Yale Talk: Conversations with Peter Salovey

Episode 21: The First Amendment in the Information Age

**Peter Salovey:** Hello, everyone, I’m Peter Salovey, and thank you for joining me for Yale Talk. The spread of inaccurate information online is a major problem for many reasons, but it has emerged as particularly challenging during the COVID-19 pandemic. Back in April 2020, U.N. Secretary-General António Guterres spoke about “a dangerous epidemic of misinformation.” Such concerns have only grown with the rise of the more contagious Delta variant. And in his very first advisory as U.S. surgeon-general, Dr. Vivek Murthy wrote about the danger posed by “health misinformation,” much of it spreading through social media.

So, my guests today address these issues from the perspective of the law—specifically, the intersection of law, information, and technology. Jack Balkin is the Knight Professor of Constitutional Law and the First Amendment at Yale Law School. He is the founder and director of Yale’s Information Society Project, an interdisciplinary center that studies law and new information technologies. He also directs the Abrams Institute for Freedom of Expression and the Knight Law and Media Program at Yale.

My other guest is Robert Post, Sterling Professor of Law, former dean of the law school, and a world-renowned First Amendment expert. Robert is a member of Facebook’s Oversight Trust, which is charged with “helping Facebook answer some of the most difficult questions around freedom of expression online: what to take down, what to leave up, and why.”

So, Jack and Robert, thank you very much for joining me today. Let’s start with the social media landscape. So according to the Pew Research Center, over 70 percent of Americans use some type of social media, and about half of American adults say they get their news from social media, that social media is their primary news site. What are we to make of these trends, and are there special issues that social media raises in terms of how our democracy works, how the First Amendment works? Robert, maybe as a former dean, you are the person we should start with.

**Robert Post:** Thank you, Peter. So to understand, I think, the special issues caused by social media, we have to understand that there are really two distinct factors at play. The first is the creation of a new medium of communication—the Internet, which didn’t exist 30 years ago. And the Internet has some properties which make it different than any previous system of communication. The first is that it has virtually zero marginal information cost. So a statement that might have been harmless when made in Hyde Park is very different on the Internet because of the rapidity with which it’s disseminated and because of the numbers of people that will see it. A second issue caused by marginal zero marginal information cost is that the Internet has undercut traditional forms of social authority. That’s particularly important for misinformation about COVID. When the printing press was developed in the 16th and 17th centuries, it undercut traditional forms of authority. In Catholic doctrine, you could not read the Gospel directly. You had to go through your priest. Once the Bible became printed and everyone could read it, they could read the Gospel for themselves, and so the authority of the church was undermined, and you had the Reformation and two centuries of disorder because social authority was undermined by the spread of information. The Internet has the same thing. If you go to your doctor’s office, sometimes you’ll see a sign that says, “your Google search is not equivalent to my M.D. degree.” But everyone thinks they know everything because they can have access to the information, and a world without social authority is a very different sort of world.

There are many other properties we could talk about the Internet. But to speak very quickly, social media are forms of interaction which didn’t exist before the Internet, another of whose properties is that it’s interactive. This creates forms of social solidarities, which are new. This creates forms of attention grabbing, which are new. This creates forms of life online, which didn’t exist 30 years ago. So we’re dealing with an entirely new media environment, which we don’t really understand and which causes, quite justly, great forms of apprehension.

**Peter Salovey:** Just to stay with your comments for a minute, let’s imagine the marginal costs of spreading information through the Internet were not close to zero. You actually had to pay to put something on. I mean, quite literally, that would change the whole thing, right?

**Robert Post:** Of course it would.

**Peter Salovey:** People would think before they post. [Laughter]

**Robert Post:** Remember fluoride in the 1950s? And how right-wing organizations thought fluoride was a Communist conspiracy? It’s the same kind of misinformation, but it was confined because it was expensive to spread. And the fact that it’s not expensive to spread means that we have epidemics of misinformation, which previously wouldn’t have happened precisely because of cost.

**Peter Salovey:** Jack, what do you make of this statistic that adults, let alone adolescents, essentially get their news from the Internet?

**Jack Balkin:** This is a long-term trend. It’s more likely that the younger you are, the more this is true of you. The older you are, you’re still probably using pre-digital media, although pre-digital media is now completely merged into and makes use of digital media as well.

I just want to pile on to the point that Robert made. In fact, it’s not just simply that misinformation is costless. It actually turns out that misinformation is a very lucrative profession. And that’s because of another feature that we have to throw into the mix, which is that these systems of communication are funded by digital advertising. So, instead of money being collected from the people who subscribe, they’re collected from advertisers, and advertisers in turn have been swallowed up in a very, very large system of digital advertising networks. The two most powerful players in these networks are Google and Facebook, respectively. They don’t control all of digital advertising. They control a very large share of it. And it turns out that folks who engage in misinformation have figured out how to game the system. They’ve figured out how to use the existence of algorithms that are used to place things in digital advertising and also the algorithms on the social media sites in order to gain greater placement and reach more people. So it’s not just simply frictionless communication, it’s actually *amplified* communication that is a key feature of our system today.

