identical but have been interpreted in varying ways. The limits placed upon the American government's ability to proscribe speech are a valid

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162 Brugger, *supra* note 69.

163 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting); GRUNDGESETZ [GG] [BASIC LAW], art. 2(1) & 5(1), *translation at* https://www.btg-bestellservice.de/pdf/80201000.pdf.

164 *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting); Brugger, *supra* note 69.

165 Henry, *supra* note 72; *see generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

166 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

167 Henry, *supra* note 72.

and representative evolution of the legitimate school of thought that prioritizes "freedom of speech over most countervailing interests, even when the speech is filled with hatred."[168] However, this evolution occurred before the advent of social media and the potential for one person's speech to be legitimized and displayed to 2.23 billion people across the globe.[169]

As a result of the "new" marketplace of ideas created by the Internet and social media, Congress should enact a statute which bans from social media platforms racial supremacist speech requiring that: (1) any racial supremacy messages published advance a demonstrably dangerous true threat to a protected class of people; (2) the ban be limited to social media as a time, place, and manner regulation aimed at protecting against the "secondary effects" of white supremacy on social media rather than suppressing the content of white supremacist speech; and (3) the publishing of racial supremacy be done knowingly in an effort to educate, counsel, advocate, promote, or support racial supremacy.[170]

The statute would be directed not only at white supremacist speech that aims to intimidate on the basis of "race, gender, or religion, … or homosexuality," as was the case in *R.A.V.*[171] It would be directed at all speech perpetrated by racial supremacy groups on social media in light of racial—but particularly white supremacy's—"long and pernicious history as a signal of impending violence" and as a "particularly virulent form of intimidation" traditionally perpetrated by cross burnings but now perpetrated by post sharing.[172] A statute does not become "viewpoint based" because it was motivated by partisan conduct and the such a statute will not be invalidated solely on an "alleged illicit legislative motive."[173]

1. Requirement of a Demonstrable True Threat

Governmental response, when regulating speech, can be formulated to address the special and overriding interests of the speech.[174] In *Virginia v. Black*,

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168 Brugger, *supra* note 69, at 2.

169 *See* discussion, *supra* Section II.C.

170 City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46–47 (1986).

171 Virginia v. Black, 538 U.S. 343, 362 (2003).

172 *Id.* at 363.

173 Hill v. Colorado, 530 U.S. 703, 724–25 (2000) ("The antipicketing ordinance upheld in *Frisby v. Shultz*, 487 U.S. 474, a decision in which both of today's dissenters joined, was obviously enacted in response to the activities of antiabortion protestors who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral."); *City of Renton*, 475 U.S. at 48 (citing United States v. O'Brien, 391 U.S. 367, 383–84 (1968)).

174 *City of Renton*, 475 U.S. at 49 (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 509–11

the Court stated that "a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[175] The Court reasoned that Virginia is allowed to outlaw cross burning performed "with the intent to intimidate because burning a cross is a particularly virulent form of intimidation" that may be regulated "in light of cross burning's long and pernicious history as a signal of impending violence."[176] Likewise, Germany outlawed denial of the Holocaust as a means of taking a "major step towards leaving its National Socialist past behind."[177]

Just as slavery is the history with which Americans must bear, the mark of the Nazi regime is indelible in Germany. The Ku Klux Klan is a reminder of America's "violent past centered on segregation" just as "Nazism has changed the way Germans look at anti-Semitism, which has now become a symbol for all that went wrong between 1933 and 1945."[178] As a result of this "eye toward the past," Section 130 of the German Penal Code outlaws "attacks on human dignity that incite hatred in a manner likely to cause a breach of the peace," language which is very similar to that of *Virginia v. Black* and the allowance for states to regulate against the "possibility that the threatened violence will occur."[179] Just as the pamphlets which were found to have endangered Germany due to their "racial hatred" and threatening nature to "regular constitutional order," cross burning was found to be a "potent symbol[] of shared [Ku Klux Klan] identity and ideology," which constituted a "true threat" towards the family in whose front yard the cross was burned.[180]

The idea that a government has no right to discriminate against speech on the basis of its content is much too drastic and absolutist for the modern world. Despite its presumption in favor of free speech, Germany has seen fit to outlaw some categories of speech, e.g., Holocaust denial, which according to Justice White, the United States has done before *R.A.V.*[181]

Justice Scalia's assertion in *R.A.V.* that the First Amendment is predicated on the idea that the views of the majority must be "expressed in some fashion

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(1969)).

