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# Freedom of Algorithmic Expression

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## INTRODUCTION

"Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated," said Elon Musk when he struck a deal to buy Twitter for about

44 million dollars in 2022.[1] What did Mr. Musk mean by "free speech" and whose speech was he referring to? Intuitively, he seemed to be advocating that users' free speech deserves to be delivered to others via a "digital town square" without any arbitrary impingement by the operators of the square.

Social media's commitment to free speech is hardly new.[2] Among others, Twitter's UK director left the famous comment, "We are the free speech wing of the free speech party"[3] in 2012, Twitter's head of public policy testified "We are not the arbiters of truth" before British lawmakers in 2018,[4] and in 2019 Mark Zuckerberg said, "[G]iving everyone a voice empowers the powerless and pushes society to be better over time."[5]

However, it is remarkably difficult to hold these executives legally accountable for their comments. If one is upset about Twitter's arbitrary removal of their legitimate tweets, they cannot sue Twitter's CEO for their broken promises Twitter has double shields—the state action doctrine in the U.S. Constitution and Section 230 of the Communications Decency Act ("CDA").[6] Moreover, representatives in either federal or state legislatures may not willingly enact a law to regulate Twitter because these platforms now claim that content moderation is protected speech.

Indeed, the current legal system has placed online platforms in a legal

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1. *Elon Musk to Acquire Twitter*, CISION (Apr 25, 2022), https://www.prnewswire.com/news-releases/elon-musk-to-acquire-twitter-301532245.html. But, later, Elon Musk terminated the deal, and Twitter and Musk have been in a legal battle. *See* Lauren Hirsch, Kate Conger & Matthew Goldstein, *Elon Musk Claps Back at Twitter's Lawsuit Over $44 Billion Deal*, N.Y. TIMES (July, 15, 2022), https://www.nytimes.com/2022/07/15/technology/elon-musk-twitter.html (last visited July 15, 2022).

2. In this article, social media platforms indicate a service that delivers user-generated content to users' friends and/or the public (e.g., Facebook, YouTube, TikTok). This definition is influenced by the UK's Online Safety Bill. The Online Safety Bill defines its subject matter as user-to-user service and search services. Specifically, "user-to-user service" means "an internet service by means of which content that is generated directly on the service by a user of the service or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service." Online Safety Bill 2021-22, HL Bill [285], cl.. 2(1) (UK), https://publications.parliament.uk/pa/bills/cbill/58-02/0285/210285.pdf (last visited Feb. 24, 2023).

3. Emma Barnett, *Twitter Chief: We Will Protect Our Users from Government*, THE TELEGRAPH (Oct. 18, 2011), https://www.telegraph.co.uk/technology/twitter/8833526/Twitter-chief-We-will-protect-our-users-from-Government.html.

4. Callum Borchers, *Twitter Executive on Fake News: 'We Are Not the Arbiters of Truth'*, WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/02/08/twitter-executive-on-fake-news-we-are-not-the-arbiters-of-truth.

5. *Mark Zuckerberg Stands for Voice and Free Expression*, META (Oct. 17, 2019), https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression.

6. 47 U.S.C. § 230.

"sweetest spot." They are not held responsible for content on their forums, like newspapers, but also claim to enjoy the same editorial discretion as newspapers. Nonetheless, Section 230 liability immunity validates their deliberate refusal to moderate unlawful content as well as their arbitrary moderation of legitimate content. This legal uncertainty has not only discouraged legislative attempts at regulation but has also made it possible for social media companies to engage in doctrine-shopping, vacillating between functioning as "mere conduits" and "speakers."

Addressing this issue requires a better understanding of a platform's free speech rights, which have rarely been discussed when compared to users' free speech rights. Do social media companies have freedom of speech? Do they communicate their thoughts rather than passively deliver others' speech? Isn't it against their proposed mission as a public square? Given the prevalence of large-scale and automated moderation,[7] does the First Amendment protect algorithmic intervention? If content moderation is a form of speech, are all algorithmic decisions considered speech? Won't this cause an extreme expansion of First Amendment law? How can we draw a line between expressive algorithms and non-expressive algorithms?

The linguistic format of programming language poses fundamental challenges to the traditional distinction between ideas and expression as well as ideas and conduct. As most human activities are translated into a programming language in digital communication, the scope of expression expands along with the scope of the First Amendment. Since it is unreasonable to assert that the First Amendment has precedence over all legal doctrines, new approaches are needed to distinguish between algorithmic expression that is closely related to autonomy, self-governance, and democracy.

This article suggests two novel principles. The first is establishing "expressive intent" as a key criterion to determine the expressive nature of algorithms. The second is taking a contextualized approach to adjusting the level of free speech protection instead of extending full protection to all speech.

Section I portrays how the legal landscape structurally incentivizes the irresponsibility of social media companies. Next, Section II depicts the enormous expansion of expression in an algorithmic society and suggests three elements for defining "expressive" algorithms. Section III attempts to understand how a platform exercises editorial discretion. It also distinguishes between "content moderation" and "content promotion," and finds both practices satisfy the elements of "expressive" algorithms. Setion IV rejects the assumption that conceptualizing algorithms as

7. Robert Gorwa, *What Is Platform Governance?*, 22 INFO., COMM. & SOC'Y. 854, 854 (2019).

speech automatically awards a platform a shield against state regulation. Instead, this article suggests a contextualized approach as opposed to the all-or-nothing approach of the contemporary U.S. Supreme Court's jurisprudence, then finds reasons to justify limiting the degree of free speech protections for the platform's algorithms.

## I. SWEETEST SPOT: PLATFORMS' RIGHT TO IRRESPONSIBILITY

Anyone who believes in democracy understands the significance of giving everyone a voice. In this regard, the First Amendment has special cultural status in the United States: "Like the sun, the First Amendment's size and brightness tend to blot out all else."[8] While European, African, and Asian countries have enacted hate speech laws,[9] the U.S. "tightly embraces an outlier position in comparative speech regulation while remaining largely oblivious to alternative frameworks of constitutional speech protection."[10]

Despite rampant misinformation and fraud, the U.S. Supreme Court has maintained the limited scope of unprotected speech outlined in *Chaplinsky v. New Hampshire*—lewd, obscene, profane, libelous, insulting, and fighting words.[11] The category of fighting words has been narrowly defined as posing imminent danger to society, thus speech that "stirs the public to anger [and] invites dispute" is generally permitted.[12] The Court is also averse to legislation restricting speech. For example, the Court struck down part of the CDA because criminalizing "indecent" content on the internet casts a "far darker shadow over free speech, threaten[ing] to torch a large segment of the Internet community."[13]

The firmly entrenched status of the First Amendment led people to view the regulation of speech by private entities as problematic. These people believe that the free exchange of ideas and opinions, even those

8. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2301 (2021).

9. *See generally* MICHAEL E. HERZ ET AL., THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES (2012) (exploring various hate speech subjects such as defamation of religion, Holocaust denial, and state-sanctioned incitement to genocide across vast geographic scope, including sub-Saharan Africa and the post-Soviet world); Paul M. SNIDERMAN ET AL., PARADOXES OF LIBERAL DEMOCRACY: ISLAM, WESTERN EUROPE, AND THE DANISH CARTOON CRISIS (2014) (showing that the Danish citizens supported for the rights of their country's growing Muslim minority against the newspaper's free speech rights); IVAN HARE ET AL., EXTREME SPEECH AND DEMOCRACY (2009) (introducing speech regulations in non-US countries, including French defamation law and the Hungary Supreme Court's 'clear and present danger' test influenced by the U.S. case law).

10. Claudia E. Haupt, *Regulating Speech Online: Free Speech Values in Constitutional Frames*, 99 WASH. U. L. REV. 751, 754 (2022).

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

12. Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).

13. Reno v. ACLU, 521 U.S. 844, 882 (1997).

that are controversial or offensive, is essential to a healthy democracy and that private companies should not have the power to censor or restrict this exchange. As a result, these people expect private platforms to respect users' rights to circulate content, even if it includes hate speech or disinformation, and may challenge decisions to take down such content.

However, those seeking to challenge such decisions in court face significant obstacles. One such barrier is the state action doctrine, which holds that the First Amendment only applies to the actions of the government and not to the actions of private entities. Another is the liability immunity provided by Section 230 of the CDA, which protects social media platforms from being held liable for the actions of their users. Additionally, the platform itself may assert its own First Amendment rights in defense of its decision to take down content.

### *A. First Shield: State Action Doctrine*

By interpreting the First, Fourth, and Fourteenth Amendments of the U.S. Constitution, courts have established a long-held state action doctrine—that the deprivation of constitutionally protected rights is only enforceable against a state action.[14] In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, the U.S. Supreme Court describes the purpose of this doctrine as preserving "an area of individual freedom by limiting the reach of federal law" and avoiding "the imposition of responsibility on a State for conduct it could not control."[15]

Determining whether a party is a state actor can be complex, especially when there is a close relationship between public and private entities.[16] To determine whether a party is a state actor, courts have developed four discernible tests: (1) the existence of a *symbiotic relationship* between the private actor and the state, (2) the state *commanding or encouraging* private discriminatory action, (3) the private party performing a *traditionally public function*, and (4) *the involvement of a governmental authority* in the unlawful conduct.[17]

The test most relevant to social media is the third, the public function test. This is because social media platforms have become essential forums

14. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) ("[S]tate action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor.") (quotations omitted).

15. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)).

16. Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 467 (2002)

17. Air Line Pilots Ass'n v. Dep't of Aviation of the City of Chicago, 45 F.3d 1144, 1149 (7th Cir. 1995) (citations omitted).

for communication and expression, similar to traditional government functions such as elections, [18] municipal parks, [19] and company towns. [20] It is also clear that there is no symbiotic relationship between the state and platforms, and the state does not encourage platforms to engage in discriminatory or unlawful conduct.

However, it is unlikely that social media would satisfy the public function test as it requires the function to have been "historically" and "exclusively" performed by the government, regardless of its importance to the public. For example, privately owned essential utility companies,[21] nursing homes,[22] public defenders,[23] shopping malls,[24] non-profit schools for maladjusted students,[25] and internet service providers[26] have all been deemed not to be state actors, even though they serve the public and may have stable relationships with the state.

According to court precedent, the following elements of a private business do not necessarily constitute state action: (1) extensive state regulation,[27] (2) a monopoly status,[28] (3) government funding,[29] or (4) a government franchise or agreement.[30] However, the simultaneous presence of these elements within a single business, such as a company operating as regulatory supervision of an administrative agency[31] with a

18. Nixon v. Condon, 286 U.S. 73 (1932); Terry v. Adams, 345 U.S. 461 (1953).

19. Evans v. Newton, 382 U.S. 296 (1966).

20. Marsh v. Alabama, 326 U.S. 501 (1946).

21. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)

22. Blum v. Yaretsky, 457 U.S. 991, 1006 (1982) (ruling that a nursing home is not a state actor although both state and federal regulations encouraged a nursing home to transfer patients to less expensive facilities when appropriate).

23. Polk Cnty. v. Dodson, 454 U.S. 312 (1981) (ruling that although the state paid the public defender, she is not a state actor because her relationship with her client was identical to that existing between any other lawyer and client).

24. Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

25. Rendell-Baker v. Kohn, 457 U.S. 830, 842-843 (1982) ("Nonprofit, privately operated school's receipt of public funds did not make its discharge decisions acts of state subject to suit under federal statute governing civil action for deprivation of rights, notwithstanding that virtually all of school's income was derived from government funding.")

26. Island Online, Inc. v. Network Solutions, 119 F. Supp. 2d 289 (E.D.N.Y. 2000).

27. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, __ (1972) (ruling that the state's regulatory scheme enforced by the state liquor board does not implicate a state action).

28. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

29. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

30. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).

31. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."); Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 462 (1952) ("We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress.")

government-protected monopoly,[32] may be considered state action.

Applying these criteria, the courts have determined that cable TV networks do not possess a power "traditionally exclusively reserved to the State,"[33] even though the state played a role in establishing the business and imposing certain duties, such as operating public access channels.[34] Therefore, it is doubtful that social media companies would be considered state actors because they are privately owned and operated, are not subject to government day-to-day oversight, and do not have a government-facilitated monopoly.

This position was upheld in *Prager University v. Google, LLC*, in which the Ninth Circuit rejected Prager University's claim that YouTube's content moderation constituted state action.[35] The court found that YouTube is similar to a cable TV service[36] and its "ubiquity and its role as a public-facing platform" does not change its private nature.[37] As a result, users cannot rely on the First Amendment to challenge the actions of private platforms, since they are not considered state actors.

### *B. Second Shield: Section 230 Liability*

Online platforms are strongly protected under Section 230 of the CDA, which is titled "Protection for private blocking and screening of offensive material."[38] Section 230 states that providers or users of interactive computer services will not be treated as publishers or speakers of user-generated content[39] and that online service providers will not be held liable for good-faith filtering or blocking of user-generated content.[40]

Based on a broad interpretation by the courts, Section 230 effectively shields platforms from most lawsuits related to harmful content or moderation decisions.[41] For decades, Section 230 has been recognized as a

32. *Jackson*, 419 U.S. at 350-51 ("It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics.")

33. *Halleck*, 139 S. Ct. at 1924 (quoting *Jackson*, 419 U.S. at 352).

34. *Id*. at 1925.

35. Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020).

36. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).

37. *Prager Univ.*, 951 F.3d at 995.

38. 47 U.S.C. § 230.

39. 47 U.S.C. § 230(c)(1); *see also* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 14 (2020) ("This limited protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal.").

40. 47 U.S.C. § 230(c)(2)(A); *see also Malwarebytes*, 141 S. Ct. at 14 ("This provision ensures that a company (like an e-mail provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content.")

41. *See, e.g.*, Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1010 (E.D. Ky. 2012); Blockowicz v. Williams, 675 F. Supp. 2d 912, 914 (N.D. Ill. 2009), *aff'd*, 630 F.3d 563 (7th

crucial element of internet innovation and is often referred to as "the most important law protecting internet speech."[42]

Originally, the CDA, which is part of the Telecommunications Act of 1996, was introduced to make the internet safer for children and to address concerns about internet pornography.[43] Lawmakers took a two-pronged approach: criminalizing sexually explicit materials and fostering self-regulation by platforms through the use of liability immunity under Section 230.[44]

This approach was influenced by the Supreme Court of New York's ruling in *Stratton Oakmont, Inc. v. Prodigy*, which found that Internet content host Prodigy's efforts to moderate content made it a publisher and increased its risk of liability.[45] This ruling could have had a chilling effect on platforms' willingness to moderate content due to concerns about legal liability. In response, lawmakers included Section 230 in the CDA to "incentivize, rather than penalize, private efforts to filter, block, or address noxious activity."[46]

Since 1996, the internet and the jurisprudence surrounding Section 230 have evolved significantly. While the initial purpose of Section 230 was to protect platforms from liability for moderating content, courts have applied it more broadly to immunize platforms that knowingly allow illegal activity to occur on their platforms, solicit users to engage in illegal or tortious activity, or design their site to facilitate such activity while protecting the identities of the perpetrators.[47] This goes beyond the original intent of the law.

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Cir. 2010); Shiamili v. Real Estate Group of N.Y., Inc., 952 N.E.2d 1011, 1016-17 (N.Y. 2011); Reit v. Yelp!, Inc., 907 N.Y.S.2d 411, 413 (N.Y. Sup. Ct. 2010).

42. *The Most Important Law Protecting Internet Speech*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited July 15, 2022); Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want to Take It Away.*, REASON (July 29, 2019), https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away.

43. Reno v. ACLU, 521 U.S. 844, 844, 849 (1970) ("Two provisions of the Communications Decency Act of 1996 . . . seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world.")

44. Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46 (2020).

45. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

46. Citron & Franks, *supra* note 44, at 46.

47. Mary Anne Franks, *How the Internet Unmakes the Law*, 16 OHIO ST. TECH. L.J. 10, 17-22 (2020); Danielle Keats Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties.

There has been increasing criticism from judges, [48] scholars, [49] and even internet companies[50] that the courts' overly broad interpretation of Section 230 does not align with the Section 230's legislative purpose. Critics argue that courts' *laissez-faire* approach to, and deregulatory stance of, Section 230 allow a wide range of harmful activities to thrive.[51]

Building on the work of critics, five aspects of Section 230 that are overly broad and potentially benefit bad-faith actors are: (1) it provides immunity to a wide range of businesses, (2) it bars various types of legal claims, (3) it protects a variety of actions by platforms, even when they profit from unlawful transactions while recognizing the harm they cause, (4) it has a broad definition of "good faith," and (5) it has no conditions attached to immunity.

