Poe in Cyberspace: The First Amendment, Anti-Trust law, and an Internet Rhubarb

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Poe’s encounters with censorship and the possible monopolistic practices of editors have unexpected relevance to controversies today in social networks, our contemporary equivalents of his magazines.

In May 1839, when Poe was about to become assistant editor of *Burton’s Gentleman’s Magazine*, he submitted a review of Rufus Dawes that Burton refused to publish. Was this an act of censorship that violated the rights of free speech guaranteed by the First Amendment to the U.S. Constitution?

Similarly, in 1844, when Poe proposed to James Russell Lowell the formation of a writers’ coalition for defense against the monopolistic coterie of editors, he warned: “If we do not defend ourselves by some such coalition, we shall be devoured, without mercy, by the Godeys, the Snowdens, *et id genus omne.*” Did this coalition have an anti-trust purpose?

In rejecting Poe’s scathing review of Dawes, Burton diplomatically explained that he could not approve of “the word-catching tone of your critique,” preferring instead that his reviewers “deal leniently with the faults of genius” (W. E. Burton to Poe, May 30, 1839). Poe later offered the article to J. and H. G. Langley of the *Democratic Review*, but they also declined it. After it appeared, finally, in *Graham's* in October 1842 as a "retrospective review,“ Lowell, who was a staunch supporter of Poe as "almost the only fearless American critic," invited him to contribute whatever prose or verse he wished to the first issue of his magazine, *The Pioneer;* however, he added a sharp caveat, "namely I do not wish an article like that of yours on Dawes."

Although three of the four editors who were aware of the Dawes review rejected or disapproved of it, none of them raised issues of free speech. Could Poe himself have raised the First Amendment guarantee of free speech to protect his right to publish even his most severe criticism and reviews? If Antitrust laws had been in effect at that time, could the practices of the literary coteries of which Poe complained have been regarded as fit subjects for Antitrust prosecutions? Poe’s experiences with possible censorship and monopolistic exclusion provide a useful reference point for the discussion of our current controversies over the workings of the First Amendment and antitrust laws in today’s Internet.

Although Poe supported international copyright protection for his fellow authors, he drew the line at indiscriminate laudation by editors of their favorite writers. Condemning what he saw as their monopolistic tendencies, he wrote in the *Broadway Journal* on March 8, 1845 (the day he first appeared on the masthead), that his personal response to the “system of indiscriminate laudation of American books” raised his acute “contempt of our general editorial course of corruption and puffery.” If puffery was a rising tide, it unfortunately lifted only a very few boats.

Strictly speaking, the First Amendment of 1791 refers only to government activities, not private publishers. Moreover, Antitrust laws, originally enacted between 1890 and 1914, typically were directed at oil monopolies and were concerned mainly with issues of consumer price and quality. The original antitrust laws of more than a century ago could not possibly have envisioned the social networks of today with their massive distribution and re-distribution of messages and images, mostly made free to users, but indirectly financed by Internet surveillance and the sale of this information to advertisers to target the public more efficiently.

Many Internet observers were concerned during the presidential election of 2020 that there might be a repetition of the Russian interference that took placed in the 2016 election. However, the new concerns were not interference but rather hacking and ransomware --in particular, the devastating hacking of security companies that made all their clients highly vulnerable. The initial Russian hacking of SolarWinds was followed by a second wave of ransomware attacks directed through Kaseya, a Florida security company, said to affect 1,500 companies, including a railway in Sweden. Various contrary suggestion on how to treat ransomware became an Internet rhubarb (baseball term for quarrel).

Although some conservatives complained that the social media had censored their political views, the main issue was often the opposite of censorship, namely the hands-off tolerance that permitted the circulation of unexpected forms of speech, such as unfounded statements, conspiracy theories, and outright lies. Unfortunately, the most outrageous postings sometimes seemed to get the most circulation. Evidently misinformation sells. According to the Center for Confronting Digital Hate, only 12 persons were needed to spread 65% of the disinformation on the Covid vaccine on social media such as Facebook.. What steps should Facebook, Twitter, and YouTube take to become aware of and censor such extremist postings before they appear?

The European solution, to severely regulate social media and impose enormous penalty fines when necessary, so far has not provided a model for American practice. The antitrust fines (some still under appeal) of the European Union against Google reach unprecedented heights: in 2017, €2.4 billion for unfairly using search engine dominance against shopping rivals; in 2018, €4.34 billion for requiring Android users to install Google as the default search engine on phones; and in 2019, €1.5 billion for unfair terms on websites imposed on web sites using Google search bar. In the summer of 2021 France fined Google an astonishing €900 million a day if it did not within two months close an arrangement with news publishers to compensate them for the use of their material. A remarkable budget item appeared in the financial statement of Facebook in December 2020, setting aside €302 million in anticipation of European fines for privacy violations, apparently a normal cost now of doing business, made possible by its enormous worth and revenue.

