MISSING IN "STATE ACTION": TOWARD A PLURALIST CONCEPTION OF THE FIRST AMENDMENT

by
*Moran Yemini**

Online speech intermediaries, particularly social platforms, have an enormous impact on internet users' freedom of expression. They determine the speech rules for most of the content generated and information exchanged today and routinely interfere with users' speech while enjoying practically unchecked power to block, filter, censor, manipulate, and surveil. Accordingly, our current system of free expression lacks one of the main requirements of a just system—the notion that no form of power is immune from the question of legitimacy. Scholarly responses to this situation tend to assign decreased weight to constitutional norms as means to impose duties on online intermediaries and promote internet users' speech while focusing instead on other means, such as non-legal norms, legislative and administrative regulation, and technological design.

This Article will swim against this current, arguing that a speech-promoting environment cannot be sustained without an effective constitutional check on online intermediaries' exercise of power. Unfortunately, existing First Amendment doctrine poses the following high barriers for structural reform: (1) the state action doctrine prevents users from raising speech-related claims against online intermediaries; and (2) an expansive interpretation of what constitutes speech serves as a Lochnerian *vehicle for intermediaries to claim immunity from government regulation. This Article will discuss these doctrinal barriers as well as possible modifications to existing doctrine, which could create an environment more supportive of users' speech.*

However, the main contribution of this Article is a reassessment of traditional doctrinal assumptions required for the First Amendment to fulfill its speech-

* PhD (law), University of Haifa. Visiting Fellow, Information Society Project, Yale Law School; Visiting Fellow, Digital Life Initiative, Cornell Tech; Senior Fellow, Center for Cyber, Law and Policy, University of Haifa. The author would like to thank Niva Elkin-Koren, Oren Bracha, Ellen Goodman, Jack Balkin, and Michael Byrne, as well as Katherine Strandburg and the participants of New York University's Privacy Research Group, for their valuable comments on previous versions of this Article. The author would also like to thank Editor in Chief Audrey Davis and the editing team of the *Lewis & Clark Law Review* for a meticulous editing process and many helpful comments.

protecting role in the digital age. The underlying premise of traditional thinking about speech-related constitutional conflicts conceptualizes such conflicts as necessarily bipolar, speaker-government equations. Accordingly, courts and scholars ordinarily focus on asking whether "the state" is present on one side of the equation or whether "a speaker" exists on the other. This way of thinking about speech-related conflicts suffers from grave limitations when trying to cope with the realities of networks comprised of multiple speakers and multiple censors/regulators (with potential overlaps between these categories). The bipolar conception of the First Amendment is simply incompatible with the type of conflicts that pluralist networks generate. Consequently, if the First Amendment is to have a significant speech-protective meaning in the digital ecosystem, a more sophisticated analysis than the reigning bipolar conception of the First Amendment is necessary. This Article will propose such an alternative analysis, which shall be denominated a pluralist conception of the First Amendment.

INTRODUCTION

Online speech intermediaries, particularly social platforms, have an enormous impact on internet users' freedom of expression. Online platforms determine the speech rules for most of the content generated and information exchanged today and construct and control our speech environment through their Terms of Service ("ToS"), choice architecture, and internal processes.[1] As such, online intermediaries

[1] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1632–33 (2018); Moran Yemini, *The New Irony of Free Speech*, 20 COLUM. SCI. & TECH. L. REV. 119, 163–64 (2018).

(and especially Facebook in light of its dominant position)[2] are "the most obvious examples of private [information and communication technology ('ICT')] companies fulfilling a public regulatory role."[3] There is also a significant discrepancy between online intermediaries' self-nurtured image as facilitators of human rights and social change, as manifested in their self-proclaimed values and missions,[4] and the actual role they play in our system of free expression. Online intermediaries routinely interfere with users' speech; they enjoy practically unchecked power to block, filter, censor, manipulate, and surveil.[5] And since most speech today takes place on these terms, freedom of expression, rather than being an inviolable right, is "steadily and increasingly being reshaped as a privilege."[6]

However, the problem lies not with the mere concept of speech mediation or moderation. Online intermediaries carry extremely important tasks in our system of free expression. And online moderation, when done right, may have considerable advantages since it facilitates communication and creates the conditions that enable

---

[2] As of October 2019, Facebook is the leading social network worldwide, ranked by number of active users, with 2.32 billion monthly active users. Facebook is followed by YouTube with 1.9 billion monthly active users and Facebook-owned WhatsApp with 1.5 billion monthly active users. *See Most Popular Social Networks Worldwide as of October 2019, Ranked by Number of Active Users*, STATISTA, https://www.statista.com/statistics/272014/global-social-networksranked-by-number-of-users/ (last visited Jan. 21, 2020).

[3] Thorsten Busch, Fair Information Technologies: The Corporate Responsibility of Online Social Networks as Public Regulators 71 (2013) (unpublished dissertation) (on file with the University of St. Gallen), https://www.alexandria.unisg.ch/228863/; *see also* Tarleton Gillespie, *The Politics of "Platforms,"* 12 NEW MEDIA & SOC'Y 347, 347 (2010) (arguing that digital platforms act as "curators of public discourse").

[4] *See, e.g.*, *Our Values*, TWITTER, https://about.twitter.com/en_us/values.html ("[Twitter] believe[s] in free expression and think[s] every voice has the power to impact the world."); *About YouTube*, YOUTUBE, https://www.youtube.com/yt/about/ (stating that its "mission is to give everyone a voice and show them the world," and its "values are based on four essential freedoms"—expression, information, opportunity, and belonging); *About Facebook*, FACEBOOK, https://www.facebook.com/facebook/info?tab=page_info (stating that its mission is to "[g]ive people the power to build community and bring the world closer together"); Brief for Facebook, Inc. as Amicus Curiae in Support of Plaintiff-Appellant Daniel Ray Carter, Jr. and in Support of Vacatur, Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013) (No. 12-1671), https://www.aclu.org/files/assets/bland_v._roberts_appeal_-__facebook_amicus_brief.pdf ("Facebook . . . has a vital interest in ensuring that speech on Facebook and in other online communities is afforded the same constitutional protection as speech in newspapers, on television and in the town square.").

[5] *See* Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 WASH. U. L. REV. 1353, 1361–62 (2018); Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237, 238 (2018) (arguing that "the new intermediaries of the Internet Age operate substantially free of effective regulatory or normative controls"); Yemini, *supra* note 1, at 177.

[6] Yemini, *supra* note 1, at 192.

cooperation in online communities.[7] The problem is not even with Facebook or Google *per se*; these corporate giants are mere symptoms of a system of free expression that lacks one of the main requirements of a just system—the notion that "all authority is limited, all coercion requires reasoned justification"[8] and "[n]o form of power is immune from the question of legitimacy."[9]

Scholarly responses to this situation tend to focus on the importance of nonlegal norms, legislative and administrative regulation, and technological design in promoting online freedom of expression.[10] One commentator has even defined the combination of these sources as the "Internet's constitution."[11] While views differ as to what role, if any, the law should play in protecting expressive freedom from the power of online intermediaries,[12] the tendency is to assign decreased weight to

---

[7] James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 45 (2015); *see also* Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2041 (2018) (arguing that social media companies and search engines "facilitate public participation in art, politics, and culture," enable people to find and communicate with each other, and "curate public opinion by providing individualized feeds and search results, and by enforcing civility norms through their terms-of-service obligations and community guidelines" (emphasis omitted)); Magarian, *supra* note 5, at 239 ("Speech intermediation is inevitable and necessary in large, complex societies."); Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 778 (2008).

[8] Stephen G. Gilles, *On Educating Children: A Paternalist Manifesto*, 63 U. CHI. L. REV. 937, 946 (1996) (emphasis omitted).

[9] BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4 (1980).

[10] *E.g.*, Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2261 (2014) (suggesting that lawyers of online platform companies "are shaping the future of free expression worldwide"); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009) ("[T]he most important decisions affecting the future of freedom of speech will not occur in constitutional law," but in "technological design, legislative and administrative regulations, the formation of new business models, and collective activities of end-users."); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1208–09 (2008) (suggesting the regulation of search engines); Tim Wu, *Is Filtering Censorship? The Second Free Speech Tradition*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 83, 85 (Jeffrey Rosen & Benjamin Wittes eds., 2011) (arguing that regulatory agencies such as the FCC have more influence over speech than Supreme Court Justices).

[11] Henry H. Perritt Jr., *The Internet at 20: Evolution of a Constitution for Cyberspace*, 20 WM. & MARY BILL RTS. J. 1115, 1116 (2012).

[12] *E.g.*, Balkin, *supra* note 7, at 2032 (advocating for a regulatory model based on a mix of private sector initiatives and legislative oversight); Citron & Richards, *supra* note 5, at 1374 (arguing that the protection of expressive liberties should come from common law and statutes); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010) (arguing against regulation of speech intermediaries).

constitutional safeguards as a means to secure and promote internet users' speech.[13] Scholars increasingly treat the First Amendment as irrelevant to the promotion of speech in the digital age.[14] It is almost as if scholars have given up on it.

This Article will swim against this current. It is true that constitutional rights are not the only possible institutional expression of free speech and that in the circumstances of our technological environment, a constitutional right to freedom of expression cannot serve as the only source for protecting free speech. It is also true, as a matter of description, that the First Amendment has lost much of its relevance as a safeguard of free speech in the digital age.[15] In fact, existing First Amendment doctrine *undermines* users' freedom of expression; it does so through two main doctrinal mechanisms: (1) the state action doctrine, which prevents users from raising speech-related claims against online speech intermediaries (formally organized as private entities)[16] and (2) an expansive interpretation of what constitutes speech, which increasingly serves as a *Lochnerian* vehicle for speech intermediaries to claim immunity from government regulation.[17] These mechanisms work together to facilitate speech intermediaries' power over individual speakers without the corresponding accountability for abuses of that power.

I submit, however, that a speech-promoting environment cannot be sustained by simply trying to dodge or circumvent these doctrinal barriers. A system of free expression must include a strong component of constitutional support for users' speech and an effective constitutional check on online intermediaries' exercise of power. Indeed, the idea that the institutionalization of free speech in the digital ecosystem may be carried out in different ways was originally based on the notion that a system of free expression would be produced through a *synergy* of various sources, including constitutional rights.[18] Yet recent suggestions for the creation of administrative and legislative tools for limiting speech intermediaries' power are not designed to work in synergy with constitutional doctrine but are rather expected to

---

[13] *E.g.*, Ammori, *supra* note 10, at 2272; Balkin, *supra* note 7, at 2033; Balkin, *supra* note 10, at 441; Citron & Richards, *supra* note 5, at 1372; Wu, *supra* note 10, at 84.

[14] *E.g.*, Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548 (2018) (questioning whether the First Amendment is suited to today's challenges).

[15] *Id.* at 570; *see also* Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1121 (2015); Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 238 (2014).

[16] *Cf.* LAWRENCE LESSIG, CODE: VERSION 2.0 317 (2006).

[17] *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015); Tutt, *supra* note 15, at 285.

[18] *See, e.g.*, Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 51–52 (2004) (arguing that a system of free expression is produced through the synergy of government policies, technological designs, and the traditional recognition and enforcement of judicially created rights, which form three legs of a three-legged stool).

compensate for the drawbacks of doctrine. It is doubtful that such tools can effectively perform this task. Take, for example, Danielle Citron and Neil Richards's suggestion to refocus free speech policy on "largely forgotten" tools such as statutes and the common law.[19] Citron and Richards are right that these tools are far older than the constitutional doctrine of free speech,[20] but these tools must now be implemented in a system in which speech-limiting First Amendment doctrine covers them. Or consider Jack Balkin's contention that speech intermediaries should be treated as information fiduciaries toward their end-users as part of what he calls a pluralist model of speech regulation.[21] Yet the constitutionality of such a legal arrangement would need to be determined through a doctrinal filter, which, as this Article will show, stands in opposition to a pluralist model of regulation.

Put simply, it is correct that we lack the "conceptual and moral vocabulary to talk about excesses of private power" in the digital age.[22] But, in developing a suitable conceptual and moral vocabulary, constitutional protections must not be neglected. With that in mind, this Article will proceed as follows: Part I will elaborate on online speech intermediaries' moral duties owed to their end-users, the main one being the duty not to harm. Part II will explain why developing constitutional protections is essential to the process of translating online intermediaries' moral duties into binding legal duties. Part III will discuss the current doctrinal barriers to reform in the power relations between online intermediaries and their end-users as well as possible modifications to existing doctrine, which could create an environment supportive of users' speech. More importantly, however, the main contribution of this Article, as explained in Part IV, centers on the argument that a deeper reassessment of traditional doctrinal assumptions is required for the First Amendment to fulfill its speech-protecting role in the digital age.

The underlying premise of traditional thinking about speech-related constitutional conflicts conceptualizes such conflicts as necessarily bipolar, speaker-government equations. Accordingly, courts and scholars ordinarily focus on asking whether "the state" is present on one side of the equation (as the problem of state action demonstrates) or whether "a speaker" exists on the other (as manifested in the question of what counts as speech).[23] If that were not so, as Justice Breyer once candidly noted with regard to cable television, "courts might have to face the difficult, and

---

[19] Citron & Richards, *supra* note 5, at 1373.

[20] *Id.*

[21] Balkin, *supra* note 7, at 2048; *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186 (2016) [hereinafter Balkin, *Information Fiduciaries*].

[22] Citron & Richards, *supra* note 5, at 1374.

[23] *See, e.g.*, Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 13 VA. J.L. & TECH. 1, Winter 2008, at 28.

potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program . . . is the 'speaker' whose rights may not be abridged, and who is the speech-restricting 'censor.'"[24]

Yet this bipolar way of thinking about speech-related conflicts suffers from grave limitations when trying to cope with the realities of networks comprised of multiple speakers and multiple censors/regulators (with potential overlaps between these categories).[25] The bipolar conception of the First Amendment is incompatible with the type of conflicts that pluralist networks generate. Consequently, if the First Amendment is to have a significant speech-protective meaning in the digital ecosystem, a more sophisticated analysis than the reigning bipolar conception of the First Amendment is necessary. This Article proposes such an alternative analysis, which shall be denominated a pluralist conception of the First Amendment.[26]

I. MORAL DUTIES OF ONLINE SPEECH INTERMEDIARIES

Rights are strong ethical pronouncements whose reality is normative and whose existence does not depend on political recognition or enforcement (though institutions may and should be designed to enforce them).[27] In this view, the force of the assertion of freedom of speech as a right lies in the recognition of its fundamental importance for individuals and correspondingly in the acceptance of obligations by society to support and promote that freedom.[28] Freedom of speech serves in this respect as a moral proposition as to what *should* be done in terms of policy, while the institutionalization of such moral proposition, as applied to the digital

---

[24] Denver Area Educ. Telecomms. Consortium, Inc., v. Fed. Commc'ns Comm'n, 518 U.S. 727, 737 (1996).

[25] Yemini, *supra* note 23, at 29.

[26] For a short exposition of this idea in the context of network neutrality, see Amit M. Schejter & Moran Yemini, *"Justice, and Only Justice You Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137, 161–62 (2007) (noting the same); Yemini, *supra* note 23, at 29 (distinguishing between a "bilateral" and "multilateral" conception of the First Amendment); *cf.* 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, 1187 (2018) (distinguishing between a "dyadic" and "pluralist" model of regulation).

[27] *See, e.g.*, AMARTYA SEN, THE IDEA OF JUSTICE 357–58 (2009); Joel Feinberg, *The Nature and Value of Rights*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 143, 155 (1980); Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 85 (1995); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OX. J. LEGAL STUD. 18, 23 (1993). For the opposing view that rights cannot pre-exist their political recognition as such, see, for example, Jeremy Bentham, *Anarchical Fallacies*, *in* 'NONSENSE UPON STILTS': BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1551 (1988).

[28] *Cf.* SEN, *supra* note 27, at 358.

ecosystem, may be carried out in different ways, from technological design, to regulation, to legislation, to the particularly powerful and important institution of a constitutional right.[29]

For freedom of speech to constitute a moral right rather than simply a moral good, it is essential to identify to whom a claim for its existence can be directed, i.e., who bears duties correlative with the right and which duties they bear.[30] Legal thinking is largely centered on what moral theory defines as *perfect* duties, that is, duties that specify the relevant duty-bearer as well as what constitutes an adequate performance of the duty.[31] Perfect duties may be either *universal* or *special*.[32] Universal duties fall on everyone, and they are generally described as negative duties not to interfere.[33] Special duties, on the other hand, require positive action from specific actors toward specified persons.[34] Moral theory also acknowledges the existence of *imperfect* duties, i.e., duties which leave room for discretion in their performance and do not specify the person(s) to whom the duty is owed.[35] Imperfect duties may, again, take *universal* or *special* form, depending on whether the duty is perceived to be held by all or only by some.[36] Due to this character of imperfect duties, they are often seen as belonging to the realm of charity or virtues and therefore as not having corresponding rights at all.[37] This depiction, however, is not entirely accurate. As noted by Amartya Sen, although they differ in content from perfect duties, imperfect duties are correlative with rights in much the same way as perfect duties.[38] The difference lies in the form of the ethical requirement that each duty reflects: while a perfect duty involves a specific demand imposed on specific persons (or all persons), an imperfect duty is a more loosely specified ethical requirement, according to which

---

[29] *Cf.* Waldron, *supra* note 27, at 24.

[30] The idea of unity between rights and duties in moral theory is often attributed to Kantian philosophy. *See, e.g.*, ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 128 (1996); Jilles L.J. Hazenberg, *Transnational Corporations and Human Rights Duties: Perfect and Imperfect*, 17 HUM. RTS. REV. 479, 481 (2016). This idea is also central to rights-modeling in legal theory. *See, e.g.*, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717 (1917); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31 (1913).

[31] *See* Amartya Sen, *Normative Evaluation and Legal Analogues*, *in* NORMS AND THE LAW 247, 255 (John N. Drobak ed., 2006) (noting that the legal concept of rights concentrates on perfect duties, but that the normative conception of rights also accommodates imperfect duties).

[32] *See* O'NEILL, *supra* note 30, at 147; Hazenberg, *supra* note 30, at 482.

[33] O'NEILL, *supra* note 30, at 147.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 148–49.

[37] *Id.* at 149.

[38] *See* Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 319 (2004).

"if one is in a plausible position to do something effective in preventing the violation of a right, then one does have an obligation to consider doing just that."[39]

Universal duties not to interfere are generally deemed to be correlative with liberty rights, while special duties (which require positive action) are often described as correlative with welfare rights,[40] but this pairing only partly covers the possible, often dynamic, correlations of duties with rights.[41] The right to freedom of expression in the digital age demonstrates this point well. As I have argued elsewhere, our current technology-mediated system of free expression invokes an understanding of freedom of expression as a right incorporating two interrelated aspects: the liberty to speak *and* the capacity to act on that liberty.[42] Securing the capacity aspect of freedom of speech requires, as a threshold matter, providing individuals sufficient physical access to information and communication technologies ("ICTs"). This component of the right is therefore correlative with what would be regarded as a classic special duty to provide certain resources. But securing the capacity aspect of freedom of speech in the digital ecosystem, after access has been acquired, is interrelated with the need to promote an environment of liberty in which users can express themselves without interference from others who are in a position to exert control over their speech. The boundaries between positive action and non-interference in securing such an environment are quite murky.[43]

---

[39] *Id.* at 340–41.

[40] Hazenberg, *supra* note 30, at 482.

[41] *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 171 (1986) ("[T]here is no closed list of duties which correspond to the right . . . . A change of circumstances may lead to the creation of new duties based on the old right.").

[42] *See* Yemini, *supra* note 1, at 126.

[43] *Cf.* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 65 (2011) (arguing that that the very idea of "negative liberty" is incoherent because all liberties "require the inhibition of interference by others" and therefore "involve an affirmative task for government"); Simon Barnbeck, *Freedom and Capacity: Implications of Sen's Capability Approach for Berlin's Negative Freedom*, 1 RERUM CAUSAE 10, 12 (2006) (explaining the close relationship between negative and positive freedom by noting that positive actions may be necessary to defend negative freedom and that defending negative freedom increases the probability of attaining positive freedom). For example, Jonathan Zittrain has suggested that the government offer tax breaks, or certain immunities, to online intermediaries that are willing to adopt a fiduciary duty towards their users in the handling of their data. Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 340 (2014). Such a policy would qualify as positive action, although it is not intended to distribute resources but rather to provide an incentive for intermediaries to respect users' liberty. Moreover, if online intermediaries simply refrained from using their users' data in certain ways without government incentives, the same result would be reached by way of non-interference.

The law generally regards the state as the primary, if not sole, bearer of duties correlative with rights,[44] and this is also the case with respect to the right to freedom of expression.[45] However, moral and political theories do not single out the state as the only possible duty-holder or exclude other entities from bearing duties correlative with rights. As Steven Ratner has argued, while they are often tied to each other legally, individual rights and state duties are not exclusively tied to each other normatively or even historically.[46] Lockean rights theory, which inspired the American Declaration of Independence,[47] never saw rights as creating duties only for government, certainly with respect to the negative duty not to harm.[48] The concept of freedom as immunity from interference by others has always been understood as being bound by an obligation not to interfere with the liberty of others.[49] It is only over time and with the institutionalization of rights, that rights discourse came to focus on duties of the state because of its power and authority over citizens.[50]

In recent years, however, as transnational corporations (TNCs) have become key players in the global economy and the international political system, there is growing recognition that TNCs are themselves authors of rules with public impact

---

[44] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 267 (1977) (explaining that the "traditional definition" of liberty is "the absence of constraints placed by a government upon what a man might do if he wants to"); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 105 (1994) (explaining that human rights are "demands of a particularly high intensity made by individuals *vis-à-vis* their governments"); William N. Nelson, *Human Rights and Human Obligations*, *in* HUMAN RIGHTS 281, 282 (J. Roland Pennock & John W. Chapman eds., 1981) (labeling the governments' obligations flowing from individual rights as the "standard assumption"); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461, 466–71 (2001).

