

SOCIAL MEDIA COMPANIES SHOULD PURSUE SERIOUS SELF-SUPERVISION — SOON: RESPONSE TO PROFESSORS DOUEK AND KADRI

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We understand why eighty-two percent of Americans regularly use social media.¹ Social media networking platforms offer speedy communication and entertainment at no immediate cost to users. But they also produce problems widely acknowledged by groups that otherwise diverge or even disagree. Democrats and Republicans, adults and teens, national security experts, and parents alike² have criticized social media because it is addictive, is associated with depression and anxiety,³ propels misinformation and disinformation,⁴ and poses national security concerns.⁵ The bullying, unrealistic presentations of body image, and high-risk activity challenges propelled through social media sites increase

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¹ S. Dixon, *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2021*, STATISTA (July 27, 2022), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile> [https://perma.cc/LEC6-XXR4].

² Monica Anderson et al., *Teens' Views About Social Media*, PEW RSCH. CTR. (Nov. 16, 2022), <https://www.pewresearch.org/internet/2022/11/16/2-teens-views-about-social-media> [https://perma.cc/578G-H3NB] (“[T]eens’ views are different when the question involves the impact of social media on all teens. About a third of teens (32%) say social media is mostly negative for people their age, compared with about a quarter (24%) who think the effect has been mostly positive.” (emphasis omitted)); Cat Zakzewski, *Senators Unveil Children’s Online Safety Bill After Months of Pressure on Silicon Valley*, WASH. POST (Feb. 16, 2022, 6:00 AM), <https://www.washingtonpost.com/technology/2022/02/16/kids-online-safety-act-unveiled-blackburn-blumenthal> [https://perma.cc/6LJ6-DY5T] (Democrats and Republicans); Rachel Treisman, *The FBI Alleges TikTok Poses National Security Concerns*, NPR (Nov. 17, 2022, 12:37 PM), <https://www.npr.org/2022/11/17/1137155540/fbi-tiktok-national-security-concerns-china> [https://perma.cc/H9RB-AYL6] (national security experts).

³ See, e.g., Luca Braghieri et al., *Social Media and Mental Health*, 112 AM. ECON. REV. 3660, 3661 (2022).

⁴ See, e.g., Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. NAT’L ACAD. SCI. U.S. 554, 558 (2016).

⁵ See, e.g., Treisman, *supra* note 2.

mental health harms for many users.⁶ Even social media companies acknowledge they face problems that they cannot handle by themselves.⁷ Amid clashing ideas about government regulation — including some promising ideas, many of which are unlikely ever to become laws — greater and more thoughtful self-regulation by the social media companies would be a wise and productive step. History suggests some missed opportunities. The United States government failed to encourage, and even forbade as anticompetitive, a proposal from the National Association of Broadcasters (NAB) to self-regulate by capping advertisements per hour in the early 1960s.⁸ That missed opportunity and other self-regulatory efforts offer lessons for this moment, when national governmental action is especially unlikely given partisan divides.⁹ Hence, the time is ripe for advocacy groups and governmental actors to explore industry self-regulation avenues for social media’s targeted ads and content moderation.

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Professor Evelyn Douek recently raised important criticisms of the judicial-style thinking infusing the “Facebook Oversight Board” created by the company now known as Meta.¹⁰ Professor Thomas Kadri expanded on this caution by demonstrating how the juridical focus in Meta’s self-regulation entrenches its own power.¹¹ Kadri urges skepticism about any potential contribution of industry self-regulation to the welfare of users, but nonetheless sketches a mix of internal and external regulatory measures to “foster[] healthier digital environments.”¹² Douek identifies how constructive developments, such as transparency

⁶ *Just How Harmful Is Social Media? Our Experts Weigh-In.*, COLUM. MAILMAN SCH. PUB. HEALTH (Sept. 27, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/just-how-harmful-social-media-our-experts-weigh> [<https://perma.cc/6F3H-AP6Y>].

⁷ See, e.g., Amanda Macias, *Facebook CEO Mark Zuckerberg Calls for More Regulation of Online Content*, CNBC (Feb. 15, 2020, 4:39 PM), <https://www.cnbc.com/2020/02/15/facebook-ceo-zuckerberg-calls-for-more-government-regulation-online-content.html> [<https://perma.cc/K9Q8-ZMM5>]; Twitter Global Government Affairs (@GlobalAffairs), TWITTER (July 30, 2020, 11:11 AM), <https://twitter.com/GlobalAffairs/status/1288854770082603013> [<https://perma.cc/U52D-YQVP>] (before current ownership).

⁸ See *infra* notes 58–62 and accompanying text.

⁹ Stalemate in the United States is increasing the influence of regulators in other countries. See Tom Wheeler, *The UK and EU Establish Positions as Regulatory First Movers While the US Watches*, BROOKINGS INST.: TECHTANK (Mar. 8, 2023), <https://www.brookings.edu/blog/techtank/2023/03/08/the-uk-and-eu-establish-positions-as-regulatory-first-movers-while-the-us-watches> [<https://perma.cc/7FMM-D3VD>].

¹⁰ See Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 567–69 (2022) (critiquing the post hoc judicial model for social media oversight and advocating ex ante systemic approaches).

¹¹ Thomas E. Kadri, *Juridical Discourse for Platforms*, 136 HARV. L. REV. F. 163, 167–68 (2022) (response to Douek) (warning that social media companies deploy the judicial metaphor for their own advantage rather than use self-regulation to protect social media users).

