

The New Gatekeepers?

Social Media and the “Search for Truth”

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4.1 INTRODUCTION

What is the role of “trusted communicators” in disseminating knowledge to the public? The trigger for this question, which is the topic of this set of chapters, is the widely shared belief that one of the most notable, and noted, consequences of the spread of the internet and social media is the collapse of sources of information that are broadly trusted across society, because the internet has eliminated the power of the traditional gatekeepers¹ who identified and created trusted communicators for the public. Many commentators argue this is a troubling development because trusted communicators are needed for our society to create and maintain a common base of facts, accepted by the broader public, that is essential to a system of democratic self-governance. Absent such a common base or factual consensus, democratic politics will tend to collapse into polarized camps that cannot accept the possibility of electoral defeat (as they arguably have in recent years in the United States). I aim here to examine recent proposals to resurrect a set of trusted communicators and the gatekeeper function, and to critique them from both practical and theoretical perspectives. But before we can discuss possible “solutions” to the lack of gatekeepers and trusted communicators in the modern era, it is important to understand how those functions arose in the pre-internet era.

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¹ By gatekeepers, I mean entities and/or institutions who control what information and what sources of information the general public is exposed to without great effort on the audience’s part.

4.2 THE OLD GATEKEEPERS

Underlying the concept of trusted communicators is the question of “Who to trust?” But underlying *that* question is yet another, more foundational one: “Who *decides* who to trust?” Ultimately, of course, each person must decide for themselves who to trust. But for a societal consensus on this question to emerge, some common source of authority must exist. If there is one lesson that can be drawn from the modern era of social media, it is that robust, public discourse alone cannot be expected to generate an automatic consensus on who can be trusted (or on trustworthy facts). The quest for trusted communicators, then, is in truth a quest for authoritative sources of trust – which is to say, a quest for authority. In the internet era, centralized control over information flows has fragmented and, consequently, so too has the authority to identify trusted communicators. Before seeking to recreate such authority, however, it is important to understand how and why such authoritative sources of information emerged in the pre-internet era, when modern expectations about trust and a factual consensus developed – which is to say, during the first six or seven decades of the twentieth century.

Who were the creators and designators of trust during this period? In short, it was the institutional media. Moreover, through most of the twentieth century, institutional media acted as the gatekeepers of knowledge and news as well. Just who constituted the institutional media gatekeepers, however, changed over time. During the first part of the century, perhaps the crucial period in the development of gatekeepers and trusted communicators, it was major daily newspapers, especially those associated with William Randolph Hearst and Joseph Pulitzer, as well as Adolph Ochs’s *New York Times*. As we shall discuss in more detail, in many ways it was cultural clashes between Hearst and Pulitzer on one side and Ochs on the other that generated the dominant gatekeeper/trusted-communicator model.²

After World War I, while newspapers certainly maintained their importance, commercial radio broadcasters emerged as another crucial – and soon more popularly accessible – media institution. The first commercial radio station began broadcasting in 1920 in Pittsburgh, Pennsylvania. Four years later, 600 commercial radio stations were broadcasting in the United States. In 1926, the first national radio network, NBC, was formed.³ As evidenced by President Franklin Delano Roosevelt’s fireside chats during the Great Depression, radio quickly emerged as a widely available, popular means for institutional media – and those trusted communicators to whom they provided airtime, such as FDR – to reach mass public audiences.

Finally, around the mid-century, at the beginning of what many considered the Golden Age of the institutional media, television broadcasters began to complement

² See generally W. JOSEPH CAMPBELL, *THE YEAR THAT DEFINED AMERICAN JOURNALISM: 1897 AND THE CLASH OF PARADIGMS* (2006).