[45] *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 383 (1997); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) ("[T]he first amendment is conceived of as a shield, as a means of protecting the individual speaker from being silenced by the state."); Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2203 (2006) (arguing that the Supreme Court treats freedom of speech mostly as a "negative right that shields individual autonomy against government interference").

[46] Ratner, *supra* note 44, at 469.

[47] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[48] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., 1988) (1690) ("The *State of Nature* has a Law of Nature to govern it, which obliges every one . . . . [N]o one ought to harm another in his Life, Health, Liberty, or possessions.").

[49] *Id.* at 306*; see also* IMMANUEL KANT, THE METAPHYSICS OF MORALS 230–31 (Mary Gregor ed. & trans., 1996) (1797); JOHN RAWLS, A THEORY OF JUSTICE 98 (rev. ed. 1999) (describing "the duty not to harm or injure another" as a "natural duty"); *id.* at 220 ("Each person is to have an equal right to the most extensive total system of equal basic liberties *compatible with a similar system of liberty for all*." (emphasis added)).

[50] *See* Ratner, *supra* note 44, at 468–69.

and hold positions of power and authority over individuals, which also entail duties.[51] Major online speech intermediaries stand out as potential bearers of such duties, given their power and authority over users' speech. As Thorsten Busch has shown, an online social platform like Facebook can be described as an almost state-like institution in itself, with many of the major characteristics of a developed political system.[52] Facebook defines binding policies, norms, and standards of behavior, which users must follow in order to participate in the Facebook community (the policy dimension);[53] it applies and enforces its policies, which involve regulating and adjudicating conflicts between itself and its users as well as between users themselves (the politics dimension);[54] and thus it creates an effectively governed online territory (the polity dimension).[55]

Growing awareness of TNCs' potential effects on individual rights has confronted TNCs with increased expectations to legitimize their actions[56] and has sprung attempts to operationalize these expectations through different soft law instruments. One of the major processes in this regard is the United Nations' "Protect,

---

[51] *Id.*; *see also* Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q. 371, 380–84, 389 (2010); Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, 19 BUS. ETHICS Q. 349, 353–54 (2009); Ken McPhail & Carol A. Adams, *Corporate Respect for Human Rights: Meaning, Scope, and the Shifting Order of Discourse*, ACCT. AUDITING & ACOUNTABILITY J. 650, 655 (2016); Claire Methven O'Brien & Sumitra Dhanarajan, *The Corporate Responsibility to Respect Human Rights: A Status Review*, 29 ACCT. AUDITING & ACCOUNTABILITY J. 542, 555 (2016); Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective*, 32 ACAD. MGMT. REV. 1096, 1112 (2007); Marion Weschka, *Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?*, 66 HEIDELBERG J. INT'L L. 625, 625–28 (2006); Florian Wettstein, *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, 96 J. BUS. ETHICS, Sept. 2010, at 33, 38–39 (all describing the authority and rulemaking power of TNCs).

[52] Busch, *supra* note 3, at 88; *see also* REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 88 (2012) (referring to Facebook as a "digital sovereign").

[53] Busch, *supra* note 3, at 104.

[54] *Id.*

[55] *Id.*; *see also* Marcelo Thompson, *In Search of Alterity: On Google, Neutrality, and Otherness*, 14 TUL. J. TECH. & INTELL. PROP. 137, 139 (2011) (arguing that Google holds a position of "sovereignty").

[56] *See, e.g.*, Gerardo Patriotta et al., *Maintaining Legitimacy: Controversies, Orders of Worth, and Public Justifications*, 48 J. MGMT. STUD. 1804, 1805 (2011); Andreas Georg Scherer et al., *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505, 514–15 (2006).

Respect, and Remedy" Framework[57] and the set of Guiding Principles for operationalizing and implementing the Framework.[58] The Framework and accompanying Guiding Principles *expect* corporations to *respect* human rights (as opposed to states, which are *required* to *protect* human rights), i.e., to "avoid infringing on the human rights of others" and "to address adverse human rights impacts with which they are involved."[59] The Guiding Principles also urge companies to express their responsibility to respect human rights in policy statements and to carry out human rights due diligence relating to their activities.[60] Similar provisions can be found in the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises.[61] There is also a global trend among TNCs to adopt corporate social responsibility (CSR) policies with regard to human rights[62] and/or participate in human rights initiatives, such as the United Nations Global Compact (UNGC).[63]

Some of the leading tech companies are at the forefront of this trend of voluntary subscription to imperfect duties. As noted above, online speech intermediaries make a tremendous effort to portray themselves as a benevolent social service and as facilitators of freedom of expression.[64] Twitter wishes its platform to be seen as a force for "civic engagement" and expresses a commitment to respect users' digital rights.[65] Google is famous for its "Don't Be Evil" motto[66] (replaced with "do the

---

[57] *See* Human Rights Council Res. 8/7, U.N. Doc., at 4(a)-(c) (June 18, 2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

[58] *See* Human Rights Council Res. 17/31, U.N. Doc., at G.E.11 (Mar. 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

[59] *Id.* ¶ 6.

[60] *Id.*

[61] *OECD Guidelines for Multinational Enterprises*, OECD ¶ 10, ¶ 44 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

[62] *See, e.g.*, O'Brian & Dhanarajan, *supra* note 51, at 544, 552–55 (assessing how the Guiding Principles have been interpreted and operationalized through business behavior); McPhail & Adams, *supra* note 51, at 652 (exploring how respect for human rights is being operationalized in 30 Fortune 500 companies).

[63] The first two principles of the UNGC's ten principles relate to human rights: "Businesses should support and respect the protection of internationally proclaimed human rights" and they should "make sure that they are not complicit in human rights abuses." *See The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles. According to the UNGC's website, 9,933 companies are currently involved in the initiative. UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/ (last visited Jan. 21. 2020).

[64] *See* FACEBOOK, *supra* note 4; TWITTER, *supra* note 4; YOUTUBE, *supra* note 4.

[65] *See Twitter for Good*, TWITTER, https://about.twitter.com/en_us/values/twitter-for-good.html (last visited Feb. 4, 2020).

[66] *See 2004 Google Founders' IPO Letter*, ALPHABET, https://abc.xyz/investor/founders-letters/2004/ipo-letter.html (last visited Oct. 11, 2019).

right thing" upon the foundation of Google's parent company, Alphabet).[67] Microsoft has a detailed CSR plan[68] and participates alongside Facebook, Google, and other tech companies in the Global Network Initiative (GNI), a multi-stakeholder group of companies, NGOs, investors, and academics aimed at protecting and advancing freedom of expression and privacy in information and communication technologies.[69]

The GNI has published Principles[70] and Implementation Guidelines,[71] which states its purpose to "provide direction and guidance to the . . . [ICT] industry and its stakeholders in protecting and advancing the enjoyment of human rights globally."[72] These principles and guidelines prescribe duties on participating companies to respect and protect the freedom of expression of their users against government interference[73] but remain silent on participating companies' own speech-restricting practices. Online intermediaries' commitments to making the world a better place are rarely found in any legally binding document. Nevertheless, the analysis shows that online intermediaries themselves acknowledge that their unique position *vis-à-vis* their users has normative implications, which leads them to "invest in ethics," at least as an instrument to advance their business objectives.[74]

Moreover, online intermediaries tend to commit themselves to (imperfect) special duties, which involve taking positive action,[75] even though, from the standpoint

---

[67] *Code of Conduct*, ALPHABET, https://abc.xyz/investor/other/code-of-conduct/ (last visited Oct. 11, 2019); *see also* Tanya Basu, *New Google Parent Company Drops 'Don't Be Evil' Motto*, TIME (Oct. 4, 2015), http://time.com/4060575/alphabet-google-dont-be-evil/.

[68] *The 2018 Corporate Social Responsibility*, MICROSOFT, https://www.microsoft.com/about/csr/ (last visited Jan. 21. 2020).

[69] *See About*, GLOBAL NETWORK INITIATIVE, http://globalnetworkinitiative.org/ (last visited Oct. 11, 2019).

[70] GLOBAL NETWORK INITIATIVE, GNI PRINCIPLES ON FREEDOM OF EXPRESSION AND PRIVACY, https://globalnetworkinitiative.org/wp-content/uploads/2018/04/GNI-Principles-on-Freedom-of-Expression-and-Privacy.pdf (last visited Oct. 11, 2019) [hereinafter GNI PRINCIPLES].

[71] GLOBAL NETWORK INITIATIVE, IMPLEMENTATION GUIDELINES FOR THE PRINCIPLES ON FREEDOM OF EXPRESSION AND PRIVACY 1 (2017) https://globalnetworkinitiative.org/wp-content/uploads/2018/08/Implementation-Guidelines-for-the-GNI-Principles.pdf (last visited Sept. 26, 2019) [hereinafter GNI GUIDELINES].

[72] *Id.* at 1; GNI PRINCIPLES, *supra* note 70, at 2.

[73] GNI GUIDELINES, *supra* note 71, at 8; GNI PRINCIPLES, *supra* note 70, at 3–4.

[74] Thorsten Busch & Tamara Shepherd, *Doing Well by Doing Good? Normative Tensions Underlying Twitter's Corporate Social Responsibility Ethos*, 20 CONVERGENCE 293, 296 (2014); *see also* Gillespie, *supra* note 3, at 348.

[75] *See, e.g.*, GNI GUIDELINES, *supra* note 71, at 8–9 ("Participating companies will . . . [e]ncourage government restrictions and demands that are consistent with international laws and standards on freedom of expression and privacy. This includes *engaging proactively* with

of moral theory, imposing special duties on non-state actors is not as straightforward as subjecting them to a universal duty not to harm.[76] This even includes massive involvement in areas that have classically been considered the sole domain of states, such as providing access to technology itself. Google, for example, is responsible for Loon, "a network of balloons traveling on the edge of space, delivering connectivity to people in unserved and underserved communities around the world."[77] Internet.org is a platform operated and controlled by Facebook, whose ostensible goal is "bringing internet access and the benefits of connectivity to the portion of the world that doesn't have them."[78] Both initiatives have been accused of hiding commercial motives behind grand benevolent statements.[79] But the important point for our purposes is not whether online intermediaries really care about individual rights, but rather the fact that they choose to present themselves as if they care. This choice matters for holding online intermediaries responsible for the duties correlative with users' rights. Online intermediaries have actively helped create users' normative expectations of them as well as the normative dissonance between those expectations and reality.[80]

This Article will adopt a modest view as to online intermediaries' moral duties toward their end users. Although several tech companies have chosen to do so, it will not be assumed that online intermediaries have a duty to work on "ways to

governments to reach a shared understanding of how government restrictions can be applied in a manner consistent with the Principles." (emphasis added)).

[76] *See, e.g.*, Hazenberg, *supra* note 30, at 479 (arguing that corporations do not bear human rights duties beyond the negative duty to avoid causing harm). *But see* Wettstein, *supra* note 51, at 34 (arguing that corporate responsibility may go beyond "doing no harm" and include a positive obligation to protect).

[77] LOON, https://loon.co/ (last visited Dec. 18, 2019).

[78] *Our Mission*, INTERNET.ORG BY FACEBOOK, https://info.internet.org/en/mission/ (last visited Feb. 4, 2020).

[79] *See, e.g.*, Ianthi Guha, *Hidden Motive Behind Mark Zuckerberg's Focus on 'Internet for the Poor,'* DAZEINFO (Dec. 8, 2014), http://dazeinfo.com/2014/12/08/zuckerbergs-idea-spreading-internet-untraversed-part-globe/; Evgeny Morozov, *Facebook's Gateway Drug*, N.Y. TIMES (Aug. 3, 2014), https://www.nytimes.com/2014/08/03/opinion/sunday/evgeny-morozov-facebooks-gateway-drug.html; Ben Popper, *Inside Project Loon: Google's Internet in the Sky Is Almost Open for Business*, VERGE (Mar. 2, 2015), http://www.theverge.com/2015/3/2/8129543/google-x-internet-balloon-project-loon-interview; Dominic Tierney, *The Promise and Peril of Universal Internet*, ATLANTIC (Dec. 10, 2015), http://www.theatlantic.com/international/archive/2015/12/google-loon-global-internet/419934/. Internet.org, in particular, has been accused of violating the principles of network neutrality and threatening freedom of expression, privacy, and innovation. *See Open Letter to Mark Zuckerberg Regarding Internet.org, Net Neutrality, Privacy, and Security*, FACEBOOK (May 18, 2015), https://www.facebook.com/notes/accessnoworg/open-letter-to-mark-zuckerberg-regarding-internetorg-net-neutrality-privacy-and-/935857379791271.

[80] *Cf.* Tarleton Gillespie, *Facebook's Algorithm – Why Our Assumptions Are Wrong, and Our Concerns Are Right*, CULTURE DIGITALLY (July 4, 2014), http://culturedigitally.org/2014/07/facebooks-algorithm-why-our-assumptions-are-wrong-and-our-concerns-are-right/.

beam internet to people from the sky."[81] For our purposes, to achieve what is required for an online environment that respects freedom of expression, it is enough to hold online intermediaries to the less controversial universal duty not to harm.[82]

II. THE NEED FOR CONSTITUTIONAL PROTECTIONS

The claim that online intermediaries have moral duties correlative with internet users' rights can be a powerful normative and political statement. As users come to recognize that the internet they have is not quite the internet they thought they had (or think they should have), they are beginning to question the legitimacy of online intermediaries' actions and to pressure them—with some success—to change their policies.[83] Normative thinking influences online intermediaries' efforts to build and maintain an image of forces for good, which, in turn, underlies multi-stakeholder initiatives such as the GNI. Several international documents have codified the normative link between human rights and the internet.[84] Moral commitments to freedom of expression and other fundamental values also underlie the work of non-profit organizations, such as the Electronic Frontier Foundation.[85] The proliferation of commercial anti-surveillance tools demonstrates how normative concerns can also meet market interests.[86] The articulation of extra-legal and quasi-legal concepts thus

---

[81] Mark Zuckerberg, FACEBOOK (Mar. 27, 2014, 1:03 PM), https://www.facebook.com/zuck/posts/10101322049893211.

[82] *Cf.* Ratner, *supra* note 44, at 517–18 (stating that one analysis indicates that "the company will usually have only negative duties"). However, as noted above, due to the close unity of the capacity and liberty aspects of freedom of expression in the digital ecosystem and the unique position that online intermediaries hold *vis-à-vis* users and their speech, fulfilling the duty not to harm may require intermediaries to perform affirmative tasks such as reshaping platform architectures, which are currently built to interfere with users' speech.

[83] *See, e.g.*, Yuki Noguchi, *Facebook Changing Privacy Controls as Criticism Escalates*, NAT'L PUB. RADIO: THE TWO-WAY (Mar. 28, 2018), https://www.npr.org/sections/thetwo-way/2018/03/28/597587830/criticism-prompts-facebook-to-change-privacy-controls.

[84] *See, e.g.*, Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet, U.N. Doc. A/HRC/20/L.13 (June 29, 2012); World Summit on the Information Society (WSIS), Declaration of Principles, Building an Information Society: A Global Challenge in the New Millennium, WSIS-03/GENEVA/DOC/0004 67 (Dec. 12, 2003); U.N. Internet Governance Forum, Internet Rights & Principles Coalition, *The Charter of Human Rights and Principles for the Internet*, http://internetrightsandprinciples.org/site/wp-content/uploads/2018/10/IRPC_english_5thedition.pdf.

[85] *See, e.g.*, MANILA PRINCIPLES ON INTERMEDIARY LIABILITY 1 (Mar. 24, 2015), https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf (an Electronic Frontier Foundation-led initiative to develop best practices guidelines for limiting intermediary liability for content to promote freedom of expression and innovation).

[86] *See, e.g.*, Patrick Howell O'Neill, *10 Anti-Surveillance Tools That Protect Your Privacy Online*, DAILY DOT (Jan. 19, 2016), http://www.dailydot.com/layer8/best-privacy-tools-2016-tor-ublock-signal-qubes/.

carries importance beyond what legal systems formally recognize as rights and correlative duties.

However, a realistic view of the current situation of our system of free expression should lead to skepticism about the sufficiency of normative discourse, private sector initiatives, and supranational mechanisms for promoting users' interests.[87] Steven Shavell has explored how law and morality compare in regulating behavior.[88] His analysis suggests that morality alone is suitable for controlling behavior only when the private gain from bad conduct is not too great and the expected harm due to such conduct is also not too high. In these circumstances moral sanctions, even though not as strong as legal sanctions, may be sufficient to discourage the conduct.[89] In the relationship between online intermediaries and users, however, the intermediaries' expected private gains from undesirable conduct are large and the expected harm to the users due to such conduct is also large. In such circumstances, moral sanctions will not be enough to prevent the undesirable conduct and should therefore be supplemented by law.[90] The fact that online intermediaries are corporate entities further supports the need for law, since, on the one hand, corporations (and online intermediaries in particular) are in a position to cause large harm by virtue of their size and importance, and, on the other hand, the force of

[87] *See, e.g.*, JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 242 (2008) ("The traditional approaches lead us in the direction of intergovernmental organizations and diplomatically styled talk-shop initiatives . . . . [T]his approach rarely gets to the nuts and bolts of designing new tools or grassroots initiatives to take on the problems it identifies."); Ned Rositter, *WSIS and Organised Networks as New Civil Society Movements*, *in* TOWARDS A SUSTAINABLE INFORMATION SOCIETY: DECONSTRUCTING WSIS 97, 103 (Jan Servaes & Nico Carpentier eds., 2006) ("[T]he efforts of the ITU/UN to include civil society movements in the decision making process surrounding global governance of the information society is evidence of the increasing ineffectiveness of supranational governing and policy development bodies."); Yemini, *supra* note 1.

[88] Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 227–28 (2002).

[89] *Id.* at 244.

[90] *Id.* at 246–51. An empirically supported case in point concerns the principle of transparency, which has often been raised as a primary policy recommendation for promoting users' interests in the digital ecosystem. For one of the more detailed analyses of this issue, see Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights*, 8 INTERCULTURAL HUM. RTS. L. REV. 19 (2013) (outlining a set of transparency principles that should be integrated into online intermediaries' interfaces and policies, but arguing that such principles should not be enacted into positive law). However, empirical research (as well as pure logic) suggests that transparency requirements that are implemented by the agent itself (i.e., the actor under supervision) are much less effective compared to non-agent controlled transparency requirements. *See* Catharina Lindstedt & Daniel Naurin, *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 INT'L POL. SCI. REV. 301, 305 (2010).

moral sanctions is diluted with regard to them.[91] Moreover, in the case of online intermediaries, normative discourse coupled with a voluntary subscription to soft law mechanisms seem to serve online intermediaries as tools to advance their business objectives while shifting attention away from the actual legal and technological power mechanisms they employ in order to control their users' speech.

The need for law—or, rather, law reform—is further enhanced by the fact that extra-legal initiatives are currently destined to operate in a hostile legal environment. When legal norms and moral norms are generally congruent, the latter may fill gaps left by more formal enforcement mechanisms,[92] but this is not the situation in our digital ecosystem. In his analysis of the relationship between law and morality, Joseph Raz explained that in a morally legitimate legal system, "law modifies the way morality applies to people" and, in so doing, "advances, all things considered, moral concerns rather than undermines them."[93] Niklas Luhmann has similarly argued that the function performed by law is that of stabilizing normative expectations, which law translates from other social systems.[94] The law does so by concretizing moral considerations, by giving such considerations a relatively uniform and public form, which makes reliance on them more secure and by making moral goals and morally desirable conditions more achievable.[95]

A legal system concerned with making moral goals and morally desirable conditions easier to achieve would be expected to advance liberty-enhancing policies such as: limiting online intermediaries' ability to censor users' speech based on its content; requiring social platforms to provide at least some amount of process before terminating users' accounts; demanding from online intermediaries a reasonable level of transparency as to the way their algorithms work; regulating their ability to aggregate, transfer, and sell personal user data; scrutinizing ToS agreements that

---

[91] Shavell, *supra* note 88, at 242–43. Because a firm is not a natural person, but rather a collective of individuals, we cannot speak of firms as having internal moral incentives in a literal sense. *Id.* at 242. Although morality does work on individuals within a firm, internal moral incentives are less effective in this setting because decisions are made jointly by groups, influenced by instructions from above, or by subsequent decisions from below. *Id.* In addition, firms often try to establish their own internal norms, which may offset the usual moral incentives when they conflict with the objectives of the firm. *Id.*

[92] *Id.* at 228.

[93] Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 9 (2004); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–4 (1996); Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499, 504 (1999).

[94] *See* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 148 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

[95] Raz, *supra* note 93, at 9–10. For a similar view in relation to constitutional judicial review, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 43 (1980) ("[T]he Supreme Court should give content to the Constitution's open-ended provisions by identifying and enforcing . . . those values that are, by one formula or another, truly important or fundamental.").

immunize online intermediaries from liability; and so on. Yet in our current system of free expression, law does not function in this way. Rather than making morally desirable conditions easier to achieve by protecting and promoting users' freedom of expression, the law exists in disassociation from morality, supporting and reinforcing a power structure that provides online intermediaries with practically limitless control over users' speech.[96] In these circumstances, we cannot expect extra-legal norms to work as the primary source for protecting and promoting users' interests. We need law that is more closely aligned with moral concerns.

There is a flexible range of legal instruments through which moral requirements could be modified to apply to the digital ecosystem. Legislative and administrative regulations can be an essential part of a synergy of sources required to protect users' freedom of expression.[97] These tools are especially important for concretizing users' rights and online intermediaries' duties[98] as well as for scaling complex regulatory schemes over a vast number of subjects.[99] But legislation and administrative regulation are not enough. We require a higher-order normative umbrella in the form of constitutional protections.

There are three main interrelated reasons for which a speech-promoting environment must include a strong component of constitutional support. First, legislative and administrative bodies simply cannot ensure protection for users' freedom of expression, since their enacted policies require constitutional backing in order to have an effect. While all law-making institutions have the power to modify moral considerations, law-making functions are not evenly distributed among various bodies; administrative agencies cannot make law that is at odds with legislation by Congress, and both cannot make law that is at odds with the Constitution.[100] Thus, statutes, common law rules, and administrative regulations must all be integrated into one cohesive speech-protective framework under a supportive constitutional umbrella.