In the United States the main legal complaints against Google were for giving ads a priority location on the page, higher up than conventional rankings, for using knowledge of browser tracking to target advertising, for charging premium prices for such targeted advertising, and for producing intrusive visual ads that were hard to remove. In response, Google began a massive campaign of full-page ads in influential publications, calling attention to its wide public acceptance and the immediate and extensive conveniences it offers. The extraordinary integration of myriad Google services and conveniences became both its greatest asset and its greatest legal vulnerability. Building upon its dominant search engine, Google services had come to include email, maps, books, scholarship, photos, translation, response anticipation, Chrome browser, Chromebooks operating system and apps, Chromecast, Nest speakers, Android operating system and phones, Google Cloud, Google Meet, Google Workspace, Google Drive, and Waymo autonomous cars. Its dominating influence has led to many suggestions, including the possibility that Google become a public utility like electricity or a common carrier practicing net neutrality.

With its 2.85 billion monthly global users, Facebook by its very size has created a public impression that it is monopolistic. However, in June 2021 the FTC case against Facebook failed in court in June 2021 on the grounds that the evidence presented was both insufficient in quantity and not sufficiently recent. As early as October 2020, Facebook, realizing that it and other social networks were in uncharted waters as far as censorship law was concerned, created an Advisory Oversight Board, first significantly used after the events of January 6 at the Capitol. Responding to Trump’s statement, "We fight like hell. And if you don't fight like hell, you're not going to have a country anymore," Guy Rosen, vice president of integrity at Facebook, took new action: “This is an emergency situation and we are taking appropriate emergency measures, including removing President Trump's video. We removed it because on balance we believe it contributes to rather than diminishes the risk of ongoing violence.” Facebook blocked Trump’s ability to post new content until the end of his term on January 20, but later made the blockage indefinite. At this time Trump was also banned from Twitter, YouTube, and other social media.

Upon the recommendation of its Advisory Oversight Board, Facebook changed the indefinite ban on Trump to a two-year suspension, from the original date of January 7, 2021. After January 7, 2023, Facebook would further "assess whether the risk to public safety has receded" and make a further decision. Meanwhile, Facebook ran extensive full page ads in prestigious newspapers in support of the overhaul of the provisions of the 25-year-old federal Section 260, which protected websites from liability for posts and permitted them to remove posts that violate its standards.

After 86 unsuccessful state lawsuits to overturn the 2020 election, Trump in July 2021 launched a class action suit against Facebook, Twitter, YouTube, and their respective CEOs, Mark Zuckerberg, Jack Dorsey and Sundar Pichai, claiming infringement of free speech guarantees, censorship, and the concerted actions of the Big Tech trust and the government – creating a memorable Internet rhubarb. Evidently aware that the First Amendment did not apply to private publishers, Trump argued that Facebook’s “status rises beyond that of a private company to that of a state actor.” In an op-ed in the *Wall Street Journal*, he argued that his class-action lawsuits were in support of “constitutional rights,” claiming “One of the gravest threats to our democracy today is a powerful group of Big Tech corporations that have teamed up with government to censor the free speech of the American people,…. It is not only wrong—it is unconstitutional.” In early reactions to the suit, Trump supporters used the attention to launch new fundraising efforts, while Trump detractors pointed to its legal weakness.

Poe’s complaints over issues of possible censorship and monopoly came out of very different circumstances. Cut adrift by the unexpected sale of the *Gentleman’s Magazine* to *Graham’s*, Poe revived his plan for the *Penn Magazine*. In August 1840, his prospectus in a broadside proposed a magazine of “an honest and a fearless opinion” that demonstrated “an absolutely independent criticism — a criticism self-sustained; guiding itself only by the purest rules of Art; analyzing and urging these rules as it applies them; holding itself aloof from all personal bias.” In addition, Poe promised to be a departure from “the arrogance of those organized cliques which, hanging like nightmares upon American literature, manufacture, at the nod of our principal booksellers, a pseudo-public-opinion by wholesale” (Poe Log 305).

Unfortunately, Poe was never able to realize these ideals. The closest he came was when he became editor of the *Broadway Journal* in 1845, a poorly financed venture that he used in part to reprint the texts of his tales. He terminated the *Broadway Journal* with a Valedictory: “Unexpected engagements demanding my whole attention, and the objects being fulfilled, so far as regards myself personally, for which “The Broadway Journal” was established, I now, as its editor, bid farewell — as cordially to foes as to friends.” (Jan 3, 1846). Although we do not know what those “engagements” and “objects” were, we cannot lose sight of the extraordinary range and variety of Poe’s achievements, including a novel, a scientific inquiry, a play, tales, poems, reviews, literary theory, editorship, comments on autographs, and marginal notes, all the while maintaining an unshakeable literary hope, vigor, and inventiveness. Without family aid or political assistance, he mastered the literary media of his day, but he had no ambition to translate his celebrity into political success. In the face of his continuing concern regarding censorship and monopoly, Poe in 1849 reasserted a conviction that may read today either as a promise or as a warning: “The nose of a mob is its imagination. By this, at any time, it can be quietly led” (*Marginalia* 226).

*“Poe in Cyberspace” columns are available online at eapoe.info.*

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