³ *KDKA Begins to Broadcast: 1920*, PBS (1998).

and eventually supplant radio (and newspapers) as the key institutional media. The Federal Communications Commission (FCC) first authorized commercial television broadcasts in 1941, but because of World War II, commercial television broadcasts did not begin in earnest until 1947.⁴ And then the industry exploded. From 1946 to 1951, the number of television sets in use rose from 6,000 to 12 million. By 1955, half of American households owned television sets.⁵ Moreover, during the 1940s, the three iconic national television networks – the National Broadcasting Company (NBC) (evolved from the first radio network), the Columbia Broadcasting System (CBS) (evolved from a competing radio network), and the American Broadcasting Company (ABC) (spun off from NBC by order of the FCC) – had also emerged.⁶ Finally, with the creation in 1956 of NBC's *The Huntley-Brinkley Report* (the first television news broadcast), television's dominance as the primary source of news for most Americans (and the concomitant decline in the influence of newspapers) began.⁷

The rise of broadcasting also led to the rise of the quintessential trusted communicators of this era, the network reporter and, later, anchorman. Coincidentally, the figures that epitomize both roles were affiliated with CBS. Edward R. Murrow first rose to prominence during the radio era through his revolutionary reporting on Hitler's *Anschluss* of Austria in 1938, and he became a household name by reporting live from London during the London Blitz in the early 1940s. He then moved to television and demonstrated continuing enormous influence through broadcasts, including a pathbreaking one in 1954 criticizing Senator Joseph McCarthy's witch-hunt against Communists, which contributed to McCarthy's downfall.⁸

The other, even more important trusted communicator of the broadcast era was of course Walter Cronkite. Cronkite first became prominent (among other things, as the first designated "anchorman") during CBS's coverage of the 1952 presidential nominating conventions. But it was with the launch of *The CBS Evening News with Walter Cronkite* in 1962 that Cronkite's central role as *the* trusted communicator emerged.⁹ Cronkite's influence was most famously demonstrated when his critical coverage of the Vietnam War in 1968 led to an important swing in public opinion against the war and contributed to President Lyndon Johnson's decision not to run for re-election. Cronkite's status is illustrated by the fact that a 1972 poll named him "the most trusted man in America."¹⁰ The institutional media and its key figures,

⁴ Mitchell Stephens, *History of Television*, GROlier ENCYCLOPEDIA, <https://perma.cc/G8MT-6JPP>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ David Mindich, *For Journalists Covering Trump, A Murrow Moment*, COLUM. JOURNALISM REV. (July 15, 2016), <https://perma.cc/Z77V-NGBC>.

⁹ Stephens, *supra* note 4.

¹⁰ *Walter Cronkite: American Journalist*, BRITANNICA (Mar. 7, 2022), <https://perma.cc/AAM9-A4N5>.

epitomized by Murrow and Cronkite, were thus *the* trusted communicators of this era.

Even though their technology and reach varied, the gatekeepers/trusted communicators described above shared some basic characteristics. First, they were relatively scarce. The economics of newspapers meant that during most of this period, metropolitan areas could only support one or a handful of newspapers.¹¹ With respect to the broadcast medium, the number of radio and television stations in any particular locality that actually produced original content (as opposed to playing music or broadcasting reruns of sitcoms) was limited by the same economic factors (essentially economies of scale) as newspapers. In addition, the fact that the number of possible broadcast frequencies was physically limited – electromagnetic spectrum, as the Supreme Court put it, is a “scarce resource”¹² – necessarily limited the number of outlets in any particular market. Indeed, in practice, the broadcast-television market, especially in its role as disseminator of national news and general knowledge, was completely dominated by the three major networks (NBC, CBS, and ABC) until the launch of the Fox network in 1986 – and that only added one additional player. This situation only changed with the spread of cable television in the 1980s (and thus the end of spectrum scarcity because of the large channel capacity of cable systems), resulting in the launch of cable-only CNN in 1980 and then of Fox News in 1996.