Second, with all its potential importance, legislation and administrative regulation should not be depended upon as the ultimate source of users' free speech rights in the digital ecosystem. In practice, legislation and regulation have, for the most part, only enhanced users' dependency on online intermediaries' self-written

---

[96] *See infra* Part III.A and note 107.

[97] For example, Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230 (2000), has been hailed as "one of the strongest bulwarks for free expression" today. Ammori, *supra* note 10, at 2290. For a critical assessment of this position, see Yemini, *supra* note 1, at 148.

[98] *Cf.* Balkin, *supra* note 18, at 6.

[99] The Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201 (1998), is a good example of a relatively complex arrangement, which quite effectively copes with the problem of scale. *See generally* Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 696–700 (2011) (arguing that the DMCA has proven to be remarkably scalable for enforcing copyright in hosted content but has proven less so in the context of P2P file sharing).

[100] *See, e.g.*, Raz, *supra* note 93, at 12–13.

rules and algorithms.[101] Moreover, governments themselves exploit the new terms in which speech takes place in order to suppress speech through various indirect governance and censorship mechanisms.[102] Governments may therefore have a limited incentive to initiate steps that would substantially alter the status quo.

In addition, although laws and regulations can be more easily modified than constitutional doctrine, this also means that they are less stable. Take, for example, the FCC's years-long engagement with the important issue of network neutrality—first adopting a policy that undermines neutrality principles, then changing course to embrace neutrality rules, and then repealing the rules once again, with all these policy changes made along partisan lines.[103] This exemplifies the far-reaching impact that administrative agencies may have on free speech in the digital age but also puts into question whether such agencies should be trusted to make decisions so cardinal to free speech without constitutional guidance.

Indeed, it is hard to imagine a viable environment of liberty existing in the digital ecosystem without a strong component of constitutional support being a part of it. Unfortunately, as noted at the outset, existing First Amendment doctrine and jurisprudence undermines users' freedom of expression, rather than protects it. The next Part will address the two main doctrinal barriers, which currently operate against the institutionalization of normative expectations from online intermediaries through constitutional law: (1) the state action doctrine; and (2) an expanding interpretation of what constitutes speech.

---

[101] *See, e.g.*, Yemini, *supra* note 1.

[102] *See infra* Part III.A and notes 151–56.

[103] The story of network neutrality regulation in the U.S. is an odd story. An administrative agency created a problem, then spent years trying to fix it only to create the problem again. In 2002, the FCC was required to decide whether to extend the common-carriage regulatory model, which had been applied for decades to telephone systems and later to DSL under Title II of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)), to cable-modem services as well. The path chosen by the FCC—classifying cable company internet service as an "information service" rather than a "telecommunications service"—rejected the application of common-carriage principles to cable-modem systems and eventually led to a retreat from those principles with regard to DSL as well. Consequently, the FCC, by its own doing, closed the door on the Title II common-carriage "channel" as a means to apply neutrality rules to broadband providers. Yemini, *supra* note 23, at 7–13. The FCC's later attempts to rely on other sources of authority in order to impose such rules on broadband providers failed. *See* Verizon v. Fed. Commc'ns Comm'n, 740 F.3d 623, 659 (D.C. Cir. 2014) (vacating key portions of neutrality rules adopted by the FCC in 2010); Comcast Corp. v. Fed. Commc'ns Comm'n, 600 F.3d 642, 661 (D.C. Cir. 2010). Only after the FCC initiated a new and opposite rulemaking procedure in order to re-classify broadband services as a "telecommunications service" did its neutrality rules withstand judicial scrutiny. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674, 700 (D.C. Cir. 2016) (upholding FCC Open Internet Rules). However, in December 2017, the now Republican-led FCC voted to repeal those Rules. *See* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

III. DOCTRINAL BARRIERS TO REFORM

A. The Problem of "State Action"

Under the state action doctrine, the Constitution applies only to governmental conduct and does not control the behavior of private entities.[104] Accordingly, the Constitution generally does not prohibit private deprivations of constitutional rights,[105] including the right to freedom of expression.[106] Based on the state action doctrine, courts have repeatedly rejected free-speech-related claims directed at online intermediaries.[107] The result is that judicial analysis of speech-related conflicts between users and online intermediaries is based on a formal distinction, which

---

[104] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985); *see also* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1769 (2010). The *Civil Rights Cases* are usually credited with being the origin of the state action requirement. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883).

[105] Chemerinsky, *supra* note 104, at 508.

[106] *See, e.g.*, Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973) (plurality opinion) (rejecting the argument that a broadcast licensee was a state actor); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (rejecting antiwar protestors' First Amendment challenge to exclusion from a shopping mall).

[107] *See* Howard v. Am. Online Inc., 208 F.3d 741, 754 (9th Cir. 2000) (holding that AOL is not a "quasi-public utility" and not a state actor); Thomas v. Network Sols., Inc., 176 F.3d 500, 511 (D.C. Cir. 1999) (holding that domain name assignment is not state action); Shulman v. Facebook.com, No. 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (holding that Facebook is not a state actor); Buza v. Yahoo!, Inc., No. C 11–4422 RS, 2011 WL 5041174, at *1 (N.D. Cal. Oct. 24, 2011) (holding that Yahoo! is not a state actor or a public forum); Estavillo v. Sony Computer Entm't Am., No. C–09–03007 RMW, 2009 WL 3072887, at *2 (N.D. Cal. Sept. 22, 2009) (holding that plaintiff's ban from Sony's PS3 online network does not violate the First Amendment because Sony is not a state actor); Murawski v. Pataki, 514 F. Supp. 2d 577, 588 (S.D.N.Y. 2007) (holding Yahoo! could not be held accountable for censoring political messages); Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (holding that account termination, even if done simply to suppress speech, does not violate the First Amendment because AOL is not a state actor); Island Online, Inc. v. Network Sols., Inc., 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000) (holding that defendant's policy of filtering out certain domain names does not violate the First Amendment); Sanger v. Reno, 966 F. Supp. 151, 163 (E.D.N.Y. 1997) (holding that "Internet providers are not state actors" and are, therefore, "free to impose content-based restrictions on access to the Internet without implicating the First Amendment"); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 441 (E.D. Pa. 1996) (refusing to conduct a First Amendment analysis of AOL's policy against "junk" e-mail because AOL is not a state actor); Order After Hearing Granting Defendant's Special Motion to Strike Under Code of Civil Procedure Section 425.16 & Finding Demurrer Moot, Johnson v. Twitter, Inc., (Cal. Super. Ct. July 3, 2018) (No. 18 CECG00078) (holding that Twitter is a private sector company and rejecting an analogy of Twitter to a shopping mall for First Amendment purposes).

stops at the finding that intermediaries are organized as private entities, and does not consider the rights and infringements involved and the fundamental issues presented by the cases brought before the courts.[108]

Some commentators have argued that online intermediaries should be treated as state actors.[109] Others, including strong supporters of mechanisms for promoting users' speech, believe that imposing state-like obligations on online intermediaries would be normatively undesirable.[110] Such opponents argue that imposing First Amendment doctrines on online intermediaries by way of analogy to the state would "cripple social media sites' abilities to impose civility norms";[111] prevent them from curating content in order to provide personalized feeds;[112] and limit their ability to "address online abuse and other activity that imperils free expression."[113] I agree that utilizing the concept of state action is not the optimal way to impose constitutional limits on online intermediaries—but not for the reasons detailed above. The reasons invoked against categorizing online intermediaries as state actors seem to be premised on the assumption that such a categorization would result in subjecting online intermediaries to the same exact limitations imposed on the state in other contexts. But this assumption is not necessarily correct. Analogy is not an identity,[114] and finding state action does not automatically mean that the private action in question is an impermissible violation of rights.[115]

The more basic problem with resorting to state action in relation to online intermediaries is that the doctrine envisages speech-related conflicts as necessarily

---

[108] *Cf.* Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 297 (1977) ("State action theory . . . is a substitute for thought."); Anthony Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 22 (1977) ("The current judicial approach to state action is no more than a disguised abstention doctrine: courts utilize it to avoid the fundamental issues presented by the cases."); Jerre S. Williams, *Twilight of State Action*, 41 TEX. L. REV. 347, 372–73 (1963) ("[C]ourts are using this device as a convenient means of avoiding the difficult and delicate issue which really is posed.").

[109] *See, e.g.*, DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 155–56 (2009).

[110] *See, e.g.*, Balkin, *supra* note 7, at 2025; Citron & Richards, *supra* note 5, at 1371; Klonick, *supra* note 1, at 1659.

[111] Balkin, *supra* note 7, at 2027.

[112] *Id.*

[113] Citron & Richards, *supra* note 5, at 1371.

[114] *Cf.* Balkin, *Information Fiduciaries*, *supra* note 21, at 1225 (noting that his suggestion to analogize online intermediaries to traditional professional fiduciaries is an analogy, not an identity, and arguing that the duties imposed on online intermediaries should be narrower than the duties imposed on doctors and lawyers).

[115] Chemerinsky, *supra* note 104, at 527.

bipolar, speaker-government equations. This view is not compatible with the realities of networks comprised of multiple speakers and speech regulators.[116] Accordingly, state action analysis risks over-simplifying what, in reality, may be a much more complex set of conflicting rights and interests. Having said that, it is important to explore what could be done *within* existing doctrine in order to bring online intermediaries under constitutional scrutiny as a kind of second-best solution to the pluralist conception of the First Amendment, which will be sketched out in Part IV.

The primary normative rationale used to justify the state action doctrine rests on the distinction between the private and the public spheres. In this view, the distinction between private and public is a necessary pre-condition for liberty itself, as it defines a sphere of private activity inviolable to government intervention.[117] This argument often goes together with the libertarian premise that government has a unique capacity to coerce behavior and undermine individual freedom.[118] In the context of the First Amendment, proponents of the private-public distinction posit that it promotes a main value underlying freedom of expression—individual autonomy.[119] But if state action is justified by its contribution to personal autonomy and liberty, then relying on it as a basis for denying users' free-speech-related claims against online intermediaries is problematic.

First, in the digital ecosystem, the government clearly does not possess unique power to undermine individual freedom. There is nothing new about the fact that government power does not pose the only threat to liberty; claims that private power undermines freedom of expression were also prevalent during the twentieth century, at which time they were directed primarily at powerful mass media outlets.[120] But

---

[116] *See infra* Part IV.

[117] *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (holding that the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"). For scholarly articulations of this defense of the state action doctrine, see, for example, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 237 (1992); Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982); Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129, 135 (1988).

[118] *See, e.g.*, Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1619 (1998); Fried, *supra* note 117, at 236. For a judicial expression of this proposition, see, for example, Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 685 (1994) (O'Connor, J., concurring in part and dissenting in part) ("[T]he First Amendment . . . rests on the premise that it is government power, rather than private power, that is the main threat to free expression . . . .").

[119] *See, e.g.*, Eule & Varat, *supra* note 118, at 1621; Fried, *supra* note 117, at 233; John H. Garvey, *Private Power and the Constitution*, 10 CONST. COMMENT. 311, 316 (1993); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 247–77 (1996).

[120] The most influential free speech theory of the twentieth century, democratic theory, identified the concentration of expressive capacity in the hands of a wealthy few as a threat to

twentieth-century mass media, by the nature of their business, carried their own speech and were powerful in the sense of being powerful speakers.[121] Their threat to free expression lay not in their ability to interfere directly with others' speech, but in their concentrated control over the means of expression, which was believed to adversely affect the quality of public debate.[122] Online intermediaries, on the other hand, by the nature of their business, stand between potential speakers and their potential audience in ways that once only governments could, and, in fact, in many ways that governments never could.[123]

Second, if a distinction between private and public is to have any substantive meaning—which correlates with the underlying rationale of the state action doctrine—then determining that a practice belongs to the private realm cannot solely, and superficially, rely on the fact that the entity performing it is legally organized as a private corporation. Several generations of legal scholars have argued that the rigid public-private distinction, as applied for determining who should and who should not be subject to constitutional constraint, cannot be coherently maintained.[124] "The State," as Cass Sunstein and others have argued, "is always present,"[125] since all private actions take place against a background of laws, which permit or proscribe behavior and define the conceptual categories within which persons may or may not claim and enforce rights.[126] Even the definition of what constitutes a person depends

democracy. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 94 (1996); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 5 (1948); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 94 (1993); Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642–50 (1967); Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1971 (2003).

[121] *See, e.g.*, Tutt, *supra* note 15, at 236.

[122] *See supra* note 120.

[123] *See generally* Klonick, *supra* note 1; Yemini, *supra* note 1.

[124] *See, e.g.*, Charles L. Black, Jr., Foreword, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 86–88 (1967); Chemerinsky, *supra* note 104, at 527; Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334–37 (1993); Duncan Kennedy, *The States of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354–57 (1982); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 136–39 (2004).

[125] Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 465 (2002); *see also* Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004); Williams, *supra* note 108, at 367.

[126] *See, e.g.*, Kay, *supra* note 124, at 336; Magarian, *supra* note 124, at 136–39. For early applications of this argument to the digital ecosystem, see, for example, Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1278–81 (2000); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1296–97 (1998).

on the law, and thus most online intermediaries owe their very existence to the laws of the State of Delaware.[127]

No substantive distinction between private and public can disregard the fact that in the digital ecosystem, the role of states and corporations and the consequences of their actions have converged.[128] As numerous scholars have indicated, in the circumstances of our technological environment, a dichotomous vision of the private-public divide is not realistic.[129] Online intermediaries are an integral, even indispensable, part of modern human life.[130] They play a central political role in regulating users' interactions; they act as "curators of public discourse,"[131] and they assume a state-like role in managing individuals' rights, thereby effectively acting as private regulators of public space.[132] As Sarah Michele Ford has noted, the internet, and particularly the social web, "is the place where the line between public and private seems least clear."[133]

One does not need to search beyond online intermediaries' own statements to realize that they are hosts and carriers of public discourse. For example, in a brief submitted by Facebook as amicus curiae in *Bland v. Roberts*,[134] Facebook expressly stated that it has a "vital interest" for itself and its users "in ensuring that speech on Facebook and in other online communities is afforded the same constitutional protection as speech in newspapers, on television, and in the town square."[135] Under American constitutional law, the town square to which Facebook equated itself is

---

[127] A search of corporate entities on the website of the Delaware Department of State's Division of Corporations shows that practically all major online intermediaries and their parent companies (including Alphabet, Google, YouTube, Facebook, WhatsApp, Apple, Microsoft and Twitter) are incorporated under the laws of the State of Delaware. *Corporate Entity Database*, DELAWARE.GOV, https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx.

[128] *See, e.g.*, Busch, *supra* note 3, at 70.

[129] For a useful summary of the scholarship on the subject, see Sarah Michele Ford, *Reconceptualizing the Public/Private Distinction in the Age of Information Technology*, 14 INFO., COMM., & SOC'Y 550, 554–59 (2011).

[130] *See, e.g.*, MARK LEVENE, AN INTRODUCTION TO SEARCH ENGINES AND WEB NAVIGATION 7 (2010) ("[R]ight from the early days of the Web, engines have become an indispensable tool for web users."); Chen-Wei Chang & Jun Heo, *Visiting Theories That Predict College Students' Self-Disclosure on Facebook*, 30 COMPUTERS HUM. BEHAV. 79, 79 (2014) ("Facebook has become an indispensable part of many users' everyday lives.").

[131] Gillespie, *supra* note 3, at 347.

[132] *See supra* notes 1–3, 51–55; *see also* Darin Barney, *Invasions of Publicity: Digital Networks and the Privatization of the Public Sphere*, *in* NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE 94, 115 (Law Commission of Canada ed., 2003); MACKINNON, *supra* note 52, at 165; Berman, *supra* note 126, at 1265–66.

[133] Ford, *supra* note 129, at 558.

[134] Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (concluding that "liking" something on Facebook is a form of speech protected under the First Amendment).

[135] Brief for Facebook, *supra* note 4, at 1.

the archetype of a traditional public forum.[136] Yet, in another case in which the defendant was Facebook itself, *Young v. Facebook, Inc.*,[137] a district court accepted Facebook's contradictory argument that its platform was not a "place of public accommodation" and was therefore unreachable by the First Amendment.[138] The main difference in those cases was the identity of the infringer—the government in *Bland*, Facebook itself in *Young*. But this difference alone cannot explain how Facebook's website can be *the* place of public accommodation when the government interferes but not a place of public accommodation at all when Facebook itself interferes.

A third objection to the state action doctrine as applied to the digital ecosystem is that even if we place online intermediaries' autonomy and liberty on par with users' autonomy and liberty,[139] it undermines these values, for it consistently prefers the violator's liberty to silence and manipulate over the victim's liberty to speak.[140] The doctrine thus provides courts with a formalistic basis to dismiss claims and evade the substantive issues.[141] This leads to an arbitrary choice between conflicting claims and leaves the relations between the violator and the victim to regulation by power alone. In Bruce Ackerman's terminology, the state action doctrine frees online intermediaries from the need to provide rational justification for the exertion of their power when challenged by users[142] and enables them, in Michael Walzer's terminology, to freely—and unjustly—transform their power from one sphere (the ownership of their platforms) to another (control over their users' speech).[143]

The courts' dismissal of free-speech-related claims against online intermediaries based on the state action doctrine is especially regrettable since taking a different

---

[136] *See* Frisby v. Schultz, 487 U.S. 474, 480 (1988) (re-affirming that public streets are "the archetype of a traditional public forum"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (internal quotation marks omitted)).

[137] Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1110 (N.D. Cal. 2011).

[138] *Id.* at 1115.

[139] For a rejection of this view, see *infra* notes 368–401 and accompanying text.

[140] *Cf.* Chemerinsky, *supra* note 104, at 538–40; Magarian, *supra* note 124, at 140–41.

[141] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 446–47 (1990).

[142] *See* ACKERMAN, *supra* note 9, at 6–8.

[143] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 10–12 (1983). I owe this point to Tal Z. Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L. REV. 154, 171 (2014) (arguing that Walzer's argument can be smoothly transposed into the discussion over governance of social media).

approach would not necessarily require abandoning the doctrine altogether. Although state action jurisprudence lacks sufficient clarity,[144] judicially-acknowledged exceptions to the rigid private/public divide usually applied under the state action doctrine can generally be distilled into two strands. One strand of cases has examined whether the nongovernmental defendant had a sufficiently close nexus with the government, through contract, government authorization or regulation, in order to determine if the defendant's actions could be *attributed* or *imputed* to the state.[145] Another strand of cases, analyzed under the so-called "public function" test, asks whether a nongovernmental actor performs a function *instead* of the state, i.e., a function that serves the public and has traditionally been the exclusive prerogative of the state.

In the past, the Supreme Court showed some willingness to support an expansive view of state action when inquiring whether constitutional deprivations "resulted from the exercise of a right or privilege having its source in state authority."[146] In *Marsh v. Alabama*,[147] the Court enjoined limitations on expressive freedom imposed by a nongovernmental defendant, a "company town." The Court held that the rights of an owner of private property that has been opened for use by the public in general (such as bridges, ferries, turnpikes and railroads) "become circumscribed by the statutory and constitutional rights of those who use it."[148] The operation of such property, the Court stated, "is essentially a public function" and is therefore "subject to state regulation."[149] In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court extended First Amendment obligations to private shopping malls based on similar reasoning.[150] However, the Court eventually overruled *Logan Valley* and has since then generally refused to impose constitutional obligations on nongovernmental actors.[151]

---

[144] *See, e.g.*, David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1233 (1998) ("[T]he state action doctrine has never received high marks for clarity."); Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 281 (2013) ("The state action doctrine is a mess.").

[145] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."); Burton v. Wilmington Parking Auth., 365 U.S. 715, 716–17 (1961) (enjoining racial discrimination by a restaurant located in state-owned building); Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948) (barring the state court from enforcing racially restrictive real estate covenant).

[146] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

[147] Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[148] *Id.* at 506.

[149] *Id.*

[150] Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316 (1968).

[151] *See* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976) (overruling *Logan Valley*); *see also, e.g.*, Magarian, *supra* note 124, at 130 n.196 (citing cases that overturned *Logan*

The legal tools developed by the Court from the 1940s through the 1970s could prove useful for inserting substantive considerations into the constitutional assessment of online intermediaries' actions. First, a range of online intermediaries' activities can be quite easily regarded as having a close nexus with the government. The government uses or collaborates with online intermediaries for the purpose of managing online behavior in what has been termed "censorship by proxy" or "governance by proxy."[152] One of the main benefits for the state in these arrangements is that they allegedly take place in a "regulatory twilight zone," out of the reach of constitutional law.[153] In fact, such arrangements should be captured by established state action doctrine.[154]

Second, the existence of state action should be even clearer when the government formally and openly delegates its powers to online intermediaries, thereby effectively requiring or encouraging them to act as public administrative regulators.[155] Online intermediaries' actions in accordance with their duties under the Digital

Valley and cases that rejected contentions that newspapers and television networks should be subject to state regulation).

[152] *See, e.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 867–69 (2012); Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 381–86 (2009); Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 1, 49–51 (2003) (arguing that the state increases its monitoring and enforcement capacities through an alliance with online businesses, resulting in practices that are not subject to constitutional review); Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 BROOK. L. REV. 105, 105 (2016) (analyzing the rise of new types of collaboration between governments and online intermediaries in managing online behavior); Jacquelyn E. Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 949 (2013) (describing how governments use takedown requests directed at online intermediaries as a censorial tool); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16–27 (2006) (describing various methods of hard and soft internet censorship applied by states through the use of the private sector); Yemini, *supra* note 1, at 173–76.

[153] *See* Elkin-Koren & Haber, *supra* note 152, at 107.

[154] *See, e.g.*, Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 154 (2014) (arguing that if Facebook censored messages as part of a coordinated effort with federal agencies, such censorship might satisfy the entwinement exception and be deemed state action); Kevin Park, *Facebook Used Takedown and It Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites*, 68 N.Y.U. ANN. SURV. AM. L. 891, 918–19 (2013) (analyzing possible arguments as to how censorship by a social networking site meets the state action doctrine).