**Robert Post:** I’d like to add two points to what Jack just said. So, one of the implications of zero marginal information cost is that we have a glut of information. And what do we have scarcity of? Attention. And that’s what these algorithms are about, they’re about how to gain what’s now scarce, which is you’re going to pay attention to this information. And the second point is that in the traditional media, there was always gatekeepers—an editor, a publisher who determined what would be distributed. The point about the Internet is that it’s democratically distributed and we don’t, at the moment, have gatekeepers.And that’s a really important point about the way information distributes and disseminates over the Internet.

**Peter Salovey:** And, of course, all the incentives for the platform owners—Google, Facebook, what have you—are to essentially get eyeballs on those ads and then they can charge more for them. And crazy stuff, misinformation, attracts eyeballs. Maybe even more so than boring truth. So they don’t have a lot of incentive.

**Jack Balkin:** Let me just add on top of this. What Robert said is true; I want to put a slightly different spin on it. We have extreme democratization of access to information and extreme democratization of ability to broadcast. This is a crucial feature of the Internet. In some sense, it’s been actually a very good thing. But, it’s not true that we move to a world without gatekeepers. We simply substituted a new set of gatekeepers for the older set of gatekeepers. The older set of gatekeepers, as Robert points out, produced most of the content. They did a lot of editing. They massaged content before they sent it out. The new gatekeepers are search engines, social media companies, and digital ad networks. They basically determine the speed and scope of what people see. They’re not producing the content, though. What they’re basically doing is deciding how quickly or how far it spreads. So they play a crucial role in the health of the digital public sphere. But the role they play is different than the role that, say, ABC or CBS, played in the middle of the 20th century.

**Robert Post:** Because their incentive is attention, as distinct from credibility or authority, etc.

**Peter Salovey:** Exactly. I’m a psychologist, as you know, and in my field, social media tends to get blamed for a lot of the ills of American society because the algorithms tend to feed you what you already what you’ve indicated you like, the belief is that that creates polarization in attitudes and beliefs. That the rejection of facts and science, maybe the inability to distinguish what is factual and scientific from what isn’t, is blamed on social media. I’ve seen experiments where merely having access to social media—meaning a cell phone in your pocket, even if it’s turned off—is distracting and reduces your ability to learn new information in a conventional way and affects your social relationships. So, are we overdoing it here? Are we taking a modern piece of technology and feature of the world we live in, and in the same way that violent television was blamed for all the ills of society in the 1960s, we’re attributing everything we don’t like that’s going on in today’s world to social media? Are we calibrated here? What do you think? Why don’t we start with Jack on this one?

**Jack Balkin:** I think you put it very well, which is that whenever you have a new medium of communication technology—the printing press, radio, television, cable, now the Internet—there are two things that people immediately do. The first is there’s a group of very optimistic people who say this is going to transform the world in a wonderful way. It’ll be a great educational tool. People will know more. They’ll be more thoughtful. They’ll be more deliberative.

Alexander Meiklejohn, very famous theorist of free speech, at first was very excited about radio. He thought radio would be the great educator. And then he learned that basically it would be Jack Benny and comedy shows and musicals on radio. And he was very disillusioned by it because he thought, well, nobody’s going to learn anything out of this stuff. And the same story that Meiklejohn, his disillusionment, occurs successively with television and with cable and with the Internet, with different folks playing the roles of the optimist and the disillusioned person.

So that’s true. But it’s also true that each medium of communication also changes the society around it. It changes how people interact with each other. It changes their social relations. It changes the way in which they form groups. Robert referred to this earlier. And so we just have to take that in stride. We have to understand that as a central way in which our world is changing and the role of algorithms in shaping our beliefs and attitudes and directing us in certain ways rather than another is also an incredibly important part of this story.

But, and here’s the key idea, the major vectors of propaganda and disinformation, at least with respect to older Americans, are not social media. They are traditional media, pre-digital media. They are cable news and they are radio.

It’s also true that social media can amplify and help increase these effects. But it’s very important to understand that when you’re thinking about vectors of disinformation, vectors of disinformation come from lots of different places, and they tend to be the most powerful and influential people in society. So if you compare two people, a person sitting in their basement spewing disinformation and the president of the United States, which one is more likely to be effective in spewing disinformation? The answer, the president of the United States.

**Peter Salovey:** It’s interesting, I’m reminded of that *New Yorker* cartoon where the dog is typing at a computer and says, “you know, on the Internet, nobody knows you’re a dog.” I think what you say is absolutely true. You know, when you have a highly visible, high-powered official spewing information, it is more influential, no doubt about it, but it’s really sometimes hard to understand what the source of that information is. It could be a dog typing in his basement, right? And people don’t discriminate.