¹² *Id.* at 168, 198–201.

reporting, derive from self-regulatory efforts as platform companies seek more legitimacy and responsiveness to users.¹³ Her analysis also could prompt self-regulatory efforts to pursue systemic, proactive, and innovative approaches, including monitored self-regulation.¹⁴

Yes, self-regulation is likely to advance the interests of the companies and benefit incumbents over new entrants, but it also can draw on the knowledge, resources, and flexibility of the private companies.¹⁵ Cautions about self-regulation, thus, should not weaken the pressure for action, even if the action takes the form of self-regulation. Self-regulation is far more likely to proceed and to identify effective strategies than are responses from the federal government. Calls for government regulation of social media are both understandable and a surprising point of convergence for people across the political spectrum,¹⁶ but they are unlikely to produce actual reforms anytime soon. A majority of Americans responding to surveys favor more attention by elected officials to policy concerns involving technology and tech companies, but Americans across political and racial groups also distrust Congress even more than they distrust the tech companies.¹⁷ Government regulation poses severe risks of suppressing speech of both individuals and platform companies as well as harming competition and innovation — even among social media companies that jeopardize the well-being of individuals and their trust in news and communications.

¹³ Douek, *supra* note 10, at 553–54; *see also id.* at 604–05.

¹⁴ *See id.* at 604–05; *see also, e.g., id.* at 602–03 (suggesting that private as well as public oversight can address approaching aggregated claims).

¹⁵ For concerns about protection of incumbents, see Kadri, *supra* note 11, at 195–96. On potential benefits from self-regulation, see *infra* pp. 433–42 (discussing concerns about self-regulation and potential benefits of it).

¹⁶ *See* Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> [<https://perma.cc/JFL7-99ST>]; Edith M. Lederer, *UN Chief Calls for Regulating Social Media Companies*, AP NEWS (Jan. 28, 2021), <https://apnews.com/article/donald-trump-media-social-media-antonio-guterres-united-nations-b6ed291f3008f935eeda5c1ae4b16d78> [<https://perma.cc/557N-F3FK>]; John Samples, *Why Government Should Not Regulate Content Moderation*, CATO INST. (Apr. 9, 2019), <https://www.cato.org/policy-analysis/why-government-should-not-regulate-content-moderation-social-media> [<https://perma.cc/79AN-LJHJ>] (responding to calls for regulation); Jamie Susskind, *We Can Regulate Social Media Without Censorship. Here's How*, TIME (July 22, 2022, 1:45 PM), <https://time.com/6199565/regulate-social-media-platform-reduce-risks> [<https://perma.cc/M8X7-D6U2>].

¹⁷ Cristiano Lima, *American Views on Regulating Social Media Companies Aren't As Partisan As You May Think*, WASH. POST (Mar. 9, 2022, 9:12 AM), <https://www.washingtonpost.com/politics/2022/03/09/major-study-found-that-americans-have-diverse-perspectives-internet-regulation> [<https://perma.cc/QU4Y-HLUP>] (reporting on study by Gallup and Knight Foundation); *Media and Democracy: Unpacking America's Complex Views on the Digital Public Square*, KNIGHT FOUND. (Mar. 9, 2022), <https://knightfoundation.org/reports/media-and-democracy> [<https://perma.cc/TP4U-MSL6>] (the study).

One study reports far more confidence in private, independent oversight than in regulation by government or by individual companies.¹⁸

A majority of Americans oppose changing existing law to allow individual suits against social media platforms for the content posted by third parties.¹⁹ The existing law, Section 230 of the Communications Decency Act of 1996,²⁰ shields the platform companies from the kinds of defamation and fraud suits applicable to news media and publishers while also protecting the good faith moderation and removal of content they view as harmful.²¹ Intended to promote innovative internet companies, Section 230 has been interpreted to protect platforms from civil liability for leaving content up and also to protect them if they choose to take content down.²² Congress amended the law to permit liability related to content about sex trafficking — but rather than reducing sex trafficking, this change may have made it harder for law enforcement to track it and more difficult for sex workers to obtain information to enhance their safety.²³ At the time of writing, the Supreme Court was considering two questions addressing the scope of the platforms' continuing immunities: Does the immunity persist when a social media company employs recommendation algorithms to target users with certain content posted by third parties?²⁴ And does a separate law — the Antiterrorism Act of 1990²⁵ — apply to a social media platform regularly detecting terrorist activity related to third-party content it hosts, or does the Section 230 immunity govern?²⁶

¹⁸ Megan Brenan & Helen Stubbs, *Americans Are Critical of Technology Companies Despite Changes to Misinformation Policies*, KNIGHT FOUND. (Oct. 21, 2020), <https://knightfoundation.org/articles/americans-are-critical-of-technology-companies-despite-changes-to-misinformation-policies> [https://perma.cc/6L34-XH4M].

Given a choice, Americans remain more likely to favor independent boards reviewing the decisions made by social media companies about what can and cannot appear on their sites (47%) than to support the companies themselves (18%) or the federal government (5%) doing so. A substantial minority of 29% of U.S. adults do not think any of these entities should make such decisions.

Id.

¹⁹ Colleen McClain, *56% of Americans Oppose the Right to Sue Social Media Companies for What Users Post*, PEW RSCH. CTR. (July 1, 2021), <https://www.pewresearch.org/fact-tank/2021/07/01/56-of-americans-oppose-the-right-to-sue-social-media-companies-for-what-users-post> [https://perma.cc/D93N-8YK8].

²⁰ 47 U.S.C. §§ 230, 560, 561.

²¹ *Id.* § 230(c).

²² Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS INST. (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes> [https://perma.cc/T9NY-2UPX].

²³ *Id.*

²⁴ Sabine Neschke et al., *Gonzalez v. Google: Implications for the Internet's Future*, BIPARTISAN POL'Y CTR. (Nov. 29, 2022), <https://bipartisanpolicy.org/blog/gonzalez-v-google> [https://perma.cc/5TUH-V92R] (describing *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (per curiam), and *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023)).

²⁵ 18 U.S.C. §§ 2331–2338.

²⁶ Neschke et al., *supra* note 24.