The second shared characteristic between different types of gatekeepers and trusted communicators was that these gatekeepers sought to construct an “objective,” nonpartisan image. The roots of this development, which has become an essential element of modern journalistic ethics,¹³ can be found in the conflict between the sensationalist journalism championed by newspaper tycoons William Randolph Hearst and Joseph Pulitzer, and the “counteractivist,” nonpartisan model of Adolph S. Ochs’s *New York Times* (which he purchased in 1896¹⁴). While the Hearst/Pulitzer model was dominant in the late nineteenth and early twentieth centuries, Ochs’s commitment “to give the news impartially, without fear or favor, regardless of party, sect, or interests involved” – a commitment Ochs announced on his first day of ownership of the *Times*¹⁵ – eventually won out.¹⁶ By 1920, this norm of objectivity¹⁷

¹¹ See *Miami Herald Pub’g Co. v. Tornillo*, 418 U.S. 241, 249–50 & n.13 (1974).

¹² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 391 (1969).

¹³ See *SPJ Code of Ethics*, SOC’Y PROF. JOURNALISTS, <https://perma.cc/K48S-5YWR> (“Ethical journalism should be accurate and fair”).

¹⁴ BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 76 (4th ed. 2021).

¹⁵ *Id.*

¹⁶ See generally CAMPBELL, *supra* note 2; *Invisible Men: The Future of Journalism*, *ECONOMIST* 67–68 (July 18, 2020).

¹⁷ Andrew Porwancher, *Objectivity’s Prophet: Adolph S. Ochs and the New York Times*, 36 *JOURNALISM HIST.* 186, 187 (2011), <https://perma.cc/UJ6T-6N5Y>.

(which had previously gone by the name of “realism”¹⁸) was becoming the dominant paradigm of journalism, as reflected by the fact that the Society of Professional Journalists’ first Code of Ethics, adopted in 1926, calls for journalistic “impartiality,” meaning that “[n]ews reports should be free from opinion or bias of any kind.”¹⁹

It is important to note, however, that this goal of objectivity was a historical anomaly. Prior to the early twentieth century, newspapers and publishers did not pretend to be objective – to the contrary, they were explicitly partisan. Important historical examples include *The Aurora*, the newspaper edited by Benjamin Franklin Bache (Ben Franklin’s grandson) in the late 1790s, which was tied to the Democratic Republican party of Jefferson and Madison (Bache and other Jeffersonian newspaper editors were prosecuted by the Adams Administration for sedition),²⁰ and Horace Greeley’s *New York Tribune*, which was closely associated with the Republican Party before and during the Civil War.²¹ Needless to say, these newspapers were *not* viewed as trustworthy by their political opponents (as demonstrated by Bache’s prosecution). After World War I, however, economic pressures led to the consolidation of newspapers and a notable decrease in the number of daily newspapers – as epitomized by the merger in 1924 of the old rivals the *New York Herald* (which, though allegedly nonpartisan, often supported Democratic Party policies during the Civil War) and Greeley’s *New York Tribune*.²² As a consequence, newspapers began to seek broader (and so bipartisan) audiences, which required them to abandon their partisan affiliations. Not coincidentally, journalistic ethics during this period also embraced objectivity as a desirable norm, as noted above.

The trend toward objectivity continued as newspapers were gradually supplanted by broadcast: first radio, then (even more dominantly) television. For television broadcasting in particular, the push for objectivity was driven by similar economic motivations to maximize audience share because of the effective monopoly on national news held by the three national networks. In addition, the FCC’s Fairness Doctrine, in effect from 1949 to 1987, strongly incentivized objectivity on the part of both radio and television broadcasters by requiring them to present opposing views on public issues, and by creating a right of reply on the part of individuals subject to a “personal attack” during broadcast programming.²³ Facially objective news coverage avoided triggering either requirement.²⁴

¹⁸ Walter Dean, *The Lost Meaning of “Objectivity”*, AM. PRESS INST., <https://perma.cc/6CRR-EWWL>.