**Robert Post:** This goes to the loss of authority. This is like the Catholic Church saying, we’re going to tell you what Jesus said and what the meaning of the Gospel is. And in the 21st century, the doctor says, we’re going to tell you how viruses spread. And now people don’t have to listen to the doctor because they can get the information, or at least they think, they’re getting the information for themselves. So that’s a powerful fact about the Internet.

**Jack Balkin:** I think that we should add to this that authority, we can think of authority in multiple ways, but one way of thinking about authority is just simply, who do you trust? Who do you regard as important, as opposed to who *should* you trust or who is trustworthy? So what happens in politics and in entertainment and in other parts of life is that entrepreneurs, we might call them “attention entrepreneurs,” figure out how to make use of changes in the media landscape. And through leveraging their understanding of how to do it, they can become new kinds of authorities.

But they’re not authorities because they’re trustworthy, they’re authorities because they’re trusted. And they’re trusted because of how they’ve been able to understand the new media landscape. And that’s a really important part of the story about the decline of authority. We could say that there’s been a decline in certain kinds of authority and a *rise* of new kinds of authority. In fact, the other sense in which you can have authority, take Google, for example, because Google tells you the answers to things. So it has an algorithmic authority. And if I want to know the answer to a question, I type it into Mr. Google. Mr. Google tells me the answer. I trust Mr. Google. He’s an authority now and his authority is algorithmic. Right? Similarly, if you are a young entrepreneur who is a political commentator, you try to leverage the algorithmic authority of Facebook and Google in order to raise your profile, and eventually you learn how to do it. And guess what? Some people are much better at this than other people.

**Robert Post:** So two points on that. The first is that when we’re understanding the rise of this kind of misinformation, I think the important precedent to think of is talk radio and the abandonment of the fairness doctrine. It was a huge moment in in traditional media. But it began to spread forms of the kind of authority Jack is just talking about. I think for our purposes, for purposes of the law, it’s not a question of authority as an influence. It’s a question of, can we solve our problems by reference to a common authority? And if we don’t have a common authority, then you can’t have the forms of social order that modern society needs; if everyone establishes what they want by reference to a different authority, then it’s not serving the social functions that we need to run a society. And that’s the key issue here, is the disintegration of it as a *common* form of authority. Not that there’s less influence. There is, of course, different forms of influence in exactly the way Jack is describing.

**Peter Salovey:** And now we get into this causality issue again. It feels to me like there was already a disintegration of people’s view of authority and willingness to listen to authority happening simultaneously with the rise of anyone being able to declare themselves an expert and use a social media platform to do that. And you can see that in the declining influence of organized religion. You can see that in populism on both the left and the right and their attitudes toward universities and university professors. And you could see that in your own classroom, right? Sometimes it’s a good thing, students come in and they’re willing to challenge authority right out of the chute. But the idea of received wisdom, you know, it just doesn’t play the way it once did.

Let’s stay with our social media companies now like Facebook or Google and talk a little bit about what responsibility do they actually have in handling the ills in society that they at least play some role inperpetuating—polarization, division, rejection of authority. When I lived in Silicon Valley in the late 70s, the libertarian spirit was strong then, and I think maybe it’s only gotten stronger, not necessarily in the way people vote, but in their attitudes toward startups and as well as Big Tech out there. Let them do their thing, leave them alone, and great things will happen for the American public. But it feels like there’s a bit of a backlash now against that, and you both are involved in it in different ways. So what is their responsibility?

**Jack Balkin:** I think that Mark Zuckerberg has kind of changed the way he talks about this over the years. The early version of this was, “I’m just a platform. I’m actually just a technology company. I’m not responsible for any of the content that flows through my social media site.” This is also true with Twitter. It’s also true with YouTube. The folks who develop these social media platforms came to realize that it was impossible to run a social media platform without content moderation. And this, by the way, has been known since the early days of the Internet. When you had online games, it became very clear that you had to have somebody who played the role of the Game God, who basically made sure that the players didn’t abuse each other. So this idea that you need content moderation as soon as you have a social media platform is one of the oldest principles of the Internet. And these folks eventually learned it, too, in the context of social media, where the problem was, if anything, even greater and multiplied at scale. So eventually, all of the companies started to create bureaucracies for content moderation. Actually quite vast bureaucracies now. And not only that, they harnessed their knowledge of algorithms and design of algorithms for specific content moderation. The Facebook Oversight Board, which is an independent organization which nevertheless gives advice to Facebook, is just another example of this.

But the normative question you asked is what should their responsibility be? And the answer is the normative responsibility arises from their power. That is, the power they have in organizing and facilitating public discourse. So they have to be trustworthy stewards of public discourse. They have to be trustworthy stewards of the digital public sphere. And that means they have to make decisions about what is most likely to produce a healthy and vibrant public sphere that protects the values that we want a public sphere to protect, including political democracy, cultural democracy, and the growth and spread of knowledge. And that means that content moderation is not only a necessity, it’s also a *duty* for these companies. And the problem is—I’m going to I’m going to put this in a rather simplistic way—you can think of these companies, especially Facebook, as having two sides. One side of the company is engaged in trying to put out the fires that are constantly spreading on social media: disinformation, abuse, racist speech, terrorist recruitment, you name it. Whatever you think is a problem for democracy and for society, they have to put out these fires. The problem is that the business models of these very same companies create another side of the company that starts the fires. So they are both a firefighting group and arsonists at the same time. And this conflict, which is caused by their business models, is the central problem of regulation. It’s the central issue we have to focus on.

