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Free Speech Versus the First Amendment

Jack M. Balkin

ABSTRACT

The digital age has widened the gap between the judge-made doctrines of the First Amendment and the practical exercise of free speech. Today, speech is regulated not only by territorial governments but also by the owners of digital infrastructure. This has made First Amendment law less central and the private governance of speech more central.

When the free speech interests of digital companies and their end users conflict, the major beneficiaries of First Amendment rights are likely to be the former and not the latter. Digital companies will try to use the First Amendment to avoid government regulation, including regulation designed to protect the free speech and privacy interests of end users.

In response, internet reformers on both the left and the right will attempt to de-constitutionalize internet regulation. They will offer legal theories designed to transform conflicts over online speech from questions of First Amendment law into technical, statutory, and administrative questions. In the United States, at least, de-constitutionalization is the most likely strategy for imposing public obligations on privately-owned digital companies. If successful, it will make the First Amendment less important to online expression.

The speed and scale of digital speech have transformed how speech is governed. To handle the enormous traffic, social media companies have developed algorithmic and administrative systems that do not view speech in terms of rights. Accompanying these changes in governance is a different way of thinking about speech. In place of the civil liberties model of individual speech rights that developed in the twentieth century, the emerging model views speech in hygienic, epidemiological, environmental, and probabilistic terms.

Algorithmic decisionmaking and data science also affect how people think about free expression. Speech becomes less the circulation of ideas and opinions among autonomous individuals and more a collection of measurable data and network connections that companies and governments use to predict social behavior and nudge end users. Conceived this way, speech is no longer special; it gets lumped together with other sources of measurable and analyzable data about human behavior that can be used to make predictions for influence and profit.

Meanwhile, the speed and scale of digital expression, the scarcity of audience attention, and the proliferation of online propaganda and conspiracy theories have put increasing pressure on the standard justifications for freedom of speech, including the pursuit of truth and the promotion of democracy. The gap between the values that justify freedom of speech and what the First Amendment actually protects grows ever wider.

In response, some scholars have argued that courts should change basic First Amendment doctrines about incitement, defamation, and false speech. But it is far more important to focus on regulating the new forms of informational capitalism that drive private speech governance and have had harmful effects on democracy around the globe.

The digital age has also undermined many professions and institutions for producing and disseminating knowledge. These professions and institutions are crucial to the health and vitality of the public sphere. Changing First Amendment doctrines will do little to fix them. Instead, one must revive, reestablish and recreate professional and public-regarding institutions for knowledge production and dissemination appropriate to the digital age. That task will take many years to accomplish.

AUTHOR

Knight Professor of Constitutional Law and the First Amendment, Yale Law School. This Article is based on the 2023 Nimmer Lecture I delivered at UCLA Law School on February 21, 2023. I wish to thank Evelyn Douek, Mary Anne Franks, Margot Kaminski, Daphne Keller, Kate Klonick, Genevieve Lakier, Robert Post, and Amanda Shanor for their comments on previous drafts, and the faculty of UCLA Law School for their gracious hospitality and for their comments and suggestions.

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I. INTRODUCTION

These days when I teach my course on the First Amendment, I tell my students that they are taking a course about freedom of speech and a course about the First Amendment, and the two are not the same thing. That difference grows with every passing day, and it is the subject of this Article.

The U.S. Constitution's First Amendment protects the freedom of speech from government abridgment. But the freedom of speech is a political value that concerns more than just the rights guaranteed by the First Amendment and enforced by courts. Many things other than state power affect our practical ability to communicate with other people, to express ourselves, and to be exposed to the ideas and opinions of others. Our practical ability to express ourselves and receive ideas is affected by technological affordances and by economic and social structure. It is affected by private power as well as public power. And it is affected by the number and quality of our society's institutions for the production and dissemination of knowledge and artistic expression.

The digital age has made all of these features of freedom of speech more salient, because the ability to speak and receive expression online depends on the digital infrastructure of free expression. And in the United States, as in many other countries, that digital infrastructure is mostly held in private hands.

As more and more of people's speech occurs online or through digital media, the gap between the study of the freedom of speech and the study of the First Amendment grows ever wider. In the digital age, the social practices of speech and the methods of governing speech have also changed.

This Article explains how the digital age created a pluralist model of speech regulation that involves both public and private regulators, and how this pluralist model made the judicially-created doctrines of First Amendment law less central and the private governance of speech more central. Despite this, the First Amendment remains important to online freedom of expression, and digital technologies will present many thorny doctrinal problems to resolve in the coming decades. In particular, the digital age will present an endless series of conflicts between platform owners and end users and speakers. But when the interests of digital companies and individual speakers conflict, the major beneficiaries of judicially-crafted First Amendment rights will probably not be individual speakers. They are more likely to be the owners of digital infrastructure—for example, broadband companies, platform companies, search engines, and social media companies. These companies will attempt to use the First Amendment to

avoid regulation, including regulation designed to protect the free speech and privacy interests of individuals and end users.

In response, internet reformers on both the left and the right will attempt to *de-constitutionalize* internet regulation. That is, they will offer legal theories that are designed to turn conflicts over online speech from First Amendment questions into technical, statutory, and administrative questions.

The strategy of de-constitutionalization is primarily concerned with judicially-created First Amendment doctrines and judicial review. It need not be opposed to free speech values, and it does not preclude the political branches from enforcing the First Amendment or free speech values more generally through statute or administrative regulation. In fact, de-constitutionalization argues that courts should generally defer to these legislative and administrative solutions. Thus, de-constitutionalization is more correctly described as judicial de-constitutionalization. It is a policy of judicial restraint.[1]

De-constitutionalization is how internet reformers in the United States will attempt to impose public obligations on digital companies that—although privately owned—serve important public functions and play an outsized role in our public life. If this strategy of de-constitutionalization is successful, it will also make First Amendment law less central to the governance of digital speech.

De-constitutionalization seeks to adopt legal theories that sideline First Amendment challenges and focus on non-constitutional questions. We might compare this phenomenon to the de-constitutionalization of economic liberty that occurred after the New Deal, when courts reduced all liberty of contract claims to a test of rational basis and greatly expanded federal commerce power.[2] After the New Deal, the Constitution was no longer a primary arena of debates about economic liberty and economic regulation. Instead, people fought about these

1. Note that if legislatures attempt to enforce the First Amendment or First Amendment values in ways at variance with judicially-created doctrines, judges may strike these laws down. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (holding unconstitutional, as applied to state and local governments, the U.S. Congress's attempt to enforce First Amendment values through the Religious Freedom Restoration Act). Hence, a strategy of de-constitutionalization aims primarily at judicial restraint and makes room for the political branches to enforce the values of free speech and free press.

2. The decisions de-constitutionalizing economic regulation at federal and state levels are Wickard v. Filburn, 317 U.S. 111 (1942); Olsen v. Nebraska, 313 U.S. 236 (1941); United States v. Darby, 312 U.S. 100 (1941); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

issues in policy terms.[3] Moreover, de-constitutionalization of economic liberty no longer treated economic liberty as a purely private right. Instead, it viewed the activities of businesses as public concerns and subject to regulation in the public interest. The de-constitutionalization of economic liberty paved the way for the growth of the administrative and regulatory state.

The story will not be exactly the same in the context of digital speech, however. De-constitutionalization will only be partial.

First, there may still be other constitutional issues in internet regulation besides the First Amendment. State laws regulating digital companies may run afoul of the Supremacy Clause, the Dormant Commerce Clause, and the Takings Clause, for example.[4]

Second, the judicially-created doctrines of the First Amendment will continue to remain important in a vast number of situations when governments regulate online speakers, either directly or indirectly.[5] In addition, social media reformers will try various legal theories to hold governments responsible for social media regulation. For example, litigants may assert that when government officials use social media, their decisions are state action and that blocking speakers they disagree with or find offensive is unconstitutional content regulation.[6] Social media reformers may also argue that government officials are

3. *See generally* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022) (arguing that removing the U.S. Constitution from debates about political economy had long-lasting disadvantages for American democracy).

4. *See, e.g.*, Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021) (discussing arguments for Section 230 preemption of state social media regulation but arguing that some state social media regulation should survive a preemption challenge); Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083 (2023) (discussing Dormant Commerce Clause theories); Amy Kapczynski, *The Law of Information Capitalism*, 129 YALE L.J. 1460, 1509–10 (2020) (noting how platforms might use the Takings Clause to resist government regulation of technologies protected by trade secrets); Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 541–42 (2018) (noting that companies might challenge regulations of content moderation as material interferences with property interests in violation of the Takings Clause).

5. *See, e.g.*, Packingham v. North Carolina, 582 U.S. 98, 109 (2017) (striking down restrictions on access to social media for registered sex offenders on First Amendment grounds); Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 611 (E.D. Pa. 2004) (upholding challenge to state statute requiring internet service providers (ISPs) to block access to websites displaying child pornography).

6. *See, e.g.*, Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023) (holding that members of school district board of trustees violated the First Amendment and state constitutional rights of parents by blocking parents from commenting on their public social media pages); Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022), *cert. granted*,

improperly influencing or coercing social media companies to regulate speech in ways the government prefers.[7] As I describe shortly, online speech regulation often features cooperation between government officials and digital companies, and governments are always trying to induce companies to help them solve governance problems.[8] Therefore, lawsuits challenging public-private cooperation or cooptation may be a strategy for challenging social media speech regulation.[9]

In short, social media reformers will seek to remove First Amendment judicial scrutiny only for a select set of issues and legal theories, not do away with First Amendment protections generally. And even though courts may de-constitutionalize some kinds of social media regulation, this may simply move constitutional reasoning outside the courts, allowing other branches of government to promote the values of free speech and a free press.[10]

Still other social and technological changes have contributed to the decentering of the First Amendment. The speed and scale of digital speech have transformed how speech is governed, regulated, and protected. Social media

143 S. Ct. 1780 (2023) (holding that city manager's deletion of a social media user's comments and blocking of the user did not constitute state action); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted*, *judgment vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (holding that president's social media account was a public forum and that blocking users based on political viewpoint violated the First Amendment).

7. *See, e.g.*, O'Handley v. Weber, 62 F.4th 1145 (9th Cir. 2022) (rejecting lawsuit brought by political commentator who had been suspended by Twitter and who asserted a conspiracy between Twitter and the California state government to censor plaintiff's speech); Missouri v. Biden, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La. 2023), *aff'd in part, rev'd in part sub nom* State v. Biden, 80 F.4th 641 (5th Cir. 2023) (granting preliminary injunction against communications between government actors and social media companies); *cert. granted sub nom.* Murthy v. Missouri, 2023 WL 6935337.

8. *See* text at notes 18–25 (describing new-school speech regulation in which governments attempt to induce digital companies to assist them in governance).

9. For a discussion of the free speech problems raised by government's "jawboning" digital companies to regulate in ways governments prefer, see Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015); Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning,"* LAWFARE (July 26, 2021, 3:52 PM), https://www.lawfaremedia.org/article/informal-government-coercion-and-problem-jawboning [https://perma.cc/Z5CG-6NMR]; *cf.* Daphne Keller, *When Platforms Do the State's Bidding, Who Is Accountable? Not the Government, Says Israel's Supreme Court*, LAWFARE (Feb. 7, 2022, 1:01 PM) https://www.lawfaremedia.org/article/when-platforms-do-states-bidding-who-accountable-not-government-says-israels-supreme-court [https://perma.cc/U7ME-N6JJ] (discussing the analogous problem in other countries).

10. *Cf.* FISHKIN & FORBATH, *supra* note 3 (arguing for a revival of constitutional thinking about political economy directed at the political branches); MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021) (arguing for protecting the values and institutions of a free press through policymaking by the political branches).

companies have developed an algorithmic-administrative system for governing speech that does not view speech in terms of rights. These changes in speech governance emerged in conjunction with a different way of thinking and reasoning about speech. In place of the civil liberties model of individual speech rights that developed in the twentieth century, the emerging model of thinking about speech is hygienic, epidemiological, environmental, and probabilistic (HEEP).

In addition, we are now well into what I have called the Algorithmic Society, a world in which more and more public and private decisionmaking and governance occurs through the use of algorithms, automated decision systems, artificial intelligence, and data science.[11] The Algorithmic Society transforms how people study, analyze, and think about expression. Speech becomes less the circulation of ideas and opinions among autonomous individuals and more a collection of measurable data and network connections that companies and governments can use to predict social behavior and nudge or influence end users. Conceived as a collection of data and network connections, speech is no longer special; it gets lumped together with other sources of measurable and analyzable data about human behavior. The speed and scale of online speech and the transformation of speech into data have put enormous pressure on the standard justifications for freedom of speech, including the pursuit of truth and the promotion of democracy.

Many scholars have argued that because of the many problems that social media create, courts should change basic First Amendment doctrines—for example, doctrines about incitement, defamation, and false speech. In fact, much of this doctrine still works fairly well in the digital age—with the important caveat that artificial intelligence may require some adjustments. But these rules are increasingly irrelevant to many aspects of online speech governance as well as to the health and vitality of the public sphere. I believe that it is far more important to focus on regulating the new forms of informational capitalism that have had enormous effects on free expression, culture, and politics—not only in the United States, but around the globe. The reform of First Amendment doctrines governing commercial speech, privacy, and telecommunications regulation is far more important to the task of taming informational capitalism.

11. Jack M. Balkin, *The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1219 (2017) (defining the Algorithmic Society as "a society organized around social and economic decision-making by algorithms, robots, and AI agents"); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1151 (2018) [hereinafter Balkin, *Free Speech in the Algorithmic Society*] ("[T]he Algorithmic Society . . . features large, multinational social media platforms that sit between traditional nation states and ordinary individuals, and the use of algorithms and artificial intelligence agents to govern populations.").

The digital age has also undermined many professions and institutions for knowledge production and dissemination. These professions and institutions are crucial to the health and vibrancy of the public sphere. Changing First Amendment doctrines will do little to fix them. Instead, the task of the next generation is to revivify, reestablish, and create professional and public-regarding institutions for knowledge production and dissemination that are appropriate to the digital age. That task will take many years to accomplish.

II. THE PLURALIST MODEL OF SPEECH REGULATION

In previous work I have argued the digital age created a pluralist model of speech regulation.[12] By pluralist, I mean that there are many speech regulators. For example, there is regulation by different governments around the world and by different owners of private infrastructure up and down the "tech stack."[13] The infrastructure companies comprising the tech stack collectively make digital communication possible. They include broadband and cellular providers, domain name companies, caching services, webhosting services, app stores, and platforms. States try to coerce or coopt these companies to regulate end-user speech; in addition, regulation by different governments—including the European Union—can affect how speech is regulated in other parts of the world.[14]

For simplicity, think of digital speech regulation as a triangle of relationships.[15] The first relationship is the familiar one between governments and private individuals or groups. This is *old-school speech regulation*.[16]

12. Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1153, 1186–91; Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2014–15 (2018) [hereinafter Balkin, *Free Speech Is a Triangle*].
13. Geoffrey A. Fowler & Chris Alcantara, *Gatekeepers: These Tech Firms Control What's Allowed Online*, WASH. POST (Mar. 24, 2021), https://www.washingtonpost.com/technology/2021/03/24/online-moderation-tech-stack [https://perma.cc/PKW4-GUG3] (describing how content moderation occurs up and down the various parts of the technology stack); Joan Donovan, *Navigating the Tech Stack: When, Where and How Should We Moderate Content?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 28, 2019), https://www.cigionline.org/articles/navigating-tech-stack-when-where-and-how-should-we-moderate-content [https://perma.cc/U3QX-J7VC] ("At every level of the tech stack, corporations are placed in positions to make value judgments regarding the legitimacy of content, including who should have access, and when and how.").
14. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1153, 1175, 1179–82; Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2015.
15. Balkin, *Free Speech Is a Triangle, supra* note 12, at 2014.
16. *Id.* at 2015.

Governments can abridge or threaten the freedom of speech through direct regulation of speech, using civil and criminal fines and penalties.[17]

The second relationship in the triangle is between governments and the owners and operators of the digital infrastructure through which people speak online.[18] Governments find it difficult to regulate online speech because there is so much of it. It comes from all over the world and much of it is anonymous. Therefore, governments attempt to surveil and regulate expression by regulating digital infrastructure owners in the different parts of the technology stack to get them to surveil and regulate speech in ways the state likes.[19] State regulation that aims at digital infrastructure owners to get them to regulate and surveil end-user speech according to the government's purposes is *new-school speech regulation*.[20]

In essence, in new-school speech regulation states try to coerce or to co-opt infrastructure owners to do governments' work for them. As digital companies have gotten more powerful over time, new-school speech regulation has gotten more elaborate. These days—especially in Europe—new-school speech regulation harnesses infrastructure owners—especially platform operators, search engines, and social media companies—to act as a sort of private bureaucracy of first resort that governments coerce or coopt to do their bidding.[21] A good example is the implementation of the European Union's right to be forgotten against search engines. The right to be forgotten assigns a privately owned company, Google, the administrative task of addressing complaints for delisting links and resolving most of them.[22] Germany's Network Enforcement Act (NetzDG) law and the new European Digital Services Act have even more elaborate versions of new-school speech regulation.[23]

17. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2340 (2014) [hereinafter Balkin, *Old-School/New-School Speech Regulation*].
18. Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2015.
19. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1175, 1179–82; Balkin, *Old-School/New-School Speech Regulation*, *supra* note 17, at 2298, 2324–29.
20. Balkin, *Old-School/New-School Speech Regulation*, *supra* note 17, at 2298.
21. *See* Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2030; *see also* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 29 (2019) ("[P]latforms are acting as regulators or bureaucracies—implementing the favored policy solutions of executive and legislative branch actors—on a global scale.").
22. Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1206–07; Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2029.
23. Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2030 (discussing NetzDG). The new European Digital Services Act includes, among other things, new takedown requirements for illegal content; a requirement to cooperate with "trusted flaggers" of illegal content; a requirement of mitigation against "risks such as disinformation or election manipulation,

Countries often engage in new-school speech regulation because they want platforms to take down or demote certain content, usually content that is independently unlawful. But populist politicians may seek to pass laws that prevent platforms from removing or demoting speech because they fear that social media companies will discriminate against their ideological supporters and political allies.[24] That is because they believe that the companies' values and community standards are politically hostile to the views of their supporters and allies. Recently both Texas and Florida passed social media laws motivated by these concerns.[25]

Because a handful of large global social media companies and platforms dominate online speech, one government's internet regulations can have ripple effects on freedom of speech in other jurisdictions.[26] The three most powerful players in regulating the internet—the three "empires" of internet regulation—are

cyber violence against women, or harms to minors online"; a requirement to create a "crisis response mechanism in cases of threats to public health and security crises"; and bans on the use of manipulative "dark patterns" by online platforms. *Questions and Answers: Digital Services Act*, EUR. COMM'N (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348 [https://perma.cc/2SFC-VY6R].