175 *Virginia*, 538 U.S. at 360.

176 *Id.* at 363.

177 Brugger, *supra* note 69, at 35.

178 Kahn, *supra* note 18, at 184.

179 *Id.*; Henry, *supra* note 72; *Virginia*, 538 U.S. at 360.

180 BGHSt, 12, 32 (Ger.) (1959); *Virginia*, 538 U.S. at 356.

181 BVerfG, 1BvR23/94, Apr. 13, 1994, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621; R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (White, J. concurring).

other than silencing speech on the basis of its content" does not take into account the fact that Facebook can give a false sense of majority acceptance to ideas, both true and untrue, which garner minuscule support from only fringe ideologues.[182] By doing so, the Court in *R.A.V.* effectively took away the ability of the Government to regulate speech that is of such "*de minimis* value to society" as to add nothing of value to it.[183] In Justice White's concurrence, he warned of protecting such patently false or fringe ideas through the removal of the Government's ability to proscribe categories of speech which have historically earned no First Amendment protection, saying "[s]hould the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words."[184]

A contributing factor to this false sense of majority acceptance on social media is the fact that on social media display mechanisms, news articles are displayed in identical format regardless of the poster.[185] Facebook's information display gives an air of aesthetic legitimacy to a post regardless of its content or publisher.[186] This air of legitimacy contributes to the alarming results of a study by Princeton University political scientist Andrew Guess which found that the older an American is, the more prone they are to share false news articles on Facebook, and Republicans and conservatives were more likely to share links to fake news sites.[187]

Humans have an innate inability to grasp and fully understand the real-world significance of numbers the larger the numbers are.[188] It is the "natural tendency" of humans to "misperceive and miscalculate probabilities, to think anecdotally instead of statistically," e.g., to "notice a short stretch of cool days and ignore the long-term global-warming trend."[189] This idea plays into the legitimization of white supremacist speech on Facebook, now more than ever, because of the company's shift to user-generated algorithmic displays of information and posts.

User-generated algorithms push posts with the most engagement to the top of a Facebook user's newsfeed based on the amount of engagement the post

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182 *R.A.V.*, 505 U.S. at 392; *see* Taub & Fischer, *supra* note 114.

183 *R.A.V.*, 505 U.S. at 400 (White, J. concurring).

184 *Id.* at 401.

185 Newton, *supra* note 144.

186 *See* Taub & Fischer, *supra* note 114.

187 Newton, *supra* note 144.

188 *See* Michel Shermer, *Why Our Brains Do Not Intuitively Grasp Probabilities*, SCI. AM. (Sept. 1, 2008), https://www.scientificamerican.com/article/why-our-brains-do-not-intuitively-grasp-probabilities/.

189 *Id.*

receives.[190] When a Facebook user sees a post promoting white supremacist ideals which, *arguendo*, has been liked 12,000 times, the user's tendency to "think anecdotally instead of statistically" will cause the user to falsely believe there is "widespread community support" for the ideals that the post promotes when only 0.0000054% of Facebook users have actually indicated support.[191] People's behavior is typically adapted to the social norms of a community which act as "a brake on bad behavior," but with such large numbers giving a false sense of validation to false or fringe ideas, social norms are distorted by a fraudulent shift in the Overton window.[192]

When white supremacist speech is posted to Facebook, there are potentially billions of onlookers and "spectators" which make it more probable that the post will be viewed as intimidation and thus a true threat, as opposed to the burning of a cross in a field where there are no spectators. Such online speech is more in line with the remand of the case against the men who burned the cross in the front yard of the African-American family.[193] Additionally, the right-wing media ecosystem has the ability to shift the overall media narrative to focus on topics like immigration, creating more opportunities for white supremacists to either create or share radical speech published by the litany of "clearly partisan right-wing websites."[194]