**Peter Salovey:** You are both First Amendment scholars and have written a lot about free expression. And Robert, I know you’re not an absolutist in your view of how we should regulate speech, but in this domain, isn’t the danger that ultimately all of these content moderators and oversight boards are simply going to rein in the ability to express oneself?

**Robert Post:** I think we have to step back a little bit on this. The social media platforms are new. No one understands them. So we’re all quite naturally apprehensive of them. But one thing we should understand is that the traditional media hates these social media platforms because they’ve destroyed the business model of traditional media, they’ve taken away advertising revenue, they’ve taken away eyeballs, everything. So, they’re an enemy of it. You don’t hear people saying, “God, Fox News, aren’t they responsible for the people that they put on?” You don’t hear calls that Fox News should be saying, you don’t do that. You hear it over the new media platform. This is an interesting phenomenon, considering, in fact, the influence that an author of these sorts of things, like Fox News, is doing as distinct from the media platform. So I think we have to step back and begin to see the frame in which this assault on the media platforms is coming from. That’s the first point.

The second point is from a constitutional point of view, we are really deeply ambivalent about how to regard these platforms. We know what the market is for a newspaper, but we don’t know what the market is for Facebook, because we don’t know how to define market in this context, or for Twitter. You know, if you don’t like Facebook, can you go to Reddit? Is that a competitive market? What are the markets, if we’re going to define this in terms of antitrust? What we do know is that, as Jack said, quite rightly, they exercised enormous power and with great power, says Spider-Man, comes great responsibility. We have to begin to think about what these responsibilities are. But from a legal point of view, we could say the same thing about NBC and we could say the same thing about Fox News. We don’t say that; we don’t say therefore the state ought to step in. And so what do we imagine the constitutional status of these social media platforms are? We have two different views. The first view is that they are like the editors of a newspaper. They curate what their content will be through these community standards. So Twitter has community standards, Facebook has community standards, and this determines what can and cannot be posted. And that’s like the editor of a newspaper deciding what’s going to be in the newspaper, which ads will run, what columns will run, etc. And if you don’t like what the editor has curated, you go to a different paper. Similarly, if you don’t like what Facebook has curated, you go to a different one. From this point of view, the platforms are speakers and insofar as they’re private speakers, the First Amendment says you can’t touch them. You cannot impose content discrimination on them. You can’t say, you can only publish true things. Just like you couldn’t do that for *The New York Times*, same thing.

On the other hand, we want to say they are so powerful that there’s no other game in town. And so they are like telephone wires. They are the medium through which the rest of us talk. They are not themselves speakers, but they are, to use a metaphor that we use in the law, common carriers of speakers, or they’re like a public forum within which speakers speak, something like that. And insofar as that’s true, then they’re like the state and they can’t impose the content moderation rules, which everyone wants them to impose. So we’re caught in a dilemma. On the one hand, the state can’t touch them because of the First Amendment, they’re private speakers. And on the other hand, if they’re not private speakers, but themselves, like the state, exercising the power of the state to enable the rest of us to talk, then *they* can’t exercise the power to edit and curate the rest of us. And what happens is they turn into sewers because another feature of the Internet that Jack was referring to, that you need a moderator, is because it lifts you from ordinary social context. It brings out the worst in people. That’s what happens if you read the comments to an online magazine. They’re unreadable because of this. So that’s the constitutional dilemma in traditional terms that we’re facing.

Now the Facebook Oversight Board is an experiment to try to solve that dilemma. And it itself faces all sorts of issues because on the one hand, Facebook is a private company. It owes its responsibility to its shareholders. And so it can’t delegate too much of its power without violating its fiduciary responsibility to its shareholders.

On the other hand, it cannot govern speech according to rule of law values, as distinct from the incentives of a for-profit company, unless it truly delegates the power to regulate content. And the Facebook Oversight Board, which you’ve mentioned, is an effort to thread that needle. And it has a very complex structure that will both permit the delegation of real power and at the same time allow Facebook to do what a for-profit company must do under the law in the United States.