¹⁹ *Sigma Delta Chi’s New Code of Ethics*, SOC’Y PROF. JOURNALISTS, <https://perma.cc/5CMS-BSUZ>.

²⁰ For a good discussion of this episode, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH DURING WARTIME* 35 (2004).

²¹ JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 251–52 (1988).

²² *New York Herald: American Newspaper*, BRITANNICA, <https://perma.cc/FLE8-YWJV>.

²³ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–79 (1969); Matt Stefon, *Fairness Doctrine*, BRITANNICA, <https://perma.cc/HYP3-JNUE>.

²⁴ *Id.*

This performed objectivity, playing out in a highly concentrated broadcast market, enabled a small set of individuals and institutions to emerge as “trusted communicators” in the eyes of a broad swath of the American public. We might call this the Murrow–Cronkite Effect. Furthermore, this institutional structure permitted trusted media figures to extend public trust to elite, designated “experts” *outside* the media by giving those experts the gatekeepers’ imprimatur in the form of interviews and airtime (as an example, consider Edward R. Murrow’s famous 1955 interview of Jonas Salk, the inventor of the polio vaccine²⁵). As a consequence, during this “golden era,” most of American society obtained news and knowledge from a few common and generally trusted sources.

What engendered this broad-based trust,²⁶ which in today’s world seems inconceivable? I would argue that the answer, in short, was a lack of alternative voices. The public trusted media gatekeepers because they had no choice – there were no significant opposing voices to question or undermine that trust because of concentration within the institutional media. It was precisely these factors – concentration and lack of choice – that made the institutional media, especially the three television networks, gatekeepers who exercised effective control over the flow of information into almost every American household. Indeed, it is hard to imagine how a media institution could play gatekeeper without this kind of option scarcity.

Furthermore, for economic reasons discussed above, these gatekeepers adopted an “objectivity” that overwhelmingly tended to reflect the views of the political center in order to maximize their potential audience. As a consequence, there were simply no opportunities for the public to question consensus facts, or to become aware of what the institutional media was not telling them (such as President Kennedy’s philandering, or the CIA’s secret coups during President Eisenhower’s administration). I am not insinuating that Murrow and Cronkite did not earn the public’s trust – I have no doubt that they did, through ethical and insightful journalism. But that trust ultimately depended on a lack of choice or alternative, nonmainstream voices.

4.3 THE COLLAPSE OF THE OLD GATEKEEPERS

Eventually, of course, this system of institutional concentration and consensus collapsed. The first developments along these lines are probably traceable to the FCC’s repeal of the Fairness Doctrine in 1987,²⁷ which in turn led to the rise of

²⁵ Michael Hiltzik, *On Jonas Salk’s 100th Birthday, a Celebration of His Polio Vaccine*, L.A. TIMES (Oct. 28, 2014), <https://perma.cc/JE3A-XAMP>.

²⁶ To be fair, it is far from clear that the trust I am describing here extended to minority communities, but that is another story.... Thanks to Helen Norton and Erin Carroll for (independently) pointing this out to me.

²⁷ Stefon, *supra* note 23.

right-wing talk radio, a medium which did not pretend or aspire to objectivity.²⁸ In addition, the explosion of the cable-television medium during the 1980s ended the era of television concentration because television no longer required scarce spectrum,²⁹ which in turn permitted the launch of the overtly partisan Fox News in 1996,³⁰ at the very dawn of the internet era. But while these developments began undermining the era of (supposed) media objectivity and the media's gatekeeper function, there can be little doubt that the internet, and especially the rise of social media, put a final end to the institutional media's control over public discourse. These, however, are relatively recent events. X was founded in 2006,³¹ the same year that Facebook became available to the general public.³² But at first, these were relatively obscure platforms. It was not until the availability and widespread adoption of smartphones – the first iPhone was not released until 2007,³³ and smartphones did not come into common use for several years after then – that social media became mobile and easily usable, leading to its exponential growth.³⁴

By the 2010s, the importance of social media in displacing traditional media as the primary engine of public discourse was evident – so much so that by 2017, that most hidebound of American institutions, the United States Supreme Court, recognized social media as “the most important places . . . for the exchange of views.”³⁵ Every citizen became a potential publisher and people suddenly possessed a plethora of choices regarding what voices to pay attention to, ending once and for all the gatekeeper function of the institutional media. And for the same reason, the range of opinions expressed publicly became massively more diverse, ending the media's role in creating consensus around a common set of facts and beliefs. The Murrow–Cronkite Effect had vanished.