Studies show that: (1) right-wing and white supremacist attacks not only outnumbered violent events by Islamic extremists and left-wing groups nearly two-to-one, but also were much more deadly; (2) there is a causal link between Facebook use and right-wing motivated attacks against refugees; and (3) not only are right-wing and conservative social media users more inclined to believe and propagate right-wing messages and speech, regardless of truth, but also the right-wing media ecosystem creates "an internally coherent, relatively insulated

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190 Gallegos, *supra* note 111.

191 Shermer, *supra* note 188. For the equation I divided the shares by Facebook active users as of the second quarter of 2018: 12,000/2,230,000,000 = 0.0000054. This is the number of shares I proposed in the hypothetical divided by Facebook's daily active user metric in the second quarter of 2018.

192 Taub & Fischer, *supra* note 114; *see* Reitman, *supra* note 1 (the goal of sites like the Daily Stormer is to "shift the Overton window, a wonky poli-sci concept describing the process of changing public opinion to accept ideas that might have previously been radioactive…. From the perspective of white nationalists like Auernheimer (who recently floated the idea of murdering Jewish children in the name of free speech), outrageous anti-Semitism might shift the window far enough to the right that a goal of an immigrant-free, white ethnostate would look almost palatable."); Derek Robinson, *How an Obscure Conservative Theory Became the Trump Era's Go-to Nerd Phrase*, POLITICO (Feb. 25, 2018), https://www.politico.com/magazine/story/2018/02/25/overton-window-explained-definition-meaning-217010 (explaining that the Overton window is "the range of ideas outside which lie political exile or pariahdom.").

193 *See* Virginia v. Black, 538 U.S. 343, 367 (2003).

194 Benkler et al., *supra* note 133.

knowledge community, reinforcing the shared worldview of readers."[195] Through the lens of these studies, such intimidating posts constitute "attacks on human dignity that incite hatred in a manner likely to cause a breach of the peace" as well as a "possibility that the threatened violence will occur."[196] The positive correlation between how conservative or right-wing a user is and their predisposition to "fall prey to" and share radical, untrue articles on social media creates an environment on social media platforms conducive to engendering fear.[197] White supremacist speech is not an "essential part of any exposition of ideas," this speech also does not "contribute anything to the formation of opinion that is presupposed in constitutional law[,]" and it actively creates well-founded fear of violence in those that are the target and subject of white supremacy speech, such as people of color and immigrants.[198]

Right-wing extremism is driven by, among other things, concerns over illegal immigration, a fear of economic collapse, gun control legislation, and presidential elections, all of which are consistently the topic of fringe, extreme right-wing media.[199] This "network of mutually-reinforcing hyper-partisan sites," including the Daily Stormer and Breitbart, which are shared and given the air of legitimacy through the user-generated content display functions of Facebook and other social media platforms.[200] These sites create the required environment of "decontextualized truths, repeated falsehoods, and leaps of logic" needed for white supremacy indoctrination, radicalization, and perpetration to be effective and thus is not a protected class of speech when perpetrated through social media platforms due to the true threat it poses to those

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[195] *Id.*

[196] Henry, *supra* note 72 at 133; *Virginia*, 538 U.S. at 345; *see* JOINT INTELLIGENCE BULLETIN, *supra* note 3, at 4.

[197] Benkler et al., *supra* note 133; Lois Beckett, *Pittsburgh Shooter Was Fringe Figure in Online World of White Supremacist Rage*, GUARDIAN (Oct. 30, 2018, 4:00 PM EST) https://www.theguardian.com/us-news/2018/oct/30/pittsburgh-synagogue-shooter-was-fringe-figure-in-online-world-of-white-supremacist-rage (explaining that the 2018 murder of 11 people at the Tree of Life Synagogue in Pittsburg, Pennsylvania was perpetrated by a man who frequented *Gab.com*, a social networking site popular with white supremacists. The man informed the arresting officers that his motive was his belief that "Jews 'were committing a genocide to his people;" a conspiracy theory which "mirrors the online trail of white supremacist comments posted by a 'Robert Bowers' on *Gab.com*.").