24. *See, e.g.*, Jack Nicas, *Brazil's President Bans Social Networks From Removing Some Posts*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/09/09/world/americas/bolsonaro-social-networks.html [https://perma.cc/8S48-MQKK] ("Brazil's new internet rules are the latest effort in a larger fight that conservatives are waging against Silicon Valley. Politicians and pundits on the right have argued that tech companies are censoring conservative voices, and increasingly they have pushed laws making it harder for social networks to remove posts or accounts from their sites.").

25. *See Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship*, OFF. OF THE TEX. GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship [https://perma.cc/3U57-3BDD] (quoting Governor Greg Abbott stating that "there is a dangerous movement by social media companies to silence conservative viewpoints and ideas"); News Release, Governor of Fla., Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech [https://perma.cc/HN24-YW3K] (quoting Governor Ron DeSantis's statement that "we took action to ensure that . . . real Floridians across the Sunshine State—are guaranteed protection against the Silicon Valley elites. . . . If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable"). The two statutes were challenged in the two *Netchoice* cases, Netchoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted* 2023 WL 6319650 and Netchoice, L.L.C. v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022), *cert. granted sub nom.* Moody v. NetChoice, 2023 WL 6319654, discussed *infra* text at notes 92–100.

26. *See* Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2030–32; DAPHNE KELLER, HOOVER INST., AEGIS SERIES PAPER NO. 1902, WHO DO YOU SUE? STATE AND PLATFORM HYBRID POWER OVER ONLINE SPEECH 7 (2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [https://perma.cc/2KE7-6JUW].

the United States, China, and the European Union.[27] China has mostly focused on controlling the speech of its own people and exerting influence globally through Chinese companies that produce hardware and software.[28] The United States, which has no comprehensive digital privacy law, and relatively little digital speech regulation, exerts influence over digital speech because most of the biggest tech companies are American and promote American values. Of the three, the European Union has developed the most elaborate rules for regulating speech and protecting consumer privacy. It extends its influence in two ways. First, global companies find it too expensive to develop practices solely for the European Union so their compliance with E.U. regulations affects digital communication globally.[29] Second, other countries adopt various ideas from European Union and member state regulations—for example, from the European Union's General Data Protection Regulation (GDPR) and Germany's NetzDG.[30] All three internet empires—and many other nations as well—engage in digital surveillance of their populations and of other countries to the extent they can.

The third set of relationships in the free speech triangle is between the owners and operators of privately-owned digital infrastructure and the people and organizations who speak online.[31] Because so much speech occurs online these days, infrastructure companies up and down the technology stack—for example, telecommunications companies, domain name companies, caching and defense companies, platform companies, web serving and storage companies, and social media companies—can regulate or limit speech by end users. This phenomenon is *private governance*, and it has grown rapidly in the past two decades.[32]

27. *See generally* ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY (2023) (explaining the global influence of the most powerful players in internet regulation: the United States, China, and the European Union).
28. Danielle Cave, Samantha Hoffman, Alex Joske, Fergus Ryan & Elise Thomas, *Mapping China's Tech Giants*, AUSTL. STRATEGIC POL'Y INST. (Apr. 18, 2019), https://www.aspi.org.au/report/mapping-chinas-tech-giants [https://perma.cc/G6Q2-BC8R].
29. *See* Alex Engler, *The EU AI Act Will Have Global Impact, but a Limited Brussels Effect*, BROOKINGS INST. (June 8, 2022), https://www.brookings.edu/research/the-eu-ai-act-will-have-global-impact-but-a-limited-brussels-effect [https://perma.cc/C6JH-9SMY] (describing both de facto and de jure versions of the Brussels effect by which E.U. regulations influence the world).
30. *See* Aline Blankertz & Julian Jaursch, *How the EU Plans to Rewrite the Rules for the Internet*, BROOKINGS INST. (Oct. 21, 2020), https://www.brookings.edu/techstream/how-the-eu-plans-to-rewrite-the-rules-for-the-internet [https://perma.cc/5NMN-K7R2] (noting how other nations have copied E.U. privacy regulations).
31. Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2015.
32. *Id.* at 2021.

Content moderation and recommendation systems by social media companies and other platforms are central examples of private governance. Over time the largest digital companies have developed very elaborate bureaucracies and technical infrastructure for governing speech on their platforms.[33]

In addition, some companies lower down in the tech stack often have rules that govern platforms and applications that use their services. For example, Apple can refuse to allow a social media company to offer its app on the App Store if the company lacks what Apple considers an appropriate content moderation and safety scheme.[34] Amazon Web Services can refuse to host applications that fail to meet its rules, and so on.[35]

In the pluralist system of speech regulation, digital media companies enjoy enormous power, and promulgate and enforce rules and norms. Even though they surveil and govern their end users, they are not the same as territorial governments. Territorial governments, in turn, continually try to coerce or coopt the largest digital companies into doing their bidding, offering a mixture of cooperation, incentives, and threats.[36]

There are few modern analogies for this pluralist system of power. In my courses I have often compared it to the political system of Christendom in the European Middle Ages. There were many different kingdoms and principalities who held or asserted political power in Europe, but the Catholic Church claimed a different kind of authority—spiritual authority—over all of these rulers and their

33. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635–48 (2018) (describing bureaucracies at Facebook, YouTube, and Twitter).

34. *See App Store Review Guidelines: 1.2 User-Generated Content*, APPLE DEVELOPER (June 5, 2023), https://developer.apple.com/app-store/review/guidelines [https://perma.cc/56EW-T2U2] (specifying requirements of content moderation for apps that can be made available on the Apple App Store); *Restricted Content Policy: User-Generated Content*, AMAZON APP STORE (Nov. 17, 2021), https://developer.amazon.com/docs/policy-center/restricted-content.html [https://perma.cc/2MPU-DYS9] ("[A]pps that include or link to user-generated content must include a method for filtering objectionable content, an age verification system, and a mechanism to report and remove offensive content.").

35. *See AWS Acceptable Use Policy*, AMAZON WEB SERVS. (July 1, 2021), https://aws.amazon.com/aup [https://perma.cc/5NF2-DA9N] (listing content restrictions for use of AWS services).

36. *See* Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2019–21; KELLER, *supra* note 26, at 3–7; Derek Bambauer, *Against Jawboning*, *supra* note 9, at 56–59; Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning,"* LAWFARE (July 26, 2021, 3:52 PM), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning [https://perma.cc/Z8SJ-KV86].

subjects.[37] There were constant struggles for power and influence between medieval popes and individual Christian rulers, as well as the Holy Roman Emperors. Just as the popes tried to coerce and influence Christian rulers with varying degrees of success, Christian rulers tried to inveigle and coerce the popes to support their interests and causes.[38] According to this analogy between the pluralist model and Medieval Christendom, Mark Zuckerberg, the CEO of Meta, is a sort of modern-day equivalent of Pope Innocent III, who claimed the Church's authority over the entire world.[39]

III. HOW THE PLURALIST MODEL DECENTERS THE FIRST AMENDMENT

The pluralist model has important consequences for the U.S. First Amendment. Some of these consequences arise from the global nature of speech. Others come from the legal incentives that the free speech triangle creates.

The U.S. First Amendment does not apply to other countries. To the extent that the European Union or China adopts policies that affect the behavior of global digital companies, their regulations can either promote or hinder freedom of speech for end users, both outside and inside the United States.

First, if European regulators require social media companies to change their content moderation and recommendations systems—or if companies alter them in anticipation of auditing or transparency requirements—this may have effects outside of Europe. Social media companies may find it too expensive or difficult to create content moderation and recommendation systems that apply only to the

37. *See generally* BRETT EDWARD WHALEN, THE MEDIEVAL PAPACY (2013) (explaining how the Papacy asserted spiritual power over European rulers and competed with them financially and militarily).

38. *See generally* COLIN MORRIS, THE PAPAL MONARCHY: THE WESTERN CHURCH FROM 1050 TO 1250 (1989) (describing political conflicts between the Pope and the Holy Roman Emperors).

39. *See* Letter of Pope Innocent III, *Sicut Universitatis Conditor* (Nov. 3, 1198), *available at* https://clc-library-org-docs.angelfire.com/sicut.html [https://perma.cc/NQG9-9S4L]. According to Pope Innocent III:

> Just as God, founder of the universe, has constituted two large luminaries in the firmament of Heaven, a major one to dominate the day and a minor one to dominate the night, so he has established in the firmament of the Universal Church, which is signified by the name of Heaven, two great dignities, a major one to preside—so to speak—over the days of the souls, and a minor one to preside over the nights of the bodies. They are the Pontifical authority and the royal power.

Id.

European Union. Then these regulations will affect speech by Americans as well.[40]

Second, the four largest digital companies have entered into an agreement with European regulators that requires takedowns of speech that is clearly illegal in European countries (but not necessarily in the United States) within twenty-four hours.[41] Unless the companies segregate content moderation in Europe from that in the rest of the world, the takedowns will affect audiences outside of Europe as well. Even if these speech regulations go beyond what American regulators could require, the First Amendment will not prevent the regulations.

Finally, both territorial governments and civil society groups look for speech that violates social media companies' community standards and terms of service and request that companies remove it.[42] These takedowns can affect both speakers and audiences in the United States, even if the expression would be protected by the First Amendment.

In addition to these geopolitical effects, the pluralist model creates legal incentives within the United States that decenter the First Amendment.

IV. HOW THE PLURALIST SYSTEM OF SPEECH REGULATION DE-CONSTITUTIONALIZES FREE SPEECH CONFLICTS

The free speech triangle perpetually generates free speech conflicts between speakers and owners of digital infrastructure, and especially between speakers and platforms like Facebook, YouTube, and Twitter. Both sides of the conflict will

40. *See, e.g.*, Jared Schroeder, *Meet the EU Law That Could Reshape Online Speech in the U.S.*, SLATE (Oct. 27, 2022, 12:07 PM), https://slate.com/technology/2022/10/digital-services-act-european-union-content-moderation.html [https://perma.cc/JPY4-PQRL] ("The [Digital Services Act], while written to protect EU residents, will almost certainly lead social media firms to change their moderation policies worldwide.").

41. *See The Code of Conduct on Countering Illegal Hate Speech Online*, EUR. COMM'N (June 22, 2020), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1135 [https://perma.cc/AA8A-UE3Z] (announcing a code of conduct adopted by Facebook, Microsoft, Twitter, and YouTube in which "[t]he companies commit to reviewing the majority of these requests [for removal of illegal content] in less than 24 hours and to removing the content if necessary, while respecting the fundamental principle of freedom of speech").

42. Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1038 (2018); Daphne Keller, *When Platforms Do the State's Bidding, Who Is Accountable? Not the Government, Says Israel's Supreme Court*, LAWFARE (Feb. 7, 2022, 1:01 PM), https://www.lawfareblog.com/when-platforms-do-states-bidding-who-accountable-not-government-says-israels-supreme-court [https://perma.cc/7PPL-8F2X] ("Around the world, law enforcement bodies known as Internet Referral Units (or IRUs) are asking platforms like Facebook to delete posts, videos, photos and comments posted by their users. Platforms are complying, citing their own discretionary terms of service as the basis for their actions.").

claim that that the political values and rights of free speech are on their side. But because of features of U.S. constitutional doctrine, when the free speech claims of end users and digital companies conflict, courts are likely to assign First Amendment rights to digital companies and not to end users.

Even as courts deny end users First Amendment rights against digital companies, digital companies will repeatedly employ the First Amendment to defend against regulation. In response, social media reformers on both the left and the right will attempt to neutralize the First Amendment claims of digital companies. They will try to devise legal theories that convert conflicts over speech rights into non-constitutional questions of statutory or administrative law or questions of technological design. That is, reformers will try to *de-constitutionalize* online speech controversies, making them about something other than judicially-enforced First Amendment rights.

A. The Digital Age Proliferates Speech Conflicts

The problem of conflicting speech rights is not new to the digital age.[43] Conflicts between speakers and owners of mass media existed in the twentieth century. These conflicts produced calls for rights of access to mass media.[44] There are two important differences, however, between the era of mass media and the digital era.

First, mass media companies like newspapers and television stations did not make their services generally available for the public to print or broadcast their own content. Instead, mass media companies published their own content and that of their contractual partners. In contrast, digital media rely primarily on user-generated content to attract audiences and sell advertising.

Second, during the twentieth century, scarcity of time, space, and resources meant that not everyone could have access to speak through mass media like newspapers, motion picture studios, and broadcast stations. Advocates of media access rights therefore had to limit their potential remedies to access for political candidates or representatives of the community.[45] But digital media solved the scarcity problem. Because digital business models depended on user-generated

43. *See generally*, Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933 (2008) (describing the problem in the age of newspapers and broadcast media).

44. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1667–78 (1967) (arguing for judicial remedy of media access against large privately-owned broadcasters and newspapers).

45. *See id.* at 1667–68, 1677–78 (proposing a judicial remedy that would give representatives of significant groups in the community a limited opportunity to have their voices heard in newspapers, radio, and television stations).

content, they created the presumption that everyone could and should have access to digital media to speak. As a result, being kicked off of Twitter or losing your YouTube channel has a very different social meaning than having your letter to the editor rejected by a twentieth-century newspaper.

In this way, digital technologies, which created the pluralist system of speech governance, made conflicts between privately-owned infrastructure companies and speakers newly salient, urgent, and important. As I have argued elsewhere, in understanding new technologies, the central question is not what is novel, for we can almost always find analogies in the past. The question is what technological change makes newly salient.[46] The pluralist model of speech regulation has made conflicting free speech claims routine and therefore central to the free speech jurisprudence of the digital age.

It is important to recognize that the free speech interests of digital companies and end users are not always in conflict. For example, in old-school speech regulation, states try to regulate online speakers directly. *Packingham v. North Carolina*,[47] which struck down a state law limiting access to social media, is a good example.[48] In these cases, courts will continue to protect the First Amendment rights of speakers as well as platforms.

A second case is new-school speech regulation that involves government coercion of platforms, or that alters or withdraws intermediary immunity. Here, governments threaten platform owners with criminal or civil liability—or other undesirable consequences—unless platform owners moderate or remove end user content. In cases challenging intermediary liability—or withdrawals of intermediary immunity—courts have allowed both speakers and platforms to claim First Amendment rights.[49]

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46. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2–3 (2004) [hereinafter Balkin, *Digital Speech and Democratic Culture*] ("Instead of focusing on novelty, we should focus on salience. What elements of the social world does a new technology make particularly salient that went relatively unnoticed before? What features of human activity or of the human condition does a technological change foreground, emphasize, or problematize? And what are the consequences for human freedom of making this aspect more important, more pervasive, or more central than it was before?").
47. 582 U.S. 98 (2017).
48. *Id.* at 109.
49. *See, e.g.*, Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (individual speakers had standing to raise challenge to modifications to Section 230 intermediary immunity rules); Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 611 (E.D. Pa. 2004) (upholding individual speakers' First Amendment challenge to a Pennsylvania state statute requiring ISPs to block access to websites displaying child pornography). In cases challenging government jawboning, the plaintiffs assert that government unfairly or

The third case, which is the most interesting, involves conflicting free speech claims by platforms and speakers—for example, when platforms assert the right to curate, demote, or remove end-user content. Here the free speech interests of platforms and speakers are not aligned, as they are in the case of intermediary liability.

To be sure, some speakers may support the rights of digital platforms to moderate content. They may believe that platforms will not be safe places for them to express themselves unless the platforms police other speakers who harass or threaten them. So, these end users will not see a conflict between their practical ability to speak and platforms' power to impose civility norms and remove harmful speech. Instead, the free speech conflict between speakers and platforms arises when speakers object to the ways that platforms regulate speech, for example, because they believe that platforms are ideologically biased against them, or they disagree with the way that platforms develop and enforce their community standards and terms of service.