With the collapse of the gatekeeper function also came the collapse of trusted communicators. There are no Edward Murrows or Walter Cronkites in the social-media/Fox News era; instead we have Tucker Carlsons and Robert F. Kennedy,

²⁸ It is no coincidence that *The Rush Limbaugh Show* was launched nationally in 1988. *America's Anchorman*, RUSH LIMBAUGH SHOW, <https://perma.cc/KF4Y-5E74>.

²⁹ During the 1980s, the number of cable networks exploded from 28 to 79, and cable penetration in American households enjoyed similar growth. See Brad Adgate, *The Rise and Fall of Cable Television*, FORBES (Nov. 2, 2020), <https://perma.cc/ZD29-R4KZ>.

³⁰ Michael Ray, *Fox News Channel*, BRITANNICA (Mar. 2, 2022), <https://perma.cc/8Y5G-VQMS>.

³¹ Jack Meyer, *History of Twitter: Jack Dorsey and the Social Media Giant*, THE STREET (Jan. 2, 2020), <https://perma.cc/L8V2-94LY>.

³² *Who We Are*, META, <https://perma.cc/686G-8AUA>.

³³ *Apple Reinvents the Phone with iPhone*, APPLE (Jan. 9, 2007), <https://perma.cc/5A8B-HCRT>.

³⁴ As an illustration, from 2008 to 2012, the number of Facebook users grew from 100 million to 1 billion – the latter being greater than the combined populations of the United States and the European Union. Kurt Wagner & Rani Molla, *Facebook's First 15 Years Were Defined By User Growth*, VOX (Feb. 5, 2019), <https://perma.cc/85JZ-895C>.

³⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Jr.s (Mr. Kennedy, the son of Bobby Kennedy, is an active anti-vaccine propogandist³⁶). This development is frankly unsurprising if one accepts, as I argued above, that much of the public's trust during the Murrow–Cronkite era was a product of the institutional media's gatekeeper function. No more gatekeepers, no more trust.

To be fair, the elimination of gatekeepers is not the only development that has contributed to the loss of trusted communicators. Most obviously, political polarization has also played an important role. As many people have drifted into more radicalized political positions, they inevitably cease to trust the traditional trusted communicators of the center (or, more honestly, the center-left) that made up the institutional media. Individuals whose views sit in the far-right or far-left have no reason to trust institutional speakers such as *The New York Times* or CNN. But here, too, the loss of gatekeepers plays an important causal role. During the peak of the gatekeeper era, most people had no access or exposure to radical voices unless they actively sought them out – and such voices were, as a result, quite rare. Today, social media and other internet forums provide easy access to a vast range of viewpoints, permitting individuals to trust whomever they please – usually voices that reinforce and intensify their existing views. Of course, there have always been radical movements and conspiracy theories, but the rapid spread and sheer scope of the QAnon conspiracy theory, for example, would not have been possible in the pre-internet era; its ideas would never have gotten past the gatekeepers.