**Peter Salovey:** Do you think that mechanism is working—the oversight board, that is?

**Robert Post:** I don’t know. I think it’s an experiment where we’re starting to work. And I think, given what Jack said about the contradiction in the company, I don’t know really about Twitter, but I know a little bit about Facebook and the dissemination of news in Facebook is a very small part of its business model. Tiny. Australia tried to impose a price on it and Facebook said, OK, we’re not going to allow any news, whatever, to be disseminated in Australia because they don’t really care. And actually, so far as I can make out, and this is now me speaking in my entirely private capacity, has nothing to do with any position I hold in the trust, I think it’s probably to Facebook’s advantage not to be in the content moderation business because that depresses the share price of the company. All it does is create controversy. If they can offload that, it’s a good thing. If they didn’t have to do news at all, it probably would increase the price of the share for that reason. So I’m not so sure that it’s a contradiction within the model, at least of Facebook. But on the other hand, it is the dilemma that we’re describing. And they do have the obligations, I think moral obligations, that we’re describing and how to solve that internally is in is a deep issue.

And of course, on the one hand, we have the specter of government regulation. But when we speak about the specter of government regulation, not too many people say, well, the government ought to step in with Fox News. That’s not a position most people would adopt, and yet they’re free to adopt that on the social media. And what accounts for that difference exactly? From a constitutional point of view, I don’t see that there’s a difference. And so government regulation is there, it’s a possibility. It’s unattractive in most contexts, particularly when we’re dealing with issues as problematic as misinformation. And on the other hand, self-regulation is an issue of credibility. Are you really self-regulating, or are you just using this as a guise to increase your profits? And this is the problem that has to be negotiated.

**Peter Salovey:** Jack, you you’ve suggested this idea of an information fiduciary. Is that the solution here? Maybe you could tell us a little bit about what an information fiduciary is and whether this solves the dilemma that Robert is describing.

**Jack Balkin:** So before I get to information fiduciaries, let me just say that if the problem is the tension, the normative problem, is the tension between the business model and the content moderation system I was describing before, that system arose because of a lot of changes in law during the late 20th century, in contract law, intellectual property law, and antitrust law, and privacy law. And so if you were going to think about how you want to regulate the business models to make these companies, give them incentives to be more responsible stewards of the digital public sphere, you’d have to work in many places at once.

So I’ll talk about information fiduciaries in a second. But it’s important to talk about things like antitrust law, a really important feature of the story. And antitrust law is not just simply breaking up Facebook into little Facebooks. It’s the idea of separating out different functions of these companies. So, for example, Facebook and Google are very, very large digital advertising brokers, as well as places in which where ads are placed. And so you might want to separate out the different functions of these companies. And in some cases, I’m not saying in every case that might have some valuable effects for the incentives of these companies.

So I just want to point out that I’m going to talk about privacy now, but it’s very important understand that privacy is not the silver bullet that solves everything. As to privacy, digital privacy is a really important part of this story. And that’s because what we really mean by digital privacy is the collection and use of data. So when we were really talking about privacy, we’re talking about how is data collected and how is it used, and how is it used to basically amplify content? How is it used to predict what people will do? How is it used to nudge what people will do? Those are the real questions that when we talk about privacy.

Now, it turns out there’s a very old idea in the law, which is the idea of a fiduciary. And a fiduciary is a person who performs a service for you and you are made vulnerable by their performance of that service. So, for example, you go to a doctor, the doctor knows lots about you, takes tests, asks you questions about your health, learns lots of things about you that could be used against you if the doctor was going to act for their interest and not yours. And so the law treats the doctor as a fiduciary. That is, they have a duty, when they perform services for you and collect information about you, to act in your best interests and not just in their best interests. They have to look out for you. And they have three basic duties. They have a duty of care. They have to exercise due care. They have a duty of confidentiality. They can’t go around blabbing about your health condition. And finally, they have a duty of loyalty, which is they have to put your interests in the same degree as their interest, in fact they have to put your interests ahead of their interests, right, so they avoid conflicts of interest.

Now, here’s the key idea. We have a new kind of fiduciary in this digital world because we have companies whose basic business model is collecting information about us in return for services. So you see, they perform a valuable service for us and for democracy, too. In return, they know enormous amounts about us. We know very little about their operations, and this asymmetry of power and of knowledge is precisely the kind of situation that leads to the imposition of fiduciary obligations—that is, obligations of due care, obligations of confidentiality, and above all, obligations of loyalty. So we should start thinking about these companies, because of their business models, as our fiduciaries. Andthat means they’ll have public obligations toward us and toward all the people that collect data from.

**Robert Post:** Jack’s brilliant idea of the information fiduciary follows from another innovative element of the Internet itself, which we didn’t discuss, which is that the Internet, unlike previous forms of communication, is interactive. In previous communication systems like the TV or radio, people spoke to an audience and the audience listened. The Internet is people are speaking to each other. And part of what that means is we’re getting information. When you get something on the Internet, it is in turn getting something from you. That means that the transfers of information are enormous and that raises issues of privacy, which, for example, were not raised in previous communicative systems. And the dimensions of that problem are enormous. And the idea that Jack’s putting on the table derives from this new basic property of the Internet, the interactivity of it.

**Peter Salovey:** So if a company like Facebook accepts the idea that they are an information fiduciary, or that some group there are serving as fiduciaries, the implications of that are then they can be sued if they breach that fiduciary obligation to put my interests before their own interests?

