

The New Speech

by ANDREW TUTT*

This Article explains the legal and technological structure of the modern Internet and how courts have been building a First Amendment law for the information age without realizing that literal adherence to the tenets of the offline First Amendment will threaten core First Amendment values on the Internet. It then endeavors to explain how we might look to the First Amendment's roots in building a concept of the Freedom of Speech that accounts for the uniqueness of the New Speech, and the needs of the emerging Information Society.

Every major technological change since before the invention of the telegraph has seen a concomitant warning that this new technology threatens important First Amendment values. Louis Brandeis' seminal Article on the "right to privacy" was a response, at least in part, to disruptive technological change and, in particular the introduction of the compact photographic camera.¹ Since that time, the telegraph, radio, telephone, and television have all engendered similar challenges,² but in each case we have managed as a society—

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1. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"); see also Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1431–32 & nn.189–92 (2001) (describing Brandeis' article and its motivations).

2. See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1644 (1967); Gregory P. Magarian, *Market Triumphalism*,

with some important exceptions³—to more or less preserve the First Amendment’s basic doctrines,⁴ and have held up those doctrines as a vaunted shield against government regulation of speech in the private sphere.⁵ Those who have warned against possible threats to the First Amendment arising from technological change have been proven “wrong” countless times. Because of this, claims that a new technology will require a fundamental shift in how our society protects the “freedom of speech” are dismissed as naïve or tired before they are even fully aired. Such are the wages of crying wolf.

Nonetheless, this Article argues that this time really is different because the Internet—with its unique combination of enormous data storage, processing power, and algorithmic sophistication—is unlike any technological change we have seen before. While the disruptive technologies of the past helped to make information available more widely, more quickly, or more permanently, thereby upsetting the free speech balances of their time, digital technology also stands to grant unprecedented individuated control to the intermediary who carries that information. This makes these intermediaries—which take the form of search engines, social networks, and other media platforms—extraordinarily powerful. But, these intermediaries are more than just powerful in the traditional sense of “powerful speakers.” Rather, they stand boldly and often invisibly between individuals who wish to speak to each other, fundamentally altering

Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights, 35 HOFSTRA L. REV. 1373, 1377 (2007); see also Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 934–36 (2008) (placing Professor Barron’s article in context and describing the notion that the First Amendment might confer “positive” rights).

3. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 204 (1997) (upholding “must carry” rules requiring cable operators to carry signals of local broadcast stations); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (allowing for more extensive regulation of the content of radio and television broadcasts than other forms of media because of their instantaneity); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the so-called “fairness doctrine” requiring broadcasters to present both sides of controversial public issues).

4. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010) (“[A]lthough Supreme Court precedent and our free speech traditions are agnostic as to which private actor should serve as the intermediary, they are very clear that it should not be the government, and when choosing between censorship by a private actor and the government, the choice should always favor the former over the latter.”).

5. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782–83 (1987) (“This peculiar status of free speech in our constitutional scheme, as the one plea for limited government that appears to be embraced by all, has not gone unnoticed by free market theorists.”).

the residual freedom of every individual who uses them. Without the ability to bring law to bear on how—and how much—these intermediaries intercede to interfere with speech between individuals, the individual freedoms to speak and be heard possessed by each one of us are threatened in a way they have never been before. These intermediaries stand to control—often unnoticeably but nevertheless profoundly—what information individuals receive, how they receive it, and with whom they can share it. As this Article explains, this is something they already do to a remarkable extent and with surprisingly little attention to the way these decisions impact individual autonomy and deliberative democracy.⁶

The New Speech

The Internet today is like the frontier once was. The government has stayed its hand, backed away, and allowed institutions, organizations, corporations, and communities to grow and flourish there without law. Absent the threat of government intrusion, this new frontier has found itself free to innovate and prosper. In preventing itself from regulating what happened on the Internet, the government invited individuals and entities to stake out claims to this vast and verdant wilderness, and build a new world upon it.⁷

This was a great and necessary choice. It has long been the preferred method of fostering colonization in strange new landscapes, and spurring the machinery of innovation in times where uncertainty and fear might stymie growth. We saw it in the colonization of America, and of the West. We saw it in the construction of the machinery of industrial society, and of the technology of telecommunications. Where the need for experimentation, innovation and immigration outweighed the interests of equality and fraternity, government has withdrawn its hand and allowed its citizens to rely for their protection on each other—on order, without law.