4.4 THE NEW GATEKEEPERS?

The loss of faith in institutional elites, including the institutional media, and the resulting collapse of consensus has had profound consequences. One impact has been to further exacerbate political polarization – though it should be noted that the internet did not create modern polarization, which can be traced back at least to Newt Gingrich's 1994 “Contract with America” and the bloody political battles of the 1990s. More fundamentally, however, the loss of gatekeepers and trusted communicators has either threatened or eliminated the possibility of an ideology-free consensus on even basic facts. For individual media consumers, ideology seems to play a heavy role in shaping factual perceptions, regardless of objective reality. As an example, consider the fact that in 2016, 72 percent of Republicans expressed doubts about Obama's birthplace, despite his Hawaiian birth certificate being in the public record.³⁷

This loss of what one might call “consensus reality” has created an intellectual atmosphere of existential angst in some elements of American society. This is most

³⁶ Adam Nagourney, *A Kennedy's Crusade against Covid Vaccines Anguishes Family and Friends*, N.Y. TIMES (Feb. 26, 2022).

³⁷ Josh Clinton & Carrie Roush, *Poll: Persistent Partisan Divide over “Birther” Question*, NBC NEWS (Aug. 10, 2016), <https://perma.cc/2EBV-QR3F>.

evident within the mainstream media (perhaps unsurprisingly), but it is also an important part of the dialogue in politics (mainly on the left) and in academia (almost definitionally the left). To be clear, there is no question that a lack of factual consensus has had negative social consequences. It has made compromise – or even dialogue – across partisan lines far more difficult. And as the United States’ experience with COVID-19 demonstrates, it can lead to deeply irrational policy choices (both on the left and right, to be clear). But the intellectual angst that I describe is often expressed in an existential manner, as fear for the very survival of our society (caused by such factors as the false belief among many Republicans, fostered by President Trump and elements of the conservative media, that the 2020 presidential election was stolen from Trump³⁸).

The practical ways in which these elements of society have operationalized their angst has been to place enormous amounts of pressure on social-media platforms such as Facebook, X, and YouTube to actively block (among other things) online falsehoods in order to recreate a consensus reality. Not a day goes by, seemingly, without another thundering op-ed published in *The New York Times*³⁹ or *The Washington Post*⁴⁰ decrying misinformation and “fake news” and blaming social-media platforms for failing to suppress it. Meanwhile, Democratic members of Congress such as Amy Klobuchar and Elizabeth Warren have been pushing aggressively for legislation that would force social media to suppress mis- and disinformation.⁴¹

In short, these critics want social-media platforms to become the *new* gatekeepers, replicating the role of the twentieth-century institutional media in deciding what information and sources of information the public should be exposed to. Their logic appears to be that, because a small number of social-media platforms now host such a large portion of public discourse, the owners and controllers of those platforms should therefore ensure that the flow of information to individuals is accurate and “clean,” just as the twentieth-century institutional media did when it held a similar bottleneck position. And in fact, given their dominant market positions, the “big four” owners of the key social-media platforms on which political discourse occurs – essentially Meta (which owns Facebook and Instagram), X, Alphabet (formerly

³⁸ See, e.g., Zachary Ross, *The Five Biggest Threats Our Democracy Faces*, BRENNAN CTR. FOR JUST. (Dec. 15, 2020), <https://perma.cc/6F6R-FJY2>.

³⁹ See, e.g., Richard L. Hasen, *How to Keep the Rising Tide of Fake News from Drowning Our Democracy*, N.Y. TIMES (Mar. 7, 2022); Greg Bensinger, *How Twitter Can Fix Itself*, N.Y. TIMES (Dec. 1, 2021); Andrew Higgins, Adam Satariano & Jane Arraf, *How Fake News on Facebook Helped Fuel a Border Crisis in Europe*, N.Y. TIMES (Nov. 22, 2021).

⁴⁰ Jennifer Rubin, *It’s Time to Stand Up to Facebook*, WASH. POST (Oct. 4, 2021); Joe Scarborough, *Zuckerberg Says He’s “Disgusted” by Trump’s Rhetoric. It’s Just Crocodile Tears*, WASH. POST (June 18, 2020).