[198] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942); BVerfG, 1BvR23/94, Apr. 13, 1994, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621; *see* JOINT INTELLIGENCE BULLETIN , *supra* note 3, at 4 (Over the past five years, various rightwing extremists, including militias and white supremacists, have adopted the immigration issue as a call to action, rallying point, and recruiting tool. Debates over appropriate immigration levels and enforcement policy generally fall within the realm of protected political speech under the First Amendment, but in some cases, anti-immigration or strident pro-enforcement fervor has been directed against specific groups and has the potential to turn violent).

[199] DAVID NEIWERT, ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP (2017).

[200] Benkler et al., *supra* note 133;

who have historically been persecuted in the United States.[201]

2. Secondary Effects Requirement and Time, Place, and Manner

The ostensible reason for regulating the time, place, and manner of where white supremacy can be perpetrated on the internet is the effect such perpetration of speech has on people of color and immigrants. That the effect is a result of the speech's content no more renders a statute prohibiting white supremacy on social media a content-based regulation than the statute at issue in *Hill v. Colorado*.[202] A content-neutral time, place, and manner regulation is constitutional so long as it is "designed to serve a substantial governmental interest" and does not "unreasonably limit alternative avenues of communication."[203]

A "correlation with subject and viewpoint" will always exist "when the law regulates conduct that has become the signature of one side of a controversy."[204] The intention of a statute removing white supremacist speech from social media would be to dissipate the offensive behavior associated with the speech, not the suppression of the content of the speech due to a "disagreement with the message it conveys."[205]

Such a statute would be narrowly tailored in that it would not altogether ban such speech from the internet, as such a ban would be difficult, if not impossible to justify on grounds other than the speech's content, but would merely circumscribe where such speech may take place.[206] A ban from social media would, based on the secondary effect of the true threat that white supremacy poses, be "*justified* without reference to the content of the regulated speech."[207] As long as the statute was worded as to proscribe all dangerous racial supremacy, white supremacist speech would not be "singled out."[208] It would affect only the

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[201] *Id.*; *see Virginia*, 538 U.S. at 363; JOINT INTELLIGENCE BULLETIN, *supra* note 3, at 5; Taub & Fischer, *supra* note 114.

[202] Hill v. Colorado, 530 U.S. 703 (2000) ("It is important to recognize that the validity of punishing some expressive conduct, and the permissibility of a time, place, or manner restriction, does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion." (Stouter, J., concurring)).

[203] City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986); *see* Boos v. Barry, 485 U.S. 312 (1988).

[204] *Hill*, 530 U.S. at 737 (Stouter, J., concurring).

[205] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[206] *City of Renton*, 475 U.S. at 47.

[207] *Id.* at 48 (citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

[208] *Id.* at 53.

speech "shown to produce the unwanted secondary effects" and would not be invalidated because the speech that would most immediately be affected "has become the signature" of white supremacists or because the targets of the legislation are the ones who propagate that speech.[209] It makes no difference that the danger racial supremacy currently poses is "almost unique" to white supremacists.[210] If it could be proven that Icelandic or Tongan supremacy posed a true threat, such speech would also be "a proscribable class of speech [which] can be swept up incidentally within the reach of a statute directed at conduct rather than speech."[211]

Lastly, such a statute would leave open alternate avenues of communication sufficient as to not abridge the First Amendment because white supremacists would be free to use the entire internet to propagate their views, just not social media. The First Amendment is not violated when a leaves open other avenues of communication, particularly the entirety of the internet outside of social media.[212] Neither the *Renton* nor the *Hill* Courts conditioned the closure of one avenue of communication upon the explicit existence of a commensurate avenue.[213] White supremacists and right-wing extremists must "fend for themselves" in the marketplace of ideas without the use of the intellectual subsidy granted to them by social media and its ability to falsely legitimize fringe views.[214] Just as the First Amendment does not "compel[] the Government to ensure that adult theaters … will be able to obtain sites at bargain prices," it does not require that demonstrably dangerous speech that poses a true threat be given an unregulated platform with which to perpetrate the evil that some in the United States has been fighting for so long.[215]

It is important to note that it is not the listeners' reactions to speech that is of

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209 *Id* at 48; *Hill*, 530 U.S. at 738; Boos v. Barry, 485 U.S. 312, 320.