**Robert Post:** Funny you should say that. The Supreme Court just this June decided the case, saying that Congress can’t create causes of action like that because there’s no standing. You know, we have a Supreme Court that’s doing its best to insulate most of these companies from all forms of legal responsibility.

**Peter Salovey:** Is that ultimately, though, what you’d want to see happen?

**Jack Balkin:** No, I mean, I think we have to think about it differently. So in other words, the old vision of a fiduciary was you have an individual lawsuit against your doctor or a lawyer for malpractice. That’s not the way to think about the problem today. The fiduciary idea is part of the larger problem, which is basically we have a system structured around algorithms, algorithms making decisions, algorithms amplifying. So when we apply the fiduciary duty, we’re probably going to have to administer the obligations. And it’s not just Facebook accepting the obligations. It’s going to be the fact that the government imposes the obligations on them, is going to say, look, you’re acting like a fiduciary, so we’re going to treat you like a fiduciary. It would have to create a system of administrative regulation. So in other words, you could have individual lawsuits, but a lot of the stuff is going to be compliance. It’s going to be privacy compliance, which already exists in all of these companies and other digital companies as well. So it will be a system of regulation and a system of oversight with respect to algorithms. Algorithms are the key to the story. It’s not just simply that they collect data. It’s that they process data and they analyze data and they use data in order to predict what people will do and to nudge them to do one thing rather than another. It will have indirect effects on content moderation. I just want to point out: to say that Facebook’s an information fiduciary doesn’t mean that now they have to take down this and that. What it means is that they have to understand how their content-moderation systems work, and we’re also going to change the way in which they gain a profit from the collection and use of data. And that will have indirect effects on their content moderation. It will make them more responsible.

**Robert Post:** I mean, Europe is very far along this path. They have something called the General Data Protection Regulation [GDPR], which proposes enormous obligations on most companies and most American companies actually follow that now because they’re international. But they’re very far along the path that Jack is describing. So we’re not talking here utopian ideals. We’re talking about things which are actually happening in the world.

**Jack Balkin:** The problem with the United States is the United States has an outsized effect on the global digital public sphere, on the global system, but the United States lacks a comprehensive digital privacy statute, which Europe is way ahead of us. Now, by the way, I just want to point out the GDPR has its own problems. It’s not clear how the GDPR is going to be interpreted and how it’s going to interact with Facebook’s business model, but certainly Europe has thought about these problems much more systematically than we have.

**Peter Salovey:** Is it coming, or?

**Robert Post:** California has already enacted a statute which is patterned for the GDPR. No one knows really exactly how it’s going to work. But this is the future.

**Peter Salovey:** But it’s on the books. Robert, you had mentioned your work as a member of the trust that runs the oversight board with respect to Facebook, and I think most people are aware of a case that was brought to that oversight board somewhat recently was whether former President Donald Trump should have a Facebook account anymore or, now that it’s been taken away from him, should he be reinstated. So I would be interested in your thoughts about that particular case and, more generally, how this oversight board and how the trust that guides it works.

**Robert Post:** So the first point to understand this oversight board is that one has to be extremely innovative in the legal forms that one is using to thread the needle that I described before, because on the one hand, Facebook can’t give too much of its discretion away or it violates its obligations to its shareholders. And on the other hand, there’s no point in creating an independent review unless people believe it’s actually independent and it’s independent to do what? It’s independent in order to impose rule of law values on the content moderation of Facebook so that Facebook’s regulation will have the values of predictability, reliability, stability. You know exactly what the rules are. They are interpreted in light of general human rights norms, et cetera, et cetera. So how does Facebook credibly give away the authority to do this thing without at the same time betraying its fiduciary trust? And it’s taken, let’s just say, a lot of legal innovation to think of the forms that might do this. But the form that they came up with is the common law trust. So what Facebook did is it gave a lot of money to a trust. I’m a trustee of this trust and we, in turn, create a board which are independent contractors to us through a subordinate LLC, that’s both American and British. So the board members, the people who actually make the decisions, are independent contractors. They are independent of us, the trust, although we support them, we maintain them. We’re the ones who are ultimately fiduciarily responsible. And we are independent of Facebook because we have the corpus of the trust under our control. So what we’ve created is a board which has its own independent procedures, which functions a little bit like a court and which makes these independent decisions. And it’s staffed by persons of great personal reputation from around the world. Another feature of the Internet that is unique that we’ve never talked about really, but is important here is that it’s cosmopolitan. Most forms of the public sphere are national. They’re determined by linguistic or other factors. So when we speak about the public sphere in America, we’re really talking about the American public sphere. The Internet is international. Facebook has now more than three billion users. And when we think about the public sphere and Facebook, we’re talking about posts in India or in Indonesia or in Australia or in Ghana. And each of these has its own linguistic properties, its own expertise, its own specific context. And so you have to create a board that’s able to understand the meaning and determine rules for the globe. This is an entirely innovative enterprise, and that’s what the board is trying to do. And what you saw in the Trump decision is the board said, look, our job is to interpret and bring rule of law values to the community standards that Facebook itself creates. So Facebook says we have the following rules, what you can and can’t post. So Facebook is like the legislature. The board is like a court that interprets the laws and says, this is how it should be interpreted. And then the board said back to Facebook, look, you have to enforce your own rules according to the values of the rule of law. You need to follow precedents. You need to be consistent. And you can’t be arbitrary in how you apply this. And that was the form of the decision. And so what’s really going on is the imposition of public law values on a private company. That was the essence of the Trump decision.