[155] *See, e.g.*, Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 480 (2016) (arguing that algorithmic copyright enforcement under the DMCA is a classic example of delegation of power from the government to online intermediaries that effectively act like public administrative agencies).

Millennium Copyright Act (DMCA), and arguably also their legally immune actions under Section 230 of the Communications Decency Act (CDA 230), may be seen as meeting the public function test. Private speech regulation performed under the DMCA and CDA 230 is, in fact, a case of outsourced law enforcement[156] and as such fulfills a function that serves the public and has traditionally been the prerogative of the state.[157] Indeed, these functions of online intermediaries seem to fit quite comfortably into the public function test specified in *Marsh*.[158]

While the Court has narrowed the scope of *Marsh* in subsequent cases by requiring that the private conduct serve a function that has been "*traditionally* the *exclusive* prerogative of the state,"[159] it is arguable that online intermediaries' conduct meets even this narrower conception of a public function.[160] Obviously, search engines and social media are not physically identical to town squares and public parks. But if we go slightly beyond such a literal comparison, they do share similarities relevant to the public function test: they serve as places for communication and expression, they are designed and designated for that purpose, and they are generally open to the public at large.[161] Taking the analogy one step further, since managing public parks and town squares has been traditionally the exclusive prerogative of the state, and since online intermediaries control the twenty-first century equivalents of town squares,[162] then online intermediaries currently "serve a public function that has traditionally been the province of the state."[163]

---

[156] *Cf.* Kiel Brennan-Marquez, *Outsourced Law Enforcement*, 18 U. PA. J. CONST. L. 797, 798 (2016) (arguing that investigative activity carried out by private actors that substitutes, in practice, for the labor of law enforcement officials should be subject to constitutional limitations).

[157] The Third Circuit did not share this view in *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) (holding that AOL's speech-restricting actions in accordance with CDA 230(c)(2) were not subject to constitutional scrutiny because AOL was a private company). The court dedicated only a few sentences to this issue and did not address either the close nexus or the public function tests.

[158] *See* Jackson, *supra* note 154, at 144.

[159] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)) (emphasis added); *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158–59 (1978). These requirements have made it almost impossible to extend *Marsh* beyond the context of operating bridges, railroads, public parks, and the like. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946); Evans v. Newton, 382 U.S. 296, 301–02 (1966).

[160] *See* Jackson, *supra* note 154, at 146.

[161] As noted above, Facebook itself has equated its platform to the town square. *See* Brief for Facebook, *supra* note 4, at 7.

[162] *See, e.g.*, John Craig Freeman, *The Virtual Sphere Frame: Toward a New Ontology and Epistemology*, *in* A COMPANION TO PUBLIC ART 347, 350 (Cher Krause Knight & Harriet F. Senie eds., 2016) ("In the early 1990s we witnessed the migration of the public sphere from the physical realm (the town square and its print augmentation) to the virtual realm and the Internet.").

[163] Jackson, *supra* note 154, at 146; *see also* Park, *supra* note 154, at 919.

Some scholars wish to find support for this line of reasoning in *Packingham v. North Carolina*,[164] which invalidated a North Carolina law that made it a felony for registered sex offenders to access commercial social networking websites.[165] This view relies on passages in Justice Kennedy's majority opinion that describe the internet and social networks such as Facebook, LinkedIn, and Twitter as "the modern public square"[166] and equate them with streets and parks.[167] Placed within the framework of the public forum doctrine, Justice Kennedy's terminology describes social platforms as a traditional public forum.[168] This is ostensibly a deviation from previous Supreme Court case law, which, like the case law pertaining to the state action doctrine, has refrained from extending the public forum doctrine beyond its traditional boundaries,[169] effectively turning the doctrine from a speech-protective to a speech-restrictive constitutional mechanism.[170]

---

[164] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[165] *See, e.g.*, Klonick, *supra* note 1, at 1611 ("[T]he Court's recent ruling in *Packingham v. North Carolina* might breathe new life into the application of state action doctrine to internet platforms.").

[166] *Id.* at 1737.

[167] *Packingham*, 137 S. Ct. at 1735.

[168] The Court has recognized three categories of public forums: traditional public forums, designated or limited public forums, and nonpublic forums. Traditional public forums, such as streets or parks, consist of property that "by long tradition or by government fiat" has been both open to the public and available for the exercise of First Amendment rights. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). A limited public forum is a property that traditionally has not been open to the public but has been opened by the government for speech, such as university meeting facilities. Widmar v. Vincent, 454 U.S. 263, 267–68 (1981). A nonpublic forum is government property that has neither historically been open to the public nor specifically been opened by the government for use as a forum. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802–03 (1985). Public forum law protects speech rights in traditional public forums and designated public forums, but not in nonpublic forums. *See* Laura Stein, *Speech Without Rights: The Status of Public Space on the Internet*, 11 COMM. REV. 1, 8 (2008). The public forum doctrine is jurisprudentially and analytically separate from the state action doctrine, but it is very close, conceptually, to the public function prong of the state action test. In speech-related matters, the question of whether a private actor performs a public function resembles the issue of whether property is a "public forum."

[169] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003) (concluding that requiring internet filters as a condition of receiving federal subsidies did not violate the Constitution); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (concluding that a broadcaster's decision to exclude a political candidate from televised debate was reasonable under the First Amendment); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (concluding that the New York Port Authority's restrictions on distribution of literature at airports was reasonable).

[170] *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 145 (1992) (describing the public forum doctrine as developing from a speech-protective tool to a speech-restrictive tool).

However, this view too favorably reads *Packingham*. The Supreme Court already referred to public forum case law in *Reno v. ACLU*[171] where it decided the level of First Amendment scrutiny applicable to the internet. In citing public forum case law, the Court compared internet distribution mechanisms to street-corner pamphleteering.[172] Justice Kennedy's remarks in *Packingham*, 20 years later, are more explicit and up-to-date, but they are not very different in substance from the statements made in *Reno*, which did not have a major impact on public forum jurisprudence. *Packingham* does not provide any guidance on the First Amendment's reach into social media, and particularly does not address the question of whether private social media companies are bound by state-like obligations. The question before the Court in *Packingham* was only whether a flat *government* ban on access to online social platforms was constitutional.[173] As such, *Packingham* is not so much a novel public forum or state action case as it is a straightforward case of content-neutral state legislation that does not survive intermediate scrutiny.[174] Accordingly, the language used by Justice Kennedy to describe social media should be treated as dicta.[175] Indeed, federal courts, both before *and* after *Packingham*, have rejected claims that argue Google and Facebook are public forums, which makes it clear that *Packingham* does not alter this conclusion.[176]

---

[171] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997).

[172] *Id.* at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."); *id.* at 880 ("[M]ost Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers" (citing Schneider v. New Jersey, 308 U.S. 147, 163 (1939)); *see also* Transcript of Oral Argument at 17–18, *Reno*, 521 U.S. 844 (No. 96-511) (noting that the internet is a "pretty public place, though, because anyone with a computer can get on line . . . and convey information and images, so it is much like . . . a street corner or a park, in a sense"). In a case decided shortly before *Reno*, Justice Kennedy wrote a dissenting opinion arguing that the definition of a public forum should apply to public access channels carried by cable companies. Denver Area Educ. Telecomms. Consortium, Inc., v. Fed. Commc'ns Comm'n, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[173] Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017).

[174] *Id.* at 1736 ("This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand.").

[175] *Id.* at 1738 (Alito, J., concurring in the judgment) (stating that he could not join the opinion of the Court "because of its undisciplined dicta").

[176] *See, e.g.*, Nyabwa v. Facebook, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) (holding that Facebook is not a public forum and that *Packingham* does not alter this conclusion); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (holding that Facebook is not a "place of public accommodation"); Prager Univ. v. Google, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (holding similarly with regard to Google); Kinderstart.com, LLC v. Google, Inc., No. C 06-2057 JF (RS), 2007 WL 831806,

In any event, even if *Packingham* were seen as the beginning of a possible change or shift in the application of the state action and/or public forum doctrines to online platforms, the Court's recent ruling in *Manhattan Community Access Corp. v. Halleck* makes clear that such a change is unlikely to materialize any time soon.[177] In *Halleck*, the majority—in an opinion delivered by Justice Kennedy's replacement, Justice Kavanaugh—concluded that the Manhattan Neighborhood Network (MNN), a private nonprofit corporation designated by the City of New York to operate a cable public access channel in Manhattan, was not a state actor and therefore was not subject to First Amendment constraints on its editorial discretion.[178] Although *Halleck* does not directly address online platforms, its potential First Amendment implications for the relationship between such platforms and their users are far-reaching. If the Court did not consider even MNN to be a state actor in *Halleck*, then the likelihood that the Court in its current composition would subject online platforms to state-like obligations is slim to none.

B. The Problem of What Counts as Protected "Speech"

In a parallel process to that which prevents users from raising constitutional claims against online intermediaries, current First Amendment doctrine also increasingly limits the ability of the government to impose duties on online intermediaries through legislation and administrative regulation. The First Amendment

---

at *16 (N.D. Cal. Mar. 16, 2007); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631 (D. Del. 2007) (holding that Google is not a state actor or a public forum). Notably, several judicial decisions rendered after *Packingham* dealt with the much narrower question of whether *government officials* may block or censor constituents on the basis of viewpoint on their personal Facebook pages or Twitter accounts. In *Morgan v. Bevin*, a Kentucky district court held that the First Amendment forum analysis did not apply to restrictions on speech in the official Facebook and Twitter pages of the Governor of Kentucky. Morgan v. Bevin, 298 F. Supp. 3d 1003, 1010–12 (E.D. Ky. 2018). In *Davison v. Randall*, the Fourth Circuit affirmed the judgment of a Virginia district court, holding that a state official violated the plaintiff's First Amendment rights by blocking the plaintiff for 12 hours from the official's Facebook that she had set up in order to interact with her constituents. Davison v. Randall, 912 F.3d 666, 688 (4th Cir. 2019); *see also* Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 717–18 (E.D. Va. 2017). Recently, the Second Circuit affirmed the judgment of a New York district court, which held that the interactive space associated with President Trump's Twitter account constituted a designated public forum for expression. Knight First Amendment Inst. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019). Thus, the court held, the President violated the Constitution when he blocked plaintiffs from following him on Twitter based on their viewpoint. *Id.* at 238. Both *Davison* and *Knight Institute* apply classic forum analysis, relying heavily on the defendants' statuses as government officials and on their social media sites and accounts as designated public forums. For a useful analysis of both cases at the district court level, see Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 43–54 (2019).

[177] Manhattan Comm. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019).

[178] *Id.*

increasingly serves as a *Lochnerian* vehicle for online intermediaries to claim immunity from government regulation.[179] This is done by way of advancing an expansive view of what counts as speech covered by the First Amendment, which now arguably includes "the transmission or possession of *data* or *information*, in any form and for whatever purpose."[180] As Leslie Kendrick has argued, "[i]f a litigant can squeeze her claims under the First Amendment umbrella, the rewards are great."[181] Online intermediaries certainly seem to have internalized this notion and are engaging in "First Amendment opportunism"[182] in order to claim the rewards.[183]

The question of the First Amendment's coverage[184] in the age of digital technologies is complex and has drawn much scholarly attention.[185] I will not offer a full

---

[179] *See, e.g.*, Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. 165, 166–67 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 182–91 (2016); Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMM. & HIGH TECH. L. 1, 33 (2002); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1508 (2013).

[180] Tutt, *supra* note 15, at 240.

[181] Kendrick, *supra* note 17, at 1209.

[182] Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175–76 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

[183] *See, e.g.*, Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1615–16 (2015) ("[A] veritable industry has grown up around a diverse collection of claims that the First Amendment's protection extends to computer language, source code, and raw data in all of its infinite varieties."). As Schauer observes, the trend of raising the Free Speech Clause to evade regulation is not unique to the internet industry. In recent years, litigants and scholars have claimed that the First Amendment restricts the ability of the SEC to mandate financial disclosures; restricts the power of regulatory agencies to compel disclosure of conflicts of interest in the pharmaceutical industry; constrains state authority to regulate therapists; prevents a liquor control commission from prohibiting anticompetitive franchise agreements between retailers and wholesalers; protects erroneous bond and credit ratings; prevents the seizure of computer equipment used in unlawful gambling; shields tattoo parlors from health regulations; protects people who wish to make loud nonverbal noise in athletic arenas; allows people to practice law without a license; and so on. *Id.* at 1614–15. Schauer writes:

> What is most interesting about these various claims and arguments is not merely that some of them have been taken seriously. Rather, it is that they have been advanced at all, in contrast to what would have been expected a generation ago, when the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions.

Id. at 1616.

[184] Coverage relates to the first-order analysis of whether a certain type of communication draws *any* constitutional scrutiny under the First Amendment. A second-order analysis, after it has been determined that something is speech covered by the First Amendment, relates to the level of protection (i.e., constitutional scrutiny) that would be given to the covered speech. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

[185] *See, e.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 61 (2014); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1445 (2013); Kyle Langvardt, *The*

analysis of this issue as it would require more space than is available here. Moreover, as Part IV explains, notwithstanding what I see as a problematic trend in First Amendment jurisprudence, I believe that focusing on the question of what should be considered speech is not the correct way to talk about rights in a pluralist speech environment.[186] Eventually, a principled approach for adjudicating speech conflicts in the digital ecosystem must work under an expansive assumption of what counts as speech covered by the First Amendment and provide protection for users' freedom of expression even under such an expansive view. The main problem is not whether online intermediaries engage in speech or not, but rather the automatic immunity from regulation that follows from online intermediaries gaining the status of speakers. That said, in order to fully understand the obstacles facing constitutional protection for users' speech, it is important to have a sense of where we stand with regard the First Amendment's coverage.

The courts have taken an ontological approach to the scope of the First Amendment, that is, an approach that extends blindly to speech, communication, and information *per se*, regardless of the social context in which communication is made and without grounding their conclusions in a value-theory that explains why such speech, communication, or information deserves protection.[187] Consequently, if anything looks like speech in a traditional form or can be transmitted like speech in a traditional form, it *is* speech for purposes of the First Amendment.[188]

Early court decisions that dealt with the issue of what counts as speech on or by a computer focused on computer code.[189] These opinions emphasized similarities

---

Doctrinal Toll of "Information as Speech," 47 LOY. U. CHI. L.J. 761, 761 (2016); Toni M. Massaro & Helen Norton, *Siri-Ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U.L. REV. 1169, 1169 (2016); Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73, 73 (2012); Wu, *supra* note 179, at 1508.

[186] *Cf.* Waldron, *supra* note 27, at 26 (noting that the question of what is considered speech for the purpose of First Amendment protection has occupied free speech theorists and jurists "to the point of scholasticism").

[187] *See* Ashutosh Bhagwat, *When Speech is Not "Speech,"* 78 OHIO ST. L.J. 839, 843–850 (2017); Langvardt, *supra* note 185, at 764, 775–82.

[188] *See* Tutt, *supra* note 15, at 259.

[189] *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447–49 (2d Cir. 2001); Junger v. Daley, 209 F.3d 481, 484–85 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000) (recognizing that object code may be copyrighted as expression under 17 U.S.C. § 102(a)); Bernstein v. U.S. Dep't of Just., 176 F.3d 1132, 1145 (9th Cir. 1999) (affirming that source code shared by programmers is covered by the First Amendment, but clarifying that not all software is expressive); 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1100 (N.D. Cal. 2004) (following other federal courts on this issue); United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1126 (N.D. Cal. 2002) (holding that object code, in addition to source code is protected because it "is merely one additional translation of

in form between computer code and human language.[190] While there has been some disagreement among federal courts as to whether the First Amendment covers object code in addition to source code,[191] most have settled on the view that whenever the government attempts to regulate the flow of source code, the First Amendment is implicated.[192] Subsequent judicial rulings have confronted the constitutional status of computer-generated outputs by way of analogy to traditional speech. In *Brown v. Entertainment Merchants Ass'n*,[193] the Supreme Court held that the First Amendment protects video games while relying on an analogy to books, plays, and movies.[194] In *Bland v. Roberts*, the Fourth Circuit concluded that "liking" a political candidate's campaign page on Facebook was a form of speech protected under the First Amendment.[195] Google has successfully argued in federal courts that its selection of search results is protected speech and analogous to opinions and editorial decisions of newspapers.[196] Similarly, in a more recent case, a federal court dismissed, on First Amendment grounds, a suit brought by democracy advocates in China against the Chinese search engine Baidu for unlawfully blocking the United

speech into a new, and different, language"); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 326 (S.D.N.Y. 2000) ("It cannot seriously be argued that any form of computer code may be regulated without reference to First Amendment doctrine."); Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) ("This court can find no meaningful difference between computer language . . . and German or French . . . . Even object code, which directly instructs the computer, operates as a 'language.'").

[190] *See supra* note 189.

[191] Source code is the format in which programmers write software and which is readable to human beings (who understand it). In order to operate on a computer, source code must be converted, using compiler software, into object code (a binary series of zeroes and ones that interfaces with the computer's CPU). *Compare Bernstein*, 176 F.3d at 1145 (holding that the First Amendment covers source code shared by programmers), *with Sony*, 203 F.3d at 602 (recognizing that object code may be copyrighted as expression), *and Elcom*, 203 F. Supp. 2d at 1126 (holding that the "better reasoned approach" is that object code is protected).

[192] *See, e.g.*, Langvardt, *supra* note 185, at 775. The question of the level of scrutiny applied to the regulation of computer code is a separate question from that of coverage. Existing case law seems to have made code a mid-value speech category, akin to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566–67 (1980), but this issue has not yet been settled. Langvardt, *supra* note 185, at 774–75.

[193] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 786 (2011).

[194] *Id.* at 790. Interestingly, during the 1980s a number of lower court rulings had denied First Amendment protection to the video games. *See* Wu, *supra* note 179, at 1513 n.82.

[195] Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

[196] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (citing Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)) (accepting Google's claim that compelling it to place ads of plaintiff's websites on its search engine results contravenes its First Amendment right); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (accepting Google's claim that its PageRank results are protected opinions).

States search engine results concerning "the democracy movement in China."[197] The court held, *inter alia*, that "there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation."[198]

While the question of whether code and algorithmic outputs are protected speech has not yet been directly settled by the Supreme Court, a decision with potentially far-reaching implications on this question was rendered by the Court in *Sorrell v. IMS Health Inc.*[199] In *Sorrell*, the Court struck down a Vermont statute prohibiting pharmaceutical and data-mining companies from selling, disclosing, and using information about how often physicians prescribe drugs for marketing purposes.[200] The Court found that the statute imposed content-based and speaker-based restrictions on protected speech.[201] A threshold issue was whether such information was speech as opposed to a commodity or product. The Court affirmed "the rule that information is speech," suggested that the "creation and dissemination of information are speech within the meaning of the First Amendment," and applied the rule to the data created and disclosed by the defendants.[202] Although *Sorrell* itself did not focus on digital content, the Court's statement that raw data is fully protected speech may have "sweeping ramifications for online speech even if only by analogy."[203]

A literal reading of *Sorrell* might suggest that any software program that facilitates the creation or receipt of information is protected speech[204] and therefore subject to a heightened standard of judicial review.[205] Under *Sorrell*, for example, Microsoft's decision to exclude the Netscape browser from Windows might be

---

[197] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014).

[198] *Id.* at 438.

[199] Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011).

[200] *Id.* at 557.

[201] *Id.* at 571.

[202] *Id.* at 570.

[203] Tutt, *supra* note 15, at 262. As Justice Breyer noted in his forceful dissenting opinion:

> At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.

Sorrell, 564 U.S. at 602–03 (Breyer, J., dissenting) (internal citations omitted).

[204] *See* Tutt, *supra* note 185, at 75–76. The Court's analysis in this regard may be seen as dictum, "but dictum entirely consistent with the Court's modern doctrine." Bhagwat, *supra* note 187, at 850. Notably, Justice Kennedy, who delivered the opinion of the Court, was careful to note that the holding in *Sorrell* did not render privacy law unconstitutional in general. *Sorrell*, 564 U.S. at 573. Hence, the exact implications of *Sorrell* for future cases remains to be seen.

[205] The message that emerges from *Sorrell* and lower courts' decisions is that no regulation of code, algorithmic outputs, and information in general would be evaluated under anything less than intermediate scrutiny. *See* Langvardt, *supra* note 185, at 769–75.

considered protected speech;[206] any attempt to bring an antitrust action against a tech giant might be constitutionally suspect;[207] and a person injured after relying on Google Maps' walking directions might not be able to sue Google because its software instructions enjoy First Amendment protection.[208] *Sorrell* might also raise doubts about the constitutionality of a host of laws that limit disclosure of information to protect privacy.[209] These are absurd, even disturbing, potential results.

In legal scholarship, the question of the First Amendment's coverage of computer-generated communication generally pertains to two related issues: (1) whether algorithmic outputs should be considered protected speech; and (2) the more general question of whether data and information should themselves be considered speech covered by the First Amendment. Stuart Benjamin has argued that the First Amendment encompasses "algorithm-based outputs that entail a substantive communication" (which, according to Benjamin, includes most algorithm-based editing).[210] Following the Court's ruling in *Spence v. Washington*,[211] Benjamin contends that to be eligible for First Amendment protection, communication requires "at a minimum, a speaker who seeks to transmit some substantive message or messages to a listener who can recognize that message."[212] Accordingly, "a message that is sendable and receivable and that one actually chooses to send" is speech for First Amendment purposes.[213]

Benjamin's approach has the ostensible advantage of relative simplicity. One important aspect of his approach is that it tends to exclude manipulative and secretive algorithmic-based practices from First Amendment coverage.[214] Benjamin's

---

[206] Tutt, *supra* note 185, at 76 (citing United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)).

[207] *See* Tutt, *supra* note 15, at 263.