First, the definition of an internet service provider is very broad, including those whose "products" have little to do with free speech.[52] This includes not only Facebook, YouTube, Twitter, and Reddit but also AppStore, Podcast, Amazon, LinkedIn, Glassdoor, Pinterest, and Redfin.[53] Compare this with the European Union's E-commerce Directive awarding "safe harbor immunity to hosting services that rarely involve content.[54]

Second, Section 230 provides immunity to platforms from almost all legal claims, with the exception of certain statutory limitations such as violations of federal criminal law, intellectual property law, the Electronic

48. Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040 (9th Cir. 2019); Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020). Justice Thomas, in his statement for a denial of certiorari of this case, heavily criticized the fact that the Section 230 immunity has been too broadly construed by courts beyond the natural reading of the statute. *Id.*

49. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

50. Ryan Hagemann, *A Precision Approach to Stopping Illegal Online Activities*, IBM THINK POL'Y LAB (July 10, 2019), https://www.ibm.com/blogs/policy/cda-230.

51. Citron & Franks, *supra* note 44, at 56.

52. *Id.* at 58.

53. *Id*.

54. JORIS VAN HOBOKEN, JOÃO PEDRO QUINTAIS, JOOST POORT & NICO VAN EIJK, EUROPEAN COMMISSION, HOSTING INTERMEDIARY SERVICES AND ILLEGAL CONTENT ONLINE pincite, https://data.europa.eu/doi/10.2759/284542; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [hereinafter Directive on Electronic Commerce]:

Art. 14 Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
   (a). the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
   (b). the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Privacy Communications Act, and the knowing facilitation of sex trafficking.[55] Excluded claims include civil rights violations, negligence, deceptive trade practices, unfair competition, false advertising, common law privacy torts, tortious interference with contract or business relations, intentional infliction of emotional distress, and many other legal doctrines.[56]

Third, courts have interpreted Section 230 as immunizing both actions (takedowns) and in-actions (keeping up content) of platforms, meaning that a platform is not liable to either a de-platformed user or a user who is harmed by existing harmful postings. These powerful shields have protected not only reasonable content moderation efforts but also business activities that profit from illegal commerce or harmful content with no concern for user liability lawsuits.

By legislative intent—protecting future Prodigy-like platforms—Section 230(c)(2)(A) immunizes only voluntary actions "to restrict access to or availability of material."[57] However, because Section 230(c)(1) defines platforms as non-publishers of third-party content, courts have interpreted the interaction of these two sections as providing immunity to platforms for their decisions to maintain or amplify harmful content. For example, in a case involving Armslist.com, which facilitated the sale of guns between unlicensed sellers and buyers who could not pass background checks, the Wisconsin Supreme Court found Armslist to be immune from liability under Section 230(c)(1), despite the fact that the company profited from an illegal firearm sale that resulted in multiple murders.[58]

< Figure 1. All-round Section 230 Shields >

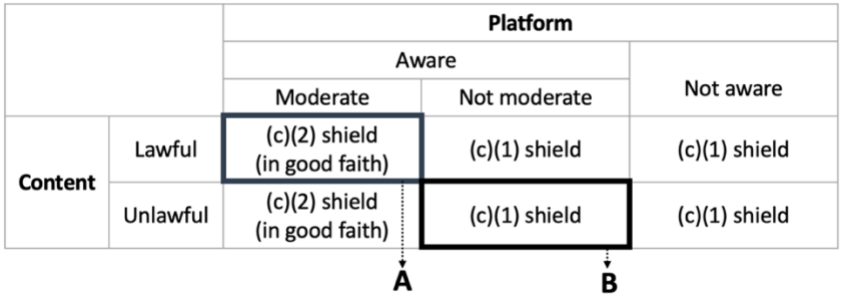


Figure 1 illustrates the fact that the liability shield protects all possible scenarios, regardless of the nature of the content or the platform's aware-

55. 47 U.S.C. § 230(e).

56. Citron & Franks, *supra* note 44, at 59.

57. 47 U.S.C. § 230(c)(2)(A).

58. Citron & Franks, *supra* note 44, at 51; Daniel v. Armslist, LLC, 926 N.W.2d 710, *cert. denied*, 140 S. Ct. 562 (2019).

ness of any illegality or foreseeable harm. For the sake of simplicity, the content can be divided into lawful and unlawful categories. In political discussions criticizing Section 230, Conservatives' main concern has been with area *A*, where a platform takes down lawful content at the expense of users' free speech. For example, former President Donald Trump and Senator Ted Cruz claimed that Section 230 gives big tech a license to silence speech based on viewpoint.[59]

On the other hand, Liberals tend to be more concerned about area *B*, where a platform knowingly ignores illegal transactions and abusive content at the expense of users' safety. They argue that Section 230 subsidizes platforms "whose business is online abuse and the platforms who benefit from ignoring abuse"[60] and grants "online intermediaries an unearned advantage over offline intermediaries."[61]

Fourth, courts have broadly interpreted the "good faith" requirement in Section 230(c)(2). Prior to *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, courts had rarely questioned the good faith of platforms' content moderation efforts. The Ninth Circuit's opinion in this case marked a departure from this precedent because it attempted to narrow the scope of Section 230 immunity by stating that platforms do not have unlimited discretion to declare online content "objectionable," and that blocking and filtering decisions driven by anti-competitive animus is not entitled to immunity. [62] This decision suggests that, in rare cases, courts may be more willing to engage with the question of whether content moderation was conducted in good faith.

Last, there are conditions required for obtaining the shield. Section 230 does not require any obligations such as a reasonable moderation effort or a duty to notify relevant authorities of unlawful content. On the other hand, the current version of the European Union's Digital Services Act imposes notice-and-action requirements on hosting services for unlawful content in exchange for liability immunity.[63] Similarly, South Korea's

59. *See* Kim Lyons, *Trump Sues to Reinstate His Twitter Account*, VERGE (Oct. 10, 2021), https://www.theverge.com/2021/10/2/22705584/trump-sues-reinstate-twitter-account-jan-6-riot-protest; Press Release, Ted Cruz, United States Senator, Sen. Cruz: Latest Twitter Bias Underscores Need for Big Tech Transparency (Aug. 16, 2019), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-latest-twitter-bias-underscores-need-for-big-tech-transparency.

60. Citron & Franks, *supra* note 44, at 54.

61. *Id.* at 59.

62. Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1047 (9th Cir. 2019).

63. The Articles 4 to 10 of the Digital Services Act (DSA), which replaces Articles 12 to 15 of the eCommerce Directive 2000/31/EC, outlines the rules for intermediary liability privileges, which generally provide immunity to intermediary services for the third-party content they process as long as they act quickly upon receiving notices of illegal content. The DSA clarifies that this immunity is not lost if the intermediary service performs voluntary preemptive screening or monitoring of content, as long as it is done in good faith and with diligence. The DSA also states that intermediaries shall not be deemed to have lost their immunity solely because they take measures to comply with Union and national laws. See

Communications Network Act requires internet service providers to implement a notice-and-action protocol to secure the liability shield.[64]

Given the broad interpretation of Section 230 by courts and the lack of conditions attached to obtaining the liability shield, online platforms have strong protection from legal claims. While this has been beneficial for the growth of the internet, it has also led to concerns about platforms profiting from harmful content and transactions without legal repercussions. There is growing debate about whether the current interpretation of Section 230 accurately reflects its legislative purpose and whether it strikes an appropriate balance between protecting free speech and holding platforms accountable for their actions.

### *C. Third Shield: Platforms' First Amendment Defense*

Given these concerns, some states have attempted to pass legislation that would obligate platforms to take certain actions, such as moderating harmful content or not discriminating against lawful content. In response, social media platforms have argued that their discretion to moderate content is protected under the First Amendment which raises the question of whether the legislature has the power to regulate the actions of these platforms.

Texas H.B. 20, a new Texas social media regulation, has brought this critical but under-explored question to the forefront. After Twitter suspended former President Trump's account, the Texas state legislature passed a law prohibiting social media platforms from moderating content based on viewpoints[65] and imposing due process[66] and transparency re-

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Regulation 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R2065&from=en#d1e2035-1-1 (last visited Oct. 1, 2022)

64. Act on Promotion of Information and Communications Network Utilization and Information Protection art. 44-2(2), (6) (S. Kor.), https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55570&lang=ENG:

Art. 44-2 Request for Deletion of Information

(2) Upon receiving a request for deletion or rebuttal of the information under paragraph (1) a provider of information and communications services shall delete the information or take a temporary or any other necessary measure and shall notify the applicant and the publisher of the information immediately. . . .

(6) If a provider of information and communications services takes necessary measures under paragraph (2) for the information circulated through the information and communications network operated and managed by himself or herself, the provider may have his or her liability to indemnify loss incurred by such information mitigated or discharged.

65. TEX. CIV. PRAC. & REM. CODE § 143A.002(a) ("A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.").

66. TEX. BUS. AND COMM. CODE § 120.101 ("A social media platform shall provide an easily

quirements.[67]

The platforms quickly challenged the law's potential violation of their right to free speech in federal court. A district court agreed and blocked the bill from being implemented, but the Texas government appealed, and the Fifth Circuit lifted the district court's preliminary injunction.[68] Finally, the U.S. Supreme Court vacated the Fifth Circuit's order.[69] Thus, the question of whether platforms' moderation practices are protected speech will likely be vigorously disputed at multiple levels of the courts.

The motives and predictable consequences of Texas H.B. 20 are troubling, but the reaction of social media companies is also somewhat disconcerting. They abandoned their previous persona as a "mere conduit" and argued that their "editorial judgment" is protected by the First Amendment and that the transparency requirement is unconstitutionally compelled speech.[70] On the other hand, the Texas Department of Justice argued that the legislation is an economic regulation on conduct, not speech, and must be subject to rational basis scrutiny.[71]

To emphasize the necessity for editorial judgment, social media companies stressed how actively and comprehensively they intervene in users' communication.[72] While this content moderation can have a positive impact, it is worth noting how different this portrayal of themselves as guardians of safety is from their previous portrayal as mere conduits. Figure 2 below illustrates how quickly a platform can change its approach in order to utilize multiple shields.

accessible complaint system to enable a user to submit a complaint in good faith and track the status of the complaint, including a complaint regarding: (1) illegal content or activity; or (2) a decision made by the social media platform to remove content posted by the user.").

67. § 120.051(a) ("A social media platform shall, in accordance with this subchapter, publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding the manner in which the social media platform: (1) curates and targets content to users; (2) places and promotes content, services, and products, including its own content, services, and products; (3) moderates content; (4) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (5) provides users' performance data on the use of the platform and its products and services.").

68. NetChoice, LLC v. Paxton, 27 F. 4th 1119 (5th Cir. 2022).

69. NetChoice, LLC v. Paxton, 596 U.S. __ (May 31, 2022).

70. Complaint at 2, NetChoice, LLC v. Paxton, No. 21-cv-00840 (W.D. Tex. 2021).

71. Respondent's Opposition to Application to Vacate Stay of Preliminary Injunction at 21, NetChoice, LLC v. Paxton, No. 21A720 (5th Cir. 2021).

72. Complaint, *supra* note 70, at 13 (describing their extensive efforts to moderate "medical misinformation, hardcore and illegal 'revenge' pornography, depictions of child sexual abuse, terrorist propaganda (like pro-Taliban expression), efforts by foreign adversaries to foment violence and manipulate American elections, [and] efforts to spread white supremacist and anti-Semitic conspiracy theories").

< Figure 2. Social Media's Multiple Personas[73] >


73. These images are created by the author.

Platforms' free speech defense has a surprisingly long history dating back to the early 2000s, before the existence of platforms like Facebook and Twitter. In 2003, a company unhappy with its low ranking on Google brought a lawsuit alleging tortious interference with contractual relations, but Google successfully argued that its search results were protected by the First Amendment. Several courts followed this decision in the 2000s.[74]

In 2014, a federal district court in New York ruled in favor of search engines, even though one of them was accused of suppressing users' political opinions.[75] The court said Baidu, which was alleged to have censored information concerning "the Democracy movement in China,"[76] had made "political speech" by curating its search results, and the First Amendment barred any civil lawsuits from imposing content-based regulation on Baidu.[77] This opinion characterized search engine results as "in essence editorial judgments about which political ideas to promote."[78]

The U.S. Supreme Court has not addressed this question, but it will do so shortly in the Texas H.B. 20 case.[79] Although it does not seem appropriate that a platform should be able to choose its own legal status in order to avoid legal responsibilities, federal court opinions and the expansion of "protected speech" in recent years may lead to the consideration of a platform's algorithmic content moderation as protected speech. This topic will be further discussed in Section II.

### *D. Consequence: Right to Irresponsibility*

The combination of the state action doctrine, Section 230 immunity, and the First Amendment defense has given social media platforms

74. Search King, Inc. v. Google Tech., Inc., No. 02-1457, 2003 WL 21464568, at *3-4 (W.D. Okla. May 27, 2003) (order granting Google's motion to dismiss); Langdon v. Google Inc., 474 F. Supp. 2d 622; Kinderstart.com LLC v. Google, Inc., No. C06–2057JF(RS), 2007 WL 831806, at *1 (N.D.Cal. Mar. 16, 2007).

75. Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433 (S.D.N.Y.2014).

76. *Id.* at 434.

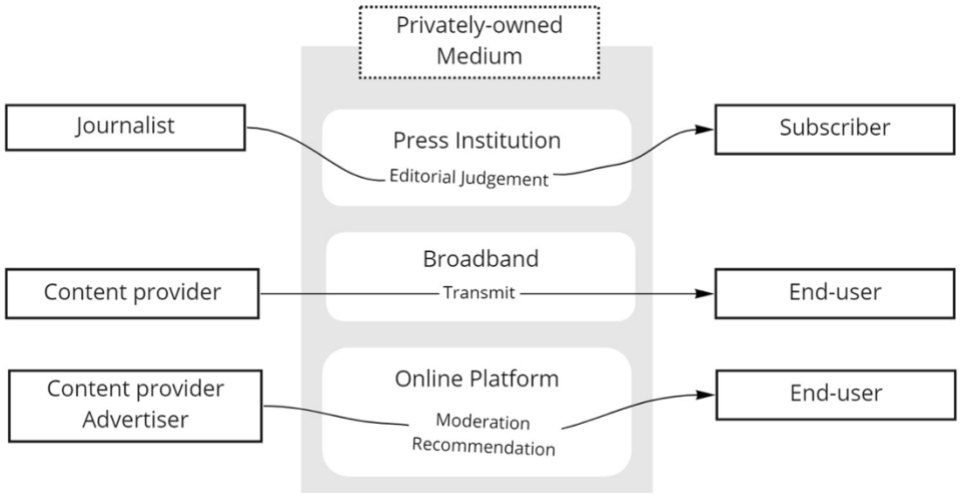
77. *Id.* at 442-43 ("[T]he search results at issue in this case . . . relate to matters of public concern and do not themselves propose transactions. And, of course, the fact that Baidu has a 'profit motive' does not deprive it of the right to free speech any more than the profit motives of the newspapers in *Tornillo* and *New York Times* did. . . . The bottom line is that Plaintiffs seek to enlist the government—through the exercise of this Court's powers—to impose 'a penalty on the basis of the content' of Baidu's speech.").

78. *Id.* at 435.

79. In addition to the Texas law, the state of Florida has also asked the Supreme Court to hear a similar case involving one of its laws, known as S.B. 7072. This law allows political candidates to sue social media companies if they are blocked or removed from online platforms for more than 14 days. *See* Brian Fung, *Tech Groups Ask Supreme Court to Rule on Hot-Button Texas Social Media Law*, CNN (Dec. 15, 2022), https://www.cnn.com/2022/12/15/tech/tech-groups-supreme-court-texas-social-media-law/index.html.

"power without responsibility."[80] Users are unable to take legal action against social media companies for their content moderation practices unless they can prove the company acted in bad faith. Meanwhile, social media platforms claim editorial freedom when faced with legislative attempts to regulate their practices. They hold a particularly privileged position compared to other intermediaries or media that have typically functioned as a conduit for delivering content.