B. U.S. Constitutional Law Does a Poor Job of Accommodating Conflicting Free Speech Rights

In general, U.S. free speech doctrine has a difficult time dealing with the conflicting speech rights of private parties. By contrast, courts in Europe and in other parts of the world sometimes apply constitutional norms to privately-owned companies under the doctrine of "horizontal effect."[50]

illegitimately coerces social media platforms. *See, e.g.*, Missouri v. Biden, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La.), *aff'd in part, rev'd in part sub nom* State v. Biden, 80 F.4th 641 (5th Cir. 2023) (granting preliminary injunction against communications between government actors and social media companies), *cert. granted sub nom.* Murthy v. Missouri, 2023 WL 6935337. This assumes that the companies would act differently but for the government's influence. If, however, the companies would still have removed or demoted the content without the government's intervention, there is a conflict between the speech claims of end users and digital companies.

50. *See* András Koltay, *The Protection of Freedom of Expression From Social Media Platforms*, 73 MERCER L. REV. 523, 564–67 (2022) (describing how German law applies free speech norms horizontally to social media companies); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003) ("In recent years, the horizontal position has been adopted to varying degrees, and after systematic scholarly and judicial debate, in Ireland, Canada, Germany, South Africa, and the European Union, among others."); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 92 (2003) ("[I]f horizontality is understood as a response to the threat to liberty posed by concentrated private power, the solution is to require that all private actors conform to the norms applicable to governmental actors."); *see also* Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks:*

U.S. courts experimented with analogous ideas in the middle of the twentieth century, but soon abandoned the idea. In 1946, in *Marsh v. Alabama*,[51] the U.S. Supreme Court held that leafleters had First Amendment rights to distribute literature in a privately-owned company town.[52] Although the Warren Court experimented with applying the First Amendment to shopping malls,[53] the Burger Court soon ended the experiment and rejected rights of access to broadcasting networks,[54] to private property,[55] and even to mailers from public utility companies.[56] As a result, *Marsh v. Alabama* was essentially confined to its facts.[57] Nevertheless, some state courts have applied the free speech provisions of their state constitutions to give people a right of access to protest at shopping malls.[58] The U.S. Supreme Court, in turn, has held that, under certain circumstances, these state rights of access do not violate the federal First Amendment rights of mall owners, because access rights do not compel the mall owners to speak or violate their editorial rights.[59]

This example shows how federal courts tend to deal with conflicting claims of speech rights. Generally speaking, federal courts do not apply the First Amendment horizontally against private parties or treat First Amendment rights

A Bottom Up Check on Content Moderation, 107 IOWA L. REV. 987, 1013–14 (2022) (noting that American courts have so far refused to give horizontal effect to First Amendment rights against privately owned social media companies); Giovanni De Gregorio, *From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society*, 11 EUR. J. LEGAL STUD. 65, 101 (2019) (arguing for horizontal effect of constitutional norms against privately owned platforms because they exercise public functions); Gunther Teubner, *Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution* 3 ITALIAN L.J. 193, 198–201 (2017) (arguing for horizontal effect of constitutional rights but emphasizing their collective nature).

51. 326 U.S. 501 (1946).
52. *Id.* at 509.
53. Amalgamated Food Emps. Union Loc. v. Logan Valley Plaza, Inc., 391 U.S. 308, 317 (1968) (holding that a private shopping mall could not prevent individuals from peacefully picketing on the premises).
54. Columbia Broad. Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973).
55. Hudgens v. NLRB, 424 U.S. 507, 520 (1976).
56. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1 (1986) (plurality opinion).
57. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (holding that *Marsh* applies only "in the exercise by a private entity of powers traditionally exclusively reserved to the State").
58. *See* Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 549–59 (2004) (collecting state cases granting free speech rights against shopping malls); Elijah O'Kelley, *State Constitutions as a Check on the New Governors: Using State Free Speech Clauses to Protect Social Media Users From Arbitrary Political Censorship by Social Media Platforms*, 69 EMORY L.J. 111, 127–40 (2019) (collecting state cases allowing free speech rights against private property owners).
59. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85–89 (1980).

as constitutional rights that might be enjoyed equally by private parties in conflict and balanced accordingly.[60] Rather, only one party enjoys First Amendment rights—or neither does. As a result, if platforms and end users both claim free speech rights, federal courts are likely to assign First Amendment rights to only one of them. And if that happens, the most likely candidate will be digital companies. That may be problematic in the long run, because it means that the business agenda of digital companies, and not the rights and interests of many different kinds of individual speakers, will shape the development of First Amendment doctrine on the internet.

Under current doctrine, the First Amendment appears to protect digital companies when they decide what end user speech to take down, keep up, recommend, or demote, but it does not protect end users when digital companies regulate their speech.[61] Therefore, when the rights of digital companies and end users conflict, companies will have several arguments for resolving the conflict in their favor. First, digital companies will argue that their content moderation decisions and their recommendation systems are protected by the First Amendment.[62] Second, companies will argue that state interference with content moderation and recommendation systems unconstitutionally violate their editorial rights or compel speech or association.[63] (In addition companies also enjoy statutory immunity under Section 230(c)(1) and (c)(2) of the 1996 Telecommunications Act.[64]) In essence, digital companies are free to employ content moderation and recommendation rules that would violate the First Amendment if state and local governments imposed them.[65]

60. Former Justice Stephen Breyer was one of the few recent Justices to explicitly consider balancing conflicting free speech interests. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 226–28 (1997) (Breyer, J., concurring in part); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 743–47 (1996) (plurality opinion).

61. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (upholding cable company's right to refuse access to speakers because a "private entity is not ordinarily constrained by the First Amendment"); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (upholding search engine's right to selectively block or remove links and noting that "the First Amendment's protections apply whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place"); *cf.* Reno v. ACLU, 521 U.S. 844 (1997) (striking down regulation of website operators).

62. *See Zhang*, 10 F. Supp. 3d at 437.

63. *See* NetChoice, L.L.C. v. Att'y Gen., Fla., 34 F.4th 1196, 1210–13 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995)); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Mia. Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)).

64. 47 U.S.C. § 230 (2012).

65. *See* KELLER, *supra* note 26, at 15–16.

C. Social Media as State Actors?

One way of avoiding this result is to argue that the largest social media companies have such enormous power over the practical ability to speak that courts should consider them state actors and treat social media as public forums akin to municipal streets and parks[66] or limited public forums like public school classrooms available for use by student groups.[67]

The standard argument against treating social media companies like state actors is that content moderation is a central feature of social media.[68] If social media companies were state actors, then under current First Amendment doctrines they would be unable to curate, remove, or demote a wide range of content that is protected by the First Amendment but that is highly undesirable to most end users and makes social media unattractive and in some cases unusable.[69] Examples include spam, terrorist recruitment, non-obscene pornography and nudity, speech that abuses people or denigrates them on the basis of religion, race, ethnicity, sex, or sexual orientation, speech that creates a risk of violence or self-harm, and so on. Daphne Keller calls this category "lawful but awful speech."[70]

Moreover, many social media applications—and many other digital applications as well—construct feeds of content for end users. Because these systems discriminate by speaker, audience, content, and viewpoint, they might also run afoul of current First Amendment doctrine if social media companies were treated as state actors.

One might try to address the "lawful but awful" problem by treating social media as nonpublic forums. In nonpublic forums, states may reserve their property for communicative uses for select groups of speakers and can make reasonable content and speaker-based regulations of speech as long as they are

66. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678–89 (1992); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).
67. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Widmar v. Vincent, 454 U.S. 263, 267–68 (1981).
68. *See* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 5–7 (2018).
69. *See* Daphne Keller, *Lawful but Awful? Control Over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. BLOG (June 28, 2022), https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech [https://perma.cc/ZH9K-CCFM]; Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2026–27.
70. Keller, *supra* note 69.

viewpoint neutral.[71] Hence, if social media companies were nonpublic forums, they might be able to impose basic civility rules on end users.

There are two problems with this approach, however. First, as their name implies, nonpublic forums are those not intended or designed for conversations by the general public,[72] but that is precisely the point of many social media applications.[73] Second, much content moderation is not only content-based but also viewpoint-based. Examples include social media decisions to remove or not recommend (1) false speech, (2) conspiracy theories, (3) speech that undermines public health, (4) speech that recruits people to terrorism, (5) speech that promotes racism, and (6) speech that advocates discrimination against people because of their race, ethnicity, religion, sex, or sexual orientation, but not on other grounds.[74] For similar reasons, social media might also not be able to construct feeds to recommend content to end users because such recommendations might discriminate on the basis of viewpoint as well as subject matter, speaker, and listener.

In the United States at least, trying to make social media companies state actors is unlikely to be the best way to impose public-regarding obligations on powerful digital actors. Instead, reformers will likely pursue strategies of de-

71. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.") (citing Perry Educ. Ass'n v. Perry Loc. Educs.' Ass'n, 460 U.S. 37, 49 (1983)). *See* Lyrissa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 PUB. LAW. 2 (2011) (applying the Court's jurisprudence to social media).

72. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015) (in a "'nonpublic for[um]', . . . 'the government is . . . a proprietor, managing its internal operations'") (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 1992)); *Cornelius*, 473 U.S. at 802–05 (arguing that the key element of traditional or designated public forum is general access to the public for exchanges of ideas, as opposed to nonpublic fora, where government may require permission before access is granted); *Perry*, 460 U.S. at 46 (explaining that a nonpublic forum "is not by tradition or designation a forum for public communication . . . ").

73. Private or encrypted messaging systems might seem the obvious exception, but messages can spread to large numbers of people, including strangers. *See* Saher Kahn & Vignesh Ramachrandran, *Millions Depend on Private Messaging Apps to Keep in Touch. They're Ripe With Misinformation*, PBS NEWSHOUR (Nov. 5, 2021, 8:22 AM) https://www.pbs.org/newshour/world/millions-depend-on-private-messaging-apps-to-keep-in-touch-theyre-ripe-with-misinformation [https://perma.cc/Z6PT-JCKG].

74. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 3 (1992) (striking down as viewpoint-based city ordinance prohibiting the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

constitutionalization. As I'll now explain, de-constitutionalization, not constitutionalization, is the most likely path for imposing public duties and responsibilities on global digital companies that structure public discourse and perform important public functions.

D. Conflicting Free Speech Claims Create Incentives for De-constitutionalization

So far, we have seen that the pluralist system of speech regulation perpetually creates conflicts between the free speech interests of end users and digital companies, and that current First Amendment doctrine is very likely to protect digital companies' free speech rights at the expense of end users.

This state of affairs generates enormous pressure to find ways to hold digital companies responsible for their content moderation and recommendation systems. This pressure comes from both the left and the right sides of the American political spectrum. Conservatives believe that large social media platforms unfairly discriminate against conservative voices in the name of progressive or "woke" values.[75] Progressives argue that companies' selective and arbitrary content moderation decisions and recommendation algorithms impose significant social harms, incite violence, threaten public health, and undermine democracy.[76]

What unites both sides is that they believe that social media companies perform important public functions and do not want social media companies to remain unaccountable to the public. This creates a powerful incentive on both the left and the right to find ways to argue that the First Amendment does not protect digital companies from state regulation of their content moderation and recommendation systems, even though progressives' and conservatives' respective values may push for different—and even conflicting—kinds of

75. *See*, *e.g.*, News Release, Governor of Fla., Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech [https://perma.cc/HN24-YW3K]; *see also* Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 307–08 (2021) (contrasting the policy goals of Republicans and Democrats); *The Speech Police Are Coming for Social Media*, ECONOMIST (May 29, 2023), https://www.economist.com/international/2023/05/29/the-speech-police-are-coming-for-social-media [https://perma.cc/U2R6-9GL5] ("Democrats, who accuse tech billionaires of stoking rage and misinformation for clicks, want platforms to remove more content. Republicans, who think woke California busybodies are gagging conservatives, want them to remove less.").

76. *E.g.*, SIVA VAIDHYANATHAN, ANTI-SOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY (2018).

regulations. Conservatives may aim at preventing ideological discrimination and arbitrary takedowns and demotions of content. Progressives may aim at imposing responsibility for harmful content, whether caused by profit-driven recommendation systems or failures of content moderation. In either case, the goal is to neutralize the companies' potential First Amendment defenses.

Both groups of reformers seek to limit platform companies' First Amendment rights and resolve conflicts over online free speech through statutory and administrative regulation. In other words, the free speech triangle creates incentives for reformers on both the left and the right to de-constitutionalize fights over digital speech and argue for judicial restraint. The convergence on this issue is remarkable, especially if we compare the case of social media regulation with debates over campaign finance reform and commercial speech, where the left generally argues for de-constitutionalization and the right argues for strong First Amendment protections.

To be sure, this convergence of views about tech giants does not include the digital companies themselves. Although the pluralist system will push reformers toward the de-constitutionalization of online free speech rights, it will also push digital companies toward relying on the First Amendment as a powerful defense against regulation. Even so, digital companies will also try to respond to lawsuits—and state regulation—by relying on federal statutory protections, like Section 230's intermediary immunity. In fact, companies may prefer Section 230 as a first line of defense rather than relying solely on the First Amendment. As Eric Goldman has pointed out, in many respects Section 230 provides greater protection for digital companies than the First Amendment itself.[77]

E. Theories of De-constitutionalization

Possible theories for de-constitutionalizing free speech conflicts between platforms and end users include:

(1) treating social media as common carriers or as public utilities (with nondiscrimination obligations);

(2) treating social media as public accommodations;

(3) imposing must-carry obligations on platforms analogous to the rules governing cable companies; and

77. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019).

(4) treating social media companies as businesses with public interest obligations by analogy to radio and television broadcasters.

Recently Justice Clarence Thomas has suggested that large social media companies might be treated as common carriers or as public accommodations.[78] Common-carriers are usually regulated by statute; once recognized as such by law, they surrender some of their First Amendment rights to discriminate among speakers on the basis of content.[79] Generally, public accommodations statutes prevent discrimination based on the identity of a customer or user.[80] In the case of social media, statutory protection would expand to preventing discrimination based on content or viewpoint.[81]

Common carriage and public accommodations approaches face a few problems. First, it is unclear to what extent common carriers or public accommodations may act against the category of "lawful but awful speech." When a passenger on a common carrier threatens or disturbs other passengers, the proprietor may eject them; similarly, the owner of a public accommodation may withhold service to a customer who refuses to behave with civility toward others.[82]

78. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

79. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) ("A common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'") (footnote omitted); *but see* Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181948 [https://perma.cc/TB3A-VLUB] (arguing that there is no general concept of common carriage and that the doctrine does not provide the clear nondiscrimination rules for internet platforms that many advocates seek); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021) (arguing that common carriers retain some First Amendment rights).

80. *E.g.*, Civil Rights Act of 1964, 42 U.S.C.A § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."); *cf* Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. at 1223–27 (2021) (Thomas, J., concurring) (noting that public accommodations laws limit the right to exclude customers).

81. *See* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation*, 15 N.Y.U. J.L. & LIBERTY 490 (2022) (collecting examples of state and local laws that ban discrimination on the basis of political expression or affiliation).

82. *See* Verizon v. FCC, 740 F.3d 623, 657 (D.C. Cir. 2014) ("Railroads have no obligation to allow passengers to carry bombs on board, nor need they permit passengers to stand in the aisles if all seats are taken. It is for this reason that the Communications Act bars common carriers from engaging in '*unjust or unreasonable* discrimination,' not all discrimination.") (emphasis in the original) (citing 47 U.S.C. § 202); Korn v. Chesapeake & O. Ry. Co., 125 F. 897, 900 (6th Cir. 1903) ("[T]he conductor is responsible for his train, and it is not only his right, but may be

The difficulty is how to tell the difference between enforcing norms against disturbing or offending others and discriminating on the basis of a speaker's content or viewpoint.

The second problem is that many social media applications create feeds for end users; these feeds are central to the end-user experience on the application. If common carriers had no right to discriminate against content, they might not be able to recommend anything and only provide end users with content by speakers they subscribed to in chronological or reverse-chronological order.

In response to these problems, Eugene Volokh has offered a more modest proposal that draws on analogies to common carriage regimes, cable must-carry rules, and public accommodations law.[83] He argues that a common carriage regime would only require social media companies to keep posts and speakers on their sites.[84] It would then be up to end users to search for content and speakers they wanted and to create their own feeds.[85] At the same time, Volokh argues that social media companies should retain First Amendment rights to selectively recommend content to others.[86] His solution will probably not be enough to please many conservative reformers because, as Daphne Keller explains, "it doesn't restore speech to places where most platform users will actually see it."[87]

Nevertheless, a common carriage model would create space for a complete transformation of social media business models. End users could subscribe to "middleware" companies that would perform content moderation, offer recommendations, and organize feeds.[88] This would help solve the "lawful but

his duty, to eject a trespasser or a drunken and disorderly passenger."); *Innkeeper's Right to Exclude or Eject Guests*, 7 FORDHAM L. REV. 417, 433–34 (1938) (explaining that at common law, innkeepers had the right to refuse service to disruptive or disorderly guests and could impose reasonable regulations of conduct on patrons).

83. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 383–84 (2021).
84. *See id.* at 382.
85. *See id.*
86. *Id.* at 451–52.
87. Keller, *supra* note 69.
88. *See* Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech [https://perma.cc/8KX8-U5N9]; FRANCIS FUKUYAMA, BARAK RICHMAN, ASHISH GOEL, ROBERTA R. KATZ, A. DOUGLAS MELAMED & MARIETJE SCHAAKE, STAN. CYBER POL'Y CTR., MIDDLEWARE FOR DOMINANT DIGITAL PLATFORMS: A TECHNOLOGICAL SOLUTION TO A THREAT TO DEMOCRACY 5–6 (2020), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-middleware_ff_v2.pdf [https://perma.cc/T6TN-R33S]; Daphne Keller, *If Lawmakers Don't Like Platforms' Speech Rules, Here's What They Can Do About It. Spoiler: The Options Aren't Great*, TECHDIRT (Sept. 9, 2020, 12:00 PM), https://www.techdirt.com/2020/09/09/if-lawmakers-dont-like-

awful problem" because middleware companies would have First Amendment rights to discriminate in their content moderation and recommendation systems and end users would have First Amendment rights to choose among middleware companies.