[208] This example is based on *Rosenberg v. Harwood*, No. 100916536, 2011 WL 3153314 (D. Utah May 27, 2011). In *Rosenberg*, a woman claimed that in relying on Google Maps' directions she stepped onto a highway and was hit by a car. *Id.* at *1. In its defense, Google claimed among other things that its directions were protected speech. *Id.* at *6. The district court avoided the constitutional question but accepted the argument that Google was a "publisher." *Id.* at *8.

[209] *See* Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 855 (2012); Agatha M. Cole, *Internet Advertising After* Sorrell v. IMS Health*: A Discussion on Data Privacy & the First Amendment*, 30 CARDOZO ARTS & ENT. L.J. 283, 304 (2012).

[210] Benjamin, *supra* note 185, at 1447.

[211] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (holding that a student's display of an American flag hung upside down and adorned with a peace symbol using black tape was protected speech and stating that the First Amendment applies when "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

[212] Benjamin, *supra* note 185 at 1461.

[213] *Id.*

[214] *Id.* at 1484–85.

suggested test requires, at the very least, that "the speaker had meaningfully attempted to communicate its message to the world, and particularly to its audience."[215] A practice that is concealed from users does not constitute a meaningful attempt to communicate a message and certainly cannot be regarded a message received.[216] Moreover, Benjamin notes that if a company sends mixed messages about its relationship with its users' speech, that incoherence alone undermines the possibility of a meaningful message being communicated.[217] Such an incoherence arguably exists in online intermediaries' claim to be speakers in order to receive First Amendment protection while at the same time assuming the role of mere conduits to avoid civil liability.[218]

Still, Benjamin's approach is vague and overbroad. First, many expressive acts meet the criteria he offers and still do not (or at least not yet) deserve the protection of the First Amendment.[219] A political assassination clearly conveys a message likely to be understood by anyone hearing about it, but the First Amendment does not protect assassinations.[220] An assassination carried out with the help of algorithmic outputs (e.g., by sending a computer command to a device from afar) would be no different. Second, Benjamin repeatedly states that in order to be considered speech a message should be "substantive," but what that means remains unclear. When my Xbox console displays a message that the batteries in my controller are low or when the anti-virus software on my laptop tells me that it has located a damaged file, they both communicate with me—they "choose" to send me a message that I receive and understand. Still, I suppose that most people would find quite odd the idea that such messages from laptops and gaming consoles are speech and deserve protection under the First Amendment. Benjamin's criteria are insufficient because a test of what constitutes *expressive* communication cannot be entirely detached from the normative and social context of that communication.[221] The same written sentence carries different normative weight when used as part of a client's sale order than

---

[215] *Id.* at 1486.

[216] *Id.* at 1485.

[217] *Id.* at 1487; *see also* ACKERMAN, *supra* note 9, at 8 (arguing that when a person simultaneously asserts conflicting arguments "he has not given two reasons for his action. He has provided some noise that adds up to no argument at all").

[218] *See, e.g.*, Bracha & Pasquale, *supra* note 10, at 1192–93; Gillespie, *supra* note 3, at 356–57; Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 U. MD. J. BUS. & TECH. L. 61, 72 (2008); Wu, *supra* note 179, at 1505.

[219] *See, e.g.*, Bhagwat, *supra* note 187, at 844; Schauer, *supra* note 183, at 1615; Schauer, *supra* note 184, at 1770–71.

[220] *See* Wu, *supra* note 179, at 1511.

[221] *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 773 (2001); Schauer, *supra* note 184, at 1801.

when written on a protest sign.[222] A toilet bowl at a restroom is not speech; a toilet bowl at a museum is.[223]

Jane Bambauer holds an even more far-reaching position on the question of First Amendment coverage. Bambauer has not dealt directly with the constitutional status of algorithmic outputs, but her position that "for all practical purposes and in every context . . . data is speech"[224] entails sweeping implications for an environment of constant digital surveillance. Her position does not rest on a technical test for the existence of a sendable and receivable message but rather on a more substantive rationale. She asks whether the output "carries an implicit right to create knowledge" for which data is essential.[225] "The right to create knowledge," argues Bambauer, "reinforces American commitments to autonomy and intellectual curiosity."[226] Consequently, "[w]hen the government deliberately interferes with an individual's effort to learn something new, that suppression of disfavored knowledge is presumptively illegitimate."[227] In particular, Bambauer posits that information *gathering* should receive First Amendment protection and that any attempt to limit the collection of personal data is potentially unconstitutional.[228]

The idea that freedom of speech carries an implicit right to create knowledge is appealing. However, it is difficult to see how a commitment to knowledge creation, autonomy, and individual curiosity can be advanced by a whole range of practices, which, in Bambauer's view, enjoy the protection of the First Amendment, such as the mass surveillance of users by corporate entities. Bambauer admits that her proposals "can be used to challenge the constitutionality of many popular privacy statutes,"[229] but seems to disregard the fact that her position would harshly undermine freedom of expression as well, including the very rationale on which she allegedly bases her call for protecting data as speech.[230] In practice, her approach

---

[222] Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1666 (2014).

[223] *See, e.g.*, Jeffrie G. Murphy, *Freedom of Expression and the Arts*, 29 ARIZ. ST. L.J. 549, 549 (1997) (discussing a 1996 exhibit at the Phoenix Art Museum that displayed Kate Millett's 1970 "The American Dream Goes to Pot" (an American flag in a toilet bowl)). To be clear, even a toilet bowl at a restroom can be said to send a "message" to its potential users by way of its design.

[224] Bambauer, *supra* note 185, at 63.

[225] *Id.* at 60.

[226] *Id.* at 61.

[227] *Id.* at 60.

[228] *Id.* at 61–62.

[229] *Id.* at 61.

[230] *Cf.* Elizabeth S. Anderson, *The Democratic University: The Role of Justice in the Production of Knowledge*, 12 SOC. PHIL. & POL'Y 186, 216–17 (1995) (arguing that when people are free to use norms of communication to deprive others of the status of inquirers or in a way detrimental to their status as speakers, they undermine the objectivity of research and the autonomy of inquiry).

seems more concerned with the free flow of information than with the freedom of actual people.[231]

The truth of the matter is that holding information in general as protected speech is untenable. As noted above, a lot of speech—from securities advertising regulations to contracts and criminal incitement—has been ignored by the First Amendment.[232] "The First Amendment," as Neil Richards has argued, "has never been interpreted as an absolute protection for all uses of words, much less for automated and mechanized data flows or the sale of information as a commodity."[233] If it had, the First Amendment would "swallow the law, making ordinary regulation impossible."[234] In an increasingly digitized world, where most things we do leave digital footprints for others to collect and analyze, the practical implication of "data is speech" is the presence of the First Amendment in almost every aspect of our social reality.[235] Thus, notwithstanding the possibility of certain data processing activities involving speech subject to First Amendment scrutiny, the proposition that data is speech "in every context" is hopelessly overbroad.[236]

---

[231] Bambauer continues to develop her position against government regulation of information in a subsequent article written with Derek Bambauer. Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 360 (2017). In their article, the knowledge-creation rationale for protecting data as speech is extremely downplayed, while information is defined as "communication between a sender and a receiver that is potentially useful to human beings." *Id.* Speech is defined circularly as "information within the First Amendment's scope." *Id.* at 359. These definitions are obviously not very helpful since the basic question is whether "information" as a category should or should not fall within the First Amendment's scope. Furthermore, there is an apparent inherent tension between Bambauer's definition of information as communication potentially useful to *human beings* and her unchecked support for corporate speech, including practices that are detrimental to the rights and well-being of human beings. *Id.* at 347.

[232] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 12 (Harv. Univ. Press 1993) ("[S]ocial life is full of words that are legally treated as the acts they constitute without so much as a whimper from the First Amendment."). *See generally* Schauer, *supra* note 184.

[233] Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1526 (2015). But, as discussed above, this statement may require a caveat in light of *Sorrell*.

[234] *Id.* at 1528.

[235] *Id.* at 1530–31.

[236] *See, e.g.*, Cole, *supra* note 209, at 305; Joseph A. Tomain, *Online Privacy & the First Amendment: An Opt-In Approach to Data Processing*, 83 U. CINN. L. REV. 1, 38–40 (2014). The importance of context in determining the scope of the First Amendment's coverage transpires from the examples on which Bambauer herself relies in an attempt to justify her own position. She suggests, for example, that the Supreme Court's important decision to uphold the right of the New York Times and the Washington Post to publish the *Pentagon Papers* (N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971)) provides strong support for treating raw facts as speech. Bambauer, *supra* note 185, at 59. There is nothing, however, in the *Pentagon Papers* which supports this view. While the *Pentagon Papers* themselves contained facts, it was the newspaper

Tim Wu distinguishes computer programs that operate as vessels to communicate their creators' own ideas from computer programs that serve as vessels to communicate the ideas of others or to perform some task for their users.[237] He defines the former as "speech products," while the latter should be seen as "communication tools."[238] What sets a speech product apart from a communication tool is a test of functionality—a distinction between the functional aspects of the communication process, which are regulable, and the expressive aspects of that process, which should be subject to First Amendment scrutiny.[239] Accordingly, technologies like posts,

reporting of those facts that constituted the speech that the government wished to enjoin. *N.Y. Times*, 403 U.S. at 714. *Pentagon Papers* was therefore not a groundbreaking case about data being speech but quite a simple case about news being speech. *Id.* at 714 (Black, J., concurring) ("I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."). Similarly, Bambauer argues that First Amendment protection should extend to newsgathering, while criticizing the Ninth Circuit's decision in *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (holding that the First Amendment does not accord reporters immunity from torts committed during the course of newsgathering). Notably, her critique of *Dietemann* is not very different from previous critiques, which have argued that the First Amendment's protection should extend at least to some extent to newsgathering activities. *See, e.g.*, Mathew D. Bunker et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273, 296–97 (1999); Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1144 (2000); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1019 (2016); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1209 (2000). But while previous critiques have focused on the constitutional significance of the social context of newsgathering, emphasizing its role as a component of expression or as conduct essentially preparatory to speech (by providing the information that the press then publishes), Bambauer wishes to draw a much more far-reaching conclusion—that information-gathering and data-creation should be considered protected speech for their own sake, regardless of context, and not only as a corollary of the right to disseminate the resulting content. Bambauer, *supra* note 185, at 84–86. This is a conceptual leap that Bambauer does not properly explain. Notably, the majority opinion in *Sorrell* suffers from a similar problem. The Court in *Sorrell* cited *Bartnicki v. Vopper* as an authority for its conclusion that "[t]his Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." Sorrell v. IMS Health Inc., 564 U.S. 552, 568 (citing Bartnicki v. Vopper, 532 U.S. 514, 527 (2001)). Yet the Court in *Bartnicki* framed the issue that was before it as a conflict between "the interest in the full and free dissemination of information *concerning public issues*," and "the interest in individual privacy." *Bartnicki*, 532 U.S. at 518 (emphasis added). The statement in *Sorrell*, purporting to follow *Bartnicki*, is therefore broader than the actual holding in *Bartnicki*, which tied the interest in the dissemination of information with the information being of public concern.

[237] Wu, *supra* note 179, at 1498. For a discussion of conceptual problems in seeing computer programs as vessels of their creators' ideas in the corporate context, see *infra* notes 368–400 and accompanying text.

[238] Wu, *supra* note 179, at 1498.

[239] *Id.* at 1496–97.

tweets, and video games should be considered speech products, while technologies like GPS navigation software should be treated as communication tools.[240]

The basic rationale of Wu's approach, the notion that the First Amendment should be "confined to its primary goal of protecting the expression of ideas,"[241] is in my mind an important step in the right direction. However, when one gets into actual questions of implementation across various algorithmic outputs and processes, quite quickly the boundary between speech products and communication tools becomes murky. Wu's functionality doctrine, which he himself describes as "mysterious,"[242] is therefore more of a "latent, elusive principle"[243] or at most a general rule of thumb.

What Wu denominates as a test of functionality does have deep roots in First Amendment jurisprudence distinguishing between speakers and speech distributors.[244] The protection afforded by the First Amendment for distributors is not the same as that provided to speakers, with the difference being based on the fact that protection for distributors is derived from the value of the speech they carry and from their role in assisting speakers to reach listeners, but not on the inherent value of distribution.[245] The distinction between speakers and distributors is classically manifested in the exclusion from First Amendment protection of mere conduits, i.e., actors that "handle or transform information in a manner usually lacking specific choices as to content, lack specific knowledge as to what they are handling, or do not identify as the publisher of that information."[246] This category has traditionally included common carriers such as postal services and telephone companies and under the FCC's 2015 Open Internet Rules (which have since been repealed) would also include broadband service providers ("BSPs").[247]

Viewed in this light, and assuming, *arguendo*, that algorithmic outputs and processes could be classified into a dichotomy of either a speech product or a communication tool, Wu's functionality test leads to classifying social media platforms as communication tools. Social platforms' primary purpose by design is to carry others' speech and to serve as communication tools for their users. Although they handle vast amounts of information, such platforms are not identified with the

---

[240] *Id.* at 1498.

[241] *Id.*

[242] *Id.* at 1533.

[243] Bracha, *supra* note 222, at 1678.

[244] *See, e.g.*, Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 81 (1995).

[245] *Id.* at 81.

[246] Wu, *supra* note 179, at 1521; *see also* Eli M. Noam, *Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 FED. COMM. L.J. 209, 216–17 (1982) (describing common carriers as acting "solely as conduits for the programs of others without control over the nature or content of programs").

[247] *See supra* note 103 and accompanying text.

speech of their users and in fact often present themselves as mere conduits to avoid liability in tort and copyright.[248] Search engines also seem to comfortably fall under this category, since their dominant function is not to express meaning but to channel users to websites and to the information users themselves seek.[249] No one consumes search results for their own sake or reads search results in order to be informed of Google's views of user preferences.[250]

The problem, however, is that online intermediaries do not neatly fit into this dichotomous classification. In terms of what BSPs are technically capable of doing, they could be characterized both as conduits and potential "editors," and thus their claims that they are potential speakers for First Amendment purposes cannot be readily dismissed.[251] While it is odd to think of what BSPs do—transmitting packets of data—as speech,[252] BSPs *are* capable of making decisions, which would be regarded as carrying expressive meaning even under Wu's functional standard (e.g., restricting access to racist websites). Of course, BSPs' motives for taking such actions may not be commendable, but the point is that it is possible for a BSP to use its technical capability to interfere with internet traffic in an expressive manner.[253]

---

[248] *See supra* note 218 and accompanying text.

[249] *See, e.g.*, Bracha & Pasquale, *supra* note 10, at 1193; Bracha, *supra* note 222, at 1684; Pasquale, *supra* note 218, at 75. Wu gives navigation software as a classic example of software that conveys information, as a tool that assists people in getting from one point to another and not as a form of social interaction that communicates ideas. Wu, *supra* note 179, at 1525. Voice commands (for example, pronouncing the words "Turn off PS4" instead of pressing the power button of a PlayStation console) are also examples of software that perform a task rather than communicate ideas. For a list of PlayStation 4 available voice commands, see *How to Use PS4 Voice Commands*, IGN (Nov. 3, 2016), http://www.ign.com/wikis/playstation-4/How_to_Use_PS4_Voice_Commands.

[250] *See* Bracha, *supra* note 222, at 1668.

[251] *See, e.g.*, Fred B. Campbell, Jr., *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 NEB. L. REV. 559, 603 (2016); Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1220–21 (2007); Yemini, *supra* note 23, at 21.

[252] *See, e.g.*, Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1675 (2011).

[253] *See, e.g.*, Bhagwat, *supra* note 187, at 860–61. A well-known example in this regard is Canada's second largest telecommunications company, Telus, blocking access to Voices for Change, a website supporting the Telecommunications Workers Union (together with 766 other websites that were hosted by the same server, but were otherwise unrelated). Tom Barrett, *To Censor Pro-Union Website Telus Blocked 766 Others*, TYEE (Aug. 4, 2005), http://thetyee.ca/News/2005/08/04/TelusCensor/. It is worth noting that the D.C. Circuit's decision to uphold the 2015 Open Internet Rules was based, *inter alia*, on a factual finding that "the exercise of editorial discretion is entirely absent with respect to broadband providers subject to the Order." United States Telecom Ass'n v. Fed. Commc'ns Comm'n, No. 15-1063, slip op. at 113 (D.C. Cir. June 14, 2016). But this finding suffers from circularity, since the 2015 Open Internet Rules themselves prevented BSPs from engaging in practices akin to the exercise of editorial discretion.

Social media platforms present a more complicated case than that of BSPs because they do not simply carry others' speech but closely control the rules and architecture of their speech environments and engage—to varying degrees—in speech-curation.[254] Search rankings present yet another challenge to the functionality standard. Proponents claim that search rankings are protected speech, which is a view that receives judicial and scholarly support.[255] A version of this claim treats search engines as editors and views attempts to interfere with a search engine's discretion as to its results constitutes an infringement of its "editorial discretion."[256]

---

[254] *See, e.g.*, Balkin, *supra* note 7, at 2041.

[255] *E.g.*, Benjamin, *supra* note 185, at 1467; Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 189 (2006); Tansy Woan, *Searching for an Answer: Can Google Legally Manipulate Search Engine Results?*, 16 U. PA. J. BUS. L. 294, 296 (2013).

[256] *See, e.g.*, Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 886–89 (2012). The argument was accepted by lower courts in *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007), and in *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014). Search results do constitute an "editorial" product in the sense that they aggregate information, form an index, and, in response to a user's search query, algorithmically include or exclude certain websites from the generated results, and rank them in a certain order, according to the algorithm's best guess of what the user wants. However, search engines lack a crucial characteristic, which lies at the core of what makes a genuine editorial process eligible for First Amendment protection against compelled speech—the association of the editor with the content it selects. *See* Bracha, *supra* note 222, at 1647–51 (citing Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006)); Wu, *supra* note 179, at 1528–29 (same); *cf.* Meyerson, *supra* note 245, at 84 ("The fact that a distributor of information may select some of what is carried does not transform that distributor into an 'editor' for all of the information carried. As far as the First Amendment is concerned, while all editing requires selection, not all selection constitutes 'editing.'"). Search engines are not identified with the content of the indexed websites to which they channel users and actually stress their disassociation, as publishers or editors, from the content of the websites they list in order to avoid liability. *See* Parker v. Google, Inc., 242 F. App'x 833, 835 (3d Cir. 2007) (upholding Google's reliance on the safe havens of the DMCA and CDA 230). The Australian High Court, in *Google, Inc. v. Austl. Competition & Consumer Comm'n* (2013), 294 ALR 404 (Austl.), accepted Google's contention that it was a mere conduit of advertisements appearing on its results page and concluding that Google was not liable for misrepresentations in such advertisements. And the English High Court in *Metro. Int'l Sch. Ltd. v. Google, Inc.*, [2009] EWHC (QB) 1765 (Eng.), accepted Google's position and classified Google as a mere conduit in relation to its search results. *See also* Case C-131/12, Google Spain SL v. Agencia Espanola de Protección de Datos, Mario Costeja González, 2014 E.C.R. 317 [hereinafter *Google Spain*] (accepting Google's argument that it cannot be regarded the "controller" of the processing of data referred to in its search results since "it has no knowledge of those data and does not exercise control over the data"). It is therefore inconsistent for search engines "to disclaim the legal responsibilities of editors and publishers while also claiming the free speech protection extended to them." Bracha, *supra* note 222, at 1649–50.

Another version of the argument treats search engines as direct speakers and search results as opinions.[257]

The limits of the functionality test suggested by Wu highlight, once again, the fact that the ontological question of what speech *is* for First Amendment purposes cannot be entirely detached from the normative question of what speech *should* be for those purposes. Categorizing a communications provider as a mere conduit for others' speech rather than a speaker does not rest solely on its technical abilities or even its expressive potential but rather on its cultural, social and normative positioning, which underlie its legal status. Postal companies are common carriers (and BSPs should be) not because mailmen do not have the ability to look into people's mail, but because the role they are expected to perform requires them not to look into people's mail. Much of what social media platforms do in relation to their users' content should normatively be conceptualized as censorship rather than as editorial discretion. And search engines' contributions to our system of free expression lies almost exclusively in providing users the ability to locate and access information, not in their own expressive importance.

Ashutosh Bhagwat has called for the adoption of a normative approach to the question of coverage, arguing that the only possible source of guidance in developing a standard to judge when speech should or should not be considered "speech" for First Amendment purposes is free speech theory.[258] He posits that the advancement of democratic self-government is the only possible theory for applying such a standard, and therefore only communicative activities which are relevant to self-governance should be considered speech deserving First Amendment protection.[259] In his view, for example, a network neutrality policy would be justified because "the types of editorial discretion that broadband providers are seeking, and the motivations

---

[257] *See, e.g.*, Benjamin, *supra* note 185, at 1467; Allyson Haynes Stuart, *Google Search Results: Buried if Not Forgotten*, 15 N.C. J.L. & TECH. 463, 487–89 (2014) (arguing that Google's search results are speech in the form of opinion protected against abridgement by the government). That claim was accepted in *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003). The claim that search rankings embody observations of relevance and usefulness, which are themselves protectable speech, is more challenging than the editorial discretion argument from a First Amendment standpoint as it attaches expressive meaning to the search rankings directly generated by the search engine, thereby avoiding the problem of claiming First Amendment protection in relation to speech that is not associated with the search engine. Bracha, *supra* note 222, at 1652. Notably, for this argument to be consistent, search engine manipulation must be excluded from the scope of its protection. Producing search results that are not consistent with a search engine's own stated assessment of relevance cannot be regarded a communication of a message. *See supra* notes 214–18. In fact, such search results may actually fall under the category of deception, which receives limited protection, if any, under the First Amendment. *See* James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 926–32 (2014).

[258] Bhagwat, *supra* note 187, at 843.