Some want further congressional amendments to Section 230 to permit suits against the platform companies for hosting hateful and harassing speech, and misinformation related to COVID-19 and elections.²⁷ But even before the midterm elections, action was stalled²⁸ and advocates were pursuing changes to state laws.²⁹ New laws in Florida and Texas would allow actions against media companies for the censorship of conservative content, but federal courts have at least temporarily halted implementation of both laws.³⁰ Other proposed state laws would require social media companies to adopt methods for reporting hate speech or misinformation, to ensure transparency of moderation rules, and to protect children against social media addiction³¹ — though even when enacted, such reforms face court challenges from individuals and from the companies.

The companies seek not only freedom from regulation but also protection against divergent rules in different states.³² Because social media's reach is global, though, the companies already face divergent rules across the globe. The companies, most of them based in the United States, must confront not only contrasting regulations in Europe, the United Kingdom, and Asia but also challenges in overseeing content in different languages and varied political contexts — and competition from companies outside the United States that may not even try to comply with rules here and elsewhere.

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Amidst these complexities and mounting unease about their industry, social media companies should engage in more vigorous self-regulation not only within their own firms but also through industry-wide

²⁷ Shannon Bond, *Democrats Want to Hold Social Media Companies Responsible for Health Misinformation*, NPR (July 22, 2021, 3:59 PM), <https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformation> [https://perma.cc/3G44-Y3NN]; Press Release, Sen. Mark R. Warner, Legislation to Reform Section 230 Reintroduced in the Senate, House (Feb. 8, 2023), <https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house> [https://perma.cc/82PV-2BTD].

²⁸ Makenzie Holland, *Elections Won't Speed Antitrust Reform, Data Privacy Efforts*, TECHTARGET (Nov. 10, 2022), <https://www.techtargget.com/searchcio/news/252527177/Elections-wont-speed-antitrust-reform-data-privacy-efforts> [https://perma.cc/9MDC-R4PZ].

²⁹ Rebecca Kern, *Push to Rein In Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229> [https://perma.cc/R2ZJ-Z2BJ].

³⁰ *Id.* After the District Court for the Western District of Texas enjoined the Texas law, the Court of Appeals for the Fifth Circuit stayed the district court's injunction. The Supreme Court vacated that stay, but the Fifth Circuit subsequently upheld the Texas law. Then, on a motion by the trade group representing the technology industry, the Fifth Circuit stayed its own ruling pending Supreme Court review. See Rebecca Kern, *5th Circuit Blocks Texas Social Media Law as Parties Turn to SCOTUS*, POLITICO (Oct. 12, 2022, 5:45 PM), <https://www.politico.com/news/2022/10/12/5th-circuit-temporarily-blocks-texas-social-media-law-00061555> [https://perma.cc/9R8L-5K2T].

³¹ Kern, *supra* note 29.

³² *Id.*

organizations. Private-sector collaborations can offer some protection against the biases and self-interest of individual companies (although large and established companies may band together for self-regulations that disadvantage smaller newcomers³³ — and “regulatory capture” by dominant companies is a danger even with public regulation³⁴). Self-regulation by voluntary standards, adopted through industry-level private groups, has offered apparently effective responses in other economic sectors.

Through voluntary self-regulation, in contrast to “audited” self-regulation, private industry-level organizations create rules and standards with which individual industry actors voluntarily comply.³⁵ Federal agencies may retain some involvement but typically delegate standard setting and licensing to self-regulatory bodies.³⁶

For example, the Financial Industry Regulatory Authority (FINRA) is a private, nongovernmental organization³⁷ that licenses and audits securities dealers to promote transparency and compliance with ethical standards devised through its own rulemaking process.³⁸ Its members — private organizations and professionals — use the self-regulatory approach to enhance integrity and build trust in the securities industry. The government, through the Securities and Exchange Commission (SEC), can review the disciplinary proceedings conducted by FINRA and also can propose changes in the rules.³⁹ The self-regulatory process, thus, draws on the expertise of the industry, the industry’s own interest in earning and expanding trust of the public, and knowledge and concerns channeled through government. FINRA’s

³³ See Kadri, *supra* note 11, at 195–96.

³⁴ See ERIN SIMPSON & ADAM CONNER, CTR. FOR AM. PROGRESS, HOW TO REGULATE TECH: A TECHNOLOGY POLICY FRAMEWORK FOR ONLINE SERVICES 64 (2021), <https://www.americanprogress.org/wp-content/uploads/sites/2/2021/11/OnlineServices-report-1.pdf> [<https://perma.cc/C9H8-BE3G>].

³⁵ “Audited” self-regulation is power delegated by government to private entities which are allowed to create and enforce rules; the government can review resulting actions and reports for accuracy. Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 176 (1995). See generally Lisa L. Sharma et al., *The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures*, 100 AM. J. PUB. HEALTH 240 (2010) (examining various self-regulatory efforts).

³⁶ See Michael, *supra* note 35, at 176; MARY LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 20 (2020), <https://sgp.fas.org/crs/misc/R44918.pdf> [<https://perma.cc/9D9E-GXK8>].

³⁷ About FINRA, FINRA, <https://www.finra.org/about> [<https://perma.cc/7LU2-MRJC>].

³⁸ *Five Steps to Protecting Market Integrity*, FINRA, <https://www.finra.org/about/what-we-do/five-steps-protecting-market-integrity> [<https://perma.cc/D37H-GBS6>].

³⁹ See DOUGLAS C. MICHAEL, ADMIN. CONF. OF THE U.S., FEDERAL AGENCY USE OF AUDITED SELF-REGULATION AS A REGULATORY TECHNIQUE 39 (1993); see also 15 U.S.C. § 78s(d)–(e) (providing for regulatory agency review over disciplinary action taken by self-regulatory organizations (SROs) in the securities market); 9370. *Application to SEC for Review*, FINRA, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/9370> [<https://perma.cc/GG83-WENG>] (providing that FINRA members may appeal an SRO disciplinary action to the SEC); cf., e.g., Self-Regulatory Organizations, Exchange Act Release No. 34-96,798, SEC Docket (CCH) 3468329 (Feb. 3, 2023) (SEC order regarding proposed FINRA rule change).

influence is substantial.⁴⁰ Similar self-regulatory approaches oversee trading in derivatives through the National Futures Association, a national industry-wide effort to protect both investors and markets.⁴¹ Self-regulation may create barriers to entry for newcomers or otherwise advance companies' self-interest, but it also harnesses insider knowledge and companies' desires to be trusted by the public.