210 *Boos*, 485 U.S. at 320.

211 R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992); *City of Renton*, 475 U.S. 51 (arguing that there was no issue with the city's choice to "first … address the potential problems created by one particular kind of adult business." In their view, this "in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment.").

212 *Hill*, 530 U.S. at 726.

213 *City of Renton*, 475 U.S 55 (arguing that the lack of undeveloped land for sale and "commercially viable adult theater sites within" the area left occupiable by adult theaters, the Court of Appeals found the ordinance to be a "'substantial restriction' on speech."). The Court should be cautious when there is a potential to "greatly restrict access to lawful speech," but unless the regulation "remove[s] a subject or viewpoint from effective discourse … a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid." *Id.*

214 *Id.* at 54; *see* discussion, *supra* Section II.C.

215 *City of Renton*, 475 U.S at 54; *see* discussion, *supra* Section V.A.1.

concern when analyzing this requirement.[216] This element of the statute is not concerned with whether the listener finds the speech offensive. It is concerned with the secondary effect of white supremacist radicalization being taken offline and causing fear and harm in the real world.[217] It is not just that the dignity of the audience is subject to adverse emotional impact when white supremacist speech is made, but that the dignity of the audience and those that are not in the audience, i.e., the victims of white supremacist threats and violence that occur in the real world by those radicalized online, are subject to adverse emotional and physical impact when the effects of the speech, particularly indoctrination, radicalization, violence, are undertaken based on the color of one's skin color, ethnic background, or religious faith.[218]

An unwilling listener has the right to be free from unwanted communication and thus to be left alone.[219] Given that social media can create a false sense of majority acceptance in fringe, racist ideas, "how far may men go in persuasion and communication and still not violate the right of those whom they would influence?"[220] Just as an unwilling listener has a right to not be the unwilling recipient of persuasion, does this right not extend in the modern world to a right to not be persuaded into believing demonstrably dangerous and false ideas based upon false pretenses given the air of legitimacy through user-engagement? [221] Is this not more so the case when the "degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure[?]"[222] Because Facebook users do not have a significant ability to consent to what appears on their newsfeeds, *a fortiori*, regulation is even more justified in the case of social networks.[223]

From America's inception, but particularly during the post-reconstruction era to the Civil rights era, people could see racist acts being perpetrated in person, which could create a moment of decision on whether to support such an act. With the "echo chamber" which Facebook and social networks help to create, this choice is lessened or absent all together because of the isolation from "moderating voices [and] authority figures" and professional gatekeepers of the

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[216] Boos v. Barry, 485 U.S. 315, 319–21 (1988).

[217] JOINT INTELLIGENCE BULLETIN, *supra* note 3; *see* discussion *supra* Section II.C.

[218] *Boos*, 485 U.S. at 321–22; Taub & Fischer, *supra* note 114; JOINT INTELLIGENCE BULLETIN, *supra* note 3; *see* Virginia v. Black, 538 U.S. 343 (2003); Taub & Fischer, *supra* note 114.

[219] Hill v. Colorado, 530 U.S. 703, 718 (2000) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[220] *Id.* at 718 (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 204 (1921)); *see also* discussion, *supra* Section II.C.

[221] *Hill*, 530 U.S. at 718.

[222] *Id.* (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975)).

[223] *See* discussion, *supra* Section II.C.

past.[224] The German government has chosen to limit the ability of those who would seek to return to a past full of persecution and discrimination.[225] With the advent of social media, it is time, now more than ever, for the American government to do the same.