[259] *Id.*

behind those efforts, have absolutely no relationship to democracy or citizenship"[260] and granting BSPs editorial control would actually "*undermine* democracy by potentially interfering with citizens' ability to speak, educate themselves, and organize."[261]

Still, Bhagwat's approach is not free of significant difficulties. First, his standard for defining speech covered by the First Amendment is highly contestable and, as he admits, "stands in sharp contrast to the position taken by others."[262] Rather than being concerned only with democratic self-government, a principle of free speech is better understood as being grounded in a plurality of values.[263] In fact, it has been argued that technological change has increased the relative importance of individual autonomy as a justification for freedom of expression[264] (compared to the second half of the twentieth century when the argument from democracy was most dominant[265]). Second, the approach is surprisingly under-sensitive to the distinction between *coverage* and *protection*. Take, for example, Bhagwat's own hypothetical of a BSP choosing to block access to white supremacist or Jihadist sites.[266] This example remains a non-trivial First Amendment question even under his standard. It certainly cannot be dismissed simply by stating that such blockage is not speech. Bhagwat's answer to this difficulty seems to be that BSPs are not really seeking editor status for ideological reasons but instead for technical and financial reasons.[267] But this contention is largely irrelevant to the democratic-theory-based rationale he advances, which has traditionally assigned little weight to speakers' identities and motivations in determining First Amendment coverage.[268] Speakers' motivations may be relevant, however, to classifying speech into different categories

---

[260] *Id.* at 879.

[261] *Id.* at 878–79; *see also* Yemini, *supra* note 23, at 38 ("The real justification for network neutrality is content providers', and especially users', own individual free-speech rights, stemming directly from the First Amendment.").

[262] Bhagwat, *supra* note 187, at 875 (referring to Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011)).

[263] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 917 (1963); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 124 (1989).

[264] *See* Balkin, *supra* note 10, at 439; Balkin, *supra* note 18, at 42.

[265] *See, e.g.*, ERIC BARENDT, FREEDOM OF SPEECH 23 (1985) (arguing that democratic theory of free speech has been "the most influential theory in the development of the twentieth-century free speech law"); Balkin, *supra* note 18, at 28 ("Probably the most important theoretical approach to freedom of speech in the twentieth century has argued that freedom of speech is valuable because it preserves and promotes democracy and democratic self-government.").

[266] Bhagwat, *supra* note 187, at 860–61.

[267] *Id.* at 879.

[268] *See, e.g.*, MEIKLEJOHN, *supra* note 120, at 25 ("[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers.").

(e.g., commercial speech), which may invoke different levels of *protection*.[269] In addition, Bhagwat does not consider the more complex questions of algorithmic curation by search engines and social media platforms and *their* relationship to democratic self-governance. Algorithmic outputs of search engines, for example, cannot be said to be inherently inimical to democracy (and therefore would most probably qualify as protected speech under Bhagwat's standard). Thus, Bhagwat's standard would seem to close any debate on search engine regulation at a point when such a debate should only begin.

IV. TOWARD A PLURALIST CONCEPTION OF THE FIRST AMENDMENT

As demonstrated in Part III, existing First Amendment doctrine and the direction at which it is currently heading are not very promising for users' freedom of expression. As I have also shown, although existing doctrine lifts high barriers to substantial reform, considerable work could be done within the existing doctrinal boundaries to create an environment more supportive of users' speech. However, to understand the fundamental flaw in current First Amendment doctrine we need to zoom-out from the specifics of each of the doctrinal barriers discussed above and try to analyze what in traditional constitutional thought connects these barriers and synergistically works to prevent imposing legal duties on online intermediaries.

I argue that the main problem of existing constitutional thought on speech-related issues is that its conceptual premises about the nature of constitutional conflict are incompatible with the realities of pluralist networks, which are comprised of multiple speakers and multiple speech regulators (with potential overlaps between the two). Traditional First Amendment thinking conceptualizes constitutional conflicts as necessarily bipolar, speaker-government equations. Accordingly, courts and scholars ordinarily focus on asking whether the state is present on one side of the equation (as the problem of state action demonstrates) or whether a speaker exists on the other (as manifested in the problem of what counts as speech). Yet, speech-related conflicts in pluralist networks are more complex than a bipolar analysis is able to reflect.

While resorting to the state action doctrine may be a necessity dictated by existing doctrine, it is an artificial substitute for a substantive evaluation of speech-related conflicts typical of the digital ecosystem. Some aspects of online intermediaries' activities may be more accurately characterized as state action than others (e.g., state censorship by proxy, copyright law enforcement under the DMCA), and with some legal creativity, online intermediaries could be placed on the government side

[269] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566–67 (1980) (holding that commercial speech is speech protected under the First Amendment, but that its regulation is subject only to intermediate scrutiny).

of the bipolar equation. However, generally speaking, the digital ecosystem, in which most speech regulation is not done by the state, is simply different. Seeking state-like characteristics in private entities makes sense in a system where the rule is that the state regulates and private entities perform state-like actions in the margins of the system. It makes less sense to insist on passing through the filter of state action when the exception becomes the rule, that is, when the state is just one among many speech-regulators, most of which are private entities. What is really needed in such a system is a proper doctrinal tool for dealing directly with intermediary action.

The same is true when the vehicle relied upon for promoting users' speech is the denial of speaker status from online intermediaries (and speech status from their algorithmic outputs).[270] This path makes the promotion of users' speech dependent on a finding that the intermediaries that facilitate such speech are not themselves speakers. It makes one's status as a speaker, and hence a rights-holder, dependent upon another's definition of a non-speaker and hence a non-rights-holder.[271] Yet, a principled, forward-looking policy for resolving speech-related conflicts in an environment of multiple speakers cannot rely on such an assumption but rather must provide guidance for resolving conflicts among the rights themselves. This is true not only with regard to the conflicts of today, but also in preparation for the conflicts of tomorrow.[272] A proper analysis of pluralist conflicts must go beyond the question of whether an online intermediary is or is not a speaker and provide guidelines for what happens *if* and *when* conflicting rights simultaneously exist on different sides of the constitutional matrix.

In the balance of this Article, I will address the limits of the bipolar conception of constitutional conflicts in the digital ecosystem and will start sketching the contours of a different, pluralist conception of the First Amendment.

A. The Bipolar Conception of the First Amendment and Its Limits in the Digital Ecosystem

The traditional encounter of the Supreme Court with issues of free speech "opens with the paradigm of the heroic speaker of conscience, pressed by her art or her politics or her science or her religion to speak the truth to a hostile world that

---

[270] *See generally* Wu, *supra* note 179.

[271] *See* Yemini, *supra* note 23, at 32.

[272] As analyzed above, new suggested standards for defining speech can be comfortably applied in some cases but present harder dilemmas in other cases. *See supra* Part III.B. It is reasonable to assume that future cases will become even harder to categorize. For example, Facebook has been testing a feature called "Conversation Topics on Facebook Messenger" that suggests discussion topics for friends. *See, e.g.*, Sarah Perez, *Facebook Messenger Suggests What to Talk About with "Conversation Topics" Feature*, TECHCRUNCH (Oct. 17, 2016), https://techcrunch.com/2016/10/17/facebook-messenger-tells-you-what-to-talk-about-with-conversation-topics-feature/. Should the algorithmic outputs of such a feature be regarded as "speech"?

prefers silence."[273] In that world drawn from the experience of the American Revolution and libertarian notions of the minimalist state, the government is the omnipotent leviathan from which the speaker needs protection, and the First Amendment is largely concerned with prohibiting government censorship of the lone pamphleteer. This anti-authoritarian perception of freedom of expression is tied, as Steven Shiffrin has argued, to Romantic ideals that place the image of the dissenter as the "organizing symbol" of the First Amendment.[274] This perception is not only closely linked to the notion that government power is the greatest threat to free expression but is also premised on the assumption that two parties, and only two parties, are relevant to First Amendment conflicts—the speaker-dissenter who wishes to speak and a government that wishes, for whatever reason, to silence her.[275] Consequently, First Amendment problems are viewed "in terms of a bipolar opposition between the state and those who wish to engage in expression—a view that is applied not only to cases involving political speech or criticism of the government, but also to cases involving speech that impacts on private parties."[276]

The problem with this vision is that speech-related conflicts are often different from and more complex than the limited way in which the bipolar conception frames them.[277] When, for example, the Court strikes down a governmental regulation compelling A to carry the speech of B, and does so without regard of the free

---

[273] Burt Neuborne, *Speech, Technology, and the Emergence of a Tricameral Media: You Can't Tell the Players Without a Scorecard*, 17 HASTINGS COMM. & ENT. L.J. 17, 30 (1994).

[274] *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990) ("If the first amendment is to have an organizing symbol, let it be an Emersonian symbol, let it be the image of the dissenter."). Shiffrin mainly relies on the ideas of nineteenth-century Romantic writers Ralph Waldo Emerson and Walt Whitman. *Id.* at 5–6; *see also* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 274–75 (1999) (ebook).

[275] *See, e.g.*, Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1116 (1992) (arguing that First Amendment tests "are premised on the assumption that there are only two relevant parties—a speaker who wants to speak and a government that wants to limit that speech, either because it objects to the content of the speech or for other, non-content-related reasons").

[276] Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1307 (1998). Heyman argues that at the time of the adoption of the Constitution and the Bill of Rights, free speech was actually understood as limited by the fundamental rights of others, and First Amendment problems were possibly understood as involving rights on both sides. *Id.* at 1280–99. Under this approach, First Amendment problems were understood to involve a trilateral relationship between those who desired to speak, those whose rights might be affected by that speech, and the state that was obligated to respect and protect the rights of both sides. *Id.* at 1305. However, over time, with the rise of more positivist and utilitarian conceptions of law that intermingled with the previously dominant notion of natural rights, this view of First Amendment problems changed and came to be viewed as a bipolar opposition between the state and those who wished to engage in expression. *Id.* at 1299–313.

[277] *Id.* at 1310 ("[M]any free speech cases implicate the rights of more than one person.").

speech interests of B,[278] the informational basis on which the Court reaches its decision is necessarily lacking. This problem has been dramatically enhanced in the era of digital technologies, as the one-case-one-right method of constitutional analysis becomes less and less relevant to many speech-related conflicts. Any decision pertaining to search results, to take one simple example, implicates not only the speech interests of the search engine itself but also those of content providers and end users who do not necessarily hold the same interests among themselves.[279] In his analysis of the flow of power and freedom in pluralist networks, Yochai Benkler points out the increasing complexity of such networks, that is, the "increasing number of entities and subsystems coming to bear on the basic dynamic."[280] Benkler shows, through an analysis of fan video production, how a system, which in 1970 involved four entities (movie studios, movie theatres, broadcasters and fans) with information flowing in one direction, has by 2010 evolved into a system potentially involving more than 20 entities with information flowing in many directions.[281]

This complexity of pluralist speech environments challenges traditional First Amendment jurisprudence and makes it much more difficult to formulate clear standards for adjudication. Existing First Amendment standards of judicial review (e.g., intermediate scrutiny and strict scrutiny) assume a bipolar conflict in which the importance of the state's public, economic, or social interests must be proven sufficiently significant to justify limiting the speaker's First Amendment rights.[282] However, the initial presumption of any analysis of this sort is that the individual right is superior to the governmental interest. Accordingly, any attempt to regulate the entity defined as "*the* speaker" within the terms of the bipolar conception arrives at a constitutional conflict with a presumption of unconstitutionality (no matter how protective of other speakers such regulation may be).[283] Yet no such presumption can control conflicts in a pluralist network of many speakers (and many speech-

[278] *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 18–19 (1986) (plurality opinion) (holding that the appellee's decision to apportion "extra space" on the appellant's monthly billing statements for messages of a consumer group abridged the First Amendment because it compelled the appellant to spread a message with which it disagreed, but failing to take into account in the analysis the First Amendment interest of the consumer group and its audience); *see also* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 626 (1994) (analyzing the constitutionality of must-carry provisions as a bipolar opposition between governmental interests and the rights of cable operators but failing to recognize the independent First Amendment rights of cable subscribers and broadcasters).

[279] *See, e.g.*, Bracha, *supra* note 222, at 1640–41.

[280] Yochai Benkler, *Networks of Power, Degrees of Freedom*, 5 INT'L. J. COMM. 721, 739 (2011).

[281] *Id.* at 740–49.

[282] Yemini, *supra* note 23, at 29.

[283] *Id.*

regulators) when the potential collision between free-speech interests is potentially a collision between equal rights of similar nature.[284]

The Court has tried to cope with the discrepancy between the bipolar legal conceptualities and the pluralist developing realities through two different approaches. One approach centers on reducing pluralist settings into bipolar ones. This in turn can be done through two mechanisms: (1) finding governmental characteristics in private entities and placing them in the spot reserved, in the bipolar conception, for the state;[285] and (2) a second-level reduction of free speech rights—typically of those who gain from government regulation—to a component of the governmental interests relied upon to justify regulation.[286] In the context of the relationship between online intermediaries and their users, the first mechanism of finding state action in private entities' activities could serve as a speech-promoting tool within the constraints of the bipolar conception.[287] However, this doctrinal tool (which the courts have been reluctant, in any event, to apply to online intermediaries) is not without its problems as it requires treating speech-related conflicts as zero-sum games, where one's status as a speaker and a rights-holder depends on another's status as a non-speaker and a non-rights-holder. This situation is incompatible with the realities of pluralist networks.[288]

The second mechanism, reducing the rights of some stakeholders in the constitutional matrix into a component of governmental interests is a more subtle, but also more pervasive and powerful mechanism for framing pluralist settings as bipolar equations. The Supreme Court's decisions in the *Turner* cases[289] provide a good example of how this mechanism plays out in judicial review of attempts to regulate new communication technologies. In *Turner Broad Systems, Inc. v. Federal Communications Commission*, the Court upheld statutory provisions requiring cable operators to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations (must-carry provisions).[290] *Turner* is therefore largely considered a speech-promoting decision, premised on an affirmative reading

---

[284] *Id.*

[285] *Id.* at 30.

[286] *Id.*; *see also* Campbell, *supra* note 275, at 1116; Heyman, *supra* note 276, at 1328.

[287] *See supra* notes 144–63 and accompanying text.

[288] Yemini, *supra* note 23, at 32.

[289] Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 520 U.S. 180, 185 (1997); Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 662–65 (1994) (plurality opinion).

[290] The Court's 1994 decision in *Turner* held that must-carry provisions were subject to intermediate scrutiny but vacated and remanded the case for further evidentiary hearings. 512 U.S. at 642, 668. After remand to the district court for further evidentiary hearings, the Court held that the must-carry provisions were consistent with the First Amendment. 520 U.S. at 224–25.

of the First Amendment.[291] However, a closer analysis of the way in which the Court framed the conflict, and hence the constitutional question, reveals this mechanism's speech-restrictive potential.

In *Turner*, the constitutionality of the must-carry provisions was analyzed through a bipolar equation in which the First Amendment rights of cable operators were weighed against three interrelated governmental interests: (1) "preserving the benefits of free, over-the-air local broadcast television" programming; (2) "promoting the widespread dissemination of information from a multiplicity of sources"; and (3) "promoting fair competition in the market for television programming."[292] Yet at least the first and second of these governmental interests are primarily the individual interests of broadcasters and cable subscribers themselves, rather than, or at least in addition to, being governmental interests. These interests, as distinct from those of the government, are practically absent from the analyses in *Turner*.[293]

As part of the classification process of the must-carry rules as content neutral, Justice Kennedy noted that the privileges conferred by the must-carry provisions are unrelated to content and that the rules benefit all broadcasters who request carriage.[294] The Court did not treat the broadcasters as holding an independent free speech interest, not to mention a free speech right, but rather treated them as entities that were privileged and benefited by the must-carry provisions, almost as if these provisions were a mere windfall for them.[295] As a result, the broadcasters did not play any significant part in the judicial analysis that intermediate scrutiny dictates, except for a representation by proxy in the governmental interests asserted to justify the must-carry provisions. Similarly, individual cable subscribers were mentioned in *Turner* only in the context of the bottleneck problem in order to distinguish *Turner* from *Miami Herald Publishing Co. v. Tornillo*.[296] At the actual stage of weighing the relevant rights and interests, the equation drawn by the Court contained only two variables: the cable operators on one side and the government on the other.

---

[291] *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765 (1995) (describing *Turner*, 512 U.S. 622, as "by far the most important judicial discussion of new media technologies"); Yemini, *supra* note 23, at 28–29.

[292] *See Turner*, 512 U.S. at 662; *Turner*, 520 U.S. at 180–81.

[293] The only exception in this regard may be Justice Breyer's concurring opinion in the second *Turner* case. *Turner*, 520 U.S. at 227 (describing the situation in *Turner* as one in which "important First Amendment interests" exist "on both sides of the equation" and which requires the striking of a "reasonable balance between potentially speech-restricting and speech-enhancing consequences").

[294] *Turner*, 512 U.S. at 632, 645.

[295] *Id.* at 648.

[296] *Id.* at 656 (noting the technological difference between newspapers and cable operators—the bottleneck or gatekeeper-control that a cable operator has over the television programming that is channeled into its subscriber's home).

From a normative perspective, reducing individual rights into components of governmental interests represented by the state deprives the rights of some stakeholders in the constitutional matrix.[297] From the perspective of constitutional analysis, this not only oversimplifies a complex situation but also arbitrarily and unjustly prefers the rights of one stakeholder, identified as *the* speaker, over the rights of other stakeholders who hold an inherently inferior position in court.[298] Finally, reduction usually works in one direction—that of preferring the liberty of the few to silence others, which is afforded the status of a right, over the liberty of the many to speak, which is deprived of such status.[299] A reductionist analysis of this sort threatens any regulation aimed at enhancing users' speech, no matter how praiseworthy.[300]

The Court's second approach for coping with the bipolar-pluralist discrepancy has been to abandon existing categories and standards in favor of a loose, case-by-case balance of interests. In *Reno v. ACLU*,[301] the Court observed that the internet was a multi-speaker environment in which "publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals."[302] It further concluded that previous case law did not provide a "basis for qualifying the level of First Amendment scrutiny that should be applied" to the internet.[303] However, the Court did not go on to establish guiding principles for applying the First Amendment in the digital sphere, preferring a case-by-case, wait-and-see approach.[304] A similar approach was adopted by a plurality of the Court in *Denver Area*,[305] a decision rendered shortly before *Reno*, in which the Court suggested that modern speech conflicts may require a re-examination of existing categories of judicial review and a resort to a contextual method of review that focuses on a "complex balance of interests."[306] Justice Souter added in his concurring opinion that the Court "should be shy about saying the final word today about what will be accepted as reasonable tomorrow."[307]

---

[297] *See* Yemini, *supra* note 23, at 31.

[298] *Id.* at 30.

[299] *See supra* notes 139–43 and accompanying text.

[300] *See* Yemini, *supra* note 23, at 6 (arguing that network neutrality legislation may not survive intermediate scrutiny due to this type of reductionist First Amendment analysis).

[301] Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

[302] *Id.* at 853.

[303] *Id.* at 870.

[304] *See* Bradley J. Stein, *Why Wait? A Discussion of Analogy and Judicial Standards for the Internet in Light of the Supreme Court's* Reno v. Am. Civil Liberties Union *Opinion*, 42 ST. LOUIS U. L.J. 1471, 1488 (1998).

[305] Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 745 (1996) (dealing with the regulation of "patently offensive" sex-related material on cable television but extending the analysis to new media technologies in general, including the internet).

[306] *Id.* at 747.

[307] *Id.* at 777 (Souter, J., concurring).

The case-by-case approach has sometimes been portrayed as a reasoned, conscious response to a complex and constantly changing situation.[308] But as I have previously written, "a close reading of *Reno* and *Denver Area* reveals, more than anything, a Court confused by both the technology itself and the First Amendment challenges that it generates"[309] as it struggles to find solutions that would fit with traditional conceptions.[310] The Court's hesitant approach in *Denver Area* and *Reno* is understandable, considering that these cases were decided in 1996 and 1997, respectively. However, the Court continues to make similar statements 20 years later in the face of today's internet.[311] As Professors Citron and Richards have noted, "[i]f online discourse ever accorded with the Court's vision, it certainly does not now."[312] The internet poses the challenge of how to reconcile the rights of all speakers when rights conflict. This challenge must be met without losing sight of the complexity of pluralist speech environments on the one hand and without collapsing into a guideline-free approach on the other.

B. The Implications of a Pluralist Conception: An Indirect Horizontal Effect

There are two main differences between a pluralist conception of speech-related conflicts and a bipolar conception. First, a pluralist conception acknowledges that individual rights may not only have an effect on governmental actors (a "vertical" effect) but may also have an effect on private entities (a "horizontal" effect).[313] Second, a pluralist conception also acknowledges that a given conflict may require both vertical and horizontal analyses.[314] In this respect, it is important to understand that in a pluralist speech environment, vertical and horizontal effects are often entangled. A vertical (bipolar) analysis of one actor's right *vis-à-vis* the government is bound to

---

[308] *E.g.*, Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 869–71 (1996); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995).

[309] *See* Yemini, *supra* note 23, at 16.

[310] *See supra* note 24 and accompanying text; *see also* Yemini, *supra* note 23, at 30.

[311] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

[312] Citron & Richards, *supra* note 5, at 1355.

[313] *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 394 (2003).

[314] "Vertical" analysis has also been referred to as "external," as it requires determining whether aggregative-utilitarian aims (social, economic, or other), external to the right itself, are sufficiently important to justify limiting the right. Intermediate scrutiny and strict scrutiny are both "external" balances that vary by degree but not by nature. A "horizontal" or "internal" analysis, on the other hand, analyzes conflicts between the rights themselves. For a discussion of the distinction between "external" and "internal" analyses, see, for example, Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3, 5–6 (1997).

have side effects on the rights of other players, which, in a bipolar setting, are not part of the analysis.

To illustrate the practical significance of the differences between a bipolar and a pluralist conception of conflicts, take, for example, network neutrality regulation or attempts to regulate search engine manipulation. Under the bipolar conception, any First Amendment claim raised by BSPs or by search engines against proposed regulation would be analyzed as a conflict between a normatively superior First Amendment right on one side and a governmental interest in limiting that right on the other side. Although content providers and users would also have a stake in the outcome of this analysis, their rights would not be included in the analysis, or at best would remain in the background with a lesser-powered representation by proxy in the governmental interests asserted to justify the regulation.