Third-party watchdog organizations help regulate industries by offering seals or certifications for meeting certain standards or by rating or accrediting actors in the industry.⁴² For example, the Good Housekeeping Institute evaluates products and issues a seal on those that perform as intended.⁴³ The Institute provides refunds to consumers for any product with the seal that a consumer finds defective within two years of purchase.⁴⁴ Similar approaches have also worked in a range of other industries. Independent private bodies provide accreditation that is central to hospitals as they participate in government funding programs.⁴⁵ Audited self-regulation through local agricultural boards ensures stable markets for certain agricultural products, and industry private audits verify that fruits and vegetables are produced, packed, handled, and stored to minimize risks of microbial food safety hazards.⁴⁶ For addressing environmental threats, the International Organization for Standardization plays a large role by developing international standards, which are used as benchmarks for external certification bodies that certify industries that pose environmental threats.⁴⁷ Production of certified products improves regulatory compliance and reduces pollution faster than noncertified production.⁴⁸

⁴⁰ See Lauren Perez, *FINRA: The Organization that Regulates Broker-Dealers and Protects Investors*, BUS. INSIDER (Sept. 13, 2022, 8:51 AM), <https://www.businessinsider.com/personal-finance/finra> [<https://perma.cc/EU85-45Z8>]; see also Liz Manning, *Financial Industry Regulatory Authority (FINRA) Definition*, INVESTOPEDIA (June 11, 2022), <https://www.investopedia.com/terms/f/finra.asp> [<https://perma.cc/4666-82SM>] (summarizing benefits and limitations of FINRA).

⁴¹ Cory Mitchell, *National Futures Association (NFA): What It Is and Does*, INVESTOPEDIA (Aug. 11, 2022), <https://www.investopedia.com/terms/n/nfa.asp> [<https://perma.cc/55LQ-JYFC>].

⁴² See Sharma et al., *supra* note 35, at 243–44.

⁴³ *How the GH Limited Warranty Seal Protects You*, GOOD HOUSEKEEPING INST., <https://www.goodhousekeeping.com/institute/about-the-institute/a22148/about-good-housekeeping-seal> [<https://perma.cc/H7TU-RL6F>].

⁴⁴ *Id.*

⁴⁵ See *Hospital Accreditation and Certification Options*, JOINT COMM'N, <https://www.jointcommission.org/what-we-offer/accreditation/health-care-settings/hospital/learn/accreditation-options-certifications> [<https://perma.cc/A66U-EYKY>].

⁴⁶ See *Marketing Orders & Agreements*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/moa> [<https://perma.cc/62C7-HQVZ>]; *Good Agricultural Practices (GAP) Audits*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/services/auditing/gap-ghp> [<https://perma.cc/CB42-2SRM>].

⁴⁷ See *About Us*, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> [<https://perma.cc/D4UJ-M7TE>].

⁴⁸ See, e.g., Jannick Schmidt & Michele De Rosa, *Certified Palm Oil Reduces Greenhouse Gas Emissions Compared to Non-certified*, 277 J. CLEANER PROD., Dec. 2020, art. 124,045, at 1, <https://doi.org/10.1016/j.jclepro.2020.124045> [<https://perma.cc/QQB5-YK24>].

The Federal Trade Commission (FTC) actively encourages and assists private-sector self-regulation efforts.⁴⁹ Trade institutes governing beer, spirits, and wine have adopted advertising and marketing codes to reduce marketing that would increase underage audiences.⁵⁰ Alcohol producers in the United States have also signed on to marketing principles established by the International Center for Alcohol Policies.⁵¹ And some alcohol producers have created their own internal advertising codes.⁵² The FTC consulted with the Individual Reference Services Group, a trade association establishing and monitoring compliance with standards to protect data aggregated across internet and private

⁴⁹ See remarks made by FTC officials: J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *The Importance of Self-Regulation: A View from the Federal Trade Commission*, Remarks at the American Teleservices Association Washington Summit (Apr. 24, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/importance-self-regulation-view-federal-trade-commission/070424americanteleservicesassoc_o.pdf [<https://perma.cc/W7LY-9YRD>]; Debra A. Valentine, Former Gen. Couns., Fed. Trade Comm'n, *Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship*, Public Statement Before the Interdisciplinary Center Herzlia (May 24, 1998), <https://www.ftc.gov/news-events/news/speeches/industry-self-regulation-antitrust-enforcement-evolving-relationship> [<https://perma.cc/88WB-KGLA>].

⁵⁰ FED. TRADE COMM'N, *SELF-REGULATION IN THE ALCOHOL INDUSTRY I* (2014).

⁵¹ INT'L CTR. FOR ALCOHOL POL'YS, *GUIDING PRINCIPLES: SELF-REGULATION OF MARKETING COMMUNICATIONS FOR BEVERAGE ALCOHOL I* (2011), <http://iardwebprod.azurewebsites.net/getattachment/e63c4c38-foff-4921-9238-05836b2e228f/guiding-principles.pdf> [<https://perma.cc/X29W-BCSM>].