A common carriage plus middleware approach would involve some degree of de-constitutionalization. Legislatures must have the power to transform current social media business models that are premised on selection and curation of content in order to engage audiences and attract advertising revenues.[89] Legislatures must also have the power to require social media companies to open their systems for middleware companies.[90] Interestingly, conservatives have opposed common carriage ideas at the broadband level. They have argued that network neutrality rules are unconstitutional because broadband companies have a First Amendment right to select and prioritize the content that flows through their channels, and that the U.S. Congress may not prevent broadband companies from adopting future business models that prioritize content.[91]

The Texas and Florida statutes at issue in *Netchoice v. Paxton*[92] and *Netchoice v. Attorney General, Florida*[93] also attempt to protect end user free

platforms-speech-rules-heres-what-they-can-do-about-it-spoiler-options-arent-great [https://perma.cc/KV79-BXMA]; *cf.* Cory Doctorow, *Adversarial Interoperability: Reviving an Elegant Weapon From a More Civilized Age to Slay Today's Monopolies*, ELEC. FRONTIER FOUND. (June 7, 2019), https://www.eff.org/deeplinks/2019/06/adversarial-interoperability-reviving-elegant-weapon-more-civilized-age-slay [https://perma.cc/5JAF-A6J2]; Michael J. Coren, *Facebook Needs to Hand Over Its Algorithm if It Really Wants to End Fake News*, QUARTZ (Dec. 6, 2016), https://qz.com/847640/facebook-needs-to-hand-over-its-algorithm-if-it-really-wants-to-end-fake-news [https://perma.cc/47L2-V36P] ("Facebook should allow anyone to write an algorithm to populate someone's feed.") (quoting Jonathan Zittrain (@zittrain), TWITTER (Nov. 15, 2016, 10:42 AM), https://twitter.com/zittrain/status/798597027449815041 [https://perma.cc/X3A7-CA7L]).

89. For an argument about when altering business models is consistent with current First Amendment problems, see Volokh, *supra* note 83, at 435–37.

90. In the early days of the internet, the U.S. Federal Communications Commission (FCC) treated broadband cable and digital subscriber line (DSL) providers as telecommunications services and required them to open up their facilities to ISPs. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975–76, 1000 (2005). The FCC eventually reclassified DSL providers as information services, relieving them of the duty to provide access, and the U.S. Supreme Court upheld the FCC's decision to reclassify cable providers as information services in *Brand X*. *Id.* at 1000; *see* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383–85 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing en banc) (explaining the FCC's changing positions).

91. *See U.S. Telecom Ass'n*, 855 F.3d at 418, 426–31 (Kavanaugh, J., dissenting from denial of rehearing en banc) (arguing that network neutrality rules violate the First Amendment because broadband providers may decide to start discriminating on the basis of content).

92. 49 F.4th 439 (5th Cir. 2022), *cert. granted* 2023 WL 6319650.

93. 34 F.4th 1196 (11th Cir. 2022), *cert. granted sub nom.* Moody v. NetChoice, 2023 WL 6319654.

speech rights through de-constitutionalization. They are not pure common carriage regimes, because they allow companies to discriminate against some content or require that certain speakers and content be specially protected.[94] Texas's statute allows social media companies to remove content in response to requests by "an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment"[95] as well as expression that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge."[96] Florida's statute prevents social media companies from censoring or demoting content "by or about" a political candidate.[97] In addition, social media companies may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."[98] These various exceptions don't fit all that well into common carriage models, and make it difficult for the statutes to survive traditional First Amendment scrutiny.

The Fifth Circuit upheld the Texas law in *Netchoice v. Paxton*, but it interpreted the Constitution in ways that will probably seem strange to many First Amendment scholars. The court acknowledged that both sides were making free speech claims but resolved the conflict in favor of end users.[99] In doing so, it recast the platform's content moderation activities not as an exercise of constitutionally protected freedom of speech but rather as a form of private censorship: "We reject the Platforms' efforts to reframe their censorship as speech. It is undisputed that the Platforms want to eliminate speech—not promote or protect it. And no amount of doctrinal gymnastics can turn the First Amendment's protections for free speech into protections for free censoring."[100] In other words, the Fifth Circuit achieved its result by de-constitutionalizing the rights issues before it. It allowed Texas to create statutory free speech rights for end users by denying that platforms had First Amendment editorial rights to curate content as they see fit.[101]

There is a twentieth-century example of how courts resolved free speech conflicts through de-constitutionalization, but, ironically, it is one that

94. *See* Keller, *supra* note 69.
95. TEX. CIV. PRAC. & REM. CODE § 143A.006(a)(2) (2021).
96. *Id.* § 143A.006(a)(3).
97. FLA. STAT. § 501.2041(2)(h) (2022).
98. *Id.* § 501.2041(2)(j).
99. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 455 (5th Cir. 2022).
100. *Id.*
101. *See id.* at 459–61.

conservatives like Justice Thomas generally do not like. It is the Fairness Doctrine and its related rules, which the Supreme Court upheld in *Red Lion Broadcasting Co. v. FCC*.[102] *Red Lion* recognized that there was a conflict between the free speech rights of broadcasters and their audiences.[103] It allowed an administrative agency—the U.S. Federal Communications Commission (FCC)—to protect the rights of audiences through administrative regulations that limit the editorial decisions of broadcasters.[104] It held that the First Amendment does not prevent the FCC from adjusting the rights of listeners and broadcasters through administrative rules, because the government can organize scarce broadcast spectrum through a series of renewable licenses, and it can require broadcasters to accept the administrative system as a condition of their licenses.[105] The FCC model also allows the government to require broadcasters to disfavor certain protected speech—for example indecent speech[106]—and favor other speech—for example, speech about issues of public concern and speech by candidates for federal office.[107] The *Red Lion* model might seem a good fit for the Florida statute in *Netchoice v. Attorney General, Florida*[108] because Florida seeks to prevent discrimination against political candidates and journalists—people that audiences might especially want to hear from. The problem is that *Red Lion* was based on the theory that the government may zone and license broadcast spectrum to avoid interference caused by multiple broadcasters. There is no similar theory of regulation justifying the Florida statute.

In sum, the pluralist system of speech regulation causes perpetual conflicts between digital companies and individual speakers. If state or federal governments want to protect end user free speech rights against platform owners, they will

102. 395 U.S. 367 (1969).
103. *Id.* at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").
104. *Id.* at 392 ("Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.").
105. *Id.* at 390–91.
106. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (upholding application of 18 U.S.C. § 1464 to ban broadcasting indecent speech during hours when children are likely to be in the audience).
107. *Red Lion*, 395 U.S. at 370–71 (citing the statutory equal time provision of 47 U.S.C. § 315 as well as the Fairness Doctrine); *see* Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–18, 2325–28 (2021) (analyzing broadcast regulation as a form of quasi-common carriage).
108. 34 F.4th 1196 (11th Cir. 2022), *cert. granted sub nom.* Moody v. NetChoice, 2023 WL 6319654.

probably try to create statutory and administrative rights for end users and argue that digital media companies lack First Amendment rights to stop them. That is, to protect end users' free speech, governments will try to de-constitutionalize online free speech rights. They will try to make online free speech rights about statutory and administrative questions rather than about judicially-protected First Amendment rights.

Digital media companies' first line of defense against regulation will be statutory rights of intermediary immunity in Section 230. Their second line of defense will be the First Amendment; they will use the First Amendment to overturn state and federal regulations that try to protect end users' speech, due process, and privacy rights. To the extent that the First Amendment plays a role in online speech conflicts, it will most likely protect digital companies from regulation, and not guarantee end user free speech rights.

This result is overdetermined by two other features of the pluralist system—scale and speed, to which I now turn.

V. HOW THE ALGORITHMIC SOCIETY CHANGES THE REGULATION AND PROTECTION OF DIGITAL SPEECH

The pluralist model significantly changes how individual speakers' freedom of speech is regulated and protected. The central reasons are platform governance and platform scale and speed. These transform online free speech protection from a system of judicially-created rights and procedures to a system of algorithmic administration. Using algorithms and probabilistic determinations, this system decides what speech to take down and leave up, amplify, and demote. It constantly monitors, makes recommendations to, and nudges speakers and audiences alike. Governments may attempt to superimpose judicial remedies on top of this system of algorithmic administration, but scale and speed will limit their effectiveness.

A. Platforms

As soon as there are online platforms, even the most rudimentary ones, like bulletin boards, Usernet groups, and Internet Relay Chat (IRC), there are governance problems. This is the lesson of one of the classic early articles about the internet, Julian Dibbell's *A Rape in Cyberspace*,[109] which involved an early text-

109. *Before Roblox: An Online Rape When Cyberspace Was New*, VILL. VOICE (July 25, 2018),

based virtual world, LambdaMOO. One of the players, whose avatar was named Mr. Bungle, figured out an exploit that allowed the avatar to virtually rape players.[110] Other players complained to the site's designers, the "game gods." Initially, the game gods did nothing, but eventually they (or someone with access to the programming) intervened and deleted the offending player's account.[111]

Although this story is now three decades old, it has many basic features of controversies that would arise later over more elaborate and sophisticated platforms. In fact, LambdaMOO, the proto-platform in Julian Dibbell's 1993 article, was an early version of what Facebook now calls the metaverse, except that it used text rather than rich graphics. Content moderation in the metaverse will also be a central problem, made even worse by the fact that, as LambdaMOO, the distinction between speech and action blurs in virtual worlds.[112] End users will find new ways to commit injuries and harms in-world, out of world, and both at once.

More generally, people on a digital platform will continually test the limits of its affordances. They will use the platform in ways that the designers did not intend or foresee.[113] They will create new forms of social interaction, some that are creative and make the site more attractive and useful for others, but also some that are harmful, controversial, and make the site less attractive or useful to others. What falls into these two categories, moreover, will often be controversial, leading to further disputes among end users.

End users will complain about other people's behavior on the platform and demand that site administrators govern it and discipline offending users. Site administrators will resist governing for a time because they think of themselves as computer programmers and software engineers whose job is to create the platform and keep it running.[114] But eventually, like the game gods in

https://www.villagevoice.com/2018/07/25/before-roblox-an-online-rape-when-cyberspace-wasnew [https://perma.cc/E8XY-TMAD] (reprinting Julian Dibbel, *A Rape in Cyberspace*, VILL. VOICE (Dec. 21, 1993)).

110. *Id.*

111. *See id.*

112. Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2089 (2004) ("Virtual worlds blur the conventional boundaries between speech and conduct as we currently understand them precisely because *all conduct in virtual worlds must begin as a form of speech*.") (emphasis in the original).

113. *See id.* at 2082. *See generally* CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008) (arguing that platforms create opportunities for unforeseen social innovation).

114. *See* Balkin, *Free Speech Is a Triangle, supra* note 12, at 2021; Klonick, *supra* note 33, at 1634–35.

LambdaMOO, they will find that they have to step in and establish or restore order, either through changing the program or through promulgating and enforcing norms and rules.

Platform governance is often time-consuming and expensive, so platform operators always have incentives to skimp on it or automate it.[115] Unless the owners of the platform find a way to organize self-administration by a large army of volunteers, governance may be arbitrary, inadequate, or done on the cheap.

A platform does not even have to be primarily for exchanging ideas—as long you can use it for communication, the problem of governing speech emerges. As soon as you have platform governance, you have private regulation of speech and disputes over freedom of speech. Hence Evelyn Douek's aphorism that "[e]verything is content moderation."[116]

Moreover, although I have been talking about platforms as sites of governance, content moderation can occur at many places up and down the tech stack. Broadband companies, domain name companies, caching and defense companies, app stores, and web hosting services can and do set rules and engage in content moderation.[117]

B. Scale and Speed

The central difference between the early text-based adventure game, LambdaMOO, and today's social media platforms is the number of participants and the speed at which they generate user-generated content. Successful—and even not so successful—platforms open themselves up to an undifferentiated public and seek to grow as large as possible as quickly as possible. Today's large social media platforms handle enormous amounts of user-generated content that is generated every second of the day around the world. Content moderation must occur at the same pace and the same scale. Facebook takes down hundreds of

115. Katie Tarasov, *Why Content Moderation Costs Billions and Is So Tricky for Facebook, Twitter, YouTube and Others*, CNBC (Feb. 27, 2019, 9:00 AM), https://www.cnbc.com/2021/02/27/content-moderation-on-social-media.html [https://perma.cc/3NK9-6MMT] ("It's a messy and expensive process, with Facebook spending billions to review millions of pieces of content every day. While TikTok directly employs content moderators, Facebook, Twitter and YouTube outsource most of the grueling work to thousands of workers at third-party companies.").

116. Evelyn Douek (@evelyndouek), TWITTER (Feb. 20, 2023, 5:14 PM), https://twitter.com/evelyndouek/status/1627793800751124485 [https://perma.cc/GZ3Z-23JL] ("Everything is content moderation.").

117. *See* Fowler & Alcantara, *supra* note 13; Donovan, *supra* note 13.

millions of posts each year.[118] YouTube takes down millions of channels and hundreds of millions of videos each year.[119] TikTok removed 110 million videos in the third quarter of 2022 alone.[120] The amount of traffic, the number of moderation decisions, and the speed at which they must occur, boggles the mind. In LambdaMOO, the game gods could intervene episodically to kick out Mr. Bungle. Not so today. The digital world is full of millions and millions of Mr. Bungles producing millions and millions of pieces of content every hour of the day.

Content moderation is only half of the story, however. Many social media systems and all search engines are also recommendation systems.[121] They attempt to recommend content to end users with limited time and attention to keep end users entertained, informed, and engaged.[122] Platform owners must also deal with constant threats to the integrity of the system. Taken together, content moderation, recommendation systems and platform security are central elements of platform governance.

The pluralist system of speech governance arises from the massive scale and speed of user-generated content. Digital infrastructure owners find that, whether they like it or not, they must engage in private governance, and most also operate recommendation systems that can promote or demote content and vary its virality and reach.[123] Territorial governments lack the ability to govern the scale and speed

118. Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 537 (2022) ("[In] Q2 2022, Facebook took down 914,500,000 pieces of content.") (citing FACEBOOK, COMMUNITY STANDARDS ENFORCEMENT REPORT (2022)).

119. In the third quarter of 2022, YouTube removed 5,820,978 channels containing 207,833,024 videos, and 5,603,794 individual videos. GOOGLE TRANSPARENCY REPORT, https://transparencyreport.google.com/youtube-policy/removals [https://perma.cc/B4KJ-Q984].

120. *Number of TikTok Videos Removed From the Platform From 3rd Quarter 2020 to 3rd Quarter 2022*, STATISTA (Dec. 2022), https://www.statista.com/statistics/1300031/tiktok-videos-removed [https://perma.cc/MC9P-4TSM].

121. *See* Chris Meserole, *How Do Recommender Systems Work on Digital Platforms?*, BROOKINGS TECH STREAM (Sept. 21, 2022), https://www.brookings.edu/techstream/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms [https://perma.cc/7MYD-TDX8] (explaining that digital platforms rely on recommender systems).

122. *See id.*

123. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1181–82 (describing multiple incentives for platform operators to become governors); Klonick, *supra* note 33, at 1625–30 (explaining why, despite the influence of American free speech norms, platform companies became moderators and governors of content); Meserole, *supra* note 121 (describing the role of recommendation systems on digital platforms).

of this online material.[124] This leads to new-school speech regulation in which governments seek to coopt or coerce infrastructure owners to govern speech in ways that governments like.[125]

The first leg of the speech triangle, old-school speech regulation, never goes away. Governments continue to try to regulate the speech of end users directly. But because online speech has become so important and pervasive in people's lives, and because it occurs with such speed and at such massive scale, the other two legs of the triangle, private governance, and new-school speech regulation, have become increasingly important to freedom of speech and its regulation.

Scale and speed make platforms large and powerful, and private governance an increasingly important feature of popular culture and political debate. Governance decisions by a handful of global private corporations generate enormous attention from politicians, policy makers, administrators, and academics. Even though platform operators are not states, interest in their leadership and operations has become a new form of Kremlinology. And in a very short period of time the idea of platform governance by private organizations has become a central focus of academic study and policy discussion.

C. The Irrelevance of Online Free Speech Rights

A number of authors, including Julie Cohen, Evelyn Douek, Mike Masnick, and Jonathan Zittrain, have pointed out that once people generate speech at its current speed and scale, the possibility of using traditional rights discourse to govern platforms more or less vanishes.[126] Instead, platforms have to design a set

124. *See* Balkin, *Old-School/New-School Speech Regulation*, *supra* note 17, at 2298, 2304 (noting that states turn to regulation of digital companies because they lack the technical ability to regulate online speech themselves).

125. *See id.* at 2298; Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2028–29; Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1175.