A pluralist conception of the same First Amendment situation would look entirely different, as it would identify all rights involved in the situation, bring those that have typically been downplayed or hidden in the background to the front and place them on presumptively equal ground with the rights traditionally acknowledged under the bipolar, one-case-one-right conception. According to this approach, different free speech rights may stand at different sides of a speech-related conflict, distinct from governmental interests in regulation, which may also be a relevant, yet different, variable. Obviously, the pluralist conception provides a much more solid ground for speech-promoting regulation in the digital ecosystem, since it bases regulation of online intermediaries directly on users' own rights to freedom of expression rather than passing these rights through the downplaying filter of governmental interests or ignoring them altogether. As I argue below, the First Amendment does not bar, at least not completely, the development of a pluralist conception of speech-related conflicts.

The theoretical spectrum of positions on the horizontal effect of constitutional rights includes two polar positions and an intermediate option.[315] The first polar position is a model of *non-application*, according to which constitutional rights are applicable against the government alone and do not have any application—direct or indirect—to the relations between private parties.[316] The United States is usually (although, as shall be argued below, inaccurately) viewed as the paradigm of the non-application model.[317] The second polar position is a model of *direct application* according to which constitutional rights apply directly to the relations between private parties in addition to being directed against the government, thereby allowing

[315] *See* Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 225 (1996); Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, PUB. L., Spring 1998, at 427.

[316] Barak, *supra* note 315, at 225; Gardbaum, *supra* note 313, at 394.

[317] Gardbaum, *supra* note 313, at 389; Hunt, *supra* note 315, at 427.

one private actor to sue another for violating her constitutional rights.[318] This type of model would enable end users, for example, to sue Facebook directly on a claim that Facebook had abridged their right to freedom of expression. The third mid-point position is a model of *indirect application*, according to which constitutional rights apply directly only to the government, but they nonetheless have some degree of indirect application to private actors, e.g., through the absorption of constitutional values into conceptions of private law.[319] In recent years, many countries have adopted the horizontal position to varying degrees. Some have adopted the direct application model[320] while most have adopted an indirect application model.[321]

The nature of the relationship between online intermediaries and users, whereby the former exercises unique and unprecedented power over the speech of the latter, arguably justifies implementing the direct application model, i.e., enabling users to directly invoke a constitutional claim against online intermediaries' violation of their free speech rights, stemming directly from the First Amendment.[322] The model of direct application would reject the dismissal of substantive conflicts between users and online intermediaries on the basis of threshold

---

[318] Barak, *supra* note 315, at 225; Gardbaum, *supra* note 313, at 395.

[319] Barak, *supra* note 315, at 225–26, 236–38; Gardbaum, *supra* note 313, at 398–411. For example, CDA 230(c)(2) exempts online intermedaries from liability for, *inter alia*, any action voluntarily taken in good faith to restrict access to objectionable material. Consideration for users' freeom of expression could infiltrate private law by construing the term "objectionable material" narrowly and setting a high standard of good faith in order for online intermediaries to be eligible for immunity under that section.

[320] Barak, *supra* note 315, at 243–47 (noting that the direct application model is accepted in Switzerland as well as, to a limited extent, in India and the U.S.—the latter via the Thirteenth Amendment); Gardbaum, *supra* note 313, at 396–97 (noting that the Irish Supreme Court has interpreted certain of the provisions in its constitution to have a horizontal effect and that South Africa has also given horizontal effect to certain rights there).

[321] Barak, *supra* note 315, at 249–54 (discussing Germany, Italy, Spain, and Japan as jurisdictions that have accepted the indirect model to varying degrees); Gardbaum, *supra* note 313, at 398–411 (discussing Canada, Germany, the United Kingdom, and South Africa as jurisdictions that have accepted the indirect model to varying degrees). Notably, there is sometimes a disagreement on which model is actually applied in a certain jurisdiction. For example, while Gardbaum places Canada under the indirect application model, Barak places it under the non-application model. Barak, *supra* note 315, at 247–49; Gardbaum, *supra* note 313, at 398.

[322] Barak mentions two main arguments often raised against the direct application model (similar to the arguments underlying the state action doctrine discussed above). One argument is that regular legislation is sufficient to protect human rights in relations between private parties, while constitutional treatment of human rights is by its very essence treatment of human rights in relation to the government. Barak, *supra* note 315, at 230. This argument is simply wrong, if only because as a factual matter countries like Ireland and Switzerland have adopted the direct application model, and even the U.S. Constitution's Thirteenth Amendment implements a model of direct application. *Id.* at 243–47. More importantly, as demonstrated in the current legal

questions, such as whether there is state action, and require courts to proceed to determine the conflict on its merits. Admittedly, acceptance of the direct application model in the United States is highly unlikely, as it would require a major rethinking of the entire constitutional structure. Therefore, for the sake of pragmatism, this Article will focus on the possibility of basing a pluralist conception of the First Amendment on an indirect application model.

As noted above, the axiom is that the Constitution does not apply in the relations between private parties (with the exception of the Thirteenth Amendment), i.e., that the model fully and definitively adopted in the United States is the non-application model.[323] As Stephen Gardbaum has shown, however, the reach of constitutional principles into the sphere of the relations between private parties in the United States is greater than is usually believed.[324] Although in the American system constitutional duties are not directly placed on private actors, constitutional rights nonetheless have a "substantial impact on what individuals can lawfully be permitted or required to do" and "which of their interests, preferences, and actions can be protected by law."[325] This is because all laws, including laws that private actors invoke in private litigation, are subject to the Constitution so that a plaintiff cannot successfully sue and a defendant cannot successfully defend on the basis of an unconstitutional law.[326] Additionally, constitutional considerations effectively infiltrate all litigation by virtue of the fact that the judiciary itself is considered part of

landscape governing the relations between users and online intermediaries, regular legislation, which is subject to constitutional review, may not be sufficient to protect human rights. A second objection to the direct application model is that it raises the negation of rights (instead of the provision of rights) to a constitutional level, since the right of one private party is the duty of another. *Id.* at 230–31. This argument also does not hold, since the opposite alternative, the non-application model, leads to a similar result. The only difference that makes the direct application model normatively superior is that the non-application model reaches its result after ignoring the rights of relevant actors, while the direct application model reaches its result after substantively considering all rights involved. Moreover, horizontal analysis does not necessarily have to end in total preference of one right over another but may also reach a result that accommodates both. Yemini, *supra* note 23, at 36. Although not cast in the same terms, certain similarities can be drawn between the direct application model, which promotes the liberty aspect of users' freedom of expression, and Jerome Barron's twentieth-century call for the development of a general right of access to the press secured by the First Amendment, which enhances the capacity aspect of individuals' freedom of expression. *See* Barron, *supra* note 120, at 1660. However, even Barron yielded to the bipolar conception of the First Amendment. *Id.* at 1666 ("If a contextual approach is taken and a purposive view of the first amendment adopted, *at some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis* to representative groups in the community." (emphasis added)).

[323] Gardbaum, *supra* note 313, at 388.

[324] *Id.* at 389.

[325] *Id.* at 415.

[326] *Id.* at 421.

the government and is therefore bound by constitutional duties.[327] An example of this is the landmark case of *New York Times Co. v. Sullivan*,[328] which held that state libel law, even though relied upon in civil litigation, must adjust itself to the First Amendment. In reaching its conclusion, the Court found state power in the application of the law by state courts.[329] Thus, in *Sullivan*, the First Amendment effectively determined the rights of parties to private litigation, although it was not deemed to apply in the relations between them directly.[330]

Sullivan demonstrates the difference between direct horizontal effect, which has not been accepted in the United States, and what Gardbaum denominates a "strong version of indirect horizontal effect," which exists in the American constitutional system.[331] While the former subjects all *action* to constitutional scrutiny, the latter subjects all *law*, including private law, to such scrutiny.[332] Accordingly, even if the Constitution does not directly impose constitutional duties on private parties, constitutional norms may still affect private parties through the laws that regulate their relationships.[333] It should be noted that the Court in *Sullivan* and

---

[327] Notably, Barak treats this as a separate and independent model of application, which he denominates the "judiciary model." Barak, *supra* note 315, at 254–57.

[328] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

[329] *Id.* at 265 ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." (internal citations omitted)).

[330] *See also* Shelley v. Kraemer, 334 U.S. 1, 20 (1948). Outside the First Amendment context, the *Shelley* Court held racially restrictive covenants unconstitutional because even though private actors sought to enforce them and were not bound by the Equal Protection Clause, the judicial enforcement of those covenants was unconstitutional. *Id.*

[331] Gardbaum, *supra* note 313, at 433.

[332] *Id. Sullivan*'s rule regarding public officials, which resolved the conflict between freedom of expression and the right to reputation strongly in favor of speech, was later extended by a plurality of the Court to public figures in general. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30–32 (1971), *overruled by* Gertz v. Robert Welch, Inc., 418 U.S. 323, 323–24 (1974). In *Gertz*, the Court concluded that *Rosenbloom* unduly restricted the authority of states to protect private reputation. *Gertz*, 418 U.S. at 323–24. The rule in *Sullivan* tilts in favor of speech, while the rule in *Gertz* gives more weight to reputation, but both reflect an implementation of the strong form of indirect horizontal effect.

[333] This strong form of indirect horizontal effect is also what underlies Bambauer's assumption that if data collection is protected speech, then *all* privacy laws are constitutionally suspect, despite the fact that many of these laws apply to the relations between private parties. *See* Bambauer, *supra* note 185, at 87. As Gardbaum explains, other legal systems that have adopted the model of indirect horizontal effect have adopted it in a weaker form that enables courts to develop the common law in accordance with constitutional values. Gardbaum, *supra* note 313, at 398–400 (referring to the Canadian system as an example).

subsequent defamation cases was not consistent in mapping the rights and interests underlying its conclusions. The very same judicial decision may, within a few sentences, treat the constitutional conflict before it as a case of conflicting public interests,[334] as a case of competing individual rights,[335] or as a mixture of both.[336] It is evident, however, that the structure of the conflict in this type of civil case, which formally places two private parties on opposing sides of a speech-related problem, requires the Court to transcend conventional constitutional analysis by giving the rights of all parties involved at least some level of consideration. Ironically, this analysis ends up being more nuanced and complex than the constitutional analysis applied in standard First Amendment cases where conflicts are almost always framed in accordance with the bipolar conception.

While horizontal constitutional analysis is undoubtedly underdeveloped in American constitutional law, *Sullivan* and similar cases teach us that the American system is not inimical to such an analysis. This leaves room for developing a pluralist conception of the First Amendment, which accounts for the rights of all parties, as well as the governmental interests involved in any given conflict. Initial guidance can be found in at least two First Amendment cases. The first is *Bartnicki v. Vopper*[337] in which the Court held that the First Amendment foreclosed imposing civil liability on a news media outlet that had published truthful information on a matter of public concern even if that information had been unlawfully acquired, provided that the publisher did not participate in the unlawful conduct.[338] Of particular importance for our purposes is Justice Breyer's concurring opinion in *Bartnicki*, in which he defined the question as implicating competing constitutional concerns—freedom of speech on the one hand and privacy on the other.[339] "[W]here, as here, important competing constitutional interests are implicated," wrote Justice Breyer,

---

[334] *See, e.g.*, *Gertz*, 418 U.S. at 342 (speaking of the need to strike the right balance "between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury"); *see also* Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 413 (2014) (describing the reasoning in *Gertz* as an attempt to "balance competing public interests in protecting the undefined class of writers and speakers comprising 'the communications media,' on the one hand, and, on the other hand, in safeguarding the good names and reputations of individuals who have not succeeded in endeavors that bring fame or fortune, nor sought public office, nor engaged in conduct that makes it likely they intended to influence important public matters").

[335] *Gertz*, 418 U.S. at 341 (describing the conflict as one between "First Amendment freedoms" and "the individual's right to the protection of his own good name").

[336] *Id.* at 343 (explaining the need to "balance between the needs of the press and the individual's claim to compensation for wrongful injury").

[337] 532 U.S. 514 (2001).

[338] *Id.* at 535.

[339] *Id.* at 536.

it is wrong to use strict scrutiny, "with its strong presumption against constitutionality."[340] Rather, the relevant question in such a case is "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences."[341] Justice Breyer's opinion in *Bartnicki*, as well as comments made by him in other cases,[342] provide a good starting point for thinking about speech-related conflicts involving online intermediaries and their end users.[343] Unfortunately, Justice Breyer's approach to issues of freedom of speech is rather unique[344] and does not reflect the mainstream approach of the Court.

Notably, however, the Court has applied something very similar to a pluralist approach in at least one case long before the advent of the internet—*Red Lion Broadcasting Co. v. Federal Communications Commission*.[345] In upholding the fairness provisions imposed on broadcasters,[346] *Red Lion* relied not only on the governmental interests in imposing those provisions but also on the viewers' and listeners' "right to have the medium function consistently with the ends and purposes of the First Amendment."[347] Citing *Associated Press v. United States*,[348] the Court noted that "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other

---

[340] *Id.*

[341] *Id.*

[342] *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("[C]onstitutionally protected interests lie on both sides of the legal equation."); Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 520 U.S. 180, 226 (1997) (Breyer, J., concurring in part) ("[T]here are important First Amendment interests on the other side as well.").

[343] Notably, a pluralist analysis in which the conflicting rights of all parties are rights to freedom of expression (such as in potential conflicts between users and online intermediaries) should be simpler than applying a pluralist analysis to a situation in which different rights conflict, as in *Sullivan* and *Bartnicki*. This is because a conflict within the realm of free speech invokes similar substantive considerations on all sides of the conflict, while a conflict between freedom of expression and other rights requires a more complex analysis of the different rationales underlying each right.

[344] *See, e.g.*, Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1681 (2006) (noting that Justice Breyer "has developed a unique and pathbreaking approach to issues of freedom of speech").

[345] Red Lion Broad. Co. v. Fed. Comm'cns Comm'n, 395 U.S. 367, 396–98 (1969).

[346] The fairness doctrine was later eliminated in 1987. *In re* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043, 5043 (1987).

[347] *Red Lion*, 395 U.S. at 390.

[348] Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.").

individual does not embrace a right to snuff out the free speech of others."[349] The Court elaborated: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[350]

Red Lion is an outlier in a constitutional system governed by a bipolar conception of conflicts. Its reasoning was not picked up by the Court outside the context of broadcast media, and the case has since been explained almost exclusively in terms of spectrum scarcity.[351] Viewed in this light, *Red Lion* would seem irrelevant for assessing speech-related conflicts in the digital ecosystem. But this reading of *Red Lion* is too simplistic as it fails to distinguish between the rationale on which the Court based its conclusion and the way in which it chose to frame the conflict. In the circumstances of *Red Lion*, the Court could have probably reached the same result by sticking to the familiar bipolar conception and without appealing to the rights of viewers and listeners. Nevertheless, the Court chose to frame the conflict as a trilateral relationship between the government, broadcasters, and viewers/listeners, without relying upon the scarcity rationale. *Red Lion* reflects a basic understanding, astonishingly absent from the mainstream approach to speech-related conflicts, that the right of one is always limited by the right of another, while government bears duties to both. It is suggested that this insight be carried through to First Amendment scrutiny of laws and regulations governing the relations between users and online intermediaries.

Before concluding this Section, it should be noted that while the main focus of the preceding discussion has been on the horizontal aspect of pluralist settings, the pluralist conception may also have implications for a vertical analysis. A pluralist approach requires that the rights of all those affected by regulation be considered in the constitutional analysis (rather than considering only the rights of the direct and formal subjects of regulation). At the vertical level of analysis, this insight implies that all actors whose freedom of expression has been affected by government action should have the ability to challenge that action. Since government regulation in pluralist settings may implicate the speech rights of different actors (or category of actors) differently, it is possible in such settings for more than one right to have a vertical effect, invoking a separate vertical analysis and possibly rendering a different result.

---

[349] *Red Lion*, 395 U.S. at 387.

[350] *Id.* at 390.

[351] *See, e.g.*, Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 637 (1994) (citing *Red Lion* in stating that the justification for the Court's "distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium"); Goodman, *supra* note 251, at 1226 (arguing that *Red Lion* "fetishized limited spectrum as the distinguishing feature of broadcasting").

C. The Role of Normative Analysis in Assessing Pluralist Speech-Related Conflicts

The pluralist conception of the First Amendment provides a much-needed framework for conceptualizing speech-related problems in the digital ecosystem while assigning proper weight to users' freedom of expression. As a framework for thinking about speech-related problems, the pluralist conception's reach is not limited to judicial scrutiny of laws and regulations but also extends to internet policy-making in general. The pluralist approach does not itself dictate the result of every conflict, nor does it necessarily require that users prevail in all disputes with online intermediaries, the government, or other actors. Nevertheless, the pluralist conception is not bereft of a moral compass, as its purpose is to adapt the First Amendment to the realities of the digital ecosystem so that it can fulfill its speech-protective end in this changed speech environment. By offering a structure that, compared to the bipolar conception, gives elevated regard to users' freedom of expression, the pluralist conception subjects every result to a broader test of legitimacy,[352] thereby showing a greater tendency toward freedom-enhancing results as opposed to freedom-restricting ones.

The question of legitimacy in the exercise of power stands at the center of Bruce Ackerman's theory of justice. He provides an interesting vantage point for dealing with conflicts in pluralist speech environments, since his method of answering the question of the legitimacy of power-structures is through conversation—what he calls a "Neutral" dialogue.[353] Ackerman offers three main principles to guide the conversation: Rationality, Consistency, and Neutrality.[354] According to the principle of Rationality, "whenever anybody questions the legitimacy of another's power, the power-holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is."[355] Consistency requires that "the reason advanced by a power wielder on one occasion must not be inconsistent with the reasons he advances to justify his other claims to power."[356] Neutrality, in his framework, provides that no reason for exercising power is a good reason if it requires the power-holder to assert that "his conception of the good is better than that asserted by any of his fellow citizens" or that "regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens."[357]

---

[352] *Cf.* ACKERMAN, *supra* note 9, at 310–11 (noting that citizens in a liberal state "have a right to relief when their fellows prove incapable of justifying their power through Neutral dialogue" and that the task of the Supreme Court is to "assure the liberal quality in each outcome, X, by exposing it to a final test of legitimacy").

[353] *Id.* at 61.

[354] *Id.* at 4, 7, 10.

[355] *Id.* at 4.

[356] *Id.* at 7.

[357] *Id.* at 11.

Online intermediaries fail to justify the legitimacy of their power over users' speech on each of these three principles. First, online intermediaries do not comply with the principle of Rationality since they do not even recognize that they must legitimate their power. To be accurate, online intermediaries *do* seem to recognize the instrumental value that legitimacy carries for their brands, hence their efforts to present themselves as benevolent empowerers, rather than power-wielders.[358] But whenever the power of online intermediaries is challenged, requiring them to "confront the harsh fact of the struggle for power,"[359] they refuse to provide a good reason for exercising their power.[360] When faced with the struggle for power, online intermediaries claim to be untouchable—untouchable by contract, untouchable by law, untouchable by the Constitution.[361]

Second, by invoking both the status of a speaker in order to avoid government regulation and the status of a conduit in order to avoid civil liability, online intermediaries fail to be consistent in the reasons they advance to justify their claims to power.[362] Online intermediaries thus also fail the test of Consistency. Finally, to the extent that online intermediaries try to advance claims to power based on their own value conceptions or their self-portrayed role in promoting good, such a claim is not a legitimate reason for exercising power under the principle of Neutrality. For example, Facebook's power over its users cannot be justified by appealing to Facebook's own vision of how the internet should look or to Mark Zuckerberg's belief that privacy is "no longer a social norm."[363] The principle of Neutrality does not prevent power-holders, such as online intermediaries, from taking part in the Neutral dialogue concerning the question of legitimacy, but it does prevent them from arguing that their value conceptions settle the issue.

The pluralist conception of speech-related conflicts denies online intermediaries the advantage of not being required to establish a rational case consistent with Neutrality to legitimize their exercise of power over users' speech. Of course, this only tells us how the conversation begins, not how it ends; concrete situations will require further normative analysis in order to adjudicate conflicting rights and interests. While it is impossible to analyze every potential speech-related conflict between online intermediaries and users, it is possible to say that normative analysis will *generally* accept placing limits on online intermediaries' own free speech rights

---

358 *See supra* note 74 and accompanying text.

359 ACKERMAN, *supra* note 9, at 5.

360 *Id.* at 4.

361 *Id.* at 4–11.

362 *See, e.g.*, *supra* note 218 and accompanying text.

363 *See, e.g.*, Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN (Jan. 11, 2010), https://www.theguardian.com/technology/2010/jan/11/facebook-privacy.

(assuming they possess such rights) for the sake of securing users' freedom of expression.

The foregoing conclusion becomes evident when the competing positions of online intermediaries and users are examined in light of their potential normative basis and the relative contribution of each position, if accepted, to free speech rationales.[364] The remainder of this Part will examine this argument in light of the three main justifications for freedom of expression identified by traditional free speech theory: the attainment-of-truth argument, the argument from liberal democracy, and the argument from personal autonomy.[365] I will start with the argument from personal autonomy, which, as noted above, has gained dominance as a primary justification for freedom of expression in the digital age.[366]

One of the most significant advantages of the pluralist conception over the bipolar conception is that it accounts for the autonomy interests of all relevant stakeholders (rather than considering only the autonomy of one actor defined as the speaker).[367] Personal autonomy is probably also where users' normative strength and online intermediaries' normative weakness is most obvious. First, although the First Amendment applies to business corporations,[368] it is highly doubtful that free speech protection accorded to companies can be rooted in personal autonomy.[369] Autonomy, as a normative ground for freedom of expression, identifies speech as a unique realm with a particularly strong and close connection to expression, self-identity, and self-realization, which requires respect for an individual's expressive choices.[370] The same does not follow for business enterprises whose use of communication does not further self-realization and self-fulfillment. Nor does it "represent a manifestation of individual freedom or choice."[371] Corporations are accorded the

---

[364] Yemini, *supra* note 23, at 37.