⁵² Jonathan K. Noel et al., *Industry Self-Regulation of Alcohol Marketing: A Systematic Review of Content and Exposure Research*, 112 *ADDICTION REV. (SUPPLEMENT 1)* 28, 28–29 (2016); see also ANHEUSER-BUSCH INBEV, *RESPONSIBLE MARKETING AND COMMUNICATIONS CODE* (2019), https://www.ab-inbev.com/content/dam/universaltemplate/ab-inbev/sustainability/792826_RespMarktg_Code_ENGLISH_Updated.pdf [<https://perma.cc/24CQ-9G9W>]; HEINEKEN, *OUR RESPONSIBLE MARKETING CODE* (2022), <https://www.theheinekencompany.com/sites/theheinekencompany/files/our-company/how-we-run-our-business/code-conduct/HEINEKEN-Responsible-Marketing-Code-final.pdf> [<https://perma.cc/535X-PP8C>]. The FTC in turn recommended ways to improve policies and compliance. See Press Release, Fed. Trade Comm'n, *FTC Staff Revises Online Behavioral Advertising Principles* (Feb. 12, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/02/ftc-staff-revises-online-behavioral-advertising-principles> [<https://perma.cc/DC26-NCFS>] (reviewing and recommending changes in self-regulation of online behavioral advertising).

databases.⁵³ These kinds of self-regulation yield impressive compliance rates⁵⁴ and address issues not handled by the federal regulatory body.⁵⁵

The motion picture industry, electronic game industry, and music recording industry each have self-regulatory systems for rating or labeling their products with the familiar notations for movies of G, PG, PG-13, and R; the label of “Mature” rating for games; and the label of “Explicit” for music.⁵⁶ The FTC’s regular reports on the self-regulatory practices of these entertainment industries find substantial compliance with the voluntary standards by the motion picture and game industries and less, but still meaningful, compliance by the music industry.⁵⁷

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What now are lessons from the experiences of self-regulation with broadcasting? Self-regulation efforts should be carefully crafted to comport with antitrust law — or devised in concert with exemptions to antitrust rules.

The history of the NAB is instructive. Starting in 1952, the NAB devised and revised code of conduct rules for programming and advertising, including content standards and advertising time limits.⁵⁸ The NAB created and enforced these standards in large part to ensure member compliance with the Federal Communication Commission’s requirement that licensees operate in “the public interest.”⁵⁹ Yet, in 1970, the Department of Justice filed an antitrust suit against the NAB, alleging that portions of the code of conduct “restricted the available amount of

⁵³ See Valentine, *supra* note 49.

⁵⁴ On impressive compliance with self-regulation, see, for example, MAUREEN ENRIGHT & LAUREN ESKENAZI, BETTER BUS. BUREAU, 2019 ANNUAL REPORT: THE CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE & CHILDREN’S CONFECTION ADVERTISING INITIATIVE 19–21, <https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/cfbai/2019-cfbai-ccai-report.pdf> [<https://perma.cc/VYP5-6943>]; DANIEL CASTRO, INFO. TECH. & INNOVATION FOUND., BENEFITS AND LIMITATIONS OF INDUSTRY SELF-REGULATION FOR ONLINE BEHAVIORAL ADVERTISING 4–5 (Dec. 2011), <https://d1bcsfjk95uj19.cloudfront.net/files/2011-self-regulation-online-behavioral-advertising.pdf> [<https://perma.cc/Y7GQ-5MGY>]. Expecting zero mistakes is not a reasonable standard; self-regulation undertaken along with cooperative relationships with regulators can motivate private companies to do better both in terms of complying with existing standards and developing better standards responsive to changing circumstances. When coupled with governmental oversight, self-regulation saves taxpayer dollars, draws on industry expertise, and adapts flexibly to innovation and other sources of change. See Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 NW. J. INT’L L. & BUS. 175, 187–95 (2021).

⁵⁵ Rosch, *supra* note 49, at 6–7.

⁵⁶ Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Self Regulatory Organizations and the FTC, Address to Council of Better Business Bureaus 14 (Apr. 11, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf [<https://perma.cc/6FT5-XVBT>].

⁵⁷ *Id.* at 15.

⁵⁸ Edward P. Sangster, *A Tale of Two Standards: Antitrust, The Public Interest, and the Television Industry*, 6 HASTINGS COMM’NS. & ENT. L.J. 887, 889 (1984).

⁵⁹ *Id.* at 888, 890.

commercial time” and therefore restrained competition in violation of the Sherman Act.⁶⁰ In the agreement settling the suit, the NAB agreed to rescind its code.⁶¹ This experience chilled self-regulatory efforts by broadcasters, and led to some broadcasting of ads that the earlier codes would have rejected.⁶²

Self-regulatory approaches have in other settings successfully overcome inadequate information, offered flexible adaptations to changing circumstances, limited costs borne both by industries and governments, engendered a sense of responsibility in private actors,⁶³ and navigated requirements of antitrust laws.⁶⁴

Voluntary sector-wide self-regulation is especially effective, according to researchers, when there is activist engagement with the industry, an independent monitoring structure, continuing possibilities of enforcement actions outside of the self-regulatory body, pressure from customers and civil society groups,⁶⁵ threat of private lawsuits, some vertical integration within companies,⁶⁶ and a strong trade association.⁶⁷ Social media as a sector holds promise for efficacious sector-wide self-regulation. Again, public approval of private independent regulation contrasts sharply with public distrust of government regulation and of individual-company regulation when compared with the prospect of no government regulation.⁶⁸ Strikingly, the European Union has constructed a voluntary code regarding disinformation and a variety of stakeholders — including Microsoft, Google, Twitter, and other companies founded in the United States — have signed on to the code.⁶⁹

⁶⁰ *Id.* at 890.

⁶¹ *Id.* at 891.

⁶² See Lynda M. Maddox & Eric J. Zanot, *The Suspension of the National Association of Broadcasters' Code and Its Effects on the Regulation of Advertising* 16 (Aug. 1983) (unpublished manuscript), <https://files.eric.ed.gov/fulltext/ED236583.pdf> [<https://perma.cc/C26K-ZX6H>].