6. See discussion *infra* Part III.

7. See ANUPAM CHANDER, *THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD TOGETHER IN COMMERCE* 57 (2013). Recently, Professor Chander has written extensively in praise of this political-institutional decision, and its impact on the growth of technology in Silicon Valley and the United States more broadly. See, e.g., Anupam Chander & Uyen P. Le, *The Free Speech Foundations of Cyberlaw*, UC Davis Legal Studies Research Paper No. 351 (Aug. 23, 2013), <http://ssrn.com/abstract=2320124>. And his thesis is quite compelling, and probably right. The contention of this Article, however, is that the legal regime that nurtured the emerging Internet is unsuited to the Internet as a mature medium.

So we come to today, 2014, and we see a slice of history, a sliver of time, the Internet of the modern state. Through this slender shutter we observe that in the Internet's dominion, every means and method of legal organization is aligned to prevent the government from interference. Terms of Service agreements provide the first line of defense from government incursion, thwarting lawsuits over manipulation and deception, wrongful censorship, and unjust dissolution and exclusion. Federal laws provide the second line of defense. The Digital Millennium Copyright Act⁸ and the Computer Fraud and Abuse Act⁹ deliver civil and criminal penalties for attempts to subvert and circumvent the technological fortifications media platforms erect; a lesser known federal law—47 U.S.C. § 230(c)(2)—immunizes platforms from responsibility for speech-related torts of any kind, even when those torts would give rise to colorable claims beyond the First Amendment's ordinary scope.¹⁰ The third line of defense is structural: There is no baseline constitutional right to protection from private censorship, manipulation, deception, or exclusion on the Internet because major speech platforms are neither state actors nor “places of public accommodation,” and therefore carry no obligation to guarantee, protect, or respect the expressive interests of the tens of millions of individuals who pass through their domains each day.¹¹

Notwithstanding these obstructions, built seemingly into the very lattice of creation, these defenses and entitlements are not what should concern us. They are epiphenomenal, ephemeral, nebulous, and changeable. With the passage of time, when the needs of a rising state can do without them, they can and will be changed—modified to bring the virtual world into alignment with the real one. These laws, institutions, and frameworks are merely legislative and regulatory. They were designed to foster exploration and discovery in a brave

8. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at scattered sections of 17 U.S.C. (2006)).

9. Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (2006).

10. See 47 U.S.C. § 230(c)(2) (2006). The little-known story of the statute is that it was enacted in part to encourage cooperative censorship by private platforms. See Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 262 (2006) (“Without requiring filtering by gatekeepers, the CDA expressed a desire to encourage it. To do so, it loosened the emerging state-level gatekeeper liability regime for defamation and other common law torts . . . apparently to encourage ‘Good Samaritan’ blocking and screening of offensive material.”).

11. See *infra* note 111. As far as our law is concerned the lowliest restaurateur owes anyone who steps into her dining room greater obligations—in a legal sense—than even the most dominant platform.

new world as it developed. As that world civilizes, change will follow. Law will emerge.

Or at least, law would emerge, if it could. This Article is concerned primarily with the fourth and final line of defense from government incursion, the Red Line that will decide the fate of much of human interaction for next the two generations: the First Amendment. The First Amendment, long the three-headed guardian at the door between individual liberty and government tyranny, could become the primary enemy of free expression in the digital age.

Why should the First Amendment concern us this much? And why now? Why in this way? Consider the world a decade from now, when individuals and governments have come to realize that major search engines and social networks are some of society's most vital cultural and political institutions. It is a world in which citizens have begun to see that online communities have replaced parks, sidewalks, streets, and street corners as the primary forums for debate and deliberation. It is a world where they see that book clubs, knitting groups, softball leagues, and debate societies take place not in private parlors, public parks, school, and universities, but on platform-hosted forums mediated by algorithms and commercial interests. It is a world in which people have begun to wonder at the ways in which algorithms hide the information they seek, obscure and slant the opinions that they read, broadcast what they say to unintended listeners, or modify and manipulate their words so that those they mean to reach never hear the message as they intend it to be heard.