3. "Knowingly" Engaging in Education, Counseling, Etc.

a. "Knowingly"

A requirement that the sharing be done knowingly would ordinary people would be able to reasonably understand what conduct is prohibited.[226] In *Hill v. Colorado*, the requirement that the infringement of the eight-foot buffer zone around those entering the medical facility be done "knowingly" helped to protect those "who thought they were keeping pace with the targeted individual" but had actually violated the law.[227]

A statutory requirement that one "knowingly" attempts to educate, counsel, advocate, promote, or support racial supremacy would "distinguish speech activities likely to have those consequences from speech activities that are most unlikely to have those consequences."[228] Just as with any regulation, one can think of different situations where the meaning of these terms could come into question, but the potential for misapplication and speculation about situations where the terms may come into question will not allow for a facial attack of a statute when it is being used as intended in the vast majority of cases.[229]

b. Requirement of Intent to Engage in Education, Counseling, etc.

If white supremacists who repeatedly espouse such views on social media only intended to reflect on the superiority of the white race, there are a multitude of methods in which this can be done in private including journals, blogs, or hosting their own website. By deliberately publishing on social media sites like Facebook, they are attempting to educate, counsel, advocate, promote, or support white supremacy. This is especially true for organization pages like that of the AfD, the subject of the German empirical study on Facebook

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224 Taub & Fischer, *supra* note 114.

225 *See* discussion, *supra* II.A.2.

226 *Hill*, 530 U.S. at 732.

227 *Id.* at 727 (quoting Schenck v. Pro-Choice Network of W. N.Y. 519 U.S. 357, 378 n.9 (1997)).

228 *Id.* at 725.

229 *Id.* at 733. The potential for misapplication is hedged against by the requirement that the speech be a demonstrably dangerous true threat. *See id.* This requirement protects against instances where the publisher acts in a gray area that is ultimately non-threatening and thus not deserving of sanction. *Id.*

engagement.[230] The entire survival of social media platforms depend upon user engagement and content sharing to drive pageviews and engagement with advertisers.[231] Facebook and other social media platforms are by definition mediums through which information is intended to be shared and disseminated; therefore, by publishing speech on social media, the publishers are intending for the post to be liked, shared, and commented on and for users to view and engage with the information.[232]

By including the requirement that the publisher of a social media post be educating, counseling, etc, "the most aggressive and vociferous" posters, such as the "superposters," might be forced to "moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding" debate and information sharing to take place.[233] The First Amendment protects "the right of every citizen to 'reach the minds of willing listeners;'" and by including the education, counseling, etc. requirement in the statute, more willing listeners will be reached with ideas that merit victory in the market place of ideas.[234]

Just as one would not be allowed to burn a cross in the front yard of an African-American family, one should not be allowed to repeatedly post messages of white supremacy and hate based on racial, religious, or other similar animus.[235] Such posts are a form of virtual cross burning that is more visible to those it threatens and creates a well-founded fear of violence similar to that created by the physical burning of a cross. By deliberately posting on Facebook, white supremacists are intending to spread the message of hate that is a part of the history of the United States and thus a true threat to Americans.[236]

B. Commerce Clause Based Regulation

As the law stands now, Congress cannot regulate social media activity based on aggregate substantial economic effect unless the activity constitutes—or is

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230 Muller & Schwarz, *supra* note 3; *see* Taub & Fischer, *supra* note 114.

231 *See* Ben Gilbert, *How Facebook Makes Money from Your Data, in Mark Zuckerberg's Words*, BUS. INSIDER (Apr. 11, 2018, 10:25 AM), https://www.businessinsider.com/how-facebook-makes-money-according-to-mark-zuckerberg-2018-4.

232 Mark Zuckerberg, FACEBOOK (Jan. 11, 2018), https://www.facebook.com/zuck/posts/10104413015393571 (arguing that the purpose of Facebook is to help people stay connected and bring us closer together with the people that matter to us.).

233 *Hill*, 530 U.S. at 727; Taub & Fischer, *supra* note 114.

234 *Hill*, 530 U.S. at 728.

235 *See* Virginia v. Black, 538 U.S. 343 (2003).

