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ARTICLES

of the RCA resulted in automated detention recommendations for hundreds of thousands of people in violation of the Constitution. The RCA thus delivers mass incarceration of immigrants with staggering efficiency. In the end, we argue the RCA supplied a veneer of risk to a tool of punishment.

The Free Speech Clause of the First Amendment of the U.S. Constitution restricts government regulation of private speech. However, it generally does not apply to private management of speech. New forms of speech regulation by online platforms disrupt this constitutional framework. Platforms, such as Google, Facebook, and Twitter, are responsible for mediating much of the public discourse and governing access to speech and speakers around the world. These private businesses match users and content in whatever way best benefits their commercial interests. At the same time, however, they exercise regulatory power when they filter, block, and remove content at the request of governmental agents or state actors. Consequently, platforms effectively blend law enforcement and adjudication powers, and sometimes even lawmaking powers.

Courts and scholars who tackle speech regulation by platforms have basically relied on the well-settled constitutional divide between private functions and governmental ones. To the extent that platforms exercise governmental powers in allowing or banning speech or speakers, platforms should be subject, as the argument goes, to public law principles of accountability, legitimacy, oversight, and power separation.

In this paper, we question this approach. As a practical matter, the public/private framework presumes that public functions of a private entity could be neatly separated from its standard business affairs. We argue that with the increasing use of Artificial Intelligence (AI) by platforms for content moderation, the public, law enforcement functions are integrated with the private, business functions that are driven by commercial interests. The same technical design which is used for targeted advertising and for curating personalized content is also deployed for monitoring and censoring online content. Using machine learning, the system is informed by the same labeling of users and content, and makes use of the same application programming interfaces (API), learning patterns, and software. Consequently, decisions on removal of speech, for (public) law enforcement purposes, are driven by the same data, algorithms, and optimization logic, which are also underlying all other functions performed by the platform. Therefore, the use of AI in content moderation calls for a fresh approach to restraining the power of platforms and securing fundamental freedoms in this environment.

This paper takes a design perspective to speech regulation. It contends that the normative distinctions between public and private functions could be upheld in online content moderation, provided that these distinctions are embedded in the system design. It introduces "separation of functions," a novel approach to restraining the power of platforms while enhancing the accountability in AI driven content moderation systems. We propose to facilitate independent tools embedding public policy. These tools would run on the platforms' data and would include their own optimization processes informed by public policy. Such separation between independent public tools and private data may enhance public scrutiny of law enforcement speech restrictions, which are a traditionally exclusive public function. This functional separation may also facilitate competition among different players who may enrich the design of speech regulation and mitigate biases. Finally, we explore the implications of this approach and discuss its possible limitations.

restraint's procompetitive benefits could have been achieved through less restrictive alternatives. The third permutation also excludes balancing and asks only whether the restraint is "directly related" to its procompetitive benefits.

These new frameworks have exacerbated the complexity and confusion of the rule of reason and threaten to convert antitrust law from an *ex ante* deterrent of anticompetitive conduct to an *ex post* regulator of procompetitive business decisions. This Article examines the evolution of the rule of reason and traces the emergence, disappearance, and reappearance of the less restrictive alternative as the analytical core within the rule of reason. This Article also provides a new descriptive framework for analyzing the different formulations of the modern rule of reason analysis and assesses the flaws of each of the formulations, with a focus on the antitrust challenges to the NCAA's amateurism model. The Article concludes that the role of the less restrictive alternative should be limited to reorient the rule of reason on the overall competitive effect of the challenged restraint. A renewed focus on the net competitive effect will provide a clearer and more coherent framework for the rule of reason and better serve the competition-protecting function of antitrust law.

This Article presents YUM! Brands, Inc. disclosure information and valuable insight into the risks of starting a business that shares intellectual property with another party. YUM is the parent of entities such as KFC, Pizza Hut, and Taco Bell, with locations around the world. YUM is particularly useful for our analysis because of its mature operating concepts.

Sandwich shop franchisor and operator Schlotzsky's, Inc. presents a different aspect of shareholder and franchisee risk. The facts leading up to Schlotzsky's bankruptcy filing represent what can go wrong with undercapitalized franchise operations and illustrate that franchising is inherently risky for anyone.

This Article seeks to answer questions facing all seeking to use a franchise concept: "What are the major risks perceived by those engaged in the universe of franchise businesses? What potential risks, if they become reality, may cause substantial increases in operating costs or threaten the very survival of the enterprise?"

This Article provides a roadmap for understanding franchise risk and an opportunity to understand and reflect upon the multi-million-dollar research, investment, and documentation of perceived system risks. Relevant annual report disclosures from YUM, along with other YUM documents, are discussed. Descriptive language from YUM's regulatory filings with the Securities and Exchange Commission is utilized to show what the management personnel of this franchise powerhouse perceive to be its major categories of risk exposure.

The primary point of this Article is to repackage the risk disclosure language from these enterprises so that franchise entrepreneurs, their lawyers, and other readers may benefit. Our goal is to have a meaningful and scholarly impact on readers who are now, or will be, creating jobs through their efforts in growing businesses. They will proceed into the chaos of the capitalistic marketplace with valuable lessons in franchise risks.

This Article has five Sections. First, we provide a background and overview of franchising. Second, we give a primer on franchise law. Third, we examine YUM, and focus on its risk disclosure language. Fourth, we describe the history and circumstances leading up to the 2004 bankruptcy of Schlotzsky's. Lastly, we

Oregon Uniform Trade Practices Act, the Federal Trade Commission Act, and the Lanham Act.

Close analysis reveals that these statutes together fail to ensure accountability. Until Oregon's benefit company statute includes more stringent protective mechanisms, benefit company status may offer companies merely seeking to capitalize on the CSR movement a safe haven from responsibility.

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