126. *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 242, 246 (2019); Douek, *supra* note 118, at 531–32; Jonathan Zittrain, Three Eras of Digital Governance (Sept. 23, 2019) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.3458435 [https://perma.cc/3XCY-3RMT]; Michael Masnick, *Masnick's Impossibility Theorem: Content Moderation at Scale Is Impossible to Do Well*, TECHDIRT (Nov. 20, 2019, 9:31 AM), https://www.techdirt.com/2019/11/20/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well [https://perma.cc/V2HH-LQEW]; *cf.* JULIE E. COHEN, HOW (NOT) TO WRITE A PRIVACY LAW 3 (2021), https://s3.amazonaws.com/kfai-documents/documents/306f33954a/3.23.2021-Cohen.pdf [https://perma.cc/CE9P-CARY] (explaining that speed and scale of digital platforms mean that digital privacy laws cannot be based in traditional rights discourse).

of technical and administrative systems for handling the enormous amount of content that flows through their facilities every day.

To deal with the problems of speed and scale, platforms employ algorithms to decide what to take down, how to construct end user feeds, and what content to recommend. An army of programmers design and tweak these algorithms, but normally do not make individual content decisions. Platforms supplement algorithmic decisions with a small group of high-level employees who promulgate norms of community standards and a very large low-level bureaucracy of humans—usually contract workers—tasked with making content moderation decisions in seconds at a time.[127]

Evelyn Douek has pointed out that this is not a juridical model.[128] It is a kind of administrative model, but much of the decisionmaking is performed by algorithms, not bureaucrats.[129] It is an example of the Algorithmic Society, in which data collection and analysis and algorithmic decisionmaking become increasingly important in both public and private decisionmaking and governance.[130] So we might call the current model of private speech regulation a system of algorithmic-administrative governance to distinguish it from mid-twentieth century administrative governance.

Algorithmic-administrative governing systems are probabilistic.[131] They try to identify and take down content that is illegal or that violates community standards as quickly and efficiently as possible. Conversely, they try to avoid taking down content that does not violate the law or their own internal rules. But at such an enormous speed and scale they will make many mistakes, even if the error rate is very small. This will produce a huge number of false positives and false negatives.[132] Moreover, algorithms do not actually understand the content they

127. *See* SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 173 (2019) (explaining that content moderation "workers had just seconds to review and delete inappropriate material from user profiles"); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2015–16 (2019) (describing mix of human and algorithmic decisionmakers). *See generally* Klonick, *supra* note 33 (describing early history of content moderation).

128. *See* Douek, *supra* note 118, at 539, 555–56.

129. *See* Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2028–29.

130. *See* Balkin, *Free Speech in the Algorithmic Society, supra* note 11, at 1151–60 (defining and explaining the nature of the Algorithmic Society).

131. *See* Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 763 (2021) ("[C]ontent moderation on major platforms . . . is now crafted around two different precepts: proportionality and probability.").

132. *See* Masnick, *supra* note 126; James Grimmelmann, *To Err Is Platform*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), https://knightcolumbia.org/content/err-platform [https://perma.cc/4LCF-S6FD]; Douek, *supra* note 131, at 792.

are processing; so companies must employ a series of proxies to engage in content moderation. These proxies are imperfect and implementing them requires multiple tradeoffs.[133]

The feeds of digital media companies, also constructed by algorithms, may also contain recommendation systems. They promote and amplify speech, and conversely, they demote and inhibit the spread of speech. Companies can adjust their recommendation engines to increase or to reduce the chances of recommending content that their algorithms predict will have certain desirable—or undesirable—effects on audiences. Companies can also create prediction models to assess when posts are likely to be illegal or in violation of their community standards. They can use these prediction models to limit the spread of certain posts even when posts are not taken down.[134]

In addition, digital media companies continually experiment on their end users, attempting to nudge or influence them in different ways and measuring the results of these experiments.[135] Thus, platforms can also regulate content by prodding end users to produce certain kinds of content, and nudging them away from producing other kinds of content, for example, through delays, warnings, or other kinds of messages.[136]

The resulting system of algorithmic removals, recommendations, demotions, and nudges does not resemble a system of free speech rights.[137] It respects and

133. *See* Douek, *supra* note 118, at 548.

134. *See id.* at 545–46; Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK, https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governanceand-enforcement/10156443129621634 [https://perma.cc/ZK5C-ZTSX] (May 5, 2021) (noting that Facebook can change its recommendation algorithms to reduce the virality of content likely to violate its community standards); Guy Rosen, *Community Standards Enforcement Report, Fourth Quarter 2020*, META NEWSROOM (Feb. 11, 2021), https://about.fb.com/news/2021/02/community-standards-enforcement-report-q4-2020/ [https://perma.cc/ZV7P-YTMG] (noting changes to Facebook's News Feed to reduce "the number of times we display posts that later may be determined to violate our policies"); Julia Alexander, *YouTube Claims Its Crackdown on Borderline Content Is Actually Working*, VERGE (Dec. 3, 2019, 9:00 AM), https://www.theverge.com/2019/12/3/20992018/youtube borderline-content-recommendation-algorithm-news-authoritative-sources [https://perma.cc/EU3X-GLLE] (noting YouTube's ability to adjust its recommendation systems to reduce the chances of placing content in end user feeds that could violate its policies).

135. *See generally* James Grimmelmann, *The Law and Ethics of Experiments on Social Media Users*, 13 COLO. TECH. L.J. 219 (2015).

136. *See* COHEN, *supra* note 126, at 100, 136, 242; Douek, *supra* note 118, at 546–47.

137. *See* Douek, *supra* note 118, at 558. Douek notes the similarities to dispute resolution systems on eBay, which offers little in the way of transparency or due process rights. *Id.* (citing Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 559–60, 567 (2016)); *see also* ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE

protects freedom of speech primarily through its affordances rather than its rules. It permits large populations to communicate with each other and share messages, and allows the vast majority of posted content to travel through the system undisturbed—although it may also be arranged, amplified, promoted or demoted by the digital company's programming.

At the same time, algorithmic-administrative systems continuously monitor who people communicate with, and what they do and say.[138] They constantly measure people's behavior and responses to their online experiences. They collect enormous amounts of data about end users and then use this data to create prediction models.[139]

These aspects of digital media companies are characteristic features of the Algorithmic Society. In the Algorithmic Society more and more decisionmaking and governance, both public and private, is performed by algorithms and automated decision systems, robots, and artificial intelligence (AI) programs.[140] States and private actors attempt to harness data collection and data analysis to make profits and govern populations. Hence, the Algorithmic Age depends on pervasive surveillance and data collection. Companies use this data to measure behavior and events and to predict how people will behave in the future; and they create prediction products which they sell to governments and other privately-owned companies. The ambition of the Algorithmic Society is practical omniscience—to know all and to predict all.[141] This has long been an ambition of human beings. The Algorithmic Society makes it appear ever closer to realization, even though the current predictive abilities of AI and algorithmic systems remain primitive and often misfire badly.[142]

The Algorithmic Society followed quickly on the heels of the beginning of the digital age, and so now one cannot really speak of the second without the first. The digital age as we now know it *is* the Algorithmic Society. The massive democratization of speech characteristic of the early digital age was soon

INTERNET OF DISPUTES 34–35 (2017) (describing the emergence of automated online dispute resolution systems).

138. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1153, 1156–57.

139. *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (describing the rise of digital companies that collect end user data in order to predict what consumers will do).

140. *See* Balkin, *Free Speech in the Algorithmic Society, supra* note 11, at 1154.

141. *See id.* at 1155.

142. *See, e.g.*, Inioluwa Deborah Raji, I. Elizabeth Kumar, Aaron Horowitz & Andrew D. Selbst, *The Fallacy of AI Functionality*, *in* 2022 ACM CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 959, 968 (2022), https://doi.org/10.1145/3531146.3533158 [https://perma.cc/EU82-7ZUE].

accompanied by, and to a certain extent accomplished through, massive and pervasive digital surveillance and data collection by private companies. Hence, the infrastructure of digital free expression is also the infrastructure of digital surveillance.[143]

In the algorithmic-administrative system of free speech governance, companies collect data from every aspect of end user behavior and use it to create prediction models, not only to engage in content moderation and recommendation systems, but also to make profits through advertising. Thus, the algorithmic-administrative system of speech governance is also a surveillance system; it treats end users as a limitless resource of data for mining and analysis. The algorithmic-administrative system does not merely provide a conduit for free speech but, through data collection, analysis, and prediction, it attempts to surveil, analyze, and shape the behavior and expression of both the speakers and audiences who use the platform.

To the extent that end users have any rights in these algorithmic-administrative systems, they tend to be rights of privacy or consumer protection more than rights of free of speech. What protects the speech of individuals is (1) the platform owner's desire to make the space safe and enjoyable for as many people as possible in order to maintain size and growth and collect more data; (2) the platform owner's desire to skimp on content moderation except where required by law or demanded by shareholders; (3) the sheer scale and speed of content generation and the inability of most platforms to police it very effectively; and (4) the cleverness of end users who are always looking for new ways to escape content moderation systems and game recommendation systems.

Although these algorithmic-administrative systems do not feature anything like individual free speech rights, the kinds of sanctions that platforms can impose on speakers are quite limited. Platforms can suspend people temporarily or kick them permanently off the site. They can take down content, limit its reach, or delay its transmission. They can affix warning labels and implement nudges. In short, although online free speech does not offer much in the way of legally enforceable individual rights, the sanctions are also very watered down.

In saying this, I do not mean to suggest that the weakness of platform sanctions justifies the absence of rights protection. In an attention-driven world,

143. *See* Balkin, *Old-School/New-School Speech Regulation*, *supra* note 17, at 2297 ("[A] significant feature of the early twenty-first century is that the infrastructure of free expression increasingly is merging with the infrastructure of speech regulation and the infrastructure of public and private surveillance. The technologies and associated institutions and practices that people rely on to communicate with each other are the same technologies and associated institutions and practices that governments employ for speech regulation and surveillance.").

being kicked off one of the major sites may effectively ruin a person's livelihood and keep them from reaching large audiences. My point, rather, is that online governance is not really about protecting individual rights. It is about maintaining the platform as a safe and secure environment for speech.

Territorial governments are ambivalent about the emerging system of algorithmic-administrative governance. On the one hand, they are happy when companies promptly deal with unlawful speech. Europe has taken advantage of the algorithmic-administrative system by employing platform companies as private bureaucracies for speech governance.[144] Governments also cooperate with digital companies and make use of their capacities in locating and removing certain kinds of speech, for example, terrorist content and other threats to national security.[145]

On the other hand, governments may be concerned that end users lack enforceable rights against digital companies, and especially social media companies. So they may try to impose due process requirements on digital platforms: these might include, among other things, a right to an explanation when content is removed, a right to appeal to the company, and eventually, a right of appeal to a court or third-party arbitrator. The new Digital Services Act tries to create such a system.[146] But these procedural obligations must deal with the basic problems of scale and speed, and so it remains unclear how much they will protect end users in practice.[147] Eveyln Douek argues that the result may be "accountability theater rather than accountability itself."[148]

144. *See* Balkin, *Free Speech Is a Triangle*, *supra* note 12, at 2028–32.

145. *See, e.g.*, Elena Chachko, *National Security by Platform*, LAWFARE (Dec. 8, 2021, 8:01 AM), https://www.lawfareblog.com/national-security-platform [https://perma.cc/S7FZ-J5S9] (noting that platforms work with governments on diverse issues such as counterterrorism, election security, and preventing mass atrocities).

146. *See Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020).

147. *See* COHEN, *supra* note 126, at 242 ("State-centered conceptions of protection for fundamental rights and freedoms sit uneasily alongside a reality in which flows of information to, from, and about network users are intermediated by and through privately owned and operated communications infrastructures and platforms, and in which those flows encompass information of an astonishing variety, granularity, and intimacy.").

148. Douek, *supra* note 118, at 533; *see id.* at 572–83 (describing the limits of transparency and due process reforms).

VI. A HEEP OF SPEECH PROBLEMS: HYGIENIC, EPIDEMIOLOGICAL, ENVIRONMENTAL, AND PROBABILISTIC VIEWS OF SPEECH

Because of the sheer scale and speed of digital communication, many commentators—and digital companies themselves—have begun to use a different language and a distinctive set of metaphors to describe the effects of online speech and the goals of platform governance. This way of thinking is *hygienic, epidemiological, environmental*, and *probabilistic* (HEEP).[149] HEEP thinking is characteristic of the Algorithmic Society more generally, and it can be applied to any facet of human behavior, not just speech.

HEEP approaches treat speech—including speech protected by the First Amendment—as a collective behavioral phenomenon produced by populations and acting on populations. HEEP conceptions of speech contrast with conceptions that view speech as individual self-expression, and the freedom of speech as a set of rights that allow individuals to contribute to public discussion in a public sphere through which people's ideas and opinions circulate. As Jonathan Zittrain put it in 2019, "We have moved from a discourse around *rights*—particularly those of end-users . . . to one of *public health*, which naturally asks for a weighing of the systemic benefits or harms of a technology, and to think about what systemic interventions might curtail its apparent excesses."[150]

149. *See, e.g.*, Mike Ananny, *Probably Speech, Maybe Free: Toward a Probabilistic Understanding of Online Expression and Platform Governance*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/probably-speech-maybe-free-toward-a-probabilistic-understanding-of-online-expression-and-platform-governance [https://perma.cc/N52Y-4VVM]; Will Cady, *Practicing Media Hygiene in the Face of the Anxiety Pandemic*, ADWEEK (Oct. 7, 2021), https://www.adweek.com/social-marketing/practicing-media-hygiene-in-the-face-of-the-anxiety-pandemic [https://perma.cc/QSK4-JT9E]; *Let's Flatten the Infodemic Curve*, WHO, https://www.who.int/news-room/spotlight/let-s-flatten-the-infodemic-curve [https://perma.cc/HP9S-A3TZ]; David Robert Grimes, *Health Disinformation & Social Media: The Crucial Role of Information Hygiene in Mitigating Conspiracy Theory and Infodemics*, EMBO REPS., 2020, https://www.embopress.org/doi/pdf/10.15252/embr.202051819 [https://perma.cc/BC9M-CKHD]; Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it [https://perma.cc/QFR7-WG22]; Christina Pazzanese, *Battling the 'Pandemic of Misinformation'*, HARV. GAZETTE (May 8, 2020), https://news.harvard.edu/gazette/story/2020/05/social-media-used-to-spread-create-covid-19-falsehoods [https://perma.cc/WZ5H-4TLX]; Edmund L. Andrews, *How Fake News Spreads Like a Real Virus*, STAN. ENG'G, (Oct. 9, 2019), https://engineering.stanford.edu/magazine/article/how-fake-news-spreads-real-virus [https://perma.cc/T5KZ-7GHQ].

150. Zittrain, *supra* note 126, at 1.

Why does this shift in ways of thinking and talking about speech occur? The short answer is that we are living in the Algorithmic Society. The longer answer is a set of interlocking reasons, which I will now describe.

The scale and speed of speech encourages thinking about speech in hygienic and epidemiological terms. Speech propagates and spreads at dizzying speeds over networks, reaching millions upon millions of people. Hence, the spread of speech seems like the spread of a disease or malady that can harm people's mental health, incite random acts of violence against them, poison their minds, or weaken their system of government. Social scientists (and their colleagues in the natural sciences too) now study the spread of digital content in the same way they would study the spread of germs or diseases through networks of human interaction.[151]

People now routinely talk about the digital world in terms of memes. Memes are bits of culture that spread from mind to mind through communication and reproduce themselves in human minds.[152] In my 1998 book, *Cultural Software: A Theory of Ideology*, written at the dawn of the digital age, I argued that ideology was a kind of cultural software produced by the spread of memes.[153] The popular meaning of "meme" is a bit narrower. It is a cultural object—often pictures with funny captions—designed to spread widely online.[154] But it is but a short step from this to the recognition that all online speech consists of memes—transmissible bits of culture that can be replicated in digital environments and spread throughout digital networks.

The idea of speech as meme encourages epidemiological and hygienic ways of thinking about speech. It also encourages environmental thinking. In the evolutionary biologist Richard Dawkins's original formulation, memes replicate like genes in Darwinian fashion.[155] They compete for survival and replication in an environment. Memes can spread more quickly or more slowly depending on their environment, which includes media, human minds, and other memes.[156]

151. *E.g.*, Kendrick McDonald, John Gregory, Sophia Tewa, Virginia Padovese & Marie Richter, *COVID-19 Vaccine Misinformation Super-spreaders*, NEWSGUARD, (November 30, 2020), https://www.newsguardtech.com/special-reports/special-report-covid-19-vaccine-misinformation [https://perma.cc/SQH7-7F52] ("In this report, we catalogue 34 Facebook Pages that are 'super-spreaders' of misinformation about the development of a COVID-19 vaccine.").
152. *See* JACK M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 43 (1998).
153. BALKIN, *supra* note 152, at 44–45, 58, 87.
154. *See The History of "Meme,"* MERRIAM WEBSTER, https://www.merriam-webster.com/words-at-play/meme-word-origins-history [https://perma.cc/23RP-NPK9].
155. *See* RICHARD DAWKINS, THE SELFISH GENE 192–97 (1989).
156. *See* BALKIN, *supra* note 152, at 50.

Instead of a marketplace of ideas—a very twentieth-century metaphor—there is now an ecology of memes. In fact, memes are a better model for speech than markets because you do not accept ideas by purchasing them. Instead, they try to attract you and your attention and insinuate themselves in your thinking. (And in online environments much content is free in any case.) The marketplace metaphor is also less apt because when you buy a commodity, you have it and the seller no longer does. But when you absorb a meme, the person who sent it to you still has it.[157] In the digital age, the ecology of memes, and not the marketplace of ideas, makes far more sense.