< Figure 3. Medium's Interventions >




In *Miami Herald v. Tornillo*, the U.S. Supreme Court found that the state cannot intervene in newspapers' editorial discretion by compelling the fair coverage of electoral opponents' views.[81] Newspapers are not required to give equal opportunities to subscribers or journalists. As a private business, a newspaper can favor users based on their financial contribution. It has the freedom to commission reporters to create content for its subscribers and to choose the material that it believes serves its subscribers' interests. In return, the newspaper is responsible if its content harms others' reputations or rights.

In contrast, in *Red Lion v. FCC*, the Court upheld the state's fairness obligation on broadcasters because of the scarcity of the airwaves, "confirmed habits of listeners and viewers," and a "substantial advantage over

80. Rebecca Tushnet, *Power without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1002 (2008).

81. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254-56 (1974) (overturning a Florida statute requiring newspapers to print opposing views, a so-called "right-of-reply requirement").

new entrants."[82] Despite the favorable ruling, the Federal Communications Commission eliminated the fairness obligation for broadcasters in 1974.[83] Later, in *Turner v. FCC*, the Court upheld a federal restriction on cable companies' channel selections out of concern for the "monopoly status in a given locale"[84] and "the widest possible dissemination of information from diverse and antagonistic sources."[85]

Similarly, the D.C. Circuit upheld the FCC's net neutrality rule, prohibiting Internet Service Providers ("ISPs") from blocking or slowing down access to specific websites or services, or from charging higher fees for faster delivery of certain types of traffic.[86] The Ninth Circuit denied the broadband companies' free speech rights because they act as "mere conduits" for the speech of their users and do not make substantive judgments about content.[87] Thus, it makes sense that broadband companies are not held responsible for harm caused by third-party content because they are not supposed to insert their own perspectives into the content. [88]

The question at hand is whether social media platforms are more similar to newspapers or broadband companies.

82. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400 (1969) (holding against a constitutional challenge to FCC regulations that required broadcasters to give those they criticized, or the opponents of political candidates they endorsed, a right of reply).

83. Broadcast Applications and Proceedings; Fairness Doctrine and Digital Broadcast Television Redistribution Control; Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates, 76 Fed. Reg. 55,817, 55,818 (Sept. 9, 2011) (removing a fairness doctrine as an obsolete rule); Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (reclassifying broadband services from Type I to Type II, which enables broadband to do blocking, throttling and paid prioritization).

84. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 656 (1994).

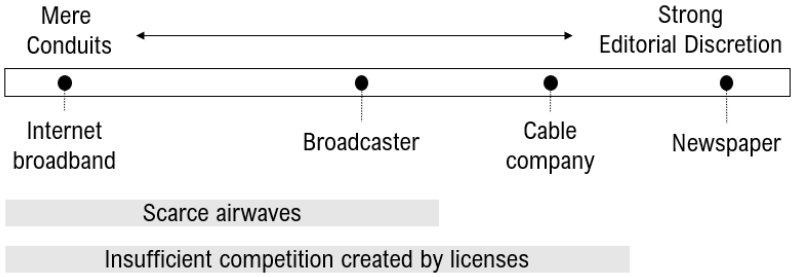
85. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 190-92 (1997) (upholding a federal law requiring cable companies to devote a portion of their channels to local broadcasters).

86. *Id*.

87. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740-42 (D.C. Cir. 2016) (ruling that broadband serves the public as a "neutral platform for speech transmission" like telephone networks, railroads, and postal services).

88. The net neutrality rule was repealed by the FCC in 2018. *See* Mozilla Corp. v. FCC, 940 F.3d 1, 18-19 (D.C. Cir. 2019) (per curiam) (describing the Agency interpretation); Jon Brodkin, *Biden Wants the FCC to Fix Net Neutrality—But It Can't Yet*, WIRED (July 11, 2021), https://www.wired.com/story/biden-fcc-restore-net-neutrality.

< Figure 4. Privately Owned Media >




The purpose of social media platforms is less clear. They have no constitutional or statutory obligation to provide equal access to their platforms for users and their involvement in users' communication may be protected by the First Amendment. Nonetheless, they are not held responsible for their editorial decisions or for the harm caused by third-party content that they allow to remain on their publicly available platform.

Table 1 below illustrates the rights and privileges of various entities that mediate users' speech, with online platforms being the only ones able to freely discriminate against and manipulate the distribution of users' speech without interference from users or legislation.

< Table 1. Rights and Responsibilities of Medium Operators >

| | Mere Conduit | | Online Platform | Publisher |
|---|---|---|---|---|
| | Public Forum | Broadband | | Newspaper |
| Rights to Favor/disfavor users | X | X | O | O |
| Editorial-ship Protected by First Amendment | X | X | O | O |
| Section 230 Bars Liability for Harmful content | X | O | O | X |
| State Action Doctrine Bars Constitutional Claims | X | O | O | O |

The inconsistency of rights and responsibilities structurally created a moral social media quagmire by allowing social media platforms to avoid taking responsibility for the negative consequences of abusive content.[89]

89. Mary Anne Franks, *Moral Hazard on Stilts: 'Zeran's' Legacy*, LAW.COM (Nov. 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/moral-hazard-on-stilts-zerans-legacy; *see also Share of Internet Users Worldwide Who Believe That Social Media Platforms Have Had an Impact*

In conclusion, Justice Thomas' concerns are justified: the current legal framework has given social media platforms unchecked power. As they grow and gain more knowledge about people, they pose an increasing threat to our social and political way of life.[90]

## II. ALGORITHMS AS SPEECH

To address the "sweetest spot" problem, which structurally incentivizes platforms' irresponsibility, it is necessary to better understand the nature and limits of platforms' freedom of expression. If content moderation is considered speech, the state's options for regulating platforms' practices will be restricted by First Amendment judicial scrutiny. This question also raises broader philosophical inquiries. If content moderation is speech, would all algorithmic output constitute speech? Does the First Amendment protect not only human language but also computer programming language? Would all commerce, products, and activities implemented by algorithms be subject to the First Amendment?

### *A. Scholarly Debates over Algorithms as Speech*

In 2012, at around the time when federal district courts upheld Google's free speech argument, Eugene Volokh and Donald Falk argued that search engines' ranking webpages based on their relevance were akin to the role of a newspaper or publisher.[91] Stuart Minor Benjamin made a broader empirical argument that the U.S. Supreme Court's free speech jurisprudence does not allow for the differentiation between algorithms and human speech. He found that most websites make speech by "engag[ing] in some screening (algorithm-based, proactive by humans, and/or in response to complaints by humans) of user-submitted material, and communicate that to the world."[92]

Benjamin pointed out that the U.S. Supreme Court only requires minimal elements of "communication" to constitute speech— "choosing to send a sendable and receivable substantive message."[93] He concluded that "any line between algorithm-based and human-based decisions would be

*on Selected Aspects of Daily Life as of February 2019*, STATISTA (2021) (reporting that social media had decreased their privacy, increased polarization in politics, and heightened everyday distractions), https://www.statista.com/statistics/1015131/impact-of-social-media-on-daily-life-worldwide.

90. Paul Romer, *A Tax That Could Fix Big Tech*, N.Y. TIMES (May 6, 2019), https://www.nytimes.com/2019/05/06/opinion/tax-facebook-google.html.

91. EUGENE VOLOKH & DONALD FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS 6-7 (2012), http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf.

92. Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1485 (2013).

93. *Id*. at 1461.

unjustifiably arbitrary"[94] and excluding any algorithm-based decisions from speech would "entail a radical revamping of our Free Speech Clause jurisprudence."[95]

Some authors agree that social media's intervention in user communication should be considered speech but are concerned about tech giants weaponizing the First Amendment for their own benefit, such as through "First Amendment Lochnerism"[96] or "First Amendment opportunism."[97] Alan Rozenshtein predicted that tech companies in Silicon Valley may increasingly use the First Amendment argument based on their role as communication facilitators.[98]

Erin L. Miller argued that the U.S. Supreme Court is likely to recognize the editorial freedom of social media platforms[99] because they "engage in exactly the sort of content moderation that courts have deemed ISPs not to."[100] However, Miller also acknowledged the possibility of state interventions to address concerns about the impact of social media on democratic discourse.[101]

On the other hand, other scholars have rejected the idea of conceptualizing algorithms as speech because they are too operational. For example, Katherine A. Moerke argued that software source codes are the "implementation of an idea, not the expression of it."[102] Tim Wu, drawing on the functionality doctrine in copyright law, argued that search results or algorithmic output are not protected by the First Amendment.[103] He compared designing and implementing algorithms to making a typewriter rather than writing an article with a typewriter.[104] Then, he distinguished

94. *Id*. at 1493.

95. *Id*. at 1448.

96. Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 341 (2021) (quoting Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016)).

97. *Id*. at 340-41 (citing Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)).

98. *Id*. at 345.

99. Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 25 (2021)

100. *Id*. at 64.

101. *Id*. at 66 (claiming that if suggested self-regulation of social media fails, "any proposals for state intervention to correct it should not be dismissed merely on the grounds that they violate the speech rights of the social media companies themselves").

102. Katherine A. Moerke, *Free Speech to a Machine? Encryption Software Source Code Is Not Constitutionally Protected "Speech" Under the First Amendment*, 84 MINN. L. REV. 1007, 1027 (2000). ("[B]ecause source code is the implementation of an idea, not the expression of it, it is not entitled to First Amendment protection as a type of speech.").

103. Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1497 (2013); Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 20, 2012, at A29 ("[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered 'speech' at all.").

104. Wu, *Machine Speech*, *supra* note 103, at 1504.

between search engines and the news media because people refer to, "what The Washington Post said about X yesterday," not "what Google had to say about X."[105]

Another rationale for denying the expressive nature of algorithms is a slippery slope argument. Kenneth Abraham and Edward White illustrated that the "all speech is free speech" view devalues the special cultural and social salience of speech about matters of public concern.[106] Leslie Kendrick argued that the temptations of "First Amendment expansionism" increased "in an information economy, where many activities and products involve communication."[107]

Danielle K. Citron highlighted that digital technology enables us to achieve more actions through "mere" words.[108] Citron warned that if any online expression is considered speech, all online conduct, including ordinary commerce such as manufacturing, selling, buying, and contracting, would absurdly be subject to First Amendment protection.[109] Furthermore, Citron addressed the issue that the internet is not "a magical speech conversion machine," so offline conduct not protected by the First Amendment should not be "transformed into speech merely because it occurs online."[110]

### *B. Copyright Law and Free Speech Law*

Copyright law and free speech law both aim to protect "expression," but they do so for different purposes. Copyright law is designed to protect the exclusive intellectual property rights of the creator of an original work. This means that the copyright holder has the right to control the reproduction, distribution, and public performance of their work. In order to qualify for copyright protection, a work must be original and must have authorship.[111]

On the other hand, free speech law is designed to protect the right of individuals to express themselves freely without interference from the

105. *Id.* at 1528.

106. Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 815 (2020) ("During the last few decades, however, the First Amendment has been so greatly expanding its empire that giving this answer is no longer possible.")

107. Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY. L. REV. 1199, 1209, 1212 (2015) (arguing that freedom of speech is a "term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance").

108. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 99 (2009).

109. Citron & Franks, *supra* note 44, at 60.

110. *Id*. at 61.

111. *Id*. at 311 (quoting 17 U.S.C.S. § 102(a)) ("The Copyright Act's definitional provision sets forth three basic conditions for obtaining a copyright. There must be a work of authorship, that work must be original, and the work must be fixed in any tangible medium of expression.").

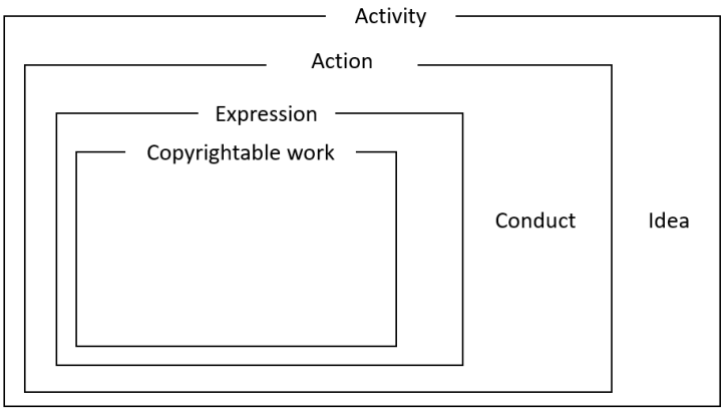
government or other entities. The First Amendment guarantees the right to freedom of speech and this protection extends to a wide range of expression, including spoken and written words, music, art, and other forms of creative expression.

It is often difficult to draw a clear line between copyrightable expression and speech protected by the First Amendment, as many works that are protected by copyright are also considered to be "unquestionably shielded" by the First Amendment. [112] This means that a work that is protected by copyright is likely to also be protected by the First Amendment, as it is hard to imagine a case where an individual has the right to exclusively express a work (as granted by copyright law) but not the right to express it more generally (as protected by the First Amendment).

In fact, the U.S. Supreme Court has specifically recognized that certain works, such as the paintings of Jackson Pollock, the music of Arnold Schoenberg, and the Jabberwocky verse of Lewis Carroll, are protected by both copyright law and the First Amendment[113]. This highlights the close relationship between the two bodies of law and the overlap between their protections for expression.

Figure 5 below roughly visualizes the relationship between the key concepts in copyright and free speech law. It helps to illustrate the overlap between the two bodies of law and the various factors that are taken into consideration when determining whether a work is protected by copyright and/or the First Amendment.

< Figure 5. Idea, Expression, Conduct, and Copyrightable Work >




112. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 569 (1995) ("As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.").

113. *Id.*

Based on this close relationship between copyright law and the First Amendment, Tim Wu applied the functionality doctrine, which is more commonly used in copyright law, to analyze the First Amendment's application to search results.[114] He denied the idea of conceptualizing Google search results as speech because "Google hopes to convey ideas like 'quality' or 'usefulness,' but then so too did the designers of my coffeemaker."[115]

However, the recent case of *Google v. Oracle*, which determined the copyrightability of Java code, may call Wu's argument into question. In this case, Google copied about 11,500 lines of code from the Java Application Programming Interface to create Android after an unsuccessful negotiation with a then-Java copyright holder Sun.[116]

The majority deliberately did not give a direct answer about whether Oracle's programming code is copyrightable. Rather, it "assumed" that the copied code was copyrightable for the purposes of applying the fair use doctrine.[117] This allowed the Court to fully consider whether Google's use of the code qualified as fair use, even if there was some uncertainty about whether the code was actually copyrightable.

The majority's decision to apply the fair use doctrine in Google's favor was based on the fact that the programmers had "put their accrued talents to work in a new and transformative program."[118] The majority believed that this transformation was sufficient to qualify as fair use, even if the copied code was technically copyrightable. This ruling could be seen as supporting the idea that Google search engines, which involve the creation of new and transformative programs, could be considered protected speech under the First Amendment.

On the other hand, Justice Thomas dissented in favor of Oracle, arguing that the majority had arbitrarily drawn a distinction between declaring code and implementation code and that Google's copying of the code and subsequent work was prohibited from "derivative use," rather than

114. Wu, *Machine Speech*, *supra* note 103, at 1519 ("[I]t is helpful to gain some idea of how judges distinguish between functional and expressive elements if we are to understand functionality in the First Amendment context.").

115. *Id*. at 1529.

116. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1121 (2021).

117. *Id*. at 1187 ("To decide no more than is necessary to resolve this case, the Court assumes for argument's sake that the copied lines can be copyrighted, and focuses on whether Google's use of those lines was a 'fair use.'").

118. *Id*. at 1209. The Court distinguished "declaring code," which defines the scope of a set of implementing code and gives a programmer a way to use it through a shortcut, from "implementing code," which provides step-by-step instructions to run methods. *Id.* at 1201-02. Then, it found that the 11,500 copied lines were declaring codes that deserved less copyright protection. *Id.* at 1204-05. Finally, Google's reimplementation was found to be sufficiently innovative and transformative to be fair use. *Id.* at 1204.