To envision this world is to realize that there has always been another phase on the horizon; that a time of regulation is coming and that the Internet cannot remain free of law forever. But, a storm gathers, and it is a familiar one. It is a pathology, a recurrent mistake, woven into the fabric of our legal culture. It is the judicial protection of old values in the face of new realities, and it will stymie this move to regulate the Internet.

Precisely one hundred years ago, we saw this resistance to regulation emerge through the preservation of liberty of contract in the face of a major social reorganization. This was the era of *Lochner* and contract liberty—the judicial preservation of the “freedom of contract” in the face of legislative attempts to grapple with the complex industrial society that was emerging.¹² Exactly fifty years

12. See John G. Palfrey, *The Constitution and the Courts*, 26 HARV. L. REV. 507, 517–18 (1913); Roscoe Pound, *The End of Law As Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198 (1914); Note, *Extent of the Legislative Power to Limit Freedom of*

later, the courts again confronted the conflict between old forms and new realities in acknowledging the development of a New Property as part and parcel of an emerging Welfare State.¹³

We are on the brink of a new Information Society, and with it a New Speech. There is a New Speech in two senses of the word. On one hand, we are seeing a new speech emerge *technologically*. The Internet is a massive vortex drawing in data, information and knowledge and pours forth articles, posts, lists, links, offers, ads, forums, games, videos, music, chatrooms, reviews, previews, remixes, snippets, shares, upvotes, downvotes, and entire virtual worlds. The making and distributing of these things has long been what it means to speak. But, while in a pre-Internet age these objects and their analogues were created and disseminated primarily by human beings, today they are intermediated, distributed, altered, edited, and increasingly primarily created by machine. How these technological changes impact old notions of what it means to “speak” poses a vexing challenge.

On the other hand, the judicial response to this technological change means that we are also witnessing the first steps in the creation of a new kind of speech *legally* and *constitutionally*. And while it takes many forms, it all shares one characteristic: Its jagged contours increasingly conflict with other important constitutional commitments. First Amendment-protected speech is increasingly the transmission or possession of *data* or *information*, in any form and for whatever purpose. It matters less and less whether that information and data are tied to any particular speaker or directed at any particular audience.¹⁴ Nor do the motives of the regulator seem to

Contract, 27 HARV. L. REV. 372 (1914); Note, *Legislative Minimum Wage for Women and Minors*, 28 HARV. L. REV. 89 (1914).

13. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964). Compare *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) with *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970). The “New Property” Reich described is the “property” individuals acquire through the grant of a privilege or a payment from the government—for example, “a relief check or a television license.” Reich, *supra*, at 746. Reich worried that if courts failed to recognize these things as “property”—treating them instead as government privileges—it would grant the government enormous power to direct the lives of any individual who depended for their livelihood on government largesse. Reich worried that this would lead to a shift in the balance of power between individuals and the State, making them dependent on the government’s good graces, depriving them of the individual liberty to direct the paths of their own lives without fear that the government might choose to withdraw its gifts without warning or reason.

14. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (holding that depictions of animal cruelty are speech even if they lack any “expressive value”); *Junger v. Daley*, 209 F.3d 481, 485 (6th

matter to its protection.¹⁵ The preservation of editorial control, and the concomitant preservation of choice about what information will be presented and what will be hidden, has torn its way to the apex of First Amendment protection,¹⁶ even as formalism about what it means for something to count as speech ascends in the courts.¹⁷

This judicial reaction is a natural one given our historical intermingling of the institution of speech as a bulwark against government overreach and as an affirmative and individual right to self-determination. Traditionally, freedom of speech has simply built a wall between the individual and the state to effectuate both values. It erected this wall to protect conscience and autonomy, association and dissension, participation and deliberation as much as it did to prevent government oppression. But, ironically, in the new Information Society, preventing government from enacting speech-focused regulation means that powerful private interests will hold enormous power to shape how individuals interact with each other and perceive the world. In a society that holds the values of individual conscience and autonomy in high esteem, the power to control and shape the very reality we see and the world that we experience strikes at the very heart of self-determination.