⁶³ See Tarbert, *supra* note 54, at 187–95; IAN BARTLE & PETER VASS, *CTR. FOR THE STUDY OF REGULATED INDUS., UNIV. OF BATH SCH. OF MGMT., SELF-REGULATION AND THE REGULATORY STATE: A SURVEY OF POLICY AND PRACTICE* 36–37 (2005), <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=fac3c18f29183e5429e2b39bf40b3doec49a084e> [<https://perma.cc/T5L6-8BNF>].

⁶⁴ See Valentine, *supra* note 49. See generally James F. Ponsoldt, *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S. CAL. L. REV. 1 (1981).

⁶⁵ Craig Volden & Alan E. Wiseman, *Government Regulation and Self-Regulation* 16–17 (Nov. 2012) (unpublished manuscript), https://www.vanderbilt.edu/csdi/events/prvtgov_wiseman.pdf [<https://perma.cc/S9PT-VHDF>].

⁶⁶ Sharma et al., *supra* note 35, at 243.

⁶⁷ Andrew King & Michael W. Toffel, *Self-Regulatory Institutions for Solving Environmental Problems: Perspectives and Contributions from the Management Literature*, in *GOVERNANCE FOR THE ENVIRONMENT* 98, 101, 108–09 (Magali A. Delmas & Oran R. Young eds., 2009).

⁶⁸ See *supra* note 17 and accompanying text.

⁶⁹ See *Signatories of the 2022 Strengthened Code of Practice on Disinformation*, EUR. COMM'N (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation> [<https://perma.cc/P5E6-8T5Q>]. For the code itself, see EUR. COMM'N,

The Netherlands employs a hybrid of private and public regulation: sectoral industry organizations can submit codes of conduct to a government supervisory body for approval.⁷⁰ The Netherlands assigned power to sectoral industry organizations to enact legally binding data protection regulations responsive to questions identified by the government. If the government found self-regulation insufficient in a given sector, the government could decree sectoral privacy regulations.⁷¹ For at least the first nine years of this plan, the government found the codes of conduct sufficient and did not decree other sectoral privacy regulations.⁷² (But Dutch courts remain able to interpret the Data Protection Act⁷³ for themselves and can find a firm in violation of the statute even if it's acting in compliance with the accepted code of conduct.⁷⁴)

* * *

How could self-regulation proceed with social media? Current and former social media executives warn that their industry harms civil discourse essential to democracy and amplifies misinformation, social divisions, and risks of violence.⁷⁵ The status quo seems unsustainable.⁷⁶ Of course, social media platforms and the larger group of digital platform companies are diverse in emphasis, business models, scale, and values.⁷⁷ Some provide social networking and amplify peer-to-peer communication with algorithmic priority ranking of items and individualized

THE 2022 STRENGTHENED CODE OF PRACTICE ON DISINFORMATION (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> [<https://perma.cc/7RBG-CPYJ>].

⁷⁰ See generally Dennis D. Hirsch, *Going Dutch? Collaborative Dutch Privacy Regulation and the Lessons It Holds for U.S. Privacy Law*, 2013 MICH. ST. L. REV. 83; Frank Kuitenbrouwer, *Self-Regulation: Some Dutch Experiences*, in NAT'L TELECOMM. & INFO. ADMIN., PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE 109 (1997). The European Union's Digital Services Act also includes hybrid governmental/self-regulatory elements regarding data protection, but largely marks the end of reliance on self-regulation. See Amélie P. Heldt, *EU Digital Services Act: The White Hope of Intermediary Regulation*, in DIGITAL PLATFORM REGULATION 69, 72–73 (Terry Flew & Fiona R. Martin eds., 2022).

⁷¹ Kuitenbrouwer, *supra* note 70, at 110.

⁷² See *id.*

⁷³ Wet van 28 december 1988, houdende regels ter bescherming van de persoonlijke levenssfeer in verband met persoonsregistraties (Wet persoonsregistraties), Stb. 1988, 665.

⁷⁴ Kuitenbrouwer, *supra* note 70, at 112.

⁷⁵ See James Vincent, *Former Facebook Exec Says Social Media Is Ripping Apart Society*, THE VERGE (Dec. 11, 2017, 6:07 AM), <https://www.theverge.com/2017/12/11/16761016/former-facebook-exec-ripping-apart-society> [<https://perma.cc/3W8Q-ZL6Z>]; Kurt Wagner, *Twitter Is Wondering Whether Twitter Is Bad for Society — And Jack Dorsey Is Starting New Research to Find Out*, VOX (Mar. 1, 2018, 11:51 AM), <https://www.vox.com/2018/3/1/17067070/twitter-tweets-abuse-harassment-health-measurement-safety-jack-dorsey> [<https://perma.cc/8MNU-CY2A>].

⁷⁶ See Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> [<https://perma.cc/945P-HALY>].

⁷⁷ See EVELYN DOUEK, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV., *THE RISE OF CONTENT CARTELS* 17 (2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels> [<https://perma.cc/B3QB-QMTJ>] [hereinafter DOUEK, CONTENT CARTELS].

targeting of ads.⁷⁸ Others are primarily associated with searching information (Google) or sharing videos (TikTok) and photographs (Instagram). Still others — like those in the gaming industry — have social media and data collection practices.⁷⁹ Internet commerce platforms, such as Amazon, provide a meeting ground for sellers and buyers of goods and services using a recommendation algorithm — all while selling their own data storage and tech services.⁸⁰ Even with this variety, these companies receive and deploy large quantities of information from individuals and groups, use algorithms to create recommendations, sell and display ads to individuals based on analyses of the data they have shared, and afford varied channels for communication between individuals and groups.⁸¹ And the lines between the different fields blur as they acquire businesses (Google owns YouTube⁸²) and experiment with new lines of business.