"transformative" use.[119] He also believed that the majority had effectively overruled the considered policy judgment by Congress, which had already made it clear that computer programs were subject to copyright protection in 1980.[120] He argued that Google's "qualitatively and quantitatively substantial"[121] copied work "profit[ed] from exploitation of the copyrighted material without paying the customary price."[122]

Under a formalistic interpretation, written phrases in a programming language should be copyrightable based on the statutory definition of "computer programs"[123] and the low threshold for the creativity required for copyrightable material.[124] One reason for the majority's hesitation to clearly rule on the copyrightability of programming code is the potential impact on the industry. Such an explicit extension of copyright protection to any set of programming languages could create barriers that could harm the open-source spirit among programmers and hinder innovation on the internet.

Google relied on Tim Wu's argument that algorithms were not covered by copyright law as a "method of operation" under Section 102(b).[125] However, both the majority and the minority rejected this interpretation, seeing this clause as creating a distinction between ideas and expressions rather than excluding functional programming language from copyrightable expression.[126] This narrow reading of Section 102(b) is practical because if it were not applied, no computer program would be eligible for copyright protection under Section 101, since all programs are a type of "method of operation."

Despite the clear language of the statute, the majority was concerned with the consequences of fully copyrighting programming code. Computer programs are fundamentally different from traditional "literary

119. *Id*. at 1219 (Thomas, J., dissenting).

120. *Id*. at 1220.

121. *Id*.

122. *Id*. at 1219 (Thomas, J., dissenting) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

123. 17 U.S.C. § 101 ("a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result.")

124. *Oracle Am*., 141 S. Ct. at 1213 (Thomas, J., dissenting) (quoting Feist Publ'ns. Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

125. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

126. *Oracle Am.*, 141 S. Ct. at 1196 ("These limitations, along with the need to 'fix' a work in a 'tangible medium of expression,' have often led courts to say, in shorthand form, that, unlike patents, which protect novel and useful ideas, copyrights protect 'expression' but not the 'ideas' that lie behind it."); *id*. at 1213 (Thomas, J., dissenting) (quoting Golan v. Holder, 565 U.S. 302, 328 (2012)) ("This provision codifies the 'idea/expression dichotomy' that copyright protection covers only the 'the author's expression' of an idea, not the idea itself.").

works"[127] since most code serves operational purposes and is not meant to convey the creative ideas of authors.[128] Additionally, granting a time-limited monopoly to every single code would give an unfair advantage to established corporations and hinder the openness and innovation of the World Wide Web.[129] Furthermore, copyright disputes could potentially lead to the termination of essential services to users' communication and businesses, which is counter to the constitutional goal of copyright, which is "to promote the Progress of Science and useful Arts."[130]

The majority stated that "[w]e do not understand Congress . . . to have shielded computer programs from the ordinary application of copyright's limiting doctrines in this way."[131] As a result, they arrived at a flexible middle ground through a broad interpretation. Fair use is often seen as a product of the "cooperative effort of Legislatures and courts,"[132] and the majority felt that it was necessary to expand upon the doctrine in order to fit the specific circumstances of the case, even though the pieces did not perfectly fit together.[133]

The *Google v. Oracle* decision highlights the complex interplay between copyright law and the rapidly evolving field of technology and the importance of finding a balance between protecting the rights of creators and promoting progress and innovation. In addition, this expansion of copyrightable expression in the realm of programming language has the potential to have broader implications for the freedom of expression in the digital world.

### *C. Expansion of Expression*

Based on the assumption that all copyrightable work is speech, *Google v. Oracle* can be read as indicating an intent to extend First Amendment protection to computer programming language.

127. *Id*. at 1198.

128. Grant Emrich, *Cracking the Code: How to Prevent Copyright Termination from Upending the Proprietary and Open Source Software Markets*, 90 FORDHAM L. REV. 1245, 1263 (2021).

129. Matthew Chalmers, *Web at 30: Celebrating a Culture of Openness*, CERN (Mar. 15 2019), https://home.cern/news/news/computing/web-30-celebrating-culture-openness (last visited July 10, 2022).

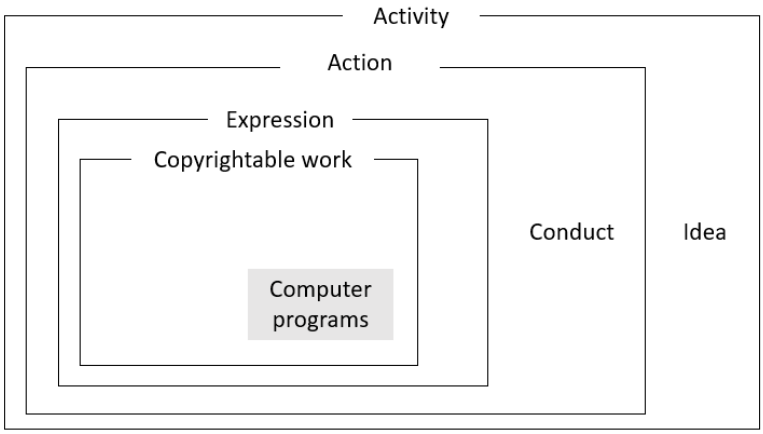
130. U.S. CONST. art. 1, § 8, cl. 8.

131. *Oracle Am.*, 141 S. Ct. at 1199.

132. *Id*. at 1208 ("assembling a jigsaw puzzle whose pieces do not quite fit").

133. *Id.* at 1198 (quoting Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F. 3d 807, 820 (5th Cir. 1995) (Boudin, J., concurring)).

< Figure 6. Computer Programs as Expression >




Both laws have particularly emphasized an *expressive format* of actions. In copyright law, copyrightable expressions are "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[134] More specifically, literary works are defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . . in which they are embodied."[135] These clauses show a very broad range of expressed formats that copyright law covers.

One clear copyright law rule is that ideas must be expressed.[136] The idea/expression dichotomy has existed because converting ideas into published works required labor, costs, and medium, which indicated the author's sincerity and made the existence of ideas verifiable. Likewise, the way of realizing ideas defines the area of law—patent or copyright. If the idea ends up being a functional product, patent law applies; if the idea turns out to be writing, painting, or film, copyright law applies. Therefore, from the perspective of copyright law, it is significant to wait and see how the idea materializes.

A digital environment seriously challenges the idea/expression dichotomy. Unlike in the past, converting ideas into a tangible format requires a very minimal level of labor and costs. Current digital technology not

134. 17 U.S.C. § 102(a).

135. § 101.

136. *Oracle Am.*, 141 S. Ct. at 1213 (Thomas, J., dissenting) (quoting Golan v. Holder, 565 U.S. 302, 328 (2012)) ("This provision codifies the 'idea/expression dichotomy' that copyright protection covers only the 'the author's expression' of an idea, not the idea itself.").

only gives everyone a forum to express their ideas (replacing a printing machine) but also enables the creation of artwork merely through words (replacing brushes and artists' labor). If you have an idea, an Artificial Intelligence ("AI") machine will implement it for you. In this case, ideas materialize in the blink of an eye.

Figure 7 below was obtained within about 80 seconds by typing a couple of words into an AI engine.[137] The copyrightability of AI-generated works has been under debate;[138] however, this technology clearly shows that artistic labor can be replaced by human-written prompts and computer programming language.

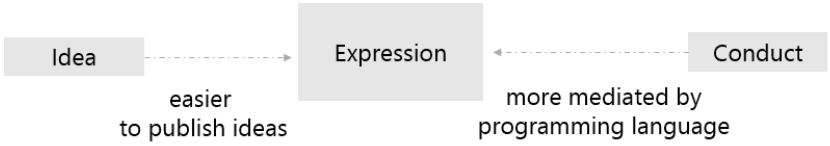
< Figure 7. Three Women and Cocktails >

137. Jane Recker, *U.S. Copyright Office Rules A.I. Art Can't Be Copyrighted*, SMITHSONIAN MAG. (Mar. 24, 2022), https://www.smithsonianmag.com/smart-news/us-copyright-office-rules-ai-art-cant-be-copyrighted-180979808. The U.S. Copyright Office found that an A.I.-created image "lacks the human authorship necessary to support a copyright claim." *Id.*

138. I typed "/imagine women enjoying cocktails in a dining restaurant, David Hockney" in the "Midjourney" Discord channel on July 10, 2022 at 10:00 p.m. Based on my input, Midjourney (which asks a user who would like to share a work to mention its Twitter account, https://twitter.com/midjourney) within about a minute generated four different paintings and offered choices of upscaling resolutions and creating variations.

The use of algorithms in the digital age not only allows for the conversion of ideas into expression but also allows for the conversion of conducts into expression, as indicated in Figure 8 below.[139] Algorithmic outputs can be visible, such as the rearrangement of search results, or invisible, such as an increase in security. It can also directly impact a user's content, such as by moderating harmful material, or have a more indirect effect, such as by improving the speed of service. In either case, the output is conveyed by a computer language and involves "expressive" elements, and as such, our increasingly virtualized world[140] may also be seen as a *textualized* world.[141]

< Figure 8. Expansion of Expression >




This raises the question of whether the expressive format of algorithms is protected under the First Amendment, as was suggested in the dissenting opinion of the *Google v. Oracle* case.

### *D. Elements of Algorithmic Expression*

The U.S. Supreme Court has used an expressive analysis to distinguish expression from conduct in First Amendment cases. "Speech," as defined by the Court, refers to expressive activity that is "intended to be communicative" and, "in context, would reasonably be understood . . . to be communicative."[142] While the Court has indicated that it is open to considering mediums of expression beyond "written or spoken words"[143] it has generally considered these linguistic forms of communication to be

139. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 99 (2009); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (describing that the temptations of First Amendment expansionism are heightened "in an information economy where many activities and products involve communication").

140. Joshua A.T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L. J. 55, 55 (2012).

141. Xiangnong Wang, *De-coding Free Speech: A First Amendment Theory for the Digital Age*, 2021 WIS. L. REV. 1373, 1406 (2021) ("This is because code embodies aspects of both speech and action in the same instance. Code is composed in the medium of text and language, but unlike other textual works, it creates action by its very utterance.").

142. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984); *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc., 515 U.S 557, 569 (1995).

143. *Hurley*, 515 U.S. at 569.

protected speech, even if words are nonsensical. When a high school student exhibited a banner with "BONG HiTS 4 JESUS," the Court found the words in the banner "cryptic,"[144] but still classified them as speech.

In *Cohen v. California*, the Court gave a thoughtful explanation for why it values "linguistic expression."[145] In this case, the Court reversed the conviction of a man wearing a shirt with the words "Fuck the Draft" in a courthouse based on his apprehensiveness about the Vietnam War.[146] The Court pointed out that "dual communicative functions"—cognitive and emotive—are both protected by the First Amendment.[147] The Court added, "otherwise inexpressible emotions . . . may often be the more important element of the overall message,"[148] and the First Amendment protects "not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[149]

Nonlinguistic expression is generally not protected as speech, but the Court has created an exception for what it calls "symbolic conduct" or "expressive conduct."[150] This exception has been used in cases involving acts of protest, such as burning the American flag[151] or wearing armbands or American military uniforms to criticize the Vietnam War,[152] and sit-ins by Blacks in a "whites only" library to protest racial segregation,[153]

For non-verbal conduct to be protected by the First Amendment, the U.S. Supreme Court has required certain elements of communication.[154] To constitute expressive conduct, the Court requires that the conduct be "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative."[155] Non-verbal conduct does not necessarily convey "a particularized message" to constitute speech[156] because this requirement would exclude paintings and music.[157]

The Court has established that speech must be the "purposeful com-

144. The student admitted that the words were "just nonsense meant to attract television cameras." Morse v. Frederick, 551 U.S. 393, 401 (2007).

145. Cohen v. California, 403 U.S. 15, 25 (1971).

146. *Id.* at 16.

147. Id. at 26.

148. *Id.* at 25.

149. *Id*. at 25-26 (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)).

150. Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

151. Texas v. Johnson, 491 U.S. 397, 399 (1989).

152. *Tinker*, 393 U.S. at 505.; Schacht v. United States, 398 U.S. 58, 58 (1970).

153. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966).

154. *Johnson*, 491 U.S. at 404 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam)).

155. Clark v. Cmty. for Creative Non-Violence, 468 U. S. 288, 294 (1984).

156. Spence v. Washington, 418 U.S. 405, 410 (1974)

157. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1741-42 (2018) (Thomas. J., concurring) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 569 (1995)).

munication of the speaker's own message.[158] This requirement is particularly relevant in the context of government speech, where the overall message must be formulated through an official action by a "person with the power to determine" it and a "human agent" must convey the message as a representative of the government, rather than as a private citizen.[159]

This concept has significant implications for the question of whether algorithms can be considered speech. While algorithms may have a linguistic format, it is not always clear whether they reflect the intention of an entity to communicate its own message. According to a traditional view of free speech jurisprudence, an expressive format unquestionably implies an expressive intent because human language is a form of conveying cognitive ideas and emotions.[160] Linguistic activities, such as talking, distributing a pamphlet, sending a letter, or publishing a book, clearly indicate the speaker's desire to communicate their ideas with others.

However, it is unclear whether this is the case for computer programming languages. While algorithms are designed to produce output based on data and input for a functional product, it is not clear whether this intention is sufficient to invoke free speech protection or aligns with the core values of the free speech doctrine such as autonomy,[161] democracy,[162] self-governance,[163] the discovery of truth,[164] and dignity.[165]

For example, if an Amazon programmer trains Alexa to make a comment about racial justice on Juneteenth in line with the company's anti-racism policy, Alexa's algorithms are intended to communicate the company's messages to users. However, if an activist programmer sneaks these algorithms into an Alexa system without the company's permission, Alexa's attempts to educate people about Juneteenth would not be

158. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

159. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

160. Cohen v. California, 403 U.S. 15, 25 (1971).

161. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("Free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'"); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 388 (2008) (arguing that freedom from intellectual surveillance or interference is a cornerstone of First Amendment liberty because it allows citizens to freely make up their minds and develop new ideas).

162. Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1059-61 (2016) (emphasizing "cultural participation - the freedom and the ability of individuals to participate in culture, and especially a digital culture").

163. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing that freedom of speech derives from the necessities of self-governance rather than a natural right).

164. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

165. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 201 (1977) (focusing on speaker dignity and respect).

considered the company's speech.

Imagine another programmer who worked on reducing Alexa's delay in responding. This programmer successfully created beautiful code to innovatively reduce users' waiting time, improving the user's experience in line with Amazon's philosophy of prioritizing the customer. However, it was not intended to communicate Amazon's cognition (e.g., "this item is fraudulent") or emotion (e.g., "we are disturbed by X's racial segregation practices…") beyond operational purposes.

When certain requirements are met, social media platforms are allowed to have "algorithmic freedom," similar to the editorial freedom protected by the First Amendment. To determine the expressive nature of algorithms, the Alexa example shows that at least the algorithms were produced with an *expressive intent* ("intended to be communicative"), similar to the cases of symbolic conduct. Figure 9 below is the suggested elements of algorithmic expression.

<Figure 9>

**Three Elements of Algorithmic Expression**

(1) **Intention**
The algorithms were intended to communicate a certain message.
(2) **Representation**
The overall messages were formulated by a person within the authority to take official action.
(3) **Judgment**
The messages express an entity's cognitive or emotive judgment

It should be recognized that these elements are ambiguous, particularly with regard to distinguishing between "cognitive or emotive judgment" and "purely operational matters." There will certainly be many difficult cases that fall into a grey area. For instance, consider a self-driving car whose algorithms are programmed to prioritize the driver's life over the passenger's life. This decision reflects the company's moral judgment, but it is also a matter of product safety. If a programmer found a way to equally increase the safety of both the driver and passenger, would this be considered purely operational? Like the functionality doctrine in copyright law, this distinction may not provide a clear way to recognize "expressive algorithms."

Nonetheless, reviving the concept of "expressive intent" is one of the reasonable ways to draw a line between expressive and non-expressive algorithms. It is undeniable that programming language has a linguistic

structure and that this structure could potentially be protected by the First Amendment. However, applying First Amendment protection to all virtual experiences mediated by programming language would be overly broad and potentially absurd. Therefore, creating a new threshold for algorithmic expression through the symbolic conduct doctrine, which has been developed over past decades, enables the classification of algorithms while still adhering to historical First Amendment jurisprudence.[166]

This approach has several benefits. First, it allows a court to exclude non-expressive algorithms from consideration. If all algorithms were protected, certain expressive algorithms closely connected to free speech values — autonomy, self-governance, democracy — may not receive the appropriate attention from courts or legislatures. By excluding operational algorithms, courts can avoid addressing free speech claims for all types of matters[167] and instead focus on cases that are more closely aligned with the Court's early 1900s view of free speech as essential for marginalized groups.[168]

Second, it can mitigate concerns about the expanding deregulatory function of the First Amendment in recent years.[169] Some critics worry that if the definition of speech is expanded, the scope of governmental regulation will shrink.[170] By excluding operational matters, there is a lower risk that the First Amendment will be weaponized by "corporations and other economically powerful actors."[171]

Third, it can increase algorithmic transparency by imposing a burden on the entity seeking First Amendment protection to demonstrate expressive intent. Under this approach, if an entity claims that its free

166. Knox v. Brnovich, 907 F.3d 1167, 1181 (9th Cir. 2018) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5).

167. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617-18 (2015) ("Like any other rule, the First Amendment does not regulate the full range of human behavior.").

168. Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118 (2018) (arguing that in the early 1900s, the First Amendment doctrine used to focus on giving a voice to marginalized and disenfranchised groups).

169. *See, e.g.*, Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 659 (1999) ("[The First Amendment] acts as a bar to governmental action not just with regard to the issues of conscience and religious practice with which it began, but far into the realm of economic regulation . . . ."); Tabatha Abu El-Haj, *"Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 922-23 (2017) (claiming that the "libertarian First Amendment" that developed in recent years poses a threat to the ability of the regulatory state to perform its essential functions); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV 143, 145 (2010) (arguing that *Citizens United* represents the "triumph of the libertarian over the egalitarian vision of free speech").

170. Lakier, *supra* note 168, at 2021 ("If the problem posed by the contemporary free speech doctrine is simply that it renders too much ordinary economic regulation subject to judicial scrutiny and that it makes that judicial scrutiny too demanding when it applies, then the obvious response is to narrow the scope of the First Amendment (to decolonize the empire, in other words) and to weaken the intensity of its protections.")

171. *Id.* at 2118.

speech rights have been violated, it must show that the algorithms were intended to reflect its perspective. Through court proceedings, we can learn about the design principles of algorithms and the practices used to process user data, which would otherwise remain hidden within a black box.

This article next considers whether social media algorithms that intervene in users' communications meet these three requirements.

## III. SOCIAL MEDIA'S ALGORITHMIC FREEDOM

### *A. Regulatory Threats*

Social media platforms have created algorithms to automate various processes related to prioritizing and deprioritizing users' conversations, such as recommending, flagging, suggesting, deleting, blocking, and degrading content. Scholars of free speech have, in the past, primarily focused on the negative effects of arbitrary removal on users' speech, but recently have turned their attention to "prioritization" as well.[172] This is because algorithms used for targeted advertising or content recommendation systems can pose significant threats, such as spreading false information and hate speech by appealing to emotions like fear, anger, and prejudice.[173]

Privacy regulations like the EU's General Data Protection Regulation[174] and the California Consumer Privacy Act[175] were formulated to address the unauthorized use of personal information. However, these regulatory tools, such as data access requests and the right to opt-out of unwanted usage, have not been effective in addressing the complexity of algorithmic manipulation.[176] Therefore, regulators have come to directly

172. *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

173. *See* Jack M. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY 233 (Lee Bollinger & Geoffrey R. Stone eds., 2022).

174. Council Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation).

175. California Consumer Privacy Act of 2018, §§ 1798.100-1798.199.100.

176. Johnny Lin & Sean Halloran, *Study: Effectiveness of Apple's App Tracking Transparency*, TRANSPARENCY MATTERS (Sept. 22, 2021), https://blog.lockdownprivacy.com/2021/09/22/study-effectiveness-of-apples-app-tracking-transparency.html (alleging that an "Ask App Not To Track" button may even give users a false sense of privacy because third-parties collecting user data for marketing purposes easily bypass this privacy function by identifying themselves as "fraud detection"); Luca Bufalieri et al., *GDPR: When the Right to Access Personal Data Becomes a Threat*, 2020 IEEE INT'L CONF. ON WEB SERVS. 75 (2020) (arguing that weak authentication mechanisms allow online services to leak sensitive user data to unauthorized users).

target platforms' algorithmic intervention. Examples include the Digital Services Act recently approved by the European Parliament,[177] the Online Safety Bill in the United Kingdom,[178] the Platform Accountability and Consumer Transparency Act proposed in the U.S. Congress, [179] and Texas HB 20.[180]

These regulations all seek to impose substantive and procedural obligations on social media platforms' mechanisms for prioritizing and deprioritizing content. The UK's Online Safety Bill and Texas HB 20 have different substantive rules and opposite goals. Texas HB 20 requires platforms "not to moderate" users' content based on viewpoints,[181] while the Online Safety Bill requires platforms to take active measures to address not only illegal content but also content harmful to children and adults, which has yet to be defined.[182]

Big tech companies have resisted these regulations, arguing that they infringe on their free speech rights and force them to make unwanted expressions. Do platforms speak through algorithms that takedown or selectively amplify certain content?

Eugene Volokh, who argued in 2012[183] that search results were protected by the First Amendment, later rejected the idea that social media content moderation was protected by the First Amendment.[184] He argued that "platforms have a First Amendment right to choose what to recommend,"[185] but do not have the right to refuse to host users' content.[186]

It is worth noting the differences between how algorithmic discretion is exercised when deprioritizing content (which this article refers to as

177. *Amendments Adopted by the European Parliament on 20 January 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, EUR. PARL., https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html (last visited Feb. 24, 2023).

178. Online Safety Bill 2021-22, HL Bill [285] (UK), https://publications.parliament.uk/pa/bills/cbill/58-02/0285/210285.pdf (last visited Feb. 24, 2023).

179. Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. § 5(2) (2020).

180. TEX. CIV. PRAC. & REM. CODE § 143A.002.

181. *Id.* ("(a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.").

182. *See, e.g.*, Online Safety Bill 2021-22, HL Bill [285], cl.. 13(4) (UK), https://publications.parliament.uk/pa/bills/cbill/58-02/0285/210285.pdf (last visited Feb. 24, 2023) ("These are the kinds of treatment of content referred to in subsection (3)–(a) taking down the content; (b) restricting users' access to the content; (c) limiting the recommendation or promotion of the content; [and] (d) recommending or promoting the content.").

183. VOLOKH & FALK, *supra* note 91.

184. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021).

185. *Id.* at 456.

186. *Id.* at 416-22, 438 (arguing that compelled hosting regulations like Texas H.B. 20's must-carry rule must not be subject to strict scrutiny).

"content moderation") and prioritizing potentially attractive or profitable content (which this article refers to as "content promotion"). Table 2 below illustrates the main differences between content moderation and promotion.

< Table 2. Comparison of Moderation and Promotion >

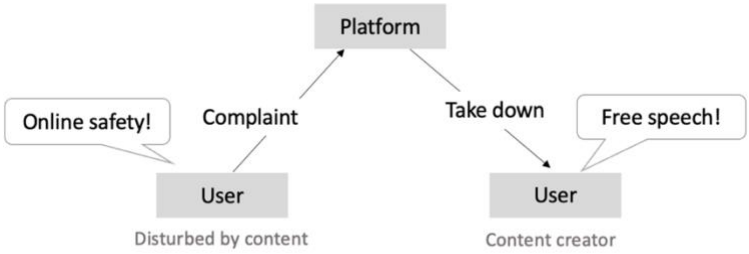
| | Platform's Intervention | |
|---|---|---|
| | Moderation | Promotion |
| Purpose | Legal/ethical causes<br>Online Safety, Rule of Law,<br>Child Protection | Financial interests<br>User engagement,<br>Market power |
| Means | Negative<br>Takedowns, Blocking access,<br>Suspension of accounts | Positive<br>Recommender,<br>Targeted adversing |
| Platform's Role | Mediator/adjudicator/enforcer | Publisher |
| Risks | Action: Restricting speech, Discrimination, Social exclusion<br>Inaction: Illegal content, Defamation, Misinformation | Privacy invasion,<br>Manipulation and biases |
| Aggreived Party | User (Content creator)<br>Other users (Recipient) | User (Recipient) |

*B. Is Content Moderation Speech?*

The purpose of content moderation is to protect the community by penalizing bad actors. Being removed is not a pleasant user experience, so platforms tend to avoid being seen as the "arbiters of truth."[187] Nonetheless, virtually all platforms have had to moderate content to prevent platforms from being filled with scams and porn. In content moderation, a platform is supposed to be a neutral adjudicator or arbiter. Different users are affected by each other's actions, and the platform must decide whether to remove, degrade, or leave the content based on reports by affected users. This creates a triangular relationship between the users and the platforms, as shown in Figure 9 below.

187. *See, e.g.*, Mark Zuckerberg, FACEBOOK (Nov. 19, 2016), https://www.facebook.com/zuck/posts/10103269806149061; Borchers, *supra* note 4; Supraja Srinivasan, *We Don't Want to Be Arbiters of Truth: YouTube CBO*, ECON. TIMES (Mar. 24, 2018), https://tech.economictimes.indiatimes.com/news/internet/we-dont-want-to-be-arbiters-of- truth-youtube-cbo-robert-kyncl/63438805.

< Figure 9. Triangular Relationship in Content Moderation >



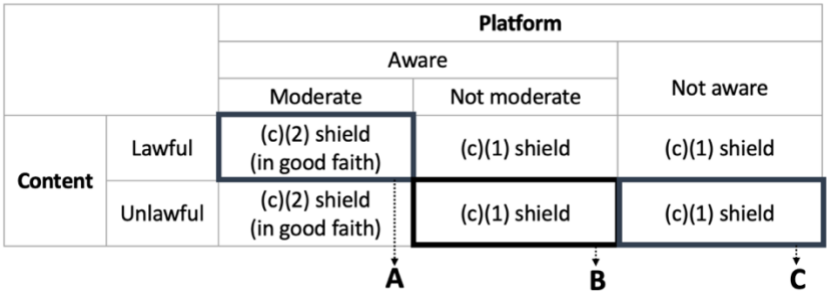

When moderating content, a platform acts as a regulator balancing the interests of various users. To be perceived as legitimate, a platform creates rules such as terms of conditions and community guidelines. These rules are often influenced by laws regarding illegal content. For example, if selling automatic weapons is prohibited offline, it makes sense to ban the online advertisement of weapons because of significant public interest. The European Commission refers to this principle as "horizontal regulation."[188]

However, it is not always easy to define illegal content. A good example is the *Miller* test, which the U.S. Supreme Court developed after decades of debate about defining obscenity using ambiguous terms like "contemporary community standards" and "artistic value."[189] There are other examples as well: terrorist recruitment messages may be confused with religious propaganda, comics may contain child pornography-like depictions, and the definition of a legal weapon varies by state.

188. *Questions and Answers: Digital Services Act**, EUR. COMM., https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348 ("The Digital Services Act sets the horizontal rules covering all services and all types of illegal content, including goods or services.") (Nov. 14, 2022).

189. The U.S. Supreme Court offers a notoriously ambiguous guideline to define obscene material as follows: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 23 (1973) (citations omitted).

< Figure 10. Section 230 Shields >




To address this issue, both the European Union[190] and South Korea[191] require platforms to follow a notice-and-action protocol to obtain liability immunity. Similar to the U.S. Digital Millennium Copyright Act,[192] internet service providers in these countries must take down alleged illegal content upon request from users. This type of regulation aims to minimize area *C* in Figure 10 above. A user's notice serves as the platform's actual knowledge about the existence of content, so the platform cannot claim ignorance.

However, a user's notice may not be enough to address ambiguities surrounding illegal content. In these cases, as long as the platform has properly exercised its duty of care, the government must respect the platform's discretion unless there is evidence that the platform deliberately ignored illegal content, such as in the *Armslist* case.[193]

Does the moderation of illegal content meet the three criteria for expressive algorithms? Moderating algorithms were designed to communicate the platform's cognitive message that "illegal content is not allowed," representing the platform's official standpoint. Therefore, the three criteria — (1) expressive intent, (2) cognitive or emotive ideas beyond mere operational matters, and (3) representing the entity's standpoint — are met. However, the speech was made not at the platform's discretion but by obligation. Thus, it is the platform's compelled speech and could be justified by compelling governmental in-

190. Directive on Electronic Commerce, *supra* note 54.

191. Act on Promotion of Information and Communications Network Utilization and Information Protection art. 44-2 (S. Kor.), https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55570&lang=ENG ("Request for Deletion of Information").

192. 17 U.S.C. § 512(g)(2) "Exception—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material . . . ."

193. Daniel v. Armslist, LLC, 926 N.W.2d 710, *cert. denied*, 140 S. Ct. 562 (2019).

terest.[194]

Similarly, platforms have the freedom to adjust the level of moderation for legal content. A platform may regulate broader categories of content, though not necessarily illegal, if it aims to create a safer environment for its users. Customers who are unsatisfied with the results may punish the platform by leaving it. It would be unreasonable if all platforms, including both family-oriented and provocative platforms, were forced to apply the same level of content moderation.

In a user-platform-user triangle, a platform is supposed to balance conflicting interests, and the result of the balancing reflects the identity of a platform. Thus, a definition of what types of content are acceptable in the community is at the heart of a platform's autonomy, "the ability to freely form one's mind, including one's beliefs and identity."[195] The collective result of moderating decisions speaks to the platform's perspective and identity.

In conclusion, platforms' decisions on both illegal and legal content are speech. In the case of illegal content, a platform may not have editorial discretion and may be compelled to exercise its authority. For legal content, however, a platform has the editorial freedom to adjust the level of acceptable expression on its platform. In the triangle of users and the platform, the platform is responsible for balancing conflicting interests, and the result of this balancing reflects the identity of the platform. Therefore, a definition of what types of content are acceptable in the community is essential to a platform's autonomy, or "the ability to freely form one's mind, including one's beliefs and identity."[196] The collective result of moderating decisions reflects the platform's perspective and identity.

### *C. Is Content Promotion Speech?*

Content promotion is designed to highlight certain content that is worthy of users' attention. This content may be paid for by advertisers or may simply be content that is likely to increase users' time spent on the platform. Either way, exposing users to this selective content can increase a platform's revenue and market power. Unlike content moderation, which can be unpopular, there are no disadvantages for a platform in using content promotion.

194. *Miller*, 413 U.S. at __ (defining the standards that were to be used to identify obscene material that a state might regulate without infringing on the First Amendment); Reno v. ACLU, 521 U.S. 844 (1997) (finding that "indecent" and "patently offensive" are overbroad compared to "obscene," which is an acceptable standard under *Miller*).

195. Miller, *supra* note 99, at 5.

196. *Id.*

< Figure 11. Linear Relationship in Content Promotion >


When promoting content, a platform no longer acts like a neutral regulator but more like a marketer trying to attract users. Modern social media is much more active in curating advertisements than traditional mass media. Since traditional mass media rarely engage in advertising content, the federal and state Unfair or Deceptive Act or Practice laws have excluded mass media advertisers from their coverage because they "merely publish claims made by others."[197]

Social media platforms use algorithms to deliver customized information to target audiences based on the vast amount of data they collect from users which allows them to make revenue from clicks on ads, as is the case with Google Ads. Google Ads hires marketing managers to create strategies for small and medium business segments, which indicates that the platform has a clear profit-driven interest in amplifying certain content.[198]

Platforms and users have a give-and-take relationship, where users offer their data in exchange for free services. While users' speech is not a major issue in content promotion, the problem lies in the fact that users are being forced to see business-interested content that may be designed to trigger impulsive purchases, social media addictions, or hatred against different identity groups. [199] This can have negative effects on individuals' well-being and self-control, public health, and democracy. To correct this injustice, the European Union's Digital Services Act enables users to have an opportunity to be informed and to have more meaningful choices to avoid unwanted consequences.[200]

Circling back to the initial question of whether content promotion

197. CONSUMER PROTECTION LAW IN A NUTSHELL 35 (Dee Pridgen & Gene. A. Marsh, eds., 2016).

198. *Marketing Manager, Small-And-Medium Business Marketing*, GOOGLE CAREERS, https://careers.google.com/jobs/results/127529640752227014 (last visited Feb. 25, 2022) ("build strategy and go-to-market plans for the small and medium business segments for customers and users across a wide range of channels (e.g., events, social, email marketing, thought leadership, case studies)").

199. Balkin, *supra* note 173, at 115. ("The most engaging material is content that produces strong emotions, including negative emotions like fear, anger, and prejudice. This includes conspiracy theories and political propaganda that undermine trust in democratic institutions, and false information about public health.")