This Article takes what is, at the moment, an unpopular position.¹⁸ Even the majority of legal scholars—ordinarily friendlier

Cir. 2000); *U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003).

15. See, e.g., *Ostergren v. Cuccinelli*, 615 F.3d 263, 270–72 (4th Cir. 2010). *But see* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 574 (2012); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1146–47 (2005).

16. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2543–47 (2012) (holding that government cannot place significant restrictions on misrepresentations and deception outside narrowly defined categories); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (holding that tobacco labeling requirements are compelled speech).

17. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001); *Search King, Inc.*, 2003 WL 21464568 (calling Google search results “opinions”).

18. This Article enters a vast and evolving literature, but many of the problems it identifies still seem far away, and many scholars and advocates worry that an increased governmental role on the internet may itself pose significant risks to core First Amendment values. See Yoo, *supra* note 4, at 702 (exploring these questions but concluding that “although Supreme Court precedent and our free speech traditions are agnostic as to which private actor should serve as the intermediary, they are very clear that

to government regulation than most—favor sweeping judicial protections for powerful media platforms when the alternative is to empower the government to intercede.¹⁹ And, certainly, the government is often the most important threat to the freedom of speech. But, this Article is an attempt to explain why the government should have the power to ensure that values of autonomy and individual freedom are preserved on the Internet. It is an attempt to show how placing unfettered discretion into the hands of powerful digital intermediaries threatens to erode access to knowledge, distort our common cultural conversation, cement inequality of wealth and privilege, and suppress the very voices on society's margins that the First Amendment was written to protect.

The remainder of this piece proceeds in five Parts. First, it examines the nature of digital creation, intermediation, and dissemination. Second, it reviews the system of law that is emerging. Third, it examines some of the consequences to the individual, to private interests, and to society. Fourth, it considers the functions of speech and its relationship to other vital constitutional commitments. Finally, it turns to the future of the First Amendment in the new society that is coming. The objective is to present an overview—a way of looking at many seemingly unrelated problems. Inevitably, such an effort must be incomplete and tentative, but it is long past time that we took account of the new world taking form around us.

It is difficult to imagine, at this juncture, what the world will look like when individuals and governments begin to attempt to roll back the muscular protections we have put in place to protect major media

it should not be the government”). Where I have been able, I have credited those whose work predates my own. However, in many ways this Article articulates a new perspective on the interaction between law and technology. Where possible, I attempt to show where my views diverge from the prevailing orthodoxy. For a sampling of scholars who argue that the judiciary's understanding of the First Amendment will have only a small part to play in the drama that is the evolving idea of “speech” in a digital age, see LAWRENCE LESSIG, *CODE 79* (2006); TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 304 (2010); Jack M. Balkin, *The Future of Free Expression in A Digital Age*, 36 *PEPP. L. REV.* 427, 427 (2009). See also Marvin Ammori, *First Amendment Architecture*, 2012 *WIS. L. REV.* 1 (2012) (“[C]onstitutional scholarship generally overlooks the role that judicial doctrine plays in ensuring the availability of spaces for speech.”); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1761 (1995) (“Many people think that there is now nothing distinctive about the electronic media or about modern communications technologies that justifies an additional governmental role.”).

19. See, e.g., Jane Bambauer, *Is Data Speech?*, 66 *STAN. L. REV.* (forthcoming 2014); Stuart Minor Benjamin, *Algorithms and Speech*, 161 *U. PA. L. REV.* 1445 (2013); Tim Wu, *Machine Speech*, 161 *U. PA. L. REV.* 1495 (2013).

platforms from regulation. It is difficult to imagine, for instance, what the Internet will look like when we repeal the immunities awarded in 47 U.S.C. § 230(c)(2) and decline to enforce Terms of Service contracts that immunize platforms from liability for censorship and exclusion. But, it was also difficult in 1914 to envision a world in which judges allowed legislatures to freely regulate the terms of employment contracts, and to envision a world in which Congress could freely regulate child labor and minimum wages. The result was a lost generation: more than thirty years of delay in the creation of a legal order reflective of the needs of an underlying industrial society. It would be wise to regard the lessons of history now as we bear witness to the new society that is emerging, lest we wait until 2037 to see the judiciary finally relent, and allow the regulation of the digital world in a manner reflective of the needs of an underlying information society.²⁰