At the moment, Facebook still has the power to set the content moderation rules themselves. They call it community standards. In the future, that may or may not be true, but at the moment, the way it works is like the distinction between a court and a legislature. And that’s what that decision was about. And we’ve put front and center less whether Trump could or couldn’t speak than the methods by which Facebook would make that determination, because in the long run, that’s what matters, that people who use Facebook feel protected by the values of the rule of law. Their decisions will be made fairly, impersonally, not according to the profit motives of Facebook, but according to the values of freedom of speech or human rights or whatever we consider to be relevant to a particular decision.

**Peter Salovey:** Well, let me shift, in the time we have remaining, from Silicon Valley to New Haven, Connecticut. You both are gifted teachers and your role as educators in the Yale Law School is something that is appreciated now by generations of students. How do you teach about this stuff? Let’s start with Jack, since you’re running a couple of relevant centers within Yale Law School, and how do students get involved, both in the thinking and in an educational context?

**Jack Balkin:** So let me say a little bit about how students get involved, and let me say a little bit of how I teach. Over time, we have created this institution in the Information Society Project that brings in lots of postdocs, graduate students, as well as J.D. students. And we basically make it possible for them to do lots of interesting research on these questions. I think that the three questions they’re most interested in these days are antitrust, questions about algorithms and the regulation of algorithms, and finally issues of digital privacy. It’s not surprising because these are central to the business models of digital companies. And so there’s a lot of research being done by the postdocs, the graduate students, and the J.D. students on these issues.

How I teach about it? Well, it’s really interesting because I used to integrate this stuff into a First Amendment course because I teach the First Amendment as Robert does. In fact, we trade off teaching First Amendment over the years. And then I realized that there was more and more of these problems that you really just couldn’t cram into a standard First Amendment course. And so I started teaching a separate course, which is on these problems of the information society, which is what I call it. So now, for example, this semester I’m going to be teaching a course called the Information Society. And it’s just a course on digital social media—the First Amendment problems, the antitrust problems, the privacy problems. And so what’s happened is that this new world and these new institutions, businesses, have created a whole new realm of law that you have to think about and policy you have to think about. It doesn’t quite fit into the standard models of the law that I taught twenty years ago. Robert already averted to this when he talked about the central problem from the viewpoint of the First Amendment and thinking and conceptualizing these companies. So that’s what we have to do. We have to change our curriculum. We have to change what we teach.

**Peter Salovey:** Robert, how about you? You’re an influential teacher of First Amendment, and you must be teaching in a very different way on these matters than you once did.

**Robert Post:** I’m half a generation older than Jack, but I would say more than a full generation older in the way I can say…no, I admire Jack immensely and his ability to dive into these new problems and to illuminate them. Mostly in my work and my teaching. I’m stuck on the old problems. I mean, I think of the First Amendment as about freedom of speech and democracy. It’s about how we govern ourselves, the relationship between public opinion and a governable nation. And I find as the world develops, these problems don’t go away. We haven’t solved them. We still haven’t thought them to the bottom. And so I’m still plugging away myself. When I teach at these much older problems of, what’s the relationship between speech and governance? What is the relationship between polarization and information? How do we imagine constitutionally we ought to think about the rules of communication so that we can create a polity that works? And if anything, recent years have given me much more to think about, much more to re-evaluate, traditional doctrine that we thought were settled. I mean, there are other issues if one thinks about this from a constitutional point of view, which is my specialty, is speech from a constitutional point of view, and that is that our courts are now using freedom of speech, in the words of Justice Elena Kagan, as a weapon for the deregulation of society. It’s become a kind of neo-conservative movement. You see that a lot when you see people say freedom of speech on the university and what they mean when they say freedom of speech on the university is you shouldn’t actually act like an educator. You should act like the moderator of whatever students want to say. And of course, that’s incompatible with education. And we see this in the area of economic regulation a lot. The modern Supreme Court is a very deregulatory institution and it wants to use freedom of speech to undermine the New Deal state. And this is very serious, in my view, misuse of constitutional doctrine. And so thinking about how one ought to respond to that, where the deformity is creeping in to First Amendment doctrine, etc. That’s a good deal of what I do now.

**Peter Salovey:** So let me conclude by asking each of you the same final question. We’ve covered a lot of landscape here and we’ve, I think, really gained an appreciation through this conversation of just how challenging these questions are and, in a way, how both new and old they are for the law. Yeah, there’s historic roots, and Robert, you’ve talked about some of them. And Jack, whoever understood what an algorithm even was in a law school classroom a century ago.