200. *Digital Services Act: Regulating Platforms for a Safer Online Space for Users*, EUR. PARL. (Jan. 20, 2022), https://www.europarl.europa.eu/news/en/press-room/20220114IPR21017/digital-services-act-regulating-platforms-for-a-safer-online-space-for-users.

algorithms speech, the answer is yes. While it may be argued that algorithms designed solely to maximize profits do not satisfy speech requirements under a broad interpretation of "purely operational matters," this view is questionable. The U.S. Supreme Court has recognized commercial advertisements as a form of speech,[201] and the act of favoring or disfavoring certain users' content reflects the platform's value judgment (e.g., a video-sharing platform recommending high-quality documentaries).

Users have different expectations of each platform's algorithms, such as highlighting cat video clips or provocative political comments. Now, online platform users are impersonating platforms' algorithms — "It is what YouTube/Spotify played for me." Platforms' algorithms transfer users' input, prior history, and other users' data into unprecedentedly customized results, and users perceive this amplification process as an autonomous intelligence reflecting a platform's subjective and complex judgment.

Unlike traditional news media, social media delivers a customized website to each user, which creates "echo chambers."[202] Platforms' algorithms define the scope of people who see you, the people whom you see, and the information and answers that you get. Users' input and prior data play a definitive role in this customization, but the terms and conditions are defined by the platform.

Under these circumstances, it is deemed that major social media algorithms reflect their identity beyond mere operational matters, thus constituting speech.

### *D. Summary*

In short, algorithms used for both moderating and promoting content on social media platforms can be considered speech because these algorithms, which are designed to communicate specific messages and reflect the identity and perspective of the platform, meet the requirements of being expressive in nature. However, this conclusion raises concerns about the potential for public regulation of these algorithms to be limited by the First Amendment's strict scrutiny. Part IV argues that a contextualized approach to free speech protection resolves this concern and allows for appropriate regulatory measures to be implemented in response to algorithmic bias and misuse.

201. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

202. Matteo Cinelli, *The Echo Chamber Effect on Social Media*, 118 PROC. NATL. ACAD. SCIS. U.S. AM. 1, 1 (2021).

## IV. ALGORITHMIC FREEDOM IS CONTEXTUAL, NOT BINARY

### *A. Beyond an All-or-Nothing Approach*

Traditionally, if certain activities constituted speech, any content-based regulations over the speech became subject to strict scrutiny and rarely survived.[203] While the Court has expanded the scope of speech to include corporate campaign finance,[204] trademark,[205] commercial advertisements,[206] gay parades,[207] video games,[208] public utilities' electric bills,[209] and cable companies' channel distribution,[210] it has also diluted the difference between political speech and commercial speech, individual speech and corporate speech, and speech of the marginalized and the privileged.[211]

This all-or-nothing approach, which treats all types of speech as equally sacrosanct and deserving of the highest level of protection against state action, has contributed to what some critics refer to as a "corporate takeover" of the First Amendment.[212] As a result, there are valid concerns that defining algorithms as speech would lead to a *laissez-faire* approach to regulating the social media industry.

However, it is important to emphasize that the issue at hand is not about defining speech, but rather the tendency of the Court in recent years to treat all types of speech as being in the same category. This article suggests a contextualized approach, which involves evaluating multiple factors in order to determine the appropriate level of First Amendment protection, rather than simply categorizing speech as either fully protected or not protected at all.

203. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

204. Citizens United v. FEC, 130 S. Ct. 876 (2010).

205. Matal v. Tam, 137 S. Ct. 1744 (2017).

206. 4*4 Liquormart*, 517 U.S. 484.

207. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 569 (1995).

208. Brown v. Ent. Merchs. Ass'n, 131 S. Ct. 2729 (2011).

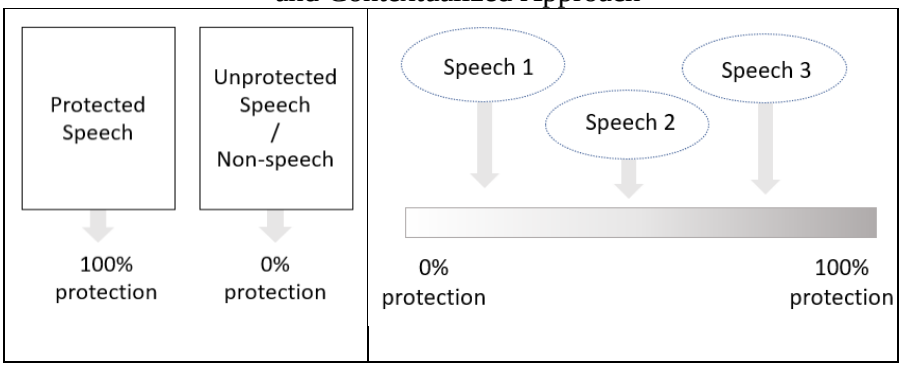
209. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) ("The First Amendment . . . protects commercial speech from unwarranted governmental regulation.").

210. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994).

211. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1745 (2018) ("[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech."); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit").

212. Lakier, *supra* note 8, at 2301 ("Like the sun, the First Amendment's size and brightness tend to blot out all else."); Lakier, *supra* note 168, at 2120.

< Figure 12. All-or-Nothing Approach
and Contextualized Approach>




One potential criticism of the all-or-nothing approach is that it arbitrarily divides first-class and second-class speech without a specific Constitutional or statutory basis. Unlike the laws of Germany[213] and South Korea,[214] the First Amendment of the U.S. Constitution ("Congress shall make no law . . . abridging the freedom of speech . . . .")[215] does not include a limitation for public interest free speech rights. The assertive tone of the First Amendment reflects the Founders' values and their belief in the importance of freedom of speech. Therefore, it is understandable that this Constitutional text has led to absolutism and formalism in free speech jurisprudence.

This article does not deny the preferential position of free speech rights compared to other fundamental rights, nor the need for heightened judicial scrutiny to effectively protect speech[216] What it rejects is the oversimplification of determining the level of free speech protection. The all-or-nothing approach is inadequate for addressing the complexity of overt, word-based algorithmic activity, and not all expressive algorithms deserve the same level of protection. Additionally, the overt expressive

213. Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048) https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0014 (July 11, 2022) ("Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. . . . These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.")

214. Constitution of the Republic Of Korea, Oct. 29, 1987, art. 21(1), (4) https://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=1 (July 11, 2022) ("All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association. . . . Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.")

215. U.S. CONST. amend. I.

216. Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

format of algorithms is likely to burden free speech jurisprudence, making it practical to accept different degrees of protection. This suggestion is not new, but rather a revitalization of an older norm in free speech law, as described in Part B below.

### *B. Free Speech Jurisprudence Used to be Contextual*

The U.S. Supreme Court has adopted a formalistic perspective for free speech, which dictates that discriminating against protected speech automatically calls for heightened scrutiny regardless of the concerns raised by the speech,[217] the speaker,[218] and or the impact of the speech and surrounding circumstances on the power imbalance between the marginalized and the privileged.[219]

This perspective certainly increases predictability and reduces arbitrariness, but it also risks over- or under-coverage of the law, particularly when the law provides almost absolute protection to speech – "[l]ike the sun"[220] – and traditional criteria for defining speech struggle to capture the complexity of algorithmic outputs.

According to Genevieve Lakier's historical analysis, the U.S. Supreme Court did not operate according to this formalistic view in early free speech cases.[221] Lakier argues that the Court was more sensitive to economic, political, and social inequalities when interpreting the constitutional guarantee of expressive equality in the early 1900s.[222] For example, the Court struck down a local ordinance that prohibited people from distributing circulars by ringing doorbells because the practice was "essential to the poorly financed causes of the little people."[223] In those days, free speech cases were often won by "civil rights groups like the NAACP, proponents of minority religions, and other representatives of

217. Citizens United v. FEC, 558 U.S. 310, 348-50 (2010) (holding that the government's interest in safeguarding elections from the corrupting and "distorting" effects of corporate wealth not only was not compelling but also even not legitimate).

218. *Id*. at 356 (rejecting the argument that the Government may restrict political speech on the basis of the speaker's corporate identity).

219. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) (rejecting the idea that the Court should take into account inequalities in economic conditions between speakers and the audience when it comes to define speech).

220. Lakier, *supra* note 8, at 2301; Saia v. New York, 334 U.S. 558, 562 (1948) ("Courts must balance the various community interests in passing on the constitutionality of local regulations . . . . But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position.").

221. Lakier, *supra* note 168, at 2118.

222. *Id*. at 2120 (quoting Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975)).

223. *Id*. at 2125 (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

the marginalized and the disenfranchised."[224]

Before adopting a formalistic approach, the Court used to carefully examine the impact of a speech or speech restriction on the voices of others. For example, the Court struck down prohibitions on distributing pamphlets in a company town in favor of the public's right to access important sites of public expression.[225]

In *Red Lion Broadcasting*, the Court ruled that broadcasters must endure a fairness obligation for their privileged position with "confirmed habits of listeners and views, network affiliation, and other advantages . . . over new entrants"[226] in order to provide the public with suitable access to social, political, esthetic, moral, and other ideas and experiences.[227] In *Turner*, the Court upheld a federal law imposing a local broadcaster quota on cable companies, stating that it served a legitimate "governmental purpose of the highest order," ensuring "the widest possible dissemination of information from diverse and antagonistic sources."[228]

However, since the 1970s, the Court has rejected its initial "context-sensitive, substantive-equality-promoting view" and only required "formally equal treatment at the government's hand."[229] The contemporary U.S. Supreme Court no longer accepts "[t]he concept that government may restrict the speech of some . . . to enhance the relative voice of others," which is one that "is wholly foreign to the First Amendment."[230]

Despite this, Genevieve Lakier argues that *Marsh*, *Red Lion Broadcasting*, and *Turner*, which supported the rights of the relevant public, remain good law. Other scholars also defend the right to receive and access information as a core value of the First Amendment.[231]

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224. *Id*. at 2118 (citations and quotations omitted).

225. *Id*. at 2141; Marsh v. Alabama, 326 U.S. 501, 506 (1946) (finding that the public's right to access a public forum—a company town—outweighs the rights of a private property owner). However, the shopping mall case, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), was overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

226. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400 (1969).

227. *Id.* at 390.

228. Lakier, *supra* note 168, at 2150; Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 190-92 (1997).

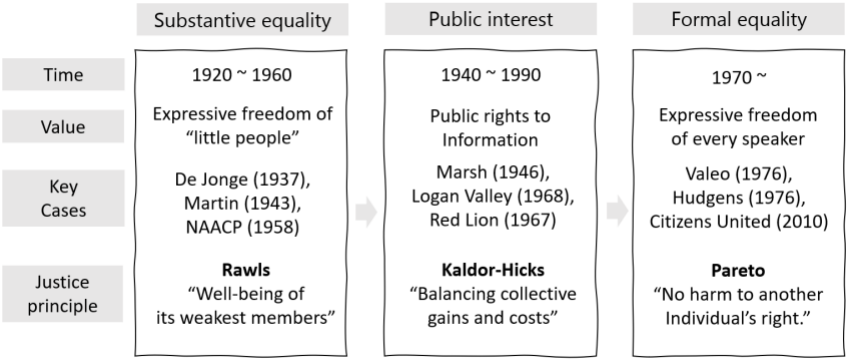
229. Lakier, *supra* note 168, at 2120.

230. *Id*. at 2145 (quoting Citizens United v. FEC, 558 U.S. 310, 349-50 (2010); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011)).

231. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 881 (2006) (describing libraries as places where information seekers have a First Amendment right to receive information); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1397 (2017) (arguing that contemporary First Amendment jurisprudence "represents a radical break from the republican and liberal traditions on which it draws" by "subordinating [listener's rights] to corporate speech rights and

Figure 13 below illustrates the gradual shift in the U.S. Supreme Court's First Amendment jurisprudence. In the first era, the Court valued "substantive equality" mostly to protect the political opinions of marginalized groups. This era followed the *Rawlsian* concept of distributive justice and its impact on the most vulnerable people.[232]

< Figure 13. Development of First Amendment Jurisprudence >




In the second era, the Court not only considered speaker's rights but also the rights of the listeners and audience, as well as the public's right to access important forms of expression and information sources. The underlying principle is *Kaldor-Hicks* utilitarianism, which evaluates a social change as efficient if the collective gains of the beneficiaries outweigh the collective costs of the damage.[233] This view requires the Court to consider the collective impacts on society of a free speech decision. Thus, speech can be conditioned and regulated if those limitations lead to favorable outcomes for the community.

In the contemporary era, the Court treats all speech rights equally and excludes factors such as the listener's right when it assesses the legitimacy of speech restriction. It rejects a distinction between commercial and political speech and between corporate and individual speakers. This view reflects a *Pareto* efficiency, which only validates a social change that does

eventually nullifying them altogether").

232. Richard Arneson, *Rawls, Responsibility, and Distributive Justice*, *in* JUSTICE, POLITICAL LIBERALISM, AND UTILITARIANISM: THEMES FROM HARSANYI AND RAWLS 106 (Mark Fleurbaey, Maurice Salles, & John A. Weymark eds., 2008) ("Distributive justice requires that resources be set so that at the onset of adulthood each agent faces an array of options that provides an effective opportunity for well-being such that, for all agents, a function of effective opportunity for well-being is maximized that gives priority to providing gains in well-being to those with less.").

233. *Kaldor-Hicks Efficiency*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100028833 (last visited July 11, 2022) ("Under the Kaldor-Hicks efficiency test, an outcome is efficient if those who are made better off could in theory compensate those who are made worse off and so produce a Pareto efficient outcome.").

not harm any individual's rights.[234] According to this perspective, a significant amount of collective benefit cannot justify a single individual's minor damage. *Pareto* efficiency is often criticized for favoring the *status quo* because it is almost impossible to effect any social change without affecting any individual's rights.[235]

This historical pathway shows that considering multiple factors when determining free speech protection is hardly new. The Court has indeed simplified its rationale to the extent that all types of not-that-egregious speech are deemed sacrosanct. However, in the first and second eras, the Court explicitly considered multiple factors, ranging from distributive justice to the accessibility of an important communication forum. Therefore, it is not necessarily a radical break to consider multiple factors, such as the impact on listeners and audience, the industry structure, and the accessibility of important communication forums, when determining free speech protection for algorithms. Instead, it may be a reinvigoration of the Court's half-buried precedents from earlier eras.[236]

### *C. A Contextualized Approach to First Amendment Protection*

The contextualized approach rejects the assumption that all speech must be protected equally. [237] Instead, it assumes that some speech will receive full protection and that other speech will receive heightened protection if it resonates with the core values of the free speech doctrine. To determine the relative significance of a given speech over other types of speech, contextual considerations include the nature of the speech, the characteristics of speakers and audiences, the industry structure, and the purpose and means of the regulation.

After the Court adopted a formal equality approach, the level of judicial scrutiny was almost solely determined based on the regulatory purpose and means. In other words, the focus of free speech jurisprudence has been "how evil the state's intrusion is" instead of "how valuable a speech

234. *Id*. ("A Pareto efficiency arises when at least one person is made better off and no one is made worse off. In practice, however, it is extremely difficult to make any change without making at least one person worse off.")

235. *Id.* It resonates with the prevalent scholarly concern of "First Amendment Imperialism": if everything is protected speech, government's economic or environmental policies would be deemed unconstitutional on First Amendment grounds. *See also* Greenwood, *supra* note 169, at 659 ("The First Amendment threatens to swallow up all politics. . . . Increasingly, it acts as a bar to governmental action not just with regard to the issues of conscience and religious practice with which it began, but far into the realm of economic regulation . . . .").

236. Lakier, *supra* note 168, at 2156.

237. Focusing on protectability instead of the definition of speech is consistent with Danielle Keats Citron and Mary Anne Franks' argument that "[e]ven [online] content that unquestionably qualifies as speech should not be presumed to be doctrinally or normatively protected." Citron & Franks, *supra* note 44, at 61.

is." Justice Kagan wrote, "First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives."[238] Recently, the Court found that the government's improper speech-suppressing motive alone sufficed to constitute a First Amendment violation, even if the speech was never communicated.[239] However, this article suggests that the intrusiveness of the regulation is just one consideration.