I. Digital Intermediation and the Control of Information

A. The Forms of Information Power

Ours is an information age, marked by the rapid evolution of power from control over property and promises²¹ to control over knowledge and information.²² The ways in which digital expression interacts with other constitutional values are of wide variety. Some of these interactions merely enhance aspects of speech that have always been troubling; others are entirely new. Some interfere with individuals' First Amendment rights to speak, to engage, to create, and to dissent, while others interfere with other important individual rights, such as rights to self-determination, equal participation, and government protection.

20. Cf. Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 459 (2001) ("Finally, in 1937, a single justice changed his vote and a new majority of the Supreme Court initiated the modern tradition of judicial deference to economic and social welfare legislation.").

21. See ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 236 (1922).

22. Balkin, *supra*, note 18, at 427; cf. Somin Sengupta, *Letting Down Our Guard With Web Privacy*, *N.Y. TIMES* (Mar. 30, 2013), http://www.nytimes.com/2013/03/31/technology/web-privacy-and-how-consumers-let-down-their-guard.html?pagewanted=all&_r=0 ("If iron ore was the raw material that enriched the steel baron Andrew Carnegie in the Industrial Age, personal data is what fuels the barons of the Internet age.").

1. *How Algorithms Grant Platforms a Unique Capacity for Detailed Content Discrimination*

Software offers an enormous capacity to tailor the experience of each individual who interacts with a program or a platform. The ability to customize user experience arises from the marriage of cheap, fast processing power, and immense aggregations of data.

Automation grants merchants unprecedented powers to use information they already possess or can easily buy to tailor what they say, how they say it, and to whom they say it. Advertisers using software that tracks user identities across the Internet can select advertisements for individual users that appeal to their tastes, preferences, heuristics, and biases.²³ Knowing users' relative wealth

23. While some websites, such as Amazon.com use their own data to generate custom, targeted advertising, cross-cutting Internet marketing companies employing sophisticated datasets are increasingly allowing for across-the-network behavioral advertising. See Emily Steel & Jilia Angwin, *On the Web's Cutting Edge, Anonymity in Name Only*, WALL ST. J. (Aug. 3, 2010), <http://online.wsj.com/article/SB10001424052748703294904575385532109190198.html>; Somini Sengupta, *What You Didn't Post, Facebook May Still Know*, N.Y. TIMES (Mar. 25, 2013), <http://www.nytimes.com/2013/03/26/technology/facebook-expands-targeted-advertising-through-outside-data-sources.html>. As the CEO of the Internet's "largest data exchange" explained in faraway 2009:

On the "sell side" we empower leading publishers who deliver targeting data on nearly 120 million unique users in vertical segments including Auto, Travel, Finance, Shopping and Demographics. . . .

. . . .

We are capturing billions of deep granular data points—what we call qualified targeting events—on multiple activity levels. We analyze the targeting events in our data lab and roll them into specific Targeting Segments based on three high level categorizations. These categorizations include Demographic data derived from user site registration information on top social nets (NOT inferred information), consumer Interest data gathered from specific site activity on relevant vertical sites (such as parenting and auto enthusiast sites), and deep purchase Intent data culled from relevant commerce activity on top transactional sites. We further segment and sub-segment this data into relevant buckets that in many cases drill down to the product and keyword level.