Unlike concerns raised with other industries, the issues raised by digital platform companies can challenge the viability of democracies, spread risks of physical violence, and put into jeopardy individuals' mental health even as they offer opportunities to learn, earn a living, and communicate.⁸³ Digital platform companies offer avenues for freedoms of speech,⁸⁴ access to knowledge, and chances — even for people with very limited resources — to sell their services and goods.⁸⁵ The scale of these companies can be staggering because they reach people around the globe and enable millions of newly posted content items to circulate each hour.⁸⁶ Devising and enforcing any common regulations is a potentially impossible task for governments. The particular tasks of moderating and regulating content shareable on social media raise not only fraught dangers from suppressing speech but also potentially

⁷⁸ See Arvind Narayanan, *Understanding Social Media Recommendation Algorithms*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Mar. 9, 2023), <https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms> [<https://perma.cc/2UHW-WZDS>].

⁷⁹ See KEVIN WESTCOTT ET AL., DELOITTE, *STREAMING VIDEO ON DEMAND, SOCIAL MEDIA, AND GAMING TRENDS* (Oct. 19, 2021), <https://www2.deloitte.com/xe/en/insights/industry/technology/svod-social-media-gaming-trends.html> [<https://perma.cc/AV7Q-ACC3>].

⁸⁰ *What Is Ecommerce? Launch and Grow an Online Sales Channel*, AMAZON, <https://sell.amazon.com/learn/what-is-ecommerce> [<https://perma.cc/2Q3X-R54E>].

⁸¹ See Narayanan, *supra* note 78.

⁸² Matthew Johnston, *7 Companies Owned by Google (Alphabet)*, INVESTOPEDIA (Oct. 23, 2022), <https://www.investopedia.com/investing/companies-owned-by-google> [<https://perma.cc/NE8M-GQWL>].

⁸³ See Vincent, *supra* note 75.

⁸⁴ Cf. SIMPSON & CONNER, *supra* note 34.

⁸⁵ Cf. *What Is Ecommerce? Launch and Grow an Online Sales Channel*, *supra* note 80 (describing ecommerce platforms that would allow those with limited resources to sell services and goods).

⁸⁶ On Facebook alone, “[e]very 60 seconds, 510,000 comments are posted, 293,000 statuses are updated, 4 million posts are liked, and 136,000 photos are uploaded.” Maddy Osman, *Wild and Interesting Facebook Statistics and Facts (2023)*, KINSTA: BLOG (Dec. 6, 2022), <https://kinsta.com/blog/facebook-statistics> [<https://perma.cc/S8HS-XNNC>].

unpredictable effects.⁸⁷ Hence, formulating and enforcing norms are difficult challenges which call for iterative and evolving undertakings by many different actors.⁸⁸

Focal points for any self-regulatory effort will vary because the businesses vary. But data privacy issues cut across all these companies and devising some coordinated voluntary practices could seem more efficient and coherent than addressing competing rules from the European Union, China, individual states within the United States, and other jurisdictions. Furthermore, the relevant governments might welcome some forms of third-party auditing and other self-regulatory modes given the scale and cost of oversight and enforcement of their rules such as the European Union's General Data Protection Regulation⁸⁹ and Digital Services Act.⁹⁰ Collaborations with private industry and government could address workable definitions of unacceptable harassment and strategies to monitor fake social media profiles.

Similarly, protections for children — including their data privacy, guards against targeted advertising, and moderation of content inappropriate for young people — could be a focal point for sector-level self-regulation. Such efforts could bring more fine-grained tools and nimble approaches to areas that are already subject to some governmental regulation and enforcement.⁹¹ Privacy professionals identify data protection for children as a global priority that should be taken up by both governments and private-sector actors and seek to bolster laws in other countries and the self-regulatory approach in the United States.⁹² The

⁸⁷ Rafael Jiménez-Durán, *The Economics of Content Moderation: Theory and Experimental Evidence from Hate Speech on Twitter* 1 (Nov. 2022) (working paper), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/workingpapers/324jmpjimenezdurano03.pdf> [<https://perma.cc/U22L-DYW2>].

⁸⁸ See Douek, *supra* note 10, at 533.

⁸⁹ Council Regulation 2016/679, 2016 O.J. (L 119) 1 (EU); see Margot E. Kaminski & Gianclaudio Malgieri, *Algorithmic Impact Assessments Under the GDPR: Producing Multi-layered Explanations*, 11 INT'L DATA PRIV. L. 125, 133 (2021).

⁹⁰ *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Sept. 7, 2022); see Heldt, *supra* note 70, at 79.

⁹¹ See, e.g., Children's Privacy Protection Rule, 16 C.F.R. pt. 312. On the continuing need for efforts to protect children from targeted ads and from potentially harmful content, see Girard K., *Kids Are Exposed to Targeted Advertising Across the Industry*, COMMON SENSE EDUC. (Mar. 21, 2022), <https://www.commonsense.org/education/articles/kids-are-exposed-to-targeted-advertising-across-the-industry> [<https://perma.cc/4T3X-G9FG>]; Hannah Rose & A C, *Youth-On-Youth Extreme Right Recruitment on Mainstream Social Media Platforms*, GLOB. NETWORK ON EXTREMISM & TECH. (Jan. 10, 2022), <https://gnet-research.org/2022/01/10/youth-on-youth-extreme-right-recruitment-on-mainstream-social-media-platforms> [<https://perma.cc/LGH5-7YWQ>].

⁹² Emma Day, *Data Governance for Children: An Emerging Priority Area for Privacy Professions*, UNICEF (May 19, 2022), <https://www.unicef.org/globalinsight/stories/data-governance-children-emerging-priority-area-privacy-professionals> [<https://perma.cc/TH8T-JCEN>].