In the past, the Court considered socioeconomic concerns related to the speaker (e.g., a motive for protest) and the industry (e.g., monopoly) to find whether the government's interest to intervene in private speech was reasonable. However, government interest includes extrinsic factors such as juvenile protection, food safety, consumer protection, anti-terrorism, and national security. Therefore, rather than squeezing every extrinsic and intrinsic consideration into a "government interest" pigeonhole, it is more logical to make a separate determination whether the characteristics of the speech, speaker, and industry invoke First Amendment protection and whether the regulation is proportionately designed to achieve the proposed purpose.

A few legal scholars share this view. Alan Rozenshtein emphasizes that their First Amendment rights should be protected for "the right of users to speak and the audience to listen."[240] Similarly, Xiangnong Wang warns that a simple doctrine that "code is speech" would enable "opportunistic litigants to resist sensible policies designed to protect the public" and argues to award the First Amendment protection to "an act that uses code [to] further[] the democratic values the First Amendment was meant to serve."[241] Wang finds that the First Amendment would protect the use of code for facilitating the formation of public opinion or disseminating useful information to the public, rather than those for manufacturing ordinary products.[242]

Built on these perspectives, the nature of speech can only be fully understood based on the socioeconomic context by examining who made the speech, why they made the speech, who the audience was, and what medium they used. A close examination of these factors helps in understanding how valuable the speech was to the individual and society. Figure 14 below depicts the multiple factors used for determining the degree of free speech protection. The factors here are specific to algor-

238. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

239. Heffeman v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) (ruling that a police department unconstitutionally demoted an officer because he was mistakenly believed to support an opposition mayoral candidate, and this demotion could be challenged on First Amendment grounds).

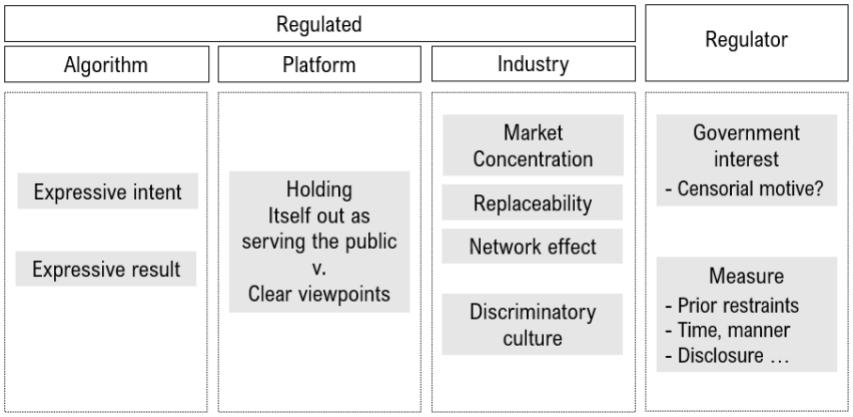
240. Rozenshtein, *supra* note 96, at, 345, 358, 374.

241. Wang, *supra* note 141, at 1376-78.

242. *Id.* at 1430-31.

ithms that are employed for mediating users' content, and different industries require different frameworks.

< Figure 14. The framework of Multi-Level Analysis >




This figure illustrates a variety of explicit and implicit rationales that courts have developed in free-speech-related cases over the past century. Other than the definition of speech, various elements have been assessed in cases of law regarding a company town, newspapers, broadcasters, cable companies, broadband, inns and restaurants, gay parades, commercial advertisements, and video games. As the algorithm's expressive intent and format have been covered in Chapters 2 and 3, this chapter examines aspects of platforms, industry, and regulation.

### 1. Platform: Holding Itself Out

In *Knights First Amendment Institute*, Justice Thomas argued to extend existing doctrines such as common carriers or public accommodation to check digital platforms' "unbridled" and "limitless" control on speech.[243] Justice Thomas provided representative elements of the historical definition of common carriers: (1) market power (monopoly), (2) the industry's impact on the public interest, (3) proximity to the transportation or communication industry, (4) countervailing benefits from the government, and (5) the entity's "holding itself out as providing service to all."[244]

"(5) holding itself out as providing service to all" is the only meaning-

243. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring) (vacating the Second Circuit opinion that defined Twitter as a public forum for the case's mootness).

244. *Id.* at 1222-23 (Thomas, J., concurring).

ful consideration at a platform level, because (1) and (2) are industry factors, (3) applies to every platform, and (4) does not apply to any platform. A "holding itself out to the public" rule can be articulated as follows:

> If a platform chooses to serve all as an open and neutral forum, this public commitment generally reduces the necessity of First Amendment protection.

At first glance, it seems counterintuitive that a platform's voluntary setting of its identity determines its legal protection. However, it is reasonable because once a platform commits to providing an open square for public communication, people will form an expectation that they can freely access the square, at least for a while. In this case, excluding certain people from the square becomes a matter of public concern, which may constitute a legitimate reason for the government's interest in mitigating the concern.

In turn, an openly opinionated and biased platform will have stronger First Amendment protection because it is expected to communicate its ideas and perspectives to users. A platform can determine its viewpoints, such as conservative, liberal, provocative, educational, family-, eco-, or dog-friendly, and in expressing this viewpoint, will enjoy free speech protections.

A "holding oneself out to the public" element has existed ever since the beginning of the English common carrier doctrine:[245] "a person [who] holds himself out to carry goods for everyone as a business . . . is a common carrier."[246] The English courts categorized highways, rivers, ports, and innkeepers as common carriers, and the U.S. courts additionally included railroads,[247] telegraphs, and telephones.[248] U.S. courts still regard "holding out" as a key element of a common carrier. In *Munn v. Illinois*, the U.S. Supreme Court said, "Enough has already been said to show that, when private property is devoted to public use, it is subject to public regulation."[249]

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245. In a common carrier doctrine, any tradesmen were supposed to perform upon reasonable request without discrimination, charge reasonable prices, and exercise an adequate care, skill, and honesty. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 403-04 (2020) (quoting Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 217, 243 (1904)).

246. Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 2 (1968) (quoting Ingate v. Christie (1850) 175 Eng. Rep. 463, 464; 3 Car. & K. 61).

247. Interstate Com. Comm'n v. Balt. & O. R. Co., 145 U.S. 263 (1892).

248. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1636 (2018). The National Telegraph Act of 1866 and the Mann-Elkins Act of 1910 established public utility regulations, including requirements for "common carriage, fairness, and pricing." *Id.*

249. Munn v. Illinois, 94 U.S. 113, 130 (1876).

Similarly, the D.C. Circuit described the "requirement of holding oneself out to serve the public indiscriminately" as the "basic characteristic" of common carriage.[250] When upholding the net neutrality rule, the D.C. Circuit concluded that broadband companies lack First Amendment rights because they do not make substantive judgments about content and therefore are mere "conduits" for the speech of their users.[251] This view also appeared in *Marsh*,[252] where a company town's exclusion of a speaker was found to be unconstitutional on the grounds of the town street's availability to the public and the prohibition's exclusionary impact, and *Red Lion*,[253] where a broadcaster's representative status justified a fairness obligation.

Therefore, if a social media platform holds itself out as a public, neutral platform, the Court is likely to grant less free speech protection and validate governmental regulation.

### 2. Industry (1): Market Concentration

As Justice Thomas has indicated, market power and the industry's impact on the public have played a significant role in justifying restrictions on private property rights.[254]

A private entity's market power provides a sophisticated economic basis for validating common carrier regulations.[255] In particular, required investments in shared infrastructure such as electricity or water provision give rise to a natural monopoly, which requires tight regulation or control by the public sector to prevent the monopolist's exploitative conduct.[256] In this case, antitrust tools such as breaking up a company are not ideal because a big organization is often necessary for stable and reasonable-rate services using large-scale infrastructure.

Under this theory, the Federal Communications Commission ("FCC") promulgated net neutrality regulation under the Title II common carriage jurisdiction of the 1934 Communications Act.[257] The FCC imposed on broadband service providers a package of duties, including rate

250. Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014).

251. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016). Justice (then-judge) Kavanaugh criticized this conclusion because one cannot lose one's future speech rights by not exercising it in the present. *Id*. at 429 (Kavanaugh, J., dissenting).

252. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222-23 (2021) (Thomas, J., concurring).

253. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

254. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

255. Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 467 (2021).

256. Rahman, *supra* note 248, at 1636.

257. 47 U.S.C. § 201(a)-(b).

regulation, mandatory interconnection, and anti-discrimination obligations, whose validity was later affirmed by the courts.[258] Later, the FCC, under the Trump administration, pulled back on net neutrality again, relying on the absence of market power.[259]

Some scholars argue that a historical analysis shows that concerns about monopolistic behavior were not a decisive factor in revoking common carriage regulation.[260] Railroads, cabs, inns, and trucks have been regarded as common carriers despite the level of competition.[261] However, it is true that the presence of a monopoly, especially when the government triggered or allowed it, gives rise to government interference.[262]

There are several unique aspects of the social media industry with respect to market competition. First, network externalities offer a huge advantage to an already established network and make it hard for a small network to thrive, creating a winner-take-all environment. The Federal Trade Commission contended that users are likely to stay with a social media platform if more users are actively and regularly engaged with the service, leaving "potential competitors with little room to maneuver."[263]

Second, a data-based profit system increases network externalities. Knowing this, most platforms charge users nothing in return for users' personal information used for classified advertising. The possession of more user data constitutes tangible market power by allowing a platform to develop more accurate recommendations and targeting systems.

Third, the marginal cost of adding a user is almost nil. The cost of adding a new account is negligible compared to the initial investment in building a platform. This cost structure forms "economies of scale," which offer benefits to larger platforms.[264]

Fourth, platforms, especially social media, work as a "pleasure-

258. Natl. Ass'n of Reg. Util. Com'rs v. FCC., 525 F.2d 630, 640 (D.C. Cir. 1976) ("This character, coupled with the lack of control exercised by shippers or travellers over the safety of their carriage, was seen to justify imposing upon the carrier the status of an insurer. The late nineteenth century saw the advent of common carriers being subjected to price and service regulations as well."); V.I. Tel. Corp. v. FCC, 198 F.3d 921, 925 (D.C. Cir. 1999) (evaluating an FCC order considering market power when applying the definition of common carriage).

259. Mozilla v. FCC, 940 F.3d 1, 57-58 (D.C. Cir. 2019).

260. Yoo, *supra* note 255, at 467 (quoting Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 148 (1914); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 518-25 (1911)).

261. *Id.* (quoting Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1409-10 (1996)).

262. Candeub, *supra* note 245, at 403-04.

263. Complaint at 9, FTC v. Facebook, No. 20-cv-03590 (D.D.C. Aug. 19, 2021), www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

264. Robert Sasse, *A Micro-Economic Perspective on Social Media in Context of the New Economy*, 4 MICROECON. & MACROECON. 56, 57 (2016).

oriented information system," where individuals are triggered by the pleasant feeling of being connected to more friends or peers.[265] Since social science research has proved that users' willingness to use a platform depends more on subjective factors than the objective quality of service, a novice platform cannot compete with established platforms by increasing efficiency.[266]

Finally, advanced data-based algorithms enable platforms to embrace an almost unlimited number of users. Newspapers only serve a certain group of subscribers whose views are consistent with the newspapers' philosophy. In contrast, platforms distribute carefully customized information based on users' preferences, thereby preventing users from being bothered by unwanted content. By creating these echo chambers, social media platforms accommodate all different groups of people peacefully, because groups cannot see each other.

All these socioeconomic conditions, combined with the advantage of the borderless internet, facilitate a platform's unlimited expansion. So, it is not surprising that a handful of tech companies control a vast majority of digital communication forums around the globe.

How does a platform's market power affect its free speech right? This article argues that:

> A platform's enormous market power reduces the necessity for First Amendment protection.

However, this view is inconsistent with contemporary case law that grants the same degree of free speech protection to powerful corporations.[267] As Lakier illustrates, the U.S. Supreme Court used to care about substantive equality or distributive justice in early free speech cases, where the Court was more attentive to the suppression of the marginalized.

Global online platforms' power to mobilize resources often exceeds the power of most nation-states. They have sufficient communication

265. Deb Sledgianowski & Songpol Kulviwat, *Using Social Network Sites: The Effects of Playfulness, Critical Mass and Trust in a Hedonic Context*, 49 J. COMPUT. INFO. SYS. 74, __ (2009).

266. Kuan-Yu Lin & Hsi-Peng Lu, *Why People Use Social Networking Sites: An Empirical Study Integrating Network Externalities and Motivation Theory*, 27 COMPUTS. IN HUM. BEHAV. 1152, __ (2011) (finding that "enjoyment" of service turned out to be a more decisive factor than the usefulness of service to users' continued intention to use); Hyun Jung Kim, *Intention to Continue Using a Social Network Site: Effects of Personality Traits and Site Quality*, 44 SOC. BEHAV. & PERSONALITY 1419, __ (2016) (proving that users' intentions to use a platform are more dependent on personal traits like the willingness to proclaim one's uniqueness rather than on the service's speed or quality).

267. Citizens United v. FEC, 558 U.S. 310, 353-56 ("The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted. . . . By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public . . . .").

channels to deliver their standpoints as well as various methods to affect users' opinions. From the perspective of substantive equality, a huge disparity in the communication resources of a layperson and a big corporation negates the necessity for First Amendment safeguards for a corporation.

This rationale resonates with the Court's reasoning that asks "public figures" to have a higher tolerance for defamatory comments due to the public figure's access and control over the media and the public's right to know about a matter of public concern.[268]

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[269]

Furthermore, a platform's market power inevitably increases its impact on the public. At a personal level, various research projects prove that individuals' emotional attachment to social media platforms affects their happiness, identity, and feelings of being supported and heard in the community.[270] In turn, de-platforming commonly arouses the resentment of users[271] and even stirs up more toxic behavior on alternative sites after being banned from a major platform.[272] In this regard, de-platforming is deemed almost equivalent to a medieval church's excommunication.[273]

At a societal level, social media is a major source of information. Their algorithms define how an individual receives information about matters of public concern. Moreover, as individuals, content creators, small businesses, non-profits, and media companies communicate with each other and reap profits through social media platforms, a small algorithmic

268. Shlomit Yanisky-Ravid & Ben Zion Lahav, *Public Interest vs. Private Lives—Affording Public Figures Privacy in the Digital Era: The Three Principles Filtering Model*, 19 J. CONST. L. 976, 982-83 (2017).

269. Gertz v. Roberts Welch, Inc., 418 U.S. 323, 344 (1974).

270. *See generally* Patti Valkenburg et al., *Social Media Use and Adolescents' Self-Esteem: Heading for a Person-Specific Media Effects Paradigm*, 71 J. COMM. 56 (2021); Chia-Yi Liu & Chia-Ping Yu, *Can Facebook Use Induce Well-being?*, 16 CYBERPSYCHOL. BEHAV. SOC. NETW. 674 (2013); Jennifer Gerson, Anke C. Plagnol & Philip J. Corr, *Subjective Well-being and Social Media Use*, 63 COMPUTS. HUM. BEHAV. 813 (2016).

271. Lyons, *supra* note 59. The complaint states that Twitter "exercises a degree of power and control over political discourse in this country that is immeasurable, historically unprecedented, and profoundly dangerous to open democratic debate." *Id.*

272. *See* Shiza Ali et al., *Understanding the Effect of Deplatforming on Social Networks*, *in* 13TH ACM WEB SCI. CON. 187 (2021) (finding that users who get banned on Twitter/Reddit exhibit an increased level of activity and toxicity on Gab, although the size of the audience they potentially reach decreases).

273. Sway, *One Year After the Jan. 6 Attack, Parler's C.E.O. Grapples with Big Tech and Trump*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2022/01/06/opinion/sway-kara-swisher-george-farmer.html.

change makes a huge impact on multiple stakeholders.

In the "public interest era" of free speech jurisprudence, the Court placed importance on increasing the public's access to information, by championing "the widest possible dissemination of information from diverse and antagonistic sources."[274] From this perspective, if the collective gains concerning the public's right to know outweigh a platform's costs, a regulation that limits the platform's speech can be justified.

### 3. Industry (2): Discriminatory Culture

There is a cultural element that possibly limits a platform's speech right. Imagine a social media industry that has ten small platforms with fewer than ten employees. Social media platforms are the main sources of information in this town because the people rarely watch TV and the only local newspaper recently went bankrupt. No platform has significant market power. All platforms convey their viewpoints to users clearly, and each platform actively moderates and amplifies users' content according to its policy. In this case, each platform's algorithmic intervention satisfies most elements of First Amendment protection.