Rev Share and Rental Pricing Models Bring Accountability to eXelate Data Exchange Says CEO Zohar, ADEXCHANGER (May 28, 2009), <http://www.adexchanger.com/data-exchanges/data-exchange-exelate-zohar>. For scholarly discussion of the emerging issues pervasive behaviorally informed targeted advertising presents, see Mark MacCarthy, *New Directions in Privacy: Disclosure, Unfairness and Externalities*, 6 I.S.J.L. & POL'Y 425, 496–510 (2011); Richard Warner & Robert H. Sloan, *Behavioral Advertising: From One-Sided Chicken to Informational Norms*, 15 VAND. J. ENT. & TECH. L. 49, 57–59 (2012).

and willingness to pay, merchants can charge some individuals more and some less for the same product or service.²⁴

Speech by individuals now passes through at least one intermediary with immense and increasing power to alter its contents, message, and presentation.²⁵ Social media websites can monitor chats and messages between users for illegal or immoral activities.²⁶ Search providers may return a different list of search results to each individual Internet user.²⁷ When items are shared and “favorited” on

24. Though their efforts have been halting, it seems that firms routinely engage in surreptitious first and second-order price discrimination where they can. See Jakub Mikians et al., *Detecting Price and Search Discrimination on the Internet*, at 79, 80 (2012), available at <http://conferences.sigcomm.org/hotnets/2012/papers/hotnets12-final94.pdf>; Virginia Heffernan, *Amazon's Prime Suspect*, N.Y. TIMES (Aug. 6, 2010), http://www.nytimes.com/2010/08/08/magazine/08FOB-medium-t.html?_r=0; Anita Ramasastry, *Web Sites Change Prices Based on Customers' Habits*, CNN (June 24, 2005), <http://www.cnn.com/2005/LAW/06/24/ramasastry.website.prices/>; Joseph Turow, *Have They Got a Deal for You: It's Suspiciously Cozy in the Cybermarket*, WASH. POST (June 19, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/18/AR2005061800070.html>. For academic discussion of this phenomenon, see Matthew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 LEWIS & CLARK L. REV. 559, 571–74 (2006); Mark R. Patterson, *Non-Network Barriers to Network Neutrality*, 78 FORDHAM L. REV. 2843, 2856–57 (2010); and Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1732–34 (2008).

25. See generally Yoo, *supra* note 4.

26. Facebook and other social platforms monitor user communications for criminal activity and notify police if any suspicious behavior is detected. See Joseph Menn, *Social Networks Scan for Sexual Predators with Uneven Results*, REUTERS (July 12, 2012), <http://www.reuters.com/article/2012/07/12/us-usa-internet-predators-idUSBRE86B05G20120712>. Facebook has also monitored user-to-user messages, blocking links to filesharing websites. See Ryan Singel, *Facebook's E-mail Censorship is Legally Dubious, Experts Say*, WIRED (May 6, 2009), <http://www.wired.com/business/2009/05/facebooks-e-mail-censorship-is-legally-dubious-experts-say> (“Facebook declined to answer questions about whether it similarly searched private messages for references to illegal drugs, underage drinking or shoplifting.”). Like all censorship, the targeting was overbroad, as all links to filesharing websites were blocked, including links to files it was legal to share. See *id.* Messages were still being monitored as recently as November of 2010. See Ryan Singel, *New Facebook Messaging Continues to Block Some Links*, WIRED (Nov. 19, 2010), <http://www.wired.com/business/2010/11/facebook-link-blocking> (“So will Facebook be using the content of messages to better profile its users? The company says no.”).

27. Google engages, when it can, in what it calls “search personalization.” Its search results change on a variety of criteria, including the geographic location of the search, and one’s past “search history.” See Carl Franzen, *Impersonal Google Search Results Are Few and Far Between DuckDuckGo Finds*, TPM (Oct. 15, 2012), <http://talkingpointsmemo.com/idealab/impersonal-google-search-results-are-few-and-far-between-duckduckgo-finds> (“[I]n the case of searches for ‘abortion,’ some users received information on Obama’s public stance on abortion, while others did not. Some users also received information on pro-life activist Gianna Jessen while others did not.”). Both Google and Bing are competing to return more personalized results with data mined from their own and other

social websites, social media companies have enormous discretion to decide who sees what is shared.²⁸ In communities that aggregate content on the basis of popularity, the election can be rigged, puffed, and manipulated.²⁹ Posts on message boards and forums can disappear in the blink of an eye or simply never post in the first place.³⁰ Newspaper articles with egregious mistakes or untruths can

social networks. See Larry Magid, *How (and why) To Turn Off Google's Personalized Search Results*, FORBES (Jan. 13, 2012), <http://www.forbes.com/sites/larrymagid/2012/01/13/how-and-why-to-turn-off-googles-personalized-search-results>; Nick Wingfield, *A Revamping of Bing in the Battle for Search Engine Supremacy*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/05/11/technology/bing-search-engine-to-be-revamped-as-war-against-google-intensifies.html>. Orbitz and other travel websites may use search discrimination as a method of price-discrimination. See Dana Mattioli, *On Orbitz, Mac Users Steered to Pricier Hotels*, WALL ST. J. (Aug. 23, 2012), <http://online.wsj.com/article/SB10001424052702304458604577488822667325882.html>.