The memetic approach to speech also affects the idea of a public sphere. The idealized version of the public sphere is a social space for the circulation of opinions by human beings who are engaged in reasoned debate and discussion about public issues.[158] In the twenty-first century, however, the public sphere transforms into an ecology for the transmission, spread, and evolution of memes competing for space in the limited attention of human minds. Whereas the language of the public sphere is humanist, the language of memetics is anti-humanist.[159] People are the carriers and spreaders of culture and language—that is, memes. People are nodes of varying degrees of power and influence in larger networks of memetic transmission.

157. Long before the invention of the term "meme," Thomas Jefferson made this point in a famous letter: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me." Letter From Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE WRITINGS OF THOMAS JEFFERSON, 33–35 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905), https://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html [https://perma.cc/5YAV-RENN].

158. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 54 (Thomas Burger trans., Polity Press 1989) (1962) (arguing that according to the ideal of the public sphere, discussion on public issues is open to all on an equal footing in accordance with reason and the influence of ideas is based not on the status of the speaker but on the force of reason); *see also* Jürgen Habermas, *Foreword*, and Emilie Prattico, *Introduction* to HABERMAS AND THE CRISIS OF DEMOCRACY: INTERVIEWS WITH LEADING THINKERS 16–26, 33–40 (Emilie Prattico ed., 2022) (explaining Habermas's ideal vision of a public sphere based on equality, inclusiveness, and appeals to reason).

159. *See* Jack M. Balkin, *Information Power: The Information Society From an Antihumanist Perspective*, *in* THE GLOBAL FLOW OF INFORMATION: LEGAL, SOCIAL, AND CULTURAL PERSPECTIVES 233 (Ramesh Subramanian & Eddan Katz eds., 2011) ("[A]ntihumanist approaches . . . treat human beings as the constructions and unwitting agents of larger forces produced by the concatenation of individual human belief, desire, and action."). The philosophy of antihumanism is summed up in the anthropologist Claude Levi-Strauss's maxim that "the ultimate goal of the human sciences [is] not to constitute, but to dissolve man." CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 247 (1966).

Memes spread more quickly or more slowly depending on their environment. Hence speech becomes more successful, powerful, and important depending on its ability to multiply and capture attention in the scarce space of human minds.[160] The digital ecology affects people's decisions about how to communicate effectively. This means, among other things, that people may seek to gain influence through repetition or through triggering people's emotions—including anger and humor—rather than by passing through the gauntlet of traditional media gatekeepers. Thus, the digital age encourages the kind of expression and rhetoric that can seize attention and promote its replication and spread—for example, conspiracy theories.

Because digital companies form the environment for memetic transmission, and because they can vary the degree of virality and success for memes, they become similar to epidemiologists and environmental engineers. This, too, encourages thinking about speech in hygienic, epidemiological, environmental, and probabilistic terms. The sheer mass and speed of content makes content moderation and recommendation systems seem like a form of social engineering that deals in probabilities, error rates, costs, and benefits. Moreover, the effects of speech and the harms of speech also appear as probabilities or risks to populations of individuals, further encouraging both probabilistic and epidemiological thinking.

From what I have said so far, you might imagine that speech in the Algorithmic Society seems like a force of nature, an uncontrollable torrent of memes or even an act of God. That is how previous generations might have thought of popular culture, gossip, or slander. But the Algorithmic Society actually pushes our thinking in the opposite direction—viewing speech as a measurable object of prediction and control, lumped together with other forms of human behavior, for reasons I will now explain.

A. Speech and Communication as Measurable Commodities

The Algorithmic Society treats all human interaction as a potential source of data that can be collected for the purpose of analysis and used to create social experiments and prediction models for nudging and influence. Hence, in the Algorithmic Society speech and the circulation of ideas become measurable events, connections, and commodities. In this sense, speech is no longer special.

160. *See* BALKIN, *supra* note 152, at 59; *cf.* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 5–9 (2016) (explaining how scarcity of attention shapes the conditions of communication).

It is just another feature of human bodies and behaviors like locations, purchases, movements, and facial features that can be surveilled, collected, and analyzed for purposes of prediction and profit. I have previously joked that the Algorithmic Society runs on Soylent Green.[161] As the Charlton Heston movie of the same name tells us, Soylent Green is people.[162] The Algorithmic Age turns the unruly stuff of interpersonal communication and human behavior into collectable, measurable digital bits and network connections that companies and researchers can analyze.[163]

A central goal of the Algorithmic Society is the collection and measurement of social phenomena. This means converting human action, behavior, communication, and social life into measurable data, relationships, items, and commodities. Network connections, contacts, memes, and personal data become mappable and measurable. It is no accident, therefore, that network analysis and data science have become such important elements of the Algorithmic Society, used by companies and researchers alike.

Conceptualizing speech systemically and in the mass is by no means new to the digital age. The whole point of twentieth century mass media was to view audiences as collectives. Twentieth century propagandists, public relations experts, and advertisers sought to move large masses of people through propaganda, rhetoric, and advertising that appealed to emotion as much as reason.[164] Twentieth-century advertisers tried to understand and predict consumer reactions through surveys and focus groups. Twentieth century communications scholars spoke of a media ecosystem.[165] Twentieth century democratic free speech theorists like Alexander Meiklejohn and his successors

161. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1156.

162. *See* SOYLENT GREEN (Metro-Goldwyn-Mayer Studios, Inc. 1973); BradZ1, *IT'S PEOPLE!*, YOUTUBE (Nov. 19, 2007), https://www.youtube.com/watch?v=8Sp-VFBbjpE [https://perma.cc/A9AW-VL2P].

163. *See* Balkin, *Free Speech in the Algorithmic Society*, *supra* note 11, at 1156–57.

164. *See generally* J. MICHAEL SPROULE, PROPAGANDA AND DEMOCRACY: THE AMERICAN EXPERIENCE OF MEDIA AND MASS PERSUASION (1997) (tracing the history of the use of propaganda and public relations to influence mass publics in the early twentieth century); EDWARD L. BERNAYS, PROPAGANDA 9 (1928) ("The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society.").

165. *See* LANCE STRATE, ECHOES AND REFLECTIONS: ON MEDIA ECOLOGY AS A FIELD OF STUDY 21–23 (2006); Lance Strate, *Media Ecology 101: An Introductory Reading List—Revised 2019*, MEDIA ECOLOGY ASS'N, https://www.media-ecology.org/Media-Ecology-101 [https://perma.cc/EW2K-M5JF].

viewed freedom of expression according to the collectivist goal of promoting an informed public.[166]

People have also used statistics to measure and predict human behavior long before the twenty-first century. But the Algorithmic Society involves a huge boost to these abilities and ambitions that is so prodigious as to be different in kind. Because so much of life and personal interaction occurs online, it is now possible to measure communication, thought, and behavior in ways that could never have been achieved before.

What makes the Algorithmic Society different from previous conceptions of mass communication is that its powerful tools of data collection and analysis encourage thinking about speech in the mass as a measurable set of entities and relations that are not different in principle from other forms of data. Speech and communication become just another example of measurable and mappable human behaviors.

The twentieth century thought in terms of mass audiences and informed publics. But the Algorithmic Society turns speech into content, audiences into behavioral data, and publics into the nodes of a network. Human speech becomes a series of traceable memes and copies of memes. Human connection becomes a series of links, contacts, and posts that serve as grist for the mill of computer science and network analysis. Human culture becomes a database of texts and pictures. Human behavior becomes collectable data used to generate prediction models.[167] Human faces and voices become digital collections that can be analyzed and reproduced in simulations and deepfakes.[168] Social life becomes a set of statistical measures and network models. In the early twentieth century T.S. Eliot worried that he was measuring out his life in coffee spoons.[169] In the twenty-first century we measure out our lives in posts, connections, memes, likes, retweets, and links.

In the Algorithmic Society human beings can, as never before, approach the circulation of ideas, opinions, and symbols as objects of statistical measurement

166. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1110–11 (1993) (describing Alexander Meiklejohn's "collectivist" theory of free speech).

167. *See* ZUBOFF, *supra* note 139, at 4–5.

168. *See generally* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019) (discussing the legal and political issues surrounding deepfake technology).

169. *See* T.S. Eliot, *The Love Song of J. Alfred Prufrock*, POETRY FOUND., https://www.poetryfoundation.org/poetrymagazine/poems/44212/the-love-song-of-j-alfred-prufrock [https://perma.cc/BZZ9-EGWX] ("I have measured out my life with coffee spoons.").

and network analysis. Enormous databases of content allow algorithmic measurement of words and phrases, and feed artificial intelligence systems that both ape and transcend human speech and action. Network modeling allows measurements of speed, influence, and polarization.[170] Memes become measurable vectors for social science and profit.

The freedom of speech is no longer the intersubjective activity of autonomous human beings who trade ideas, or the circulation of ideas among a public of rational agents, or even the uncontrollable spread of gossip among a voracious public. Rather, in the Algorithmic Society human expression is transformed into massive collections of content, databases of reaction and behavior, and maps of communication and influence networks. Human expression becomes an object of measurable connection and social influence. The study of discourse becomes the study of clicks and links, the study of social deliberation becomes the study of network connections, likes, retweets, and reactions. Viewed through the lens of digital measurement, what we call speech is a collection of networks, nodes, and links and the memes and data that circulate through them.

B. Speech and Reactions to Speech as Predictable Causes and Effects

Because speech and influence become objects of measurement, the Algorithmic Society encourages the belief that companies and researchers can measure the effects of speech and predict the consequences of speech. How much this is true is still very much a matter of dispute, and algorithmic decision systems often promise far more than they actually deliver.[171] We are still in the rudimentary stages of both network analysis and data science. Nevertheless, the ambition of the Algorithmic Society, even if not yet fully realized, is the ability to know all and predict all. The ambition of private digital companies is to become ever more expert at analyzing data and programming algorithms for prediction, influence, and profit. The ambition of states and governments is to measure and predict human behavior to protect public health, safety, and welfare, and to deter and punish crime.

Yet this vaulting ambition creates a deep irony for an age that celebrates the proliferation of information, the democratization of communication, and the power of science and human reason. The more that speech appears as a measurable commodity rather than an intersubjective activity, the more the

170. *See, e.g.*, Henrique Ferraz de Arruda, Felipe Maciel Cardoso, Guilherme Ferraz de Arruda, Alexis R. Hernández, Luciano da Fontoura Costa & Yamir Moreno, *Modeling How Social Network Algorithms Can Influence Opinion Polarization*, 588 INFO. SCIS. 265, 266–67 (2022).

171. *See, e.g.*, Raji et al., *supra* note 142.

consequences of speech, considered as a mass, appear predictable and knowable, in theory if not in practice. And the more that digital companies boast of their abilities to predict, nudge, and influence their end users successfully, the more they appear responsible for their content moderation decisions and their recommendation algorithms.

The Algorithmic Society encourages understanding the freedom of speech in the public sphere as a knowable and predictable set of causes and effects for which digital companies may and should be held responsible. As people come to think of speech as countable bits of data propagated through mappable networks, and social influence as measurable and predictable, the causal connection between speech and harm, between propaganda and violence, seems increasingly objective, measurable, and natural. Using algorithms to amplify content seems like deliberately letting a disease loose into the world. The spread can be traced, the harms can be measured. The flood of digital expression seems less and less like the circulation of human reason and more and more like a predictable source of human harm.

Not entirely coincidentally, the early twenty-first century has featured a rebirth of studies of propaganda, misinformation, and disinformation.[172] Because social media produce measurable data, they become a central object of study. Researchers and policy makers regard digital media as central examples of how to use data collection and predictive algorithms to influence, manipulate, and mislead people, harm mental health, and generate risks of physical violence. Speech—which in the Enlightenment was the exemplar of human reason that distinguished humans from lower forms of life—is no longer the activity that distinguishes autonomous reason from the deterministic causal world. Speech is not the exemplar of human beings as ends in themselves. It is evidence of cause and effect.

C. The Decline of the Civil Liberties Model in the Algorithmic Society

As the form of governance changes, so too does the way people look at freedom of speech. To explain this point, I will contrast the emerging vision of digital speech in the Algorithmic Society with assumptions about free speech and

172. *See, e.g.*, PHILIP N. HOWARD, LIE MACHINES: HOW TO SAVE DEMOCRACY FROM TROLL ARMIES, DECEITFUL ROBOTS, JUNK NEWS OPERATIONS, AND POLITICAL OPERATIVES (2020); YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018); JASON STANLEY, HOW PROPAGANDA WORKS (2015).

free speech regulation in twentieth-century First Amendment doctrine, which as a shorthand, I will call the civil liberties model.

In the civil liberties model, freedom of speech is a set of individual rights protected by judge-made doctrines. These doctrines strongly protect public discourse but allow for a small number of exceptions for certain kinds of immediate and direct harms.

Under the civil liberties model, governments should protect free speech even if it predictably causes harm to other individuals or groups over time. Speech deserves protection even though it is likely to poison the public sphere, create long-term civic unrest, provoke random acts of violence, slowly undermine democracy, or deter the spread and acceptance of truth.[173]

The civil liberties model does not generally worry about the probabilities of harm or the long-term destruction of the environment in which speech occurs. Regulation of public discourse does not turn on whether a certain type of speech, promulgated cumulatively over sufficiently long periods of time, will foreseeably produce harm to individuals, to groups, or to democracy itself.[174]

The civil liberties model is not naïve about harm. It accepts that speech causes harm and creates risks of harm. It protects speech even when it predictably causes harm. That is because the civil liberties model maintains that the benefits of freedom of speech—for self-government, the production of knowledge, and human freedom, for example—outweigh the harms and risks of harm.[175]

173. The archetypal expression of this way of thinking appears in the famous free speech dissents of Justices Oliver Wendell Holmes, Jr. and Louis Brandeis. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . There must be reasonable ground to believe that the danger apprehended is imminent.").

174. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

175. *See Whitney*, 274 U.S. 357 at 377 (Brandeis, J., concurring). In his concurrence in *Whitney*, Justice Brandeis argued:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion

You can see from this description that the civil liberties model does not think about speech in hygienic, epidemiological, environmental, or probabilistic terms. Rather, it defines itself in opposition to these approaches. During the twentieth century, many people did argue that speech should be understood in terms of what I am calling a HEEP approach. But they eventually lost the battle as modern First Amendment doctrine formed in the middle of the twentieth century. For example, early twentieth-century courts asked whether speech had a "bad tendency" to cause harm.[176] In 1943 in *Beauharnais v. Illinois*,[177] the Supreme Court upheld a group libel law, arguing that it was justified in the context of a long history of racial and religious violence "and its frequent obligato of extreme racial and religious propaganda."[178] During the McCarthy Era, the Supreme Court adopted a probabilistic cost-benefit test in *Dennis v. United States*.[179] It asked whether the cost to freedom of speech was outweighed by the magnitude of the harm it caused discounted by the probability of harm.[180] This was Judge Learned Hand's risk-benefit test of tort liability, applied to the risk of harms caused by speech.[181]

The civil liberties model that eventually prevailed defined itself against these ideas. In fact, the standard narrative of the success of civil liberties in the twentieth century measures progress in terms of rejecting HEEP thinking. Courts gradually gave up the "bad tendency test" of the 1920s and the cost-benefit test of *Dennis v. United States* of the 1950s.[182] In 1969, the Supreme Court established the

> the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.
>
> *Id.*

176. *See* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 533 (1981) ("The [early twentieth century Supreme Court's] decisions stated or assumed that speech could be penalized if it had a 'bad tendency' upon the public welfare."); *id.* at 539 ("The Court, as well as the statutes it upheld, took for granted the proposition that expressions of opinion can themselves be penalized for their bad tendency to lead to a socially undesirable act.").
177. 343 U.S. 250 (1952).
178. *Id.* at 261.
179. 341 U.S. 494, 510 (1951).
180. *See id.* ("'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' . . . We adopt this statement of the rule.") (quoting United States v. Dennis, 183 F.2d. 201, 212 (2d. Cir. 1950) (opinion of Learned Hand, J.)).
181. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (offering risk-benefit test for negligence).
182. *See* Noto v. United States, 367 U.S. 290, 297–98 (1961) ("[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."); Yates v. United States, 354 U.S. 298, 320–24 (1957) (overturning convictions which could have been based on mere advocacy of violent action).

modern test of *Brandenburg v. Ohio*,[183] which built on arguments by Justices Oliver Wendell Holmes, Jr., and Louis Brandeis that protecting freedom of speech required a showing of imminent harm.[184]

The *Brandenburg* test for when governments may criminalize speech that advocates lawbreaking and violence does not reason in terms of discounted probabilities of harm or long-term environmental effects. It draws the line at immediacy and virtual certainty.[185] Many other free speech doctrines also draw doctrinal lines unrelated to whether speech creates a foreseeable risk of harm to populations or to the speech environment. Examples are the actual malice test of *New York Times v. Sullivan*,[186] and the distinction between content-based regulations and regulations of time, place, and manner.[187] Instead, a central goal of most doctrinal distinctions is to avoid government censorship of ideas and opinions,[188] including those that create a predictable risk of harm to individuals, groups, and even to democracy itself.