Then, let us assume that a religious platform *X* has a very low tolerance for postings related to abortion. Although abortions are lawful in the town, *X* does not allow pro-choice content on its platform. *X* immediately takes down content related to pro-choice, abortions, or reproductive justice. If *X* cannot remove the content, *X* applies a filter to blur the content to protect its users. Of course, *X* rejects all advertising related to contraception or abortion clinics.

Nonetheless, *X*'s practice does not constitute a violation of either the First Amendment or the Equal Protection Clause. This platform is not a state actor that must guarantee individuals' free speech or equal treatment. Also, reproductive activists have nine other alternatives to communicate their ideas with others. Aggrieved activists can organize a campaign against *X*, and informed individuals may choose to unsubscribe to *X*. Faced with consumer complaints, *X* could choose to let users talk about abortions or maintain its initial position. It seems consistent with the "marketplace of ideas" principle.

However, what if all ten platform owners share the same religious belief and the same strict policy against abortions? In that case, abortion clinics would lose advertising venues, and townspeople would be deprived of sources of information. Children would grow up seeing only anti-abortion campaigns, and people would be unlikely to bring up abortion-related topics. This consequence seems to be what the First

274. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 190-92 (1997)

Amendment has tried to prevent: self-censorship, destruction of self-governance, and deprivation of an important forum for communication.

This is an exaggerated scenario, but the collective stigmatization or amplification of certain viewpoints is possible given that most tech companies are somewhat homogeneous, located on the U.S.'s West Coast, and dominated by white and Asian male engineers.[275] Already, a scholar has reported "content cartels," where tech companies share blacklists and applications for content moderation.[276]

Furthermore, viewpoint discrimination in the machine-learning system can occur more invisibly and prevalently because algorithmic output relies on available datasets for training. Accordingly, studies have proven that facial recognition technologies work most poorly for women of color and work most efficiently for lighter-skinned males.[277] The machine-learning system can result in a "system of advantages based on race" even with no explicit intent to harm certain groups.[278]

Could this collective discriminatory practice affect free speech jurisprudence? If there was no explicit intent, can discriminatory results be immune?

This article finds a clue to resolving these questions in a public accommodation doctrine. Public accommodation has its roots in English common law dating back to the sixteenth and seventeenth centuries when certain services were required to serve all comers and to demand reasonable prices.[279] In the U.S., the concept of public accommodation was developed during the civil rights movements and normally refers to inns and restaurants, where racial minorities advocated for their right to be served.[280]

After the Thirteenth and Fifteenth Amendments were enacted to end racial discrimination, the U.S. Congress passed the Civil Rights Act of 1875, which entitled everyone access to accommodation.[281] However, the U.S. Supreme Court nullified the law because of Congress's lack of power to promulgate anti-racism rules based on the Commerce Clause.[282] Subsequently, the state legislatures enacted public accommodation laws,

275. Sara Harrison, *Five Years of Tech Diversity Reports—and Little Progress*, WIRED (Oct. 1, 2019), https://www.wired.com/story/five-years-tech-diversity-reports-little-progress.

276. Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (Feb. 11, 2020), https://knightcolumbia.org/content/the-rise-of-content-cartels.

277. Alex Najibi, *Racial Discrimination in Face Recognition Technology*, SCI. IN THE NEWS (Oct. 24, 2020), https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology.

278. *Our Reality: A Novella*, U. WASH. COMPUT. SCI. & ENG'G (June 6, 2021), https://homes.cs.Washington.edu/~yoshi/OurReality.html.

279. Yoo, *supra* note 255, at 477-79.

280. *Id*.

281. *Civil Rights Cases*, 109 U.S. 3 (1883).

282. *Id.*

but some state courts found that they infringed on property rights.[283]

Finally, Congress enacted the Civil Rights Act of 1964,[284] and the U.S. Supreme Court upheld Congress's power to regulate public accommodation based on racial discrimination's negative impact on interstate commerce.[285] Thus, the American people obtained the statutory right to service in public accommodations.

Imposing the non-discrimination obligation on innkeepers and restaurant owners represented a powerful challenge to the "classical conception of property, which presumes that owners are free to use their property as they see fit."[286] However, this challenge was legitimate because there was a common practice of racial discrimination, which put individual autonomy and safety in danger, and the Thirteenth and Fifteenth Amendments declared the injustice of racial discrimination. The history of public accommodation law reflects how democracy and the rule of law mitigate conflicting rights — here, property rights and equal protection rights.

When evils prevail, the legislature prioritizes equal protection and limits the individual's property rights for the sake of a better and more just social outcome. This mitigation cannot be justified by the *Pareto* principle but can be justified by both the *Rawls* and *Kaldor-Hicks* principles.

*Nebbia v. New York*[287] is also instructive here. In *Nebbia*, the U.S. Supreme Court upheld a New York statute fixing the price of milk after the Great Depression. The Court rejected the idea that only certain businesses, like public utilities, are regulatable because all private activity "affect[s] the public."[288] Instead, it employed a general rational basis test granting the government authority to step in concerning the use of private property and the making of private contracts through "whatever economic policy may reasonably be deemed to promote public welfare."[289] The Court asserted that "neither property rights nor contract rights are

283. Yoo, *supra* note 255, at 478.

284. Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1)-(3) (including within public accommodations inns, restaurants, gas stations, and places of entertainment); Americans with Disabilities Act, 42 U.S.C. § 12181 (including within public accommodations common carriers, innkeepers, restaurants, places of entertainment, retail stores, offices of physicians and lawyers, laundromats, barber shops, funeral parlors, hospitals, insurance agents, and schools).

285. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

286. Yoo, *supra* note 255, at 478.

287. Nebbia v. New York, 291 U.S. 502, 536, (1934); Rahman, *supra* note 248, at 1638 ("Ultimately, the Court dropped this public interest test in the 1934 case Nebbia v. New York, conceding that any business may be regulated by legislatures acting on a rational basis.").

288. *Nebbia*, 291 U.S. at 525.

289. *Id.* at 537 ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.").

absolute," and "the private right must yield to the public need."[290]

Considering the underlying philosophy of these cases, it is fair to say that:

> The common practice of racial, sexual, or religious discrimination in the industry gives rise to less free speech protection on all platforms.

The right to free speech is at the heart of American democracy, but it is also not absolute.[291] When evils prevail, the idea of the marketplace of ideas — "the widest possible dissemination of information from diverse and antagonistic sources" — would fail.[292] Then, discrimination becomes a matter of public concern, and the private free speech right must yield to the public need.

Additionally, the high probability of unintended harmful consequences informs the public need for algorithmic transparency. When the Court examines equal protection violations of state action, the Court requires proof of not only a discriminatory consequence but also the state's discriminatory intent.[293] Setting aside the criticism about this high bar, an algorithmic bias is different from a discriminatory state action because the existing datasets inevitably reproduce the cumulative bias and the platform's internal documents are not publicly available. Therefore, this circumstance could justify public control over algorithmic bias even if the platform did not intend the result.[294]

### 4. Regulator (State)

Whether a regulation has a reasonable government purpose and means tailored to the purpose are the most intensely discussed and explicitly addressed elements in free speech cases. This article does not add anything to the established judicial scrutiny but instead summarizes the basic principles that have been reiterated by courts over the past decades:

> "Content-based regulation"[295] must pass strict scrutiny. The government must prove that the narrowly tailored means achieve a compelling

290. *Id.* at 524-25.

291. United States v. O'Brien, 391 U.S. 367, 376 (1968).

292. Associated Press v. United States, 326 U.S. 1, 20 (1945).

293. Washington v. Davis, 426 U.S. 229 (1976) (upholding the written personnel test for recruiting police officers proved to produce racially discriminatory effect because it was not clear that the legislature had a racially discriminatory purpose).

294. *O'Brien*, 391 U.S. at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

295. Content-based regulation means a restriction on speech or expression that is based on the substance of the message being communicated.

government interest.[296]

"Time, place, and manner" restrictions must pass intermediate scrutiny. The government must prove that a content-neutral means serves an important government interest and leaves open, ample, alternative channels of communication.[297]

"Compelled speech" is subject to free speech scrutiny when the speaker, while engaging in speech, is forced to make accommodations.[298]

### *D. A Contextualized Approach to the "Sweetest Spot"*

Table 3 below summarizes of the principles used to determine the degree of First Amendment protection for social media platforms' algorithms.

< Table 3. Principles of Contextualized Approach >

| | |
|---|---|
| Algorithm | - An algorithmic expression must be intended to communicate messages that reflect the ideas and perspectives of a platform beyond purely operational matters. |
| Platform | - A platform that chooses to serve all as an open and neutral forum deserves less First Amendment protection. |
| Industry | - A platform's enormous market power reduces the necessity for First Amendment protection.<br>- The common practice of racial, sexual, or religious discrimination in the industry gives rise to less free speech protection on all platforms. |
| Regulator (State) | - Content-based regulation must pass strict scrutiny.<br>- Time, place, and manner restrictions must pass intermediate scrutiny.<br>- Compelled speech is subject to free speech scrutiny when the speaker's message was affected. |

This article finds that a social media platform has algorithmic freedom in content moderation and promotion. By adjusting the level of acceptable expression in its community, a platform balances conflicting users' interests as well as reveals its direction to users. Also, curating infor-

296. Boos v. Barry, 485 U.S. 312 (finding that a Washington, D.C. regulation on "public disrepute" within 500 feet of the embassy fails to pass strict scrutiny).

297. *O'Brien*, 391 U.S. 367 (upholding a federal law that criminalizes the burning of draft cards for a legitimate government interest to raise armies); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding a Minnesota regulation on selling religious literature as a valid content-neutral restriction).

298. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51 (2006) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 566 (1995)).

mation and advertising for for-profits are likely to fall under the definition of algorithmic expression. These practices alter the structure of users' communication by defining the content that users see and the audience that users reach.

However, algorithmic freedom can be regulated because, under the contextualized approach, not all speech triggers heightened scrutiny. Rather, the degree of First Amendment protection is determined by examining the nature of the speech, the platform's willingness to serve the public, the industry's economic and cultural problems, and the regulatory purpose and means.

Most social media platforms hold themselves out as open and neutral platforms. According to *Munn*, "private property . . . devoted to public use . . . is subject to public regulation."[299] Moreover, some platforms enjoy what is almost a monopoly status. The Federal Trade Commission proved Facebook's "60%-plus" market share in the personal social networking industry with users' time spent, and daily/monthly active users.[300] A high degree of network externalities based on interpersonal connections of social media, collection of personal information, and advanced machine-learning technology enable a platform to extend its territory without limit.

Moreover, the growing opacity of algorithmic intervention makes it trickier to recognize what is going on inside. For example, "behavioral content moderation" is a platform's practice of adjusting the level of exposure of a group or a posting based on the track records of an account's or a group's behavioral patterns.[301] Since this intervention is far less visible than the traditional removal of an individual posting, its existence and negative impacts are hard to measure.

According to research, as of 2016, the number of new articles, chapters, and books mentioning social media and journalism to some degree totaled 16,600 across the social sciences.[302] Researchers dwell on negative aspects of social media, including harassment and hate speech,[303] alt-right trolls,[304] and minors' self-esteem.[305] After Facebook whistleblower Fran-

299. Munn v. Illinois, 94 U.S. 113, 130 (1876).

300. Complaint, *supra* note 70, at 62.

301. Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 540 (2022).

302. Seth C. Lewis & Logan Molyneux, *A Decade of Research on Social Media and Journalism: Assumptions, Blind Spots, and a Way Forward*, 6 MEDIA & COMMC'N 11, __ (2018).

303. Laura Macomber, *A New Manual for Writers and Journalists Experiencing Harassment Online*, COLUM. JOURNALISM REV. (Apr. 28, 2018), https://www.cjr.org/analysis/online-harassment-manual.php.

304. *See generally* ALICE MARWICK & REBECCA LEWIS, DATA & SOC'Y, MEDIA MANIPULATION AND DISINFORMATION ONLINE (2017), https://datasociety.net/library/media-manipulation-and-disinfo-online.

305. Dong Liu & Roy F. Baumeister, *Social Networking Online and Personality of Self-Worth: A Meta-analysis*, 64 J. RSCH. IN PERSONALITY 79 (2016); Valkenburg et al., *supra* note 270.

ces Haugen vividly portrayed the deliberate abuses of social media companies,[306] the European Parliament approved the Digital Services Act by an overwhelming majority of votes (530 out of 688), marking "[a] big win, with support from the left to the right."[307]

Circling back to *Nebbia*,[308] when the social harm of private speech becomes a matter of public concern, the private free speech right must yield to the public need. A social media platform's market power, the inherent opacity of algorithms, and reported abuses and manipulations of algorithms call for the public scrutiny of algorithmic freedom. Thus, despite its incidental restriction on platforms' free speech,[309] regulation to increase transparency and public awareness of platforms' algorithmic decision-making can be well-justified.

This article offers philosophical and historical grounds for defining speech and refining First Amendment protection in a digital communication environment. However, this article does not extend to assessing the validity of proposed regulations or offer solutions to structurally resolve the "sweetest spot" issue. Since the premise of this article is that a platform's algorithmic intervention is speech, a variety of regulations, including transparency requirements, the must-carry rule, the due process rule, notice-and-action, out-of-court settlements, and third-party audits, must be examined through the lens of free speech, which remains for later research.

## CONCLUSION

Despite the explosion of social media regulation from across the political spectrum, two fundamental questions remain unanswered: (1) whether a platform's algorithmic intervention constitutes speech protected by the First Amendment; and (2) if it is speech, how to balance the legislative purpose and First Amendment heightened scrutiny.

Social media platforms, like other entities, have a right to free speech.

306. Kelvin Chan, *Europe Bolsters Pioneering Tech Rules with Help from Haugen*, ASSOCIATED PRESS (Nov. 8, 2021), https://apnews.com/article/technology-business-europe-media-social-media-a473ff6db25e8492adf2274bfb480da7.

307. Emma Roth, *European Parliament Approves Initial Proposal to Ban Some Targeted Ads*, THE VERGE (Jan. 23, 2022), https://www.theverge.com/2022/1/23/22897574/european-parliament-eu-digital-services-act-big-tech.

308. Nebbia v. New York, 291 U.S. 502, 515 (1934) (ruling that the government can step in concerning the use of the private property and the making of private contracts through "whatever economic policy may reasonably be deemed to promote public welfare.").

309. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

When this is handled in an automated manner, this article labels it algorithmic freedom. An expressive format of programming language satisfies the linguistic element of speech, but this article suggests narrowing the scope of algorithmic expression by examining "the expressive intent."

To this end, this article proposed three elements to determine algorithms as "speech": (1) The algorithms are designed to communicate messages; (2) the relevant messages reflect cognitive or emotive ideas beyond mere operational matters; and (3) the messages represent the company's standpoints. Based on these elements, algorithms related to curating content are found to be speech regardless of whether no human is involved in the algorithms' execution or whether algorithms are for demoting or amplifying content.

However, the algorithmic expression does not automatically invoke full First Amendment protection. This article rejects the Supreme Court's current all-or-nothing approach to free speech jurisprudence and instead suggests a contextualized approach by considering multiple factors related to the speaker, audience, platform, and industry, something which was more explicitly used in the U.S. Supreme Court prior to the 1970s.

Under this approach, if a platform describes itself as opinionated and has minimal impact on the public, it will enjoy the freedom to express its identity through algorithms. In turn, if a platform contends that its role is to serve as a neutral public square and it has an irreplaceable status in the industry, its free speech rights merit less protection. Moreover, the opacity of algorithmic decision-making and the high probability of discrimination based on data used for training trigger the public's need for algorithmic transparency.

This article does not attempt to address the specific mechanisms for dragging social media down from the sweetest spot. Nor does it assess specific legislative proposals. Rather, it has tackled the questions of when algorithms invoke First Amendment protection, and which contextual factors justify a lesser degree of free speech protection of algorithmic expressions.

This intellectual journey leads us to a somewhat familiar conclusion. Social media companies have algorithmic freedom. However, this freedom is not, and should not be, absolute, and negative impacts on society invite public regulation. By clarifying these issues, it contributes to preventing social media companies from doctrine-shopping and to fine-tuning the First Amendment's focus on algorithmic expressions directly related to free speech values.