28. Facebook's frequently changing privacy policy means that new, previously private, personal data is constantly being exposed with Facebook's default mode being to "share" it. See Somini Sengupta, *Staying Private on the New Facebook*, N.Y. TIMES (Feb. 6, 2013), <http://www.nytimes.com/2013/02/07/technology/personaltech/protecting-your-privacy-on-the-new-facebook.html>. As Facebook rolls out "social search," Facebook's default setting is to allow "strangers, along with 'friends' on Facebook, to discover who you are, what you like and where you go." *Id.* A forthcoming paper finds that each Facebook post is seen by 24% of a user's friends on average, and that users underestimate their audience size by a factor of four. See Michael S. Bernstein et al., *Quantifying the Invisible Audience in Social Networks*, at 4 (ACM SIGCHI Conference on Human Factors in Computing System Conference Paper) (Apr. 27–May 2, 2013), available at http://static2.volkskrant.nl/static/asset/2013/Facebook_1462.pdf. Facebook's troubles keeping user information private are well known. See, e.g., Nick Bilton, *Facebook Changes Privacy Settings, Again*, N.Y. TIMES (Dec. 12, 2012), <http://bits.blogs.nytimes.com/2012/12/12/facebook-changes-privacy-settings-again>; Somini Sengupta, *Private Posts on Facebook Revealed*, N.Y. TIMES (Jan. 18, 2013), <http://bits.blogs.nytimes.com/2013/01/18/private-posts-on-facebook-revealed>.

29. Marketers target websites such as Reddit (a website that allows for social upvoting and downvoting) to make it seem as if their brands are "organically" popular. See Ryan Holiday, *Hail Corporate: The Increasingly Insufferable Faker of Brands on Reddit*, BETABEAT (Feb. 21, 2013), <http://betabeat.com/2013/02/hail-corporate-the-increasingly-insufferable-fakery-of-brands-on-reddit/>. Reddit censors such efforts. See Kevin Morris, *Reddit Bans The Atlantic and Businessweek in Major Anti-Spam Move*, THE DAILY DOT (June 13, 2012), <http://www.dailydot.com/news/reddit-ban-the-atlantic-physorg-businessweek>; see also EVGENY MOROZOV, TO SAVE EVERYTHING CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM 155–57 (2013) (describing the practice and its consequences).

30. See Colleen Taylor, *Is This Censorship? Facebook Stops Users From Posting 'Irrelevant Or Inappropriate' Comments*, TECHCRUNCH (May 5, 2012), <http://techcrunch.com/2012/05/05/facebooks-positive-comment-policy-irrelevant-inappropriate-censorship>. As a policy spokesperson explained when a legitimate comment was preemptively blocked by Facebook:

To protect the millions of people who connect and share on Facebook every day, we have automated systems that work in the background to maintain a trusted environment and protect our users from bad actors

be altered surreptitiously without requiring public notice and public correction.³¹ Different versions of the same article may be accessible only to some, and at different times, in different places.³²

2. *How the Structure of Digital Technologies Grants Powerful Platforms Unique Control over Access*

Speech, commerce, and social activities on the Internet pass through hubs—the major nodes in the network. These hubs are inevitable: the result of ineradicable physical constraints and rational collective action. It takes vast amounts of computer processing power and data storage capacity merely to index the network and make it searchable.³³ The same is true of other large information

who often use links to spread spam and malware. These systems are so effective that most people who use Facebook will never encounter spam. They're not perfect, though, and in rare instances they make mistakes. This comment was mistakenly blocked as spammy, and we have already started to make adjustments to our classifier. We look forward to learning from rare cases such as these to make sure we don't repeat the same mistake in the future.