So the final question is: What is the most vexing question, from a First Amendment scholar’s point of view, that we are now going to have to address for the good of society and that law schools and students in law schools are going to be grappling with for some time here in the future? It could be something we’ve already talked about, but just interested in how you would answer that question, maybe start with Jack.

**Jack Balkin:** This will sound like a strange answer, but it’s actually one of the oldest problems in the First Amendment. It’s the relationship between capitalism and democracy. And here’s why. Robert was talking earlier about the weaponization of the First Amendment as a way of basically deregulating business. It turns out that, over the years, as capitalism evolves, and capitalism is an extremely agile and adaptable, protean form of social organization, it latches on to whatever features exist in society in order to basically promote its interests. And so it latched on to freedom of speech near the end of the 20th century and beginning the 21st century. And earlier I was talking about the business models of these large corporations, digital corporations and the issues of privacy. Well, they’re using the First Amendment to basically perpetuate particular models of business that they’re in. These models of business, in turn, are creating many of the problems that we’ve described in the last hour or so. The point is, a free society always has to find some interesting balance between the protection of self-governance and of free markets (that is, capitalism). And the way that struggle plays out is different in every era. It was different for the Jacksonians. It was different for the period after the Civil War. It was different in the Gilded Age and the Progressive Era. It was different in the New Deal, and it’s different today. And that is, in fact, the central problem of our times, how to make these two features of our society—free markets and capitalism and democracy—live together peaceably.

**Peter Salovey:** A wonderful framing for an entire course, I think. Robert, how would you answer that question?

**Robert Post:** I would say the deepest problem, myself, is the oldest problem, which is, what do we mean by freedom of speech? We alluded to this earlier when we were talking about people arguing about freedom of speech in the university, but when people say freedom of speech, they mean you can say anything anytime, anywhere, which, of course, is impossible, and no one ever really means that when you press it. So what do we mean by freedom of speech? We are social animals, we do everything we do through speech and, therefore, to regulate anything is to regulate also the speech of the thing.

So consider, for example, a doctor-patient relationship. Doctors speak to their patients all the time. Does that mean there can’t be medical malpractice suits when doctors say the wrong things? Of course not. But it’s speech. So to understand why we protect speech is to understand the circumstances in which speech should be protected and not. Now, traditionally, our speech doctrine has been oriented around political matters, around democracy. We protect freedom of speech in order that we can participate in the formation of public opinion, and democracy is government by public opinion. So insofar as the state is responsive to public opinion, and insofar as I can participate in the formation of public opinion, I can experience the state is responsive to me. It’s democratically legitimate. Has nothing to do with doctors talking to patients or companies advertising widgets. It has to do with the formation of public opinion. And in every legal system of which I’m familiar, speech which is about matters of public concern or about public figures or is newsworthy, any of these adjectives are all about the same thing, meaning about things about which “the public” should be concerned. And the reason we care about the public is because “the public” is a metonym for the *demos*. As we inform the public, so we—first-person, plural—decide what to do. Now, the interesting thing about the Internet is that it’s not tied to a *demos*, it’s international. So I’m talking to people from France and to Armenia and to Belarus, and the boundaries are no longer bounded by traditional political entities. I’m just speaking. So what are the principles by which I care about the formation of the virtual international public opinion? Why do I care about that? There’s no entity that responds to that. There’s no democratic legitimation that comes out of that. So how then do I limit what counts as the sorts of speech that should get the protections of freedom of speech and not? There’s a huge theoretical problem and one can see it in the Internet because all sorts of speech which—and this goes to the question that Jack was talking about before, privacy—all sorts of speech, which one would imagine was private, is perceived as public because it’s going out to the public on the Internet, and yet it doesn’t have these properties as being relevant to a demotic public opinion. And this has thrown our whole understanding of freedom of speech into profound disarray.

**Peter Salovey:** This is so stimulating, both the big issues and then the applications in the information age, and I’m ready to submit my application to Yale Law School. This would be so enjoyable and stimulating to be able to talk about these issues every day. I would love that.

Professors Jack Balkin and Robert Post, I have to thank you. You’ve given us so much to think about, not just me. I think everyone who’s listening to this podcast, and I want to thank you for sharing your insights with all of us.

We’ve really focused on some very serious social issues, but I’d be remiss if I didn’t mention all of the positive ways that social media helps us to connect with one another, especially during this era of COVID when our social connections have had to be modified for the public health. Helps us communicate with friends and family members, even in my case, helped me reconnect with old classmates, from Yale, from Stanford, and from my high school, and even earlier than that. And I’m grateful to social media for affording all of that.

Not only that, of course, you can follow Yale on Facebook, on Instagram, and on Twitter, and I hope that you all do. It’s a great way to keep up with events on campus and learn more about the university today.

So, to friends and members of the Yale community, thank you for joining me for Yale Talk. Until our next conversation, best wishes and take care.