Of course, the civil liberties model treats the costs and benefits of speech asymmetrically. When people argue for the *benefits* of freedom of speech, the style of analysis completely flips. It is not necessary to show that the benefits of speech are immediate, clear, and certain. Rather, we protect free speech because of its long-run benefits to society, benefits that may be diffuse and partially unknowable today. Moreover, the benefits of freedom of speech are benefits to entire populations, even if particular individuals do not enjoy them. Considered in the mass, and over long periods of time, freedom of speech creates a healthy environment for democracy, for self-expression, and for the promotion and discovery of truth. Even if speech undermines these interests in the short run—because lies quickly outrun truths, demagogues undermine democracy, and

183. 395 U.S. 444 (1969).

184. *See id.* at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *see also supra* note 173 (quoting Holmes and Brandeis on imminence).

185. *See Brandenburg*, 395 U.S. at 477.

186. 376 U.S. 254 (1964).

187. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.").

188. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.").

hateful expression injures equality and self-development, the civil liberties model preaches faith in the curative powers of free expression in the long run.

A similar kind of reasoning applies when governments consider the benefits of state subsidies of speech and knowledge production—for example, through state expenditures for educational institutions, libraries, museums, archives, and scientific research. The point of these investments is to create a healthy environment for self-government, increase the chances that the public will be informed, and promote the growth and spread of knowledge over the long run. The justification for these investments is often hygienic, epidemiological, environmental, and probabilistic.

Finally, the civil liberties model does not apply to speech unprotected by the First Amendment—for example, speech involved in obscenity, commercial transactions, securities regulation, products liability, consumer protection, and so on. In these cases, regulators frequently think about the potential harms of speech and the need for regulation in probabilistic and environmental terms. For example, securities law may be interested in the damage to markets as a whole; consumer protection law may ask whether an advertisement or a failure to disclose creates a reasonable probability of misleading some segment of the public. The law does not require that these harms be certain or immediate to justify regulation.

What becomes of the civil liberties model in the Algorithmic Society, which is premised on HEEP thinking? It does not go away. Rather, it continues to apply to old-school speech regulation. In areas outside of online speech regulation, it continues to expand with a vengeance.[189] But in the two other legs of the free speech triangle—private governance and new-school speech regulation—the civil liberties model becomes less important.

That is not entirely surprising. In the United States in the twentieth century, the civil liberties model generally did not apply to private regulation of speech. And, as we have seen, it is unlikely that U.S. courts will now apply the model to

189. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (holding that requiring nonmembers of public sector unions to pay fees toward collective bargaining violates the First Amendment); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (striking down California law requiring pro-life pregnancy centers to provide certain factual information to patients); Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014) (striking down agency-fee provision of Illinois's Public Labor Relations Act); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014) (striking down aggregate limits on federal campaign contributions); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (striking down Arizona law providing "matching funds" to publicly funded state candidates when privately funded opponents spend over a certain amount); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (striking down statutory limits on corporate electioneering).

private governance in the twenty-first. But because an increasing amount of speech regulation involves private governance in the digital age, the civil liberties model becomes less important to speech regulation as a whole.

The most interesting case is the third leg of the triangle. This is new-school speech regulation, where governments regulate internet intermediaries and platforms. Because new-school speech regulation is aimed at privately-owned companies, one might assume that it will mostly retain the civil liberties model just like old-school speech regulation will. As we have seen, digital companies will press hard for strong First Amendment protections against new-school speech regulation as well as for strong intermediary immunity. But in the years to come, the Algorithmic Society will put enormous pressure on treating new-school regulation according to a civil liberties model of individual rights.

Digital companies routinely analyze and moderate online behavior in HEEP terms—for that is how they make their money and conduct their business. At the same time, they will argue that they cannot and should not be made legally responsible for the predictable effects of speech on vulnerable populations, or for the corrosion and poisoning of democratic life. Even as they analyze online speech in HEEP terms, they will insist that the state cannot apply the same kind of reasoning to their own operations. Digital companies will try to achieve an acoustic separation between the exclusion of HEEP reasoning in the civil liberties model and their own prodigious use of this reasoning in their business decisions. As we have seen, reformers will try any number of end-arounds to this strategy. They will try to de-constitutionalize platform regulation by turning to legal ideas such as common carriage, public utility models, competition law, consumer protection, and privacy.

Can digital companies maintain this acoustic separation on the grounds that they are private First Amendment actors? This strategy may succeed in the short run, but it will face increasing resistance as time goes on. The distinction depends on the distinction between private ownership and public governing, between curating within an environment and creating an environment. The problem is that the Algorithmic Society undermines these distinctions. The more that digital companies dominate human communication, the more public they seem—in function, if not in ownership. Moreover, much of digital speech governance and digital speech surveillance blurs the line between public and private governance. It involves companies cooperating with states and states coopting companies. In the short run some courts may double down on First Amendment

protections for digital company business models.[190] But in the long run the pressure to impose public obligations on privately-owned companies that perform public functions will eventually lead to some form of de-constitutionalization.

VII. HOW THE ALGORITHMIC SOCIETY WIDENS THE GAP BETWEEN THE FIRST AMENDMENT AND THE VALUES THAT JUSTIFY IT.

A. The Free Speech Values Gap

I have argued that the digital age and the Algorithmic Society change our conception of free speech rights and how free speech is protected. They also affect the justifications for freedom of speech. In particular, they reveal the First Amendment as increasingly inadequate to secure the values that justify it in the first place.

There are many justifications for freedom of expression. One is the promotion of truth and the growth and spread of knowledge, sometimes misleadingly referred to as the marketplace of ideas theory.[191] Another is self-expression; recently Seana Shiffin has offered a new version of this theory that argues that freedom of speech enables people to develop themselves as social beings by being able to express what is in their minds to others.[192]

Perhaps the most familiar justification for free expression is democracy, but there are multiple versions. Alexander Meiklejohn and his successors argued that freedom of speech promotes an informed public and reasoned deliberation about public issues that is necessary for democratic self-governance.[193] Robert Post argues that freedom of speech protects public participation in the creation and circulation of public opinion that is necessary to legitimate the exercise of public

190. *See, e.g.*, U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 418, 426–31 (D.C. Cir. 2017) (Kanvanaugh, J., dissenting from denial of rehearing en banc) (arguing for First Amendment right of digital companies to content discriminate); Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (protecting sale, disclosure, and use of commercial data under the First Amendment); *cf.* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (treating a cable company as a private actor with First Amendment rights).

191. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See generally* JOHN STUART MILL, ON LIBERTY (1859) (offering the canonical account of the truth-based justification for freedom of speech).

192. *See* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 294 (2011).

193. *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) (consisting in part of the republication of ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

power.[194] Vincent Blasi argues that freedom of speech performs a checking function that prevents abuses of public power (and I would add, of private power as well).[195]

Still another conception of democracy, which I have emphasized in my own writings, is cultural democracy—the ability of people to participate in the forms of meaning making and cultural power that constitute them as individuals.[196] According to the theory of cultural democracy, freedom of expression protects the ability to participate in the forms of cultural power that constitute the self. I have argued that cultural democracy has gained increasing importance as a justification for freedom of speech in the digital age.[197]

I will call these multiple justifications for freedom of speech *free speech values*. They are the goals that freedom of speech is supposed to realize. And they are the goods that a well-functioning public sphere should produce.

Now these free speech values justify the First Amendment's protection of speech from government interference and abridgement. But they also justify freedom of speech with respect to private power. To be sure, how we realize these free speech values and balance them against competing considerations may be very different in the case of private power than in the case of public power. Among other things, private actors also have rights of free expression; as the example of the free speech triangle shows, this creates a conflict of free speech rights that doesn't arise so clearly when the question is government regulation of speech. Genevieve Lakier has pointed to a group of legal doctrines outside of the First Amendment that protect free speech values against private actors.[198]

In addition, there are a whole host of institutions, industries, and technologies that promote free speech values even if they are not required by the First Amendment and do not promote free speech by awarding people legal rights. For example, the existence of media organizations, schools, universities, libraries, museums, scientific research institutions, and artistic organizations—whether run by private parties or by the state—promote free speech values. But the First Amendment does not require them or require that the government subsidize them. Telecommunications infrastructure and digital industries can promote

194. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000); Post, *supra* note 166, at 1115–17.

195. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 528, 539 (1977).

196. *See* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1061 (2016) [hereinafter Balkin, *Cultural Democracy and the First Amendment*]; Balkin, *Digital Speech and Democratic Culture, supra* note 46, at 33.

197. *See* Balkin, *Digital Speech and Democratic Culture*, *supra* note 46, at 2–3.

198. *See* Lakier, *supra* note 107, at 2316–18, 2325–28.

free speech values, and so can good design of communications technologies, interfaces, and affordances. But the First Amendment does not require them.

If we had only the First Amendment but none of these laws, institutions, infrastructures, technologies, or industries, this would impoverish the realization of free speech values even if nobody's First Amendment rights were violated. In other words, the fullest realization of free speech values will not be secured merely by recognizing and protecting First Amendment rights. Call this phenomenon the *free speech values gap*. This is just another way of saying that the First Amendment has always been necessary but not sufficient to realize the values that justify freedom of speech—the production and spread of knowledge, self-expression, political democracy, and cultural democracy.

If we protect speech through the First Amendment, the institutions, infrastructures, and industries that protect free speech values may eventually emerge, because the First Amendment creates space for them. But this is not guaranteed. Someone has to build the institutions, infrastructures, and industries that promote free speech values, and this takes investment and effort over long periods of time. If you destroy these features of our social world, their replacements will not necessarily spring up overnight. That is why when authoritarian regimes take power, they do not simply ban speech. They take aim at the institutions and features of social life—like the press, schools, and universities—that secure free speech values.[199] They try to weaken, coopt, or destroy them.

The digital age has had an ironic consequence. One the one hand, it greatly increases the opportunities for people to express themselves, to speak to each other, and to reach audiences around the world. In this sense, the creation and spread of digital technologies has promoted free speech values. That is not because these technologies increase First Amendment rights, but because their affordances increase people's practical freedom. Early internet optimists argued that the internet would provide an end run around government censorship and allow ordinary people to participate in politics and hold power accountable.[200] I argued

199. *See* Ronald J. Daniels, *Why Authoritarian Regimes Attack Independent Universities*, WASH. POST (Sept. 28, 2021, 12:46 PM), https://www.washingtonpost.com/opinions/2021/09/28/why-authoritarian-regimes-attack-independent-universities [https://perma.cc/H2P6-V83J].

200. *See, e.g.*, John Perry Barlow, *On the Internet: Censorship 2000*, INTERNET SOC'Y, https://web.archive.org/web/20050206214653/https://www.isoc.org/oti/articles/1000/barlow.html [https://perma.cc/M49P-Q3ZK] (quoting John Gilmore's remark at the Second Conference on Computers, Privacy, and Freedom that "[t]he Internet treats censorship as though it were a malfunction and routes around it").

that digital technologies would give people new ways to participate in and transform the cultures in which they lived.[201]

On the other hand, digital technologies weaken many of the institutions that secure free speech values. In particular, digital technologies can undermine trust in professionalism, science, and expertise, weaken journalistic institutions, and eviscerate the forms of trust among citizens necessary for democracies to function. Digital technologies also create new ways to surveil people and chill their expression.

The digital age and the Algorithmic Society widen the free speech values gap. In the context of digital speech, the judge-made doctrines of the First Amendment are increasingly inadequate to secure the values that justify freedom of expression in the first place, and in a few cases, they may even undermine the values that justify free expression. There has always been a gap between what the First Amendment protects and the realization of free speech values. What the digital age and the Algorithmic Society do is make that gap more salient and obvious.

B. How the Algorithmic Society Undermines Free Speech Justifications

To list all the ways this happens would take another essay by itself. In fact, entire books have been written about the phenomenon.[202] But I will just mention a few of the highlights.

First, as the speed and scale of speech increases, and competition for scarce human attention dominates discourse, we have much less reason to believe that knowledge will spread widely, and that truth will win out over falsehood. Conspiracy theories take advantage of speed and scale. Speed and scale allow demagogues to undermine confidence in journalism, science, learned professions, educational institutions, and democracy itself.[203] If we think about speech from a meme's point of view, mere success in spread and replication may have little relationship to the spread of truth or the production of knowledge.[204] Knowledge is costly to produce and sometimes difficult to convey to already distracted

201. *See* Balkin, *Digital Speech and Democratic Culture*, *supra* note 46, at 4, 8, 33–34.
202. *E.g.*, RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022).
203. *See id.* at 21, 24.
204. *See* BALKIN, *supra* note 159, at 235 ("The memetic imperative isn't interested in what is good or bad for human freedom or human flourishing. It cares about what is good and bad for memes. Some things that help memes spread may assist human freedom and human happiness. But some may be indifferent or even hostile to them.").

audiences with scarce attention spans. False or misleading memes may cost less to produce and spread as well if not better than true ones. We may still cling to the idea that free speech values will be vindicated in the long run, but to vary John Maynard Keynes's famous saying, in the long run we—and our democracy—may all be dead.[205]

Now consider democratic justifications for free speech. These justifications assume that free speech promotes the legitimacy of democracy within a nation-state.[206] But digital media outstrip national boundaries. Digital speech is cosmopolitan.[207] It does not exist for the purpose of promoting democracy in a single country and the digital public sphere—or more correctly, spheres—do not necessarily serve this purpose.

Moreover, digital speech makes it easier and far less expensive for other countries to shape a nation's political discourse and undermine its democracy.[208] In the twentieth century, the Soviet Union's active measures against American democracy were far more expensive than digital equivalents by today's Russian Federation.[209] Indeed, because the cost of digital speech is so low, every nation on earth can engage in clandestine propaganda campaigns.

Alexander Meiklejohn and his successors argued that the goal of freedom of speech is to promote democratic deliberation about public issues by an informed public.[210] Digital media can make more valuable information about public issues

205. *See* JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (reprt. 1924) (1923).

206. *See* Balkin, *Cultural Democracy and the First Amendment*, *supra* note 196, at 1055, 1061, 1089–95.

207. *See id.*; Robert Post, *Democracy and the Internet*, BALKINIZATION (Jan. 28, 2023), https://balkin.blogspot.com/2023/01/democracy-and-internet.html [https://perma.cc/WJW2-JN2R].

208. *See* Alina Polyakova, *Weapons of the Weak: Russia and AI-driven Asymmetric Warfare*, BROOKINGS (Nov. 15, 2018), https://www.brookings.edu/research/weapons-of-the-weak-russia-and-ai-driven-asymmetric-warfare [https://perma.cc/WN6A-4X9P] ("[D]igital information warfare is cost-effective and high-impact, making it the perfect weapon of a technologically and economically weak power."); Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 560–65 (2018) (describing Russian use of "troll armies" to disrupt political discourse).

209. *See generally* THOMAS RID, ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE (2020) (describing twentieth century techniques and the transition to digital strategies).

210. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996) ("We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.").

available to more people than ever before in human history.[211] But digital media, algorithmic recommendation systems, and the digital attention economy can easily undermine the public's ability and interest in being informed about public issues.[212] As just noted, digital media also create opportunities and advantages for demagogues and political snake-oil salesmen, and they make it easier for domestic and foreign actors to misinform and mislead the public through conspiracy theories, misinformation, and propaganda.

The speed and scale of digital discourse, and the scarcity of attention in human minds, undermine the Meiklejohnian assumption—or hope—that people will engage in sustained democratic deliberation about public issues.[213] Circulation of informed opinions often requires breathing space for reflection, consideration, and opinion formation. Knowledge takes time to absorb and assimilate. But in the digital age people are constantly connected and the pace of cultural transmission is relentless.[214] A discursive system that prizes speed, constant stimulation, and the ability to grab attention makes the ideal of reasoned democratic deliberation more difficult to achieve.

Theories of democratic deliberation also assume the existence of a public whose members share and develop reasoned opinions that can legitimate public power and hold it to account. But a shift in communications technology changes the nature of the public. The public—or publics—produced by digital communications technologies become less like the public of newspapers, magazines, and books and more like a crowd or a multitude.[215] Indeed, the digital age celebrates the idea of crowdsourcing as a method of producing knowledge. Search engines do not ask people for their reasoned opinions about what is valuable and important. Instead, they measure links and reactions, producing a

211. *See generally* Philipp Lorenz-Spreen, Lisa Oswald, Stephan Lewandowsky & Ralph Hertwig, *A Systematic Review of Worldwide Causal and Correlational Evidence on Digital Media and Democracy*, 7 NATURE HUM. BEHAV. 74 (2023) (arguing that, on the whole, digital media, including websites and general internet access as well as social media, increase political knowledge although they also undermine trust in institutions).

212. *See* HASEN, *supra* note 202, at 24, 37; Lorenz-Spreen, et al., *supra* note 211, at 85 ("[C]urrent platforms fail to produce an information ecosystem that empowers citizens to make political choices that are as rationally motivated as possible.").

213. *See generally* Lorenz-Spreen et al., *supra* note 211; CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223 (2018); Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017).

214. *See* Post, *supra* note 207.

215. *See id.*

new form of agenda setting and authority that Clay Shirky has called algorithmic authority.[216]

The twentieth century version of the public sphere featured multiple gatekeeping institutions—including mass media—that produced content for mass audiences and thereby structured discourse, set cultural norms, and shaped political agendas. In the digital age social media companies—unlike twentieth-century movie studios, newspapers, and television networks—do not produce most of their own content. Their goal is to goad large populations into perpetual expression and reaction. This produces a different memetic ecology, and it offers a different set of incentives for people and organizations that seek influence and power. In the attention economy, what often works best is repetition, attention seeking, and the generation of conflict and spectacle.[217] Digital media companies, in turn, encourage these strategies because they mesh well with their business models.