⁴¹ See, e.g., Health Misinformation Act of 2021 (S.2448), <https://perma.cc/Z7F9-4PQD>; Cecelia Kang & Thomas Kaplan, *Warren Dares Facebook with Intentionally False Political Ad*, N.Y. TIMES (Oct. 12, 2019).

Google, which owns YouTube), and ByteDance (which owns TikTok) – might well jointly possess the power to shape discourse akin to the three broadcast television networks of the twentieth century. But should they?⁴²

I have argued elsewhere that any *legal* requirements forcing internet platforms to suppress “fake news” would almost certainly violate the First Amendment.⁴³ The question I am raising here is whether, leaving aside the (dubious) constitutionality of regulation, it is even a good idea for social-media firms to act as gatekeepers (and for critics to push them to do so). In other words, *should* social-media firms be in the business of screening out false information and determining who is and is not a trusted communicator? Leaving aside the question of whether this is even possible (does anyone believe that Mark Zuckerberg can replace Walter Cronkite as “the most trusted man in America?”), I believe that they should not.

There are several reasons why social-media firms are ill-suited to be effective gatekeepers (or, as Mark Zuckerberg would have it, “arbiters of truth”⁴⁴). First and foremost, they have no economic incentives to do so. The traditional institutional media emphasized their objectivity and sought to develop reputations as trusted gatekeepers because it was in their economic interest to do so. Objectivity and trust increased viewership and market share. The same is not true with social media. Social-media algorithms emphasize relevance, not truth. That is what increases engagement, and so profits. Asking for-profit companies to take on roles that they have no economic incentive to adopt strikes me as both dubious policy and likely futile.

Second, social-media firms have absolutely no expertise or training that would enable them to be either effective gatekeepers or effective identifiers of trusted communicators. As a practical matter, while social-media algorithms are quite effective at sorting by relevance and interest, I am doubtful that they can be designed to identify “truth” or its opposite, given the tenuous and disputed nature of truth. More fundamentally, the people who work for the large tech firms are unlikely to be effective at the gatekeeper function. They are, after all, software engineers, not journalists or trained experts on subject matters such as science, history, or economics, and it seems unlikely, given the culture of Silicon Valley, that they will become so. Training the Mark Zuckerbogs of the world to be journalists is likely to be about as successful as it would have been to train Walter Cronkite to code. Furthermore, social-media platforms do not themselves generate content, unlike many traditional experts (though those experts, as noted below, have themselves had a spotty record in identifying “truth”), which significantly reduces the incentives for these firms to develop serious in-house expertise (or for highly qualified experts to want to work for

⁴² See Eugene Volokh, *The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power*, 3 J. FREE SPEECH L. 197 (2023).

⁴³ Ashutosh Bhagwat, *The Law of Facebook*, 54 U.C. DAVIS L. REV. 2353, 2393–94 (2021).

⁴⁴ Yael Halon, *Zuckerberg Knows Twitter for Fact-Checking Trump, Says Private Companies Shouldn't Be “The Arbiter of Truth”*, FOX NEWS (May 27, 2020), <https://perma.cc/AUM3-3UJY>.

them – fact-checking is boring compared to content creation). Moreover, recent history suggests that when social-media firms do rely on “expert” elites to identify misinformation, the results can be dicey – as illustrated by the fiascos of labeling the lab-leak theory of COVID’s origins as misinformation,⁴⁵ or the decision to suppress a negative story about Hunter Biden on the eve of the 2020 presidential election.⁴⁶ Indeed, social-media critics are notably vague about how exactly social-media firms are to identify “truth” (or its opposite, misinformation) going forward . . . other than, that is, strongly suggesting that misinformation is whatever they themselves – the political and media elites – deem it to be.