[365] *See e.g.*, Emerson, *supra* note 263, at 881.

[366] *See* Balkin, *supra* note 10, at 439.

[367] In fact, the advantage of the pluralist conception over the bipolar conception is even greater than that, since it is difficult to even reconceive the value of personal autonomy as a governmental interest. Governmental interests by their nature aggregate across people and are driven by a consequential way of thinking. Personal autonomy, on the other hand, is a non-aggregative value that is attached to each and every individual and is often viewed as carrying intrinsic value. It is therefore difficult to see how autonomy could be given any weight even in a reduced form under the title of a governmental interest.

[368] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

[369] *See* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion for Democratic Speech*, 61 FED. COMM. L.J. 273, 307 (2009); C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 62 (1994); Bracha, *supra* note 222, at 1669–70; Yemini, *supra* note 23, at 37.

[370] *See* Bracha, *supra* note 222, at 1669–70.

[371] *Bellotti*, 435 U.S. at 805 (White, J., dissenting).

status of personhood in order "to create a mechanism for saving transaction costs in business dealings, not to create autonomous beings."[372] Accordingly, as Edwin Baker has noted, "the moral/constitutional autonomy-based justification for protecting speech of flesh and blood people is simply not at stake" with regard to business corporations.[373]

While corporations are not themselves autonomy-bearers,[374] one could argue that constitutional protection should extend to corporations as a way to protect the interests of individuals. This is in fact the justification the Supreme Court used to extend rights that were typically understood as the rights of human persons to corporations.[375] In *Citizens United v. FEC*, for example, Justice Kennedy's majority opinion did not directly rely on corporate autonomy but rather focused on the right of third-party individuals to receive information produced by corporate entities as a reason to extend First Amendment protection to corporations.[376] However, the Court's basic assumption in *Citizens United* was that corporate speech did not conflict with the interests of third-party individuals.[377] This is clearly not the assumption underlying our discussion, where the question is whether intermediaries should be allowed to suppress or otherwise interfere with users' speech without reasoned justification.

The most far-reaching example of extending an individual right based on the autonomy rationale to for-profit corporations is in fact not a Free Speech Clause case but rather a Free Exercise Clause case—*Burwell v. Hobby Lobby Stores, Inc.*[378] In *Hobby Lobby*, which extended a statutory right to religious freedom to for-profit

---

[372] Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 240 (1981).

[373] C. Edwin Baker, *Autonomy and Free Speech,* 27 CONST. COMMENT. 251, 273 (2011); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1244 (1991) (arguing that organizational speech cannot be conceived as an autonomy-based right).

[374] This statement refers to for-profit corporations. As Professors Baker and Dan-Cohen observe, different considerations may apply to other collectivities such as solidarity associations. Baker, *supra* note 369, at 71; Dan-Cohen, *supra* note 373, at 1248.

[375] *See* Thomas W. Joo, *Corporate Speech & The Rights of Others*, 30 CONST. COMMENT 335, 335 (2015).

[376] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010) ("[V]oters must be free to obtain information from diverse sources in order to determine how to cast their votes."). This point is often misunderstood in commentaries on *Citizens United*, which describe that ruling as recognizing an autonomy-based justification for corporate speech. *See, e.g.*, Anne Marie Lofaso, *Baker's Autonomy Theory of Free Speech*, 115 W. VA. L. REV. 15, 24 (2012). In fact, even Justice Scalia's dissent, which denied the existence of any difference between individuals and corporate entities for First Amendment purposes, grounded his conclusion on a view of corporations as an association of individuals.

[377] *Citizens United*, 558 U.S. at 466–67.

[378] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710 (2014).

corporations, the Court noted that when constitutional or statutory protection is extended to corporations, it is done to protect the rights of the people associated with the corporation (shareholders, officers, and employees).[379] Accordingly, the Court concluded that furthering the religious freedom of for-profit corporations also "furthers individual religious freedom."[380] Without getting into the merits of *Hobby Lobby*[381] and assuming, *arguendo*, that the rationale of *Hobby Lobby* extends beyond the Religious Freedom Restoration Act, it is still difficult to see how that rationale could be applied outside the specific context of closely-held corporations.[382]

The obvious problem with applying the autonomy rationale outside the context of closely-held corporations and particularly to large corporations such as Google, Facebook, Amazon or Microsoft is how to locate an individual autonomy-bearer whose choices the corporate expression supposedly reflects. *Hobby Lobby* assumes that it is possible to lift the veil of incorporation and identify corporate preferences (as embodied in its expressive decisions) with the preferences of specific individuals.[383] However, as Baker and Dan-Cohen among others have explained, this assumption is usually incorrect since corporations' expressive choices are often irreducible to any particular individual associated with them.[384] The first and simplest reason lies in the separation of ownership and control known in corporate law as the "agency problem."[385] The agency problem reflects the potential for a divergence of interests between the preferences of shareholders and the preferences of management, including with regard to expressive preferences.[386]

---

[379] *Id.* at 706.

[380] *Id.* at 709. Interestingly, the Court did not apply the same logic to the free speech issues in *Citizens United*. In that case, the Court rejected the contention that independent corporate expenditures could be limited in order to protect dissenting shareholders from being compelled to fund corporate political speech. *Citizens United*, 558 U.S. at 361.

[381] For extensive criticism of *Hobby Lobby*, see Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 126 (Micah Schwartzman et al. eds., 2016); Leslie C. Griffin, Hobby Lobby*: The Crafty Case that Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 641 (2015); Samuel J. Levine, *A Critique of* Hobby Lobby *and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 26 (2015).

[382] *Hobby Lobby*, 573 U.S. at 718.

[383] *Id.*

[384] Baker, *supra* note 369, at 66; Dan-Cohen, *supra* note 373, at 1240.

[385] *E.g.*, Paul S. Miller, *Shareholder Right:* Citizens United *and Delaware Corporate Governance Law*, 28 J.L. & POL. 51, 52 (2012).

[386] *Id.*; Lucian A. Bebchuck & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 90 (2010). Of course, preferences may also differ among shareholders themselves, which further complicates the situation. Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 805 (2012).

A more fundamental reason, which applies regardless of whether an agency problem exists, lies in organization theory, which posits that corporations' choices, including their expressive choices, are an organizational product that is not traceable to individual utterances.[387] Choices of a company are usually the result of a decision-making process, guided by formal structures, which relate various people and various functions to different aspects and parts of the process.[388] The total information that leads to a particular decision, and often also the authority to make a decision, are not typically possessed by a single individual.[389] Moreover, it is often impossible to account for organizational preferences in terms of the preferences of any number of individuals, since decision-making in organizations is essentially a bargaining process among various groups and functions (e.g., engineers, marketing experts, lawyers, financial officers) with different, and often conflicting interests.[390] Corporate decisions are accordingly characterized as "political resultants" of these complex bargains.[391]

In addition, even assuming an expressive act of a corporation *can* be traced to a particular, identifiable person, this still does not suffice to ground the company's speech in that individual's autonomy. While a CEO, a director, or a spokesperson may speak *on behalf* of a company, there always remains a distance between these persons as individuals and the position they express in their official roles.[392] "Statements made by organizational position-holders," as noted by Dan-Cohen, "carry with them the explicit or implicit understanding that they are made 'from the corporate point of view' and in one's 'official capacity.'"[393] Engaging in this type of positional speech is not in itself a display of individual autonomy, and the fact that corporate speech is voiced by an individual does not strip it from its organizational character.[394]

---

[387] Baker, *supra* note 369, at 66; Dan-Cohen, *supra* note 373, at 1237; *see also* Bebchuk & Jackson, *supra* note 386, at 90 (arguing that a corporation's decisions to engage in political speech are governed by the same rules as ordinary business decisions).

[388] Dan-Cohen, *supra* note 373, at 1235–36.

[389] *Id.*

[390] *Id.*

[391] *Id.* at 1236. For simplicity, I have not ventured into another reason mentioned by Dan-Cohen for the inability to identify organizational preferences with individual preferences—Arrow's "Impossibility Theorem," which suggests that "under certain plausible conditions no voting procedure is available to translate individual preferences into transitive collective orderings." *Id.* at 1236; *see also* Ammori, *supra* note 369, at 308 n.219 ("Even if one looks within the entities to their employees' autonomy, these can often conflict, as among editors, publishers, and owners. It is unclear whose autonomy courts should protect.").

[392] Dan-Cohen, *supra* note 373, at 1237 (building on Erving Goffman's idea of "role-distance").

[393] *Id.* at 1240.

[394] It is worth noting that the fact that corporate speech cannot be rooted in the autonomy of the individuals associated is actually in line with the corporate's own interests and objectives.

Now take, for example, Facebook's internal process of manual content scrutiny. Out of all persons directly or indirectly involved in the process, whose autonomy is relevant for Facebook to invoke an autonomy-based claim for having the liberty to remove content?[395] The autonomy of the employee performing the removal in accordance with Facebook's internal guidelines? The guidelines' drafters? The Chief Legal Officer? Senior management? The board of directors? Shareholders? Mark Zuckerberg? The absurdity in thinking about Facebook's content-removal decisions in terms of self-realization seems clear, and it only intensifies when we add the fact that many actions performed by online intermediaries (including content-removal decisions) are made through the use of algorithms.[396]

An attempt to structure an autonomy-based defense of online intermediaries' algorithmic outputs would not look very different from any other attempt to ground corporate speech in individual autonomy—and it would be equally flawed. The only (insignificant) difference is that in the case of algorithmic outputs it is the autonomy of designers and engineers—the human creators of algorithms—that is suddenly most important (so that it can be imputed, in turn, to the corporate employer).[397] But the fact that a Google employee writes an algorithm and not a memo does not affect the reason for which corporate speech cannot be rooted in individual autonomy. The algorithms that shape our search results or our news feed are not more of a display of personal autonomy than any other organizational product. In fact, if anything, such algorithms are even *less* deserving of an autonomy-based First Amendment protection than other organizational products since the specific outputs generated by them are necessarily dependent upon interactions with users and *their* autonomous choices (such as what information to seek using a search engine). Thus, in the case of online intermediaries' algorithmic outputs, even the alleged direct connection between the designer's autonomy, the corporate employer, and the expressive result is broken by the users' autonomy.[398]

The fact that organizational choices are seen as distinct from the choices of the individuals comprising it is what enables a corporation to *limit* the authority of individuals to speak on behalf of it without limiting that individual's autonomy. *See* Baker, *supra* note 369, at 66.

[395] This is of course only a thought experiment, since current legal structure exempts Facebook from the need to make any such claim.

[396] Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. (forthcoming 2020) (manuscript at 40–43); Yemini, *supra* note 1, at 165.

[397] *Cf.* Bracha, *supra* note 222, at 1669 (describing the process of mechanical agency by which the output of algorithms is imputed to their human creators and in turn to the creators' corporate employer). This argument may change if AI technologies reach a point at which their outputs are not traceable to a human creator. *See* Massaro & Norton, *supra* note 185, at 1175–82.

[398] *See* Bracha, *supra* note 222, at 1669.

The fact that the autonomy rationale does not apply to corporate entities carries considerable importance when weighing the rights of online intermediaries against the rights of users. If corporate speech is not itself grounded in personal autonomy, then the question of whether online intermediaries' speech-suppressing activities have themselves some inherent value does not arise. Online intermediaries' First Amendment rights can only be justified on the basis of other rationales, that is, to the extent that they carry instrumental value for the overall system of free expression.[399] If they cannot be so justified, then online intermediaries should not have a good First Amendment claim against regulation limiting their speech-restrictive practices.[400]

To conclude the discussion on the autonomy rationale, if, notwithstanding all the foregoing, autonomy were to be wrongly ascribed to online intermediaries, the autonomy of millions of users (and billions globally) to speak should nevertheless (generally) prevail over the autonomy of a few online intermediaries to suppress or otherwise interfere with users' speech. Autonomy "does not imply any inherent right to exercise power over another,"[401] and "does not extend to infringing on the autonomy of others."[402] As Marvin Ammori has argued, "there is no persuasive reason in speech theory for favoring the interests of those very few (profit-seeking, government-structured, and artificial) speakers over the First Amendment interests of individuals."[403] In fact, any policy aimed at fostering an environment of liberty in the digital ecosystem (by promoting users' speech and limiting online intermediaries' power to interfere with that speech) should not be regarded as "abridging the freedom of speech."[404]

Now let us consider the argument from democracy. As opposed to the autonomy-based justification, the democracy argument may provide a valid basis for

---

[399] Put differently, a defender of online intermediaries' freedom of expression must base her case on consequentialist grounds, while an individual user is not required to do so. *Cf.* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 204 (1972). Of course, consequentialist justifications for freedom of expression can also be applied to individuals' speech.

[400] For clarity, this does not mean that users' freedom of expression cannot be limited through the activities of online intermediaries if other sufficiently important interests, normally invoked by the government, exist (provided that such interests are transparently invoked by the government and survive constitutional scrutiny). This type of analysis falls into familiar tests of First Amendment scrutiny. Here, the discussion focuses on the type of arguments online intermediaries invoke to support their own claims for free speech rights.

[401] Baker, *supra* note 369, at 66.

[402] Erica L. Neely, *The Risks of Revolution: Ethical Dilemmas in 3D Printing from a US Perspective*, 22 SCI. & ENGINEERING ETHICS 1285, 1289 (2016) (discussing the principle in the context of controlling the printing of guns).

[403] Ammori, *supra* note 369, at 308.

[404] U.S. CONST. amend. I. For a similar argument, see Wu, *supra* note 179, at 1517.

online intermediaries' free speech rights, primarily because these online intermediaries facilitate speech in the digital society, but also because they function as speakers in their own right. From the democracy point of view, freedom of expression is grounded in its instrumental contribution to collective self-government. The ultimate point of interest of the classic, twentieth-century argument from democracy "is not the words of the speakers, but the minds of the hearers."[405] From this perspective, the identity of the source of speech—whether it is an individual or a corporation—matters less, since it is "[t]he inherent worth of the speech in terms of its capacity for informing the public"[406] that is the primary concern. However, the democratic rationale's concentration on listeners was developed against the background of a system of a few speakers and many passive listeners. Technological change requires adapting the argument from democracy to "the shift from passive receivers of information to active users."[407]

Urs Gasser has suggested that a democratic digital ecosystem should have three core values: informational autonomy, diversity of information, and information quality.[408] Informational autonomy, the central value in Gasser's framework, includes the freedom to make choices among alternative sets of information, ideas, and opinions; a demand that everyone has the right to express her own beliefs and opinions; and a requirement that every user can participate in the creation of knowledge, information, and entertainment.[409] Gasser's suggested core values not only demonstrate the transformations in the argument from democracy but also the fact that the democracy rationale has become closely linked with the autonomy-based justification of free speech. This insight is the core of Jack Balkin's conception of a democratic culture, which changes the focus of free speech theory from protecting the democratic process to a larger concern with protecting and promoting a culture "in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals."[410]

It follows that the democracy-based justification as applied to the digital ecosystem has important interrelations with the autonomy-based rationale so that First Amendment rights for online intermediaries, who shape and control our

---

[405] MEIKLEJOHN, *supra* note 120, at 25.

[406] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

[407] Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 228 (2006).

[408] *Id.* at 227.

[409] Information diversity "improves deliberation and decision-making processes," and "is an important aspect of the broader concept of cultural diversity." *Id.* at 229. A high-quality information system is required in order to enable individuals to make sound decisions in various areas of life, and includes "aesthetic and ethical requirements of different stakeholders." *Id.* at 230.

[410] Balkin, *supra* note 18, at 3.

informational experience,[411] can be justified only if and to the extent that they are consistent with informational autonomy, information diversity, and information quality. Viewed in this light, it is easy to see the inherent contradiction, for example, in Baidu claiming to have a First Amendment right to block search engine results concerning the struggle for democracy in China and the absurdity of that argument succeeding.[412] This is a classic example of a First Amendment right being invoked and receiving judicial protection while lacking any theoretical foundations.

The pursuit of truth leads us to a similar conclusion. This argument, the basis of the highly influential "marketplace of ideas" metaphor,[413] is premised on the notion that in order for truth to be discovered and prevail we must allow all available arguments to be heard.[414] If we take this argument at face value, then an online intermediary's right to suppress and manipulate speech over a user's right to speak cannot be said to promote the attainment of truth. However, the argument from truth may also provide a valid basis for according free speech rights to online speech intermediaries, primarily in their role as digital curators. This issue is complex and deserves treatment in a separate article, so I will address it here only briefly.

The marketplace model, and the argument from truth on which it is based, have attracted much legitimate criticism over the years.[415] This model, as Baker and others have argued, suffers from three main weaknesses: (1) it wrongly assumes that the purpose of a system of free expression must be to discover a particular truth; (2) it incorrectly assumes that all truths are objective, discoverable realities; and (3) it wrongly assumes that truths have some inherent power to prevail over non-truths, and that people's rational faculties necessarily enable them to sort truth from non-truth in a message.[416]

As Phil Napoli has argued with respect to news media, our current system of free expression validates and intensifies these long-established critiques of the argument from truth.[417] Napoli points to six factors that put into question the relevancy

---

[411] *See* Emily B. Laidlaw, *Private Power, Public Interest: An Examination of Search Engine Accountability*, 17 INT'L. J.L. INFO. TECH. 113, 123–26 (2008).

[412] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014).

[413] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

[414] *See* JOHN STUART MILL, ON LIBERTY 33 (4th ed. 1869); *see also* Scanlon, *supra* note 399, at 218.

[415] Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 60 (2018).

[416] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12–15 (1989); *see also* Barron, *supra* note 120, at 1642 (denouncing the "romantic view of the First Amendment," which assumes that without government intervention there is a free-market mechanism in ideas).

[417] Napoli, *supra* note 415, at 57–59.

of the classic argument that more speech leads to truth to our changed speech environment: the changing dynamic of news production, which has undermined the production of legitimate news while enhancing the production of false news; the dramatic reduction in gatekeeping barriers that have traditionally prevented the dissemination of false news relative to legitimate news; the increased ability to personalize news and target individuals who are most likely to be affected by misinformation; the filter bubble phenomenon, which diminishes the likelihood of being exposed to factual counter-speech; the diminished ability to distinguish between legitimate and false news; and the enhanced speed at which false news can be disseminated.[418]

Following the 2016 presidential election in the United States, Facebook and Google faced mounting criticism over how "fake news" disseminated through their sites may have influenced the presidential election's outcome.[419] This led the two companies to update their policies, with the purpose of banning websites that disseminate fake news through their sites.[420] These policies, which do not support the classic argument from truth, raise complex questions of legitimacy (which I will not take on here). Significantly, however, these demands for stronger speech intermediation reflect not only skepticism about the validity of the argument from truth, at least in its current form, but also an inherent tension between that argument and other free speech justifications. The complexity of this situation lies, again, in the implications of online intermediaries' policies for the rights of users. Banning false information originating from the Russian government during an election, assuming it can be detected, does not raise a major normative dilemma.[421] Yet in cases where false information originates from the individual users themselves, the decision whether to ban or not to ban such speech implicates different users (i.e., fake news writers and consumers of online news) differently, and may, therefore,

---

[418] *Id.*

[419] *E.g.*, Caitlin Dewey, *Facebook Fake-News Writer: "I Think Donald Trump Is in the White House Because of Me,"* WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/; Nick Wingfield et al., *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html.

[420] Shanika Gunaratna, *Facebook, Google Announce New Policies to Fight Fake News*, CBS NEWS (Nov. 15, 2016), https://www.cbsnews.com/news/ facebook-google-try-to-fight-fake-news/; Wingfield et al., *supra* note 419.

[421] *See* Andrew Weisburd et al., *Trolling for Trump: How Russia Is Trying to Destroy Our Democracy*, WAR ON ROCKS (Nov. 6, 2016), http://warontherocks.com/2016/11/trolling-for-trump-how-russia-is-trying-to-destroy-our-democracy/ (reviewing research indicating that during the 2016 presidential election, at least some of the efforts to disseminate fake news during those elections could be traced to the Russian government).

require more careful scrutiny.[422] This type of complexity further demonstrates the importance of a pluralist conception of speech-related conflicts in the digital ecosystem.

CONCLUSION

For online intermediaries, as things now stand, with great power comes no responsibility. One of the greatest challenges of internet law and policy today is changing the balance of power between online intermediaries and their end users. Measures for obtaining this objective may come in many forms in order to address different problems.[423] The role of government in this process is of particular importance if users do not possess a direct constitutional cause of action against online intermediaries[424] (in which case much more depends on the enactment of laws and regulations). However, it is difficult to see how a substantive change could take place without putting in place a constitutional safeguard for users' freedom of expression. This safeguard would at least subject all existing and future laws and regulations to a broader test of legitimacy, provide the legislature and administrative agencies with substantial leeway to craft freedom-protective policies, and lift a barrier against regulating speech-suppressing policies. Courts should thus adjust First Amendment doctrine to the realities of the digital ecosystem by transcending the traditional bipolar conception of the First Amendment and adopting an alternative pluralist conception.

---

[422] Under First Amendment doctrine, false speech is not automatically excluded from First Amendment protection. United States v. Alvarez, 567 U.S. 709, 721–22 (2012) (holding that "some false speech may be prohibited" but rejecting "the notion that false speech should be in a general category that is presumptively unprotected").

[423] *See, e.g.*, Balkin, *supra* note 7, at 2048 (arguing that legal obligations should be imposed on online intermediaries because they serve as information fiduciaries); Citron & Richards, *supra* note 5, at 1373 (arguing that free speech policy should be grounded in statutes and common law); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 489 (2016) (suggesting "platform neutrality" as a guide to extend the principle of network neutrality, *mutatis mutandis*, to other areas of the digital ecosystem); *see also* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1258 (2008) (arguing that users should have reasonable procedural safeguards against content removals, account terminations, and so on); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. U. L. REV. 1, 7 (2014) (arguing similarly).

[424] *See supra* notes 322–24 and accompanying text.