European Union has already directed social media firms to track down and remove content connected with child abuse.⁹³

In the specific context of social media content moderation, social media companies might even collaborate on categories in which to allow outside auditing. Industry groups could collaborate in defining best practices in areas of likely consensus, such as protecting children from violence and preventing extreme harassment.⁹⁴ They could work to refine the transparency needed for effective fact-checking by third parties, fund and craft crowdsourced verification of accuracy, or work on defining misinformation.⁹⁵ Self-regulatory efforts would draw on industry knowledge and hold off governmental pressures or provide a roadmap for sensible governmental involvement.⁹⁶ Financial and competitive pressures — and potential exemption from antitrust enforcement threats — could induce industry collaboration.

Meta's creation of the Facebook Oversight Board seemed to some a publicity stunt; the company created this board as an external body composed of twenty journalists, academics, and politicians, to which people can appeal content enforcement decisions.⁹⁷ It has rightly prompted serious criticisms.⁹⁸ Yet now, after two years of its work, both the energy behind it and the critiques it has elicited could provide helpful predicates for more effective self-regulation. The initial remit of the Board was limited essentially to individual objections to removal of individual content.⁹⁹ But by mobilizing — and compensating — distinguished people outside the company to oversee disputes over moderation decisions, the Oversight Board harnessed talented, independent

⁹³ Charles Hymas, *Track Down Child Abuse Content and Remove It, Social Media Firms to Be Told*, THE TELEGRAPH (May 11, 2022, 9:47 PM), <https://www.telegraph.co.uk/world-news/2022/05/11/social-media-firms-forced-proactively-remove-child-abuse-content> [https://perma.cc/KPV4-FRQC].

⁹⁴ For examples of collaborations already underway, see DOUEK, CONTENT CARTELS, *supra* note 77, at 7–8.

⁹⁵ See Anjana Susarla, *These Are the Ways Self-Regulation Could Fix Big Tech's Worst Problems*, FAST CO. (Feb. 23, 2021), <https://www.fastcompany.com/90607390/self-regulation-big-tech> [https://perma.cc/66EP-QHFH].

⁹⁶ Self-regulation would also avoid government action in content moderation, and hence potential First Amendment violations. A private social media company could decide, for example, to take down or slow the spread of information about how to steal a car while governmental restrictions on such content would face constitutional challenge. See Tim Arango & Jacey Fortin, *Teens Are Stealing More Cars. They Learn How on Social Media*, N.Y. TIMES (Mar. 10, 2023), <https://www.nytimes.com/2023/03/10/us/car-thefts-kia-challenge-tiktok.html> [https://perma.cc/3ZDH-FPEX].

⁹⁷ Hannah Murphy, *Facebook's Oversight Board: An Imperfect Solution to a Complex Problem*, FIN. TIMES (May 16, 2021), <https://on.ft.com/3ePUsFS> [https://perma.cc/TL75-LCWC].

⁹⁸ See *supra* notes 11–12 and accompanying text.

⁹⁹ Jessica J. Gonzáles & Carmen Scurato, *Everyone on Facebook's Oversight Board Should Resign*, WIRED (Apr. 17, 2021, 9:00 AM), <https://www.wired.com/story/opinion-everyone-on-facebooks-oversight-board-should-resign> [https://perma.cc/G93T-8E82]; Steven Levy, *Inside Meta's Oversight Board: 2 Years of Pushing Limits*, WIRED (Nov. 8, 2022, 6:00 AM), <https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits> [https://perma.cc/TTP5-YBGJ].

individuals who care about their own reputations. The members of the Oversight Board are pressing for transparency of the social media entity's rules and practices, exposing failures by the company to follow its own rules, and overcoming company resistance to welcoming and responding to concerns.¹⁰⁰

Some critics of the Oversight Board have established an independent alternative effort for monitoring and critique.¹⁰¹ Other social media companies can invent alternative approaches. Multiple private efforts offer the public and governmental actors opportunities to learn. Governments intervene with private-sector enterprises when the private sector fails to address harms they produce. Even with federal action in the United States stalled, state governments have started to act — much like governments outside the United States.¹⁰² Ongoing calls for new responses offer some grounds for concerns that self-regulation will “lock in” oversight for social media.¹⁰³ Even governments moving to regulate risks from social media companies find it essential to work with the private enterprises in order to identify and mitigate harms.¹⁰⁴ As other social media platforms examine self-regulatory options, collaborations across the sector could bring the kinds of ongoing improvements that have occurred with hospital accreditations, liquor sales, environmental threats, and other sources of serious social risk.

¹⁰⁰ Levy, *supra* note 99.

¹⁰¹ See *Real Facebook Oversight Board Issues Seven Urgent Demands of Meta to Protect 2022 US Election*, MEDIUM: REAL FACEBOOK OVERSIGHT BD. (Oct. 18, 2022), <https://rfob.medium.com/real-facebook-oversight-board-issues-seven-urgent-demands-of-meta-to-protect-2022-us-election-809d8fco452d> [<https://perma.cc/6DTB-4LK2>].

¹⁰² Mark MacCarthy, *Transparency Is Essential for Effective Social Media Regulation*, BROOKINGS INST. (Nov. 1, 2022), <https://www.brookings.edu/blog/techtank/2022/11/01/transparency-is-essential-for-effective-social-media-regulation> [<https://perma.cc/P2MH-Z2SX>] (discussing developments in California and Europe); Personal Information Privacy Act, 815 ILL. COMP. STAT. 530 (2020) (Illinois); *Vietnam to Require 24-Hour Take-Down for “False” Social Media Content*, REUTERS (Nov. 4, 2022, 1:21 AM), <https://www.reuters.com/technology/vietnam-require-24-hour-take-down-false-social-media-content-2022-11-04> [<https://perma.cc/KLL4-5V2D>] (Vietnam).

¹⁰³ Kadri has expressed concern about consistency and uniformity in self-regulation choking off innovation and improvements. Kadri, *supra* note 11, at 197. The experiences of other industries described here suggests that self-regulation can generate competition and also offer models for ongoing government efforts.

¹⁰⁴ Wheeler, *supra* note 9.