Finally, I would question whether *any* gatekeepers of information and/or “trusted communicators” are ultimately beneficial to society or consistent with principles of free expression. First, it is important to acknowledge that truth, especially ideologically tinged truth, is a slippery thing.⁴⁷ While I do not deny the existence of objective facts (e.g., COVID-19 is real, and vaccines do work and do not cause autism), that sort of objectivity falls apart very soon after one gets beyond simple, provable facts. Certainly, COVID-19 is a real and dangerous disease, but where did it originate? Maybe a lab in Wuhan, maybe not – we may never know. Was closing primary schools for lengthy periods of time necessary to combat the spread of COVID-19? Teachers and parents may have different answers. Is it necessary or wise to vaccinate young children against COVID-19, given their low risk of severe illness? The expert-provided answers to these questions are, in truth, guesswork or opinions (albeit informed ones) dressed up as objective fact (or “science”). Should disagreement with these experts be suppressed or labeled as misinformation?

The more fundamental question, once we get beyond a very narrow range of objective facts, is whether gatekeepers and deference to designated “experts” (i.e., trusted communicators) really offer the best way to identify “truth” and, conversely, misinformation. Those who favor gatekeepers, including social-media gatekeepers, assume that gatekeepers and experts are necessary to hold back the tide of fake news. But there is a deep tension between this institutional approach and basic theories of free speech, as most famously encapsulated by Justice Oliver Wendell Holmes’s foundational metaphor of the “marketplace of ideas”: “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁴⁸ Nor is it consistent with Justice Louis Brandeis’s equally fundamental adage that, when faced with false or dangerous speech, “the remedy to be applied is more speech, not enforced silence.”⁴⁹

⁴⁵ See Brett Stephens, *Media Groupthink and the Lab-Leak Theory*, N.Y. TIMES (May 31, 2021).

⁴⁶ Andrew Prokop, *The Return of Hunter Biden’s Laptop*, VOX (Mar. 25, 2022), <https://perma.cc/7XGK-BPRU>.

⁴⁷ For a thoughtful, extended discussion of this problem, see Jane Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73 (2018).

⁴⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁴⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Both Holmes's and Brandeis's theories of free speech, while differing in details, are premised on the assumption that citizens should be permitted to freely engage in political debate, to the point even of advocating lawless behavior. This is because, according to Holmes, only then can truth emerge, and, according to Brandeis only then can citizens fully engage in our democracy. The concept of gatekeepers is simply inconsistent with both these visions. Gatekeepers are anathema to competition, and they are also quintessential silencers rather than enablers of "more speech."

4.5 CONCLUSION

In short, perhaps the collapse of gatekeepers and trusted communicators is not such a terrible thing after all. None of this is to assert that the truth will necessarily emerge from the competition of the market. Markets are often flawed, and even though the internet and social media have removed the barriers to entry that plagued twentieth-century public discourse, there are other problems, often rooted in our political polarization, that continue to interfere with the free exchange of ideas – an obvious example being social media's tendency to create speech silos. Nor is it to claim that citizens, given the opportunity, will engage in honest and civil democratic deliberation. Human nature being what it is (and the desire for ideological self-reinforcement being what it is), we know today that Holmes's and Brandeis's shared optimism about the results of open discourse was probably not justified. But the gatekeeper solution, whereby a handful of elite actors control public discourse, is not consistent with either principles of free expression or the role of citizens in our democracy. Instead of trying to recreate a bygone (and, frankly, deeply flawed) era, perhaps we should be thinking about how to reinvigorate a marketplace of ideas and encourage genuine democratic deliberation that both surmount political polarization. How we might attempt to do so is beyond the reach of this chapter,⁵⁰ but such an effort, rather than creating new gatekeepers, seems to me the best hope for curing the ills of our public discourse and of our democracy.

⁵⁰ I have advanced some preliminary thoughts on this question elsewhere. See ASHUTOSH BHAGWAT, *OUR DEMOCRATIC FIRST AMENDMENT* 112–17 (2020) (arguing for greater reliance on crowd-sourcing, similar to the Wikipedia model, to work towards more factual consensus); see also Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821 (2008) (explaining the role that institutions such as universities and schools can play in reducing transaction costs within the marketplace of ideas).