236 *Id.*

closely connected to—any sort of "economic" or "commercial" activity.[237] Facebook has both a social and a business function, but the two are intertwined.

At the time *Heart of Atlanta* was decided, people of color traveling had to deliberately choose where and when to stop and stay in the country.[238] This demonstrates that there were more concentrated pockets of racism around the country which disrupted economic activity and commerce.[239] Unlike the choice minorities had during the Civil Rights Era to travel facing extreme risk or stay put, Facebook's user-generated algorithm does not give users the choice or control over what shows up in their newsfeeds beyond the people with whom they choose to be friends.[240] Individuals cannot control what their friends like, share, or publish and as a result what the user-generated algorithm will display on their newsfeeds. The algorithm is "optimized" to "show more content from friends and family" and less from businesses unless the businesses' posts have large amounts of engagement. [241] Therefore, Facebook will produce and curate few posts according to the "professional gatekeepers such as editors," who have historically helped to filter out hate speech and more posts by family and friends which have no such filter.[242]

The increase in non-curated posts coupled with the predisposition that right-wing extremists and conservatives have to believe and propagate falsities and the connection between "users' internet or Facebook access" and anti-refugee violence only helps to further social media's "closed environment with its own moral rules."[243] This has led to a dramatic increase in attacks against refugees in Germany and hate crimes like the Charleston shooting and the murder of Heather Heyer in Charlottesville.[244] While a growing number of white supremacists are radical online, studies show that they are carrying out acts of "lethal violence"

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[237] *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Wickard v. Filburn, 317 U.S. 111 (1942); Gonzalez v. Raich, 545 U.S. 1 (2005).

[238] Heart of Atlanta Inc. v. United States, 379 U.S. 241 (1964).

[239] *Id.*

[240] *See* discussion, *supra* Section II.C.

[241] Gallegos, *supra* note 111.

[242] Taub & Fischer, *supra* note 114.

[243] Benkler et al., *supra* note 133; Muller & Schwarz, *supra* note 3.

[244] *Id.*; Rachel Kaazdi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist ("To find sympathetic allies, Rogers, the owner of a flag company called Patriotic Flags, stays in the comments section of the *social-media accounts* of pissed off white men, and when the time is right, he posts links to his company, with its bazaar of Confederate, white-nationalist, Nazi, and apartheid-era flags, similar to the patches that Dylann Roof sewed onto his jacket. Rogers has said he was 'devastated' to learn that Roof connected to his writings, and he denies ever meeting Roof, going so far as to call it libelous to associate the two of them." (emphasis added)); *see* Jonathan M. Katz & Farah Stockman, *James Fields Guilty of First-Degree Murder in Death of Heather Heyer*, WASH. POST (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/us/james-fields-trial-charlottesville-verdict.html.

in the real world with racial minorities as their "primary targets."[245]

Advertisements, which are the primary revenue source for social media companies like Facebook, are intertwined with posts from family and friends which the user-generated algorithm aims at promoting.[246] Posts with the most engagement are prioritized at the top of the Newsfeed.[247] Advertisers, which are in the business of promoting businesses and enticing consumers to engage in commerce, tell Facebook what type of person they would like to target with their ads, and based on the personal data that Facebook harvests from its users those ads are displayed in the targeted users' newsfeeds.[248] Facebook also has a Facebook Marketplace where users can buy and sell goods.[249] Both targeted advertising and Facebook Marketplace qualify as "economic" or "commercial" activity or closely connected language required by *United States v. Morrison.*[250]

The Court's view of cross burning in *Virginia v. Black* as a "potent symbol" of Ku Klux Klan "identity and ideology," is applicable, now more than ever, to white supremacist speech on social media platforms.[251] Since symbolism and a sense of general agreement can be falsified through user-generated content distribution and ordering, white supremacist speech constitutes a true threat towards the subjects of the speech. There is a well-founded fear that white supremacy and right-wing extremism are increasing and growing more deadly and dangerous in the United States.[252] As such, the Commerce Clause gives Congress the ability to regulate white supremacist speech on social media platforms.