The emergence of television in the second half of the twentieth century as the most important mass medium of communications encouraged the gradual merger of politics and news with entertainment.[218] The digital age continues and accelerates this tendency. Because attention is a scarce commodity, and attention spans are shorter in digital environments, the distinction between what keeps people entertained and all other forms of discourse—including political discourse—continues to blur. Digital speech blurs the distinction between public discussion and gossip because speech must be entertaining and engaging to maintain attention.

Modern democracies arose with the rise of a public sphere featuring public discussion of public issues and publicly shared giving of reasons.[219] The opposite of what is public is what is private. But digital media do not respect the distinction between public and private discussion or public and private reason giving. Akriti Gaur has recently argued that the rise of encrypted messaging systems further undermines distinctions between public and private.[220] Encrypted messaging

216. *See* Clay Shirky, *A Speculative Post on the Idea of Algorithmic Authority*, CLAY SHIRKY (Nov. 15, 2009), https://web.archive.org/web/20091118030114/http://www.shirky.com/weblog/2009/11/a-speculative-post-on-the-idea-of-algorithmic-authority [https://perma.cc/5QH3-3VV7].

217. *See* Post, *supra* 207.

218. *See generally* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985).

219. *See* HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE *supra* note 158, at 27–31.

220. *See generally* Akriti Gaur, Social Media Shapeshifters: The Emergence of a "Public-private Hybrid" (2023) (unpublished manuscript) (on file with author).

systems are public in the sense that they reach many people and therefore can have significant public effects. For example, wild rumors and conspiracy theories can spread virally through these systems misleading people and inciting violence.[221] On the other hand, these systems are also private because their contents are encrypted and not generally visible to the public. This makes it difficult to respond to and counteract conspiracy theories and calls for violence that travel through these channels. Encrypted systems are thus hybrids—they are both private communications and also shape public politics and political action. Even non-encrypted social media share this hybrid nature. They produce individually tailored feeds that may be public in their effects but private in the sense that they are not generally available to others.

Of the various justifications for free expression, the one that fares best in the digital age is cultural democracy—the ability of people to participate in the forms of meaning making that, in turn, constitute them as individuals. Two decades ago, I argued that the digital age made cultural democracy newly salient and important as a justification for free expression.[222] It is easy to see how cultural, religious, and sexual minorities have benefited from the ability to express their identities, find like-minded communities, and stand up for themselves. The idea of cultural democracy is particularly well suited to the digital age because it does not depend on the assumption that freedom of speech requires an idealized autonomous liberal individual subject.[223] Cultural democracy assumes that people are immersed in large networks of social influence that shape who they are and how they understand themselves and their values and goals. People's autonomy comes from their ability to influence and be influenced by others; autonomy arises from, not in spite of, their social and cultural connections with others. Freedom of speech is the ability to participate in mechanisms of social influence and cultural power that transcend nation states.

Even so, digital networks can also undermine cultural democracy, because digital crowds can overpower individual participants and reshape people's cultural identities in ways that harm them. Speed and scale can undermine individuals' attempts to maintain their social identities. Digital media can make some nodes in the network very powerful and give them the unchecked ability to

221. *See id.* at 26–27; Khan & Ramachandran, *supra* 73.
222. *See* Balkin, *Digital Speech and Democratic Culture, supra* 46, at 2–3.
223. *See id.* at 34–36; *see also* JASON STANLEY AND DAVID BEAVER, THE POLITICS OF LANGUAGE (2023) (arguing for a theory of communication that does not presume a liberal individualist model of the self); Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 MARQ. L. REV. 1123, 1125 (2017) (offering a self-emergence rationale for free expression).

harm and harass others. The increased ability to participate in culture does not prevent individuals from being overwhelmed in a deluge of digital cultural power.

VIII. CONCLUSION: MINDING THE GAP

Most of my argument has been descriptive and diagnostic. I have explained how the Algorithmic Society is changing the practices, the governance, the protection, and even the understanding of freedom of speech. I have also explained how the First Amendment increasingly under-protects the values that justify it. What normative lessons follow from this diagnosis?

I have written extensively on how I would reform social media in other work[224] and I won't repeat that analysis here. I will merely point out that understanding the changes wrought by the Algorithmic Society can help us understand the proper direction of reform. Essentially, we should be less focused on changes to First Amendment doctrine, and more focused on the reform of digital industry structure and business models. We must also engage in a very long process of shoring up and reforming institutions of knowledge production and dissemination that developed in the pre-digital era so that they can work effectively in the digital environment of the Algorithmic Society.

A. To Reform Digital Media, Reform Informational Capitalism

The most natural proposals for realizing free speech values in the digital age aim at changing First Amendment doctrine itself. Because lawyers and judges identify freedom of speech with the First Amendment, it is only natural to think that tinkering with First Amendment doctrines is how one best meets the challenges of the digital age. Accordingly, an increasing number of First Amendment scholars argue that we should change our doctrines of free speech law to make it easier for the government to regulate harmful speech or speech that imperils democracy. Some argue that we should significantly modify the test of *Brandenburg v. Ohio*.[225] Others argue that we should loosen constitutional

224. *See* Jack M. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 233–54 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2022) [hereinafter Balkin, *To Reform Social Media, Reform Informational Capitalism*]; Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021) [hereinafter Balkin, *How to Regulate (and Not Regulate) Social Media*].

225. *E.g.*, Anna Rhoads, *Incitement and Social Media-Algorithmic Speech: Redefining* Brandenburg *for a Different Kind of Speech*, 64 WM. & MARY L. REV. 525, 530 (2022) ("[T]he

protections for defamation and overrule or modify the actual malice rule of *New York Times v. Sullivan* and the public figure rule of *Gertz v. Robert Welch*.[226] Still others argue that we should alter existing doctrines to allow for regulation of false political speech and conspiracy theories.[227] And half a century of scholarship has argued that America should adopt bans on hate speech closer to those in Europe and Canada.[228]

Many of these solutions are orthogonal to the root causes of the growing gap between the First Amendment and free speech values. To see why, it may be helpful to return to the distinction between old-school and new-school speech regulation. Old-school speech regulation operates directly on speakers. These are cases about defamation, obscenity, hate speech, false speech, propaganda, and conspiracy theories. New-school speech regulation operates indirectly by aiming at owners of digital infrastructure, including platform companies, search engines and social media. New-school issues concern whether to hold infrastructure providers liable for third party speech that they carry or recommend on their

incitement standard for social media-algorithmic speech should be less stringent because the *Brandenburg* standard does not apply well to new media . . . ."); ALEXANDER TSESIS, FREE SPEECH IN THE BALANCE 107–08 (2020) (arguing for special remedies to deal with dangerous terrorist speech disseminated over social media); Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015, 5:37 PM), https://slate.com/news-and-politics/2015/12/isiss-online-radicalization-efforts-present-an-unprecedented-danger.html [https://perma.cc/AJP6-DRB7] (arguing for reconsidering *Brandenburg*); Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 164 (2011) (arguing that "a better approach might be to modify the imminence requirement of *Brandenburg* so that it does not preclude liability for social-media incitement"); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 233 (2007) (arguing that in comparison to *Brandenburg*, the cost-benefit test of "[*United States v.*] *Dennis* is the better test for times of emergency").

226. *E.g.*, CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 8 (2021) ("[P]ublic figures should be able to obtain redress for defamatory statements that do not meet the standards of the defining case of *New York Times Co. v. Sullivan*. That decision, giving broad protection to defamation, looks increasingly anachronistic, a dinosaur in light of what is happening online and improved understandings about how information spreads.").

227. *E.g.*, Wu, *supra* note 208, at 573 (advocating for "[t]he enforcement of laws governing fraud, deception, and identity theft to fight deceptive propaganda campaigns, malicious usage of propaganda robots, and other mass deception campaigns"); Justin Hyland, *Conspiracy Speech: Reimagining The First Amendment in the Age of QAnon*, 44 HASTINGS COMM. & ENT. L.J. 1, 32 (2021) (arguing for "creating a doctrinal exception for online conspiracy speech").

228. *See e.g.*, TSESIS, *supra* note 225; JEREMY WALDRON, THE HARM IN HATE SPEECH (2012); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

sites, whether infrastructure providers may discriminate against speech or remove it, and so on. There are also a set of issues, aimed primarily at digital businesses, that fall into both categories. These concern whether end user privacy protections, competition law remedies, and interoperability mandates violate digital companies' free speech rights. Although some of these are technically old-school speech regulation, these questions primarily concern industry structure and business models.

Many reform proposals aim at old-school speech regulation doctrines about false, dangerous, hateful, and defamatory speech. But the real battleground of First Amendment law should be new-school speech regulation and regulations of industry structure like digital privacy, competition laws, and consumer protection laws. In addition, many legal questions will concern statutes like Section 230 and administrative regulations, not the First Amendment itself.

In general, courts should resist expanding First Amendment doctrines—such as those involving commercial speech, telecommunications regulation, and privacy—that would make it harder to reform and regulate industry structure and digital business models.[229] Many of the problems of the digital public sphere arose from the business models that digital companies developed in a relatively short space of time. These models developed as they did because of easy access to consumer data, weakened or non-existent consumer protection rules, lack of significant digital privacy legislation, little oversight of developing industry structure, and lax antitrust enforcement.[230] Reforms that alter First Amendment doctrines regarding defamation, false speech, and hate speech do not address these issues. They aim at symptoms of informational capitalism rather than its underlying causes. My approach is perhaps best summed up by the title of one

229. *See* Balkin, *To Reform Social Media, Reform Informational Capitalism*, *supra* 224, at 253–54; Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (striking down a Vermont law restricting the sale and disclosure of physicians' prescription records).

230. *See* COHEN, *supra* note 126 at 44 (explaining how platform power emerged from "a quiet revolution in the legal status of data and algorithms" as well as the systematic use of "[b]oilerplate agreements that are contractual in form but mandatory in operation" and that "are a powerful tool both for private ordering of behavior and for private reordering of even the most bedrock legal rights and obligations"); Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1497–1508 (2020) (explaining how legal changes in multiple areas assisted the growth of informational capitalism); *cf.* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 642 (2014) ("Silicon Valley's success in the Internet era has been due to key substantive reforms to American copyright and tort law that dramatically reduced the risks faced by Silicon Valley's new breed of global traders").

of my recent articles: to reform social media, we must reform informational capitalism.[231]

Even so, as a predictive matter, my guess is that the courts will change some aspects of First Amendment doctrine concerning false speech, hate speech, and defamation. That is because every age remakes constitutional norms in its own image, for good and for ill. And the reasons for these changes are overdetermined.

First, voices on both the left and right are dissatisfied with elements of current First Amendment doctrine. Although the Supreme Court's conservative majority is highly libertarian when it comes to campaign finance law, many of the Supreme Court's conservative Justices appear ready to change other aspects of free speech law to make speech easier to regulate.[232]

Second, an entire generation of Americans will grow up in a world in which the primary governors of online speech are social media companies. The community standards of these companies employ HEEP ideas that depart in multiple ways from current First Amendment doctrine.[233] Among other things, the largest social media companies ban hate speech, some kinds of denigrating and dehumanizing speech, and some speech that the companies believe predictably endangers safety and security.[234] Social media companies are privately-owned companies, and the rules reflect their value choices and their bottom line. Even so, their powerful and pervasive role in speech governance will likely shape what people believe freedom of speech means in practice.

Third, the European Union has been the first mover in social media regulation; European free speech norms differ from those in the United States, and

231. *See* Balkin, *To Reform Social Media, Reform Informational Capitalism*, *supra* 224.

232. *E.g.*, NetChoice, LLC v. Paxton, 142 S. Ct. 1715 (2022) (Alito, J., dissenting from grant of application to vacate stay); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring); McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari).

233. *See, e.g.*, *Facebook Community Standards*, META TRANSPARENCY CTR., https://transparency.fb.com/policies/community-standards [https://perma.cc/YMC6-77SM]; *The Twitter Rules*, TWITTER HELP CTR., https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/28ZU-KY95]; *Community Guidelines*, TIKTOK, https://www.tiktok.com/community-guidelines?lang=en (Mar. 2023) [https://perma.cc/RZ9M-RB8V].

234. *See Facebook Community Standards*, *supra* note 233 (prohibiting "Violence and Incitement," "Dangerous Individuals and Organizations," "Coordinating Harm and Promoting Crime," "Bullying and Harassment," "Hate Speech," and "Violent and Graphic Content"); *The Twitter Rules*, *supra* note 233 (prohibiting "Violent Speech," "Violent & Hateful Entities," "Abuse/Harassment," "Hateful conduct," and "Sensitive media"); *TikTok Community Guidelines*, *supra* note 233 (prohibiting "Bullying and harassment," "Hateful behaviors," and "Violent extremism").

its regulatory decisions will have indirect effects on what Americans experience online.[235]

Fourth, social norms about speech have changed rapidly in the internet age, becoming simultaneously less inhibited in some ways and more judgmental and censorial in others. Social media companies are inevitably influenced by these changes in norms—both in the United States and around the world—and their governing rules in turn will influence the free speech norms of current and future generations.

Thus, there is good reason to predict that U.S. courts, reacting to public anxieties about technology companies and changing public values, will make First Amendment doctrine less speech-protective over time. But most of these changes, I fear, will not get at the real issues of informational capitalism. In fact, it is entirely possible that old-school speech regulation will become less speech protective over time while the courts increasingly use the First Amendment to veto laws and regulations about privacy, consumer protection, and industry structure. Then individuals and groups will have less First Amendment protection for their speech while businesses will have more for their business models. This would, in my view, be the worst of all possible worlds, and it will do little to protect free speech values.

In 2004, I argued that most important protections of free speech values in the digital age would not come from First Amendment doctrines. Instead, they would concern statutory and administrative questions, and questions of industry structure and technological design.[236] The past two decades have repeatedly confirmed these predictions.

B. To Protect Free Speech Values, Protect the Institutions That Foster Free Speech Values

Reforming informational capitalism is only part of the story, however. Equally important reforms concern institutions. The values that justify freedom of speech—the growth and spread of knowledge, political democracy, and cultural democracy—depend on a series of institutions for producing, curating,

235. *Cf.* Neil Netanel, *Applying Militant Democracy to Defend Against Social Media Harms*, 48 CARDOZO L. REV. (forthcoming 2023) (arguing for European-style approaches to speech regulation to deal with threats to democracy from hate speech and propaganda and hoping that the Brussels effect of European Union law will have salutary effects on speech the United States).

236. *See* Balkin, *Digital Speech and Democratic Culture*, *supra* note 46, at 5–6.

and disseminating content according to professional and public-regarding norms and standards.[237] The digital age undermined and transformed many of the institutions that developed in the twentieth century to serve these functions—journalism is the most obvious example.[238] It created a new kind of digital public sphere without "the connective tissue of the kinds of institutions and practices necessary to sustain the underlying values of freedom of speech."[239] And it encouraged distrust of established institutions for producing and curating knowledge.[240] The digital age democratized the practical liberty to speak but it has not yet created the accompanying professional and public-regarding "institutions that help protect and promote the values that justify that liberty: cultural and political democracy and the growth and spread of knowledge."[241] As I noted previously, once these institutions decay, it is very hard to build them up again. But that is the burden of our age.

Institutions for knowledge production co-evolve with the dominant forms of communications media and technology. The knowledge-producing institutions we have depend for their strength and authority on how knowledge and information can be transmitted, collected, stored, and presented to people. Most of the institutions we have today—journalism, universities, research institutions—developed in the culture of print, books, and mass media. That culture has been surrounded and supplanted by a different culture of digital technology.

The Algorithmic Society has created vast possibilities and new techniques for gaining and disseminating knowledge. In particular, network and data science have already increased our understanding and yielded enormous insights. The development of powerful algorithms and artificial intelligence promises to produce even more understanding about ourselves and our world.

But the Algorithmic Society has also undermined the knowledge-producing institutions of journalism, education, science, and medicine that grew up in the

237. *See generally* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012); Balkin, *How to Regulate (and Not Regulate) Social Media*, *supra* note 224; Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CAN. J. COMPAR. & CONTEMP. L. 156 (2021); Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: of Objectivity and Decentralization*, HARV. L. REV. BLOG (Aug. 29, 2019), https://blog.harvardlawreview.org/knowledge-institutions-in-constitutional-democracies-of-objectivity-and-decentralization [https://perma.cc/BFD7-C3K8].

238. *See generally* MARTHA MINOW, *supra* note 10 (describing how the digital age has affected journalism).

239. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *supra* note 224, at 245.

240. *Id.*

241. *Id.*

pre-digital era. We must shore up these pre-digital institutions and professions as best we can, but we cannot return to the pre-digital world.

Rebuilding and reconstructing these institutions is one thing; restoring trust in and authority for them is another. It is almost certain that institutions and professions for knowledge production will have to undergo significant transformation if they are to protect and promote free speech values in our new media system. Their techniques, their practices, and even their professional norms are likely to change in the process.

Free speech is more than the First Amendment, and the gap between them grows greater every day. The free speech agenda of the future is more than the perfection of First Amendment doctrine. It is to construct and reconstruct the institutions, industries, and technologies that produce and preserve knowledge and that serve free speech values in the process. This task will take many years to accomplish. It is in the spirit of the First Amendment but it transcends First Amendment law.

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