Social media has created a world in which indoctrinators no longer have to seek out those sympathetic to their cause. False and misleading information about white supremacy is displayed front and center without permission or desire to initially see it, gradually radicalizing those most vulnerable to radicalization. White supremacy is undeniably a true threat to the American population.[253] It creates a "fear of violence" which disrupts not only commerce

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245 JOINT INTELLIGENCE BULLETIN, *supra* note 3, at 5.

246 *Transcript of Mark Zuckerberg's Senate Hearing*, WASH. POST (April 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?utm_term=.0d2f9669dd2e.

247 Gallegos, *supra* note 111.

248 Gilbert, *supra* note 231.

249 Tercius Bufete, *Facebook Marketplace: What You Should Know*, CONSUMER REP. (Oct. 7, 2016), https://www.consumerreports.org/computers-internet/facebook-marketplace-what-you-should-know/.

250 United States v. Morrison, 529 U.S. 598 (2000).

251 Virginia v. Black, 538 U.S. 343, 357 (2003).

252 JOINT INTELLIGENCE BULLETIN, *supra* note 3, at 5.

253 *Id.*

in America but also the lives of each and every American.[254] Germany has seen fit to ban such speech due to the effects it has on historically oppressed classes.[255] Now it is time for the United States to do the same.

CONCLUSION

White supremacy and far-right terrorist attacks are nothing new to the United States of America. Far-right activists and the Ku Klux Klan attacked and bombed churches and Civil Rights-related meetings so often that Birmingham—Alabama's "most important civil and industrial center"—earned the nickname "Bombingham."[256] Likewise, Germany has also confronted far-right regimes in its past. Both countries conquered the fascist stronghold put on the continent and the world during the early twentieth century only to have it rear its ugly head again.[257] Just as Germans have a duty to protect against the resurgence of their past evils, so do Americans. White supremacy is the ugly, indelible stain on America's past which we must work to erase.

Just as German courts have found that "where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual … interests must, in principle, yield," the district court in *Gersh v. Anglin* similarly found that "the regulation of 'speech on matters of purely private concern' does not 'threaten the free and robust debate of public issues.'"[258] The United States cannot allow white supremacists to propagate unfounded, dangerous speech on social media platforms under the guise of speaking on subjects of public interest and concern.[259] In the district court's view, the fact that white supremacist speech is perpetrated through a social media platform instead of more traditional modes of intimidation and recruitment does not create a shield barring the speech from regulation.[260]

It is important to note that this paper is aimed only at white supremacist speech online. Its advocacy and conclusions are not meant to be a vehicle to limit speech in other forms online. As the *Gersh* court proclaimed, "the [c]ourt must be cautious to avoid policing the speech's content, as the 'inappropriate or

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254 *Id.*; *Virginia*, 538 U.S. at 360.

255 *See* discussion, *supra* Section II.A.2.

256 *Birmingham Church Bombing*, HISTORY (Oct. 26, 2018), https://www.history.com/topics/1960s/birmingham-church-bombing.

257 *See* Reitman, *supra* note 1.

258 Henry, *supra* note 72; Gersh v. Anglin, 353 F. Supp. 3d 958 (D. Mont. 2018) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)).

259 *Gersh*, 353 F. Supp. 3d at 965 (citing City of San Diego, Cal. v. Roe, 543 U.S. 77 (1983)).

260 *Id.* (citing Snyder v. Phelps, 562 U.S. 443 (2011)).

controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[261] Freedom of speech is of paramount importance in a democracy, but so too is the protection of people from violence and the fear of violence engendered by white supremacist and Nazi speech. Stopping this violence and fear will go far to achieve these goals. One must ask, at what point does the protection of a speech's content that adds nothing of value to public discourse and truly threatens entire classes of human beings living in the United States give way to the protection of these classes from such threats and violence? The tipping point has been reached, and like Germany, it is time the United States put dignity and equality ahead of "verbally aggressive speech" that spawns violence against those whose dignity and equality Congress has a duty to protect.[262]

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[261] *Id.*

[262] Brugger, *supra* note 69, at 2.

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