Josh Constine, *Facebook Says Today's Comment Limitations Are Due to Spam Filter, Not Censorship*, TECHCRUNCH (May 5, 2012), <http://techcrunch.com/2012/05/05/facebook-comment-limitations-are-a-spam-filter-not-censorship>.

31. Most major news organizations do not have formal corrections policies, and the evidence seems to suggest that whatever corrections do occur, they happen secretly to the text itself without a correction notice and without preserving the error in the text. See Clint Hendler, *If a Correction Falls in the Woods . . .*, COLUM. JOURNALISM REV. (July 23, 2010), http://www.cjr.org/behind_the_news/if_a_correction_falls_in_the_w.php?page=all; Craig Silverman, *The State of Online Corrections*, COLUM. JOURNALISM REV. (Nov. 12, 2010), http://www.cjr.org/behind_the_news/the_state_of_online_correction.php?page=all.

32. Online news websites generate custom homepages and aggregate stories according to information they have about their visitors. See Vadim Lavrusik, *How News Consumption is Shifting to the Personalized Social News Stream*, MASHABLE (Aug. 10, 2010), <http://mashable.com/2010/08/10/personalized-news-stream>; see also MOROZOV, *supra*, note 29, at 161–62 (describing *Time Magazine's* desire to begin engaging in such news personalization). Debates about the possible costs and benefits of this new news order are already emerging. Compare Jonathan Stray, *Who Should See What When? Three Principles for Personalized News*, NIEMAN JOURNALISM LAB (Feb. 8, 2013), <http://www.niemanlab.org/2012/07/who-should-see-what-when-three-principles-for-personalized-news>; Eli Pariser, *When the Internet Thinks It Knows You*, N.Y. TIMES (May 22, 2011), http://www.nytimes.com/2011/05/23/opinion/23pariser.html?_r=0; Jeremy Mims, *Personalization Isn't the Future of News (I Hope)*, OWNLOCAL (June 7, 2011), <http://ownlocal.com/newspaper-support-group/personalization-isnt-the-future-of-news>. A recent study from PEW reveals that 75% of news consumed online is through shared news from social networking sites or e-mail. See Kristen Purcell et al., *Understanding the Participatory News Consumer* (2010), available at <http://www.pewInternet.org/Reports/2010/Online-News.aspx?r=1>.

33. There is a tendency to believe that major Internet platforms are run out of dorm rooms. This confuses the notion of concept and scale. The first McDonald's was a

aggregators.³⁴ Search engines and other sophisticated data platforms for linking and managing online interactions require capital investment and, therefore, take corporate form.³⁵ But, even if costs were not significant, there would still be points of concentration. Speakers and audiences seek mutual gathering places at which to hear and be heard. It is unavoidable that some platforms will become “focal points”—common cultural referents.³⁶

These hubs, however, are different than the public fora of old. In the digital realm, even the lowliest software author retains almost perfect control over the data and use of data in the program she provides. What this means is that those who provide the tools to

revolutionary concept and dominant in its small geographic domain, but it could not become a national force without scale. The Internet plays by the same rules. See Steven Levy, *Google Throws Open Doors to Its Top-Secret Data Center*, WIRED (Oct. 17, 2012), <http://www.wired.com/wiredenterprise/2012/10/ff-inside-google-data-center/all> (“This is what makes Google Google: its physical network, its thousands of fiber miles, and those many thousands of servers that, in aggregate, add up to the mother of all clouds. This multibillion-dollar infrastructure allows the company to index 20 billion web pages a day. To handle more than 3 billion daily search queries. To conduct millions of ad auctions in real time. To offer free email storage to 425 million Gmail users. To zip millions of YouTube videos to users every day. To deliver search results before the user has finished typing the query. In the near future, when Google releases the wearable computing platform called Glass, this infrastructure will power its visual search results.”); see also James Glanz, *Google Details, and Defends, Its Use of Electricity*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/2011/09/09/technology/google-details-and-defends-its-use-of-electricity.html> (“[Google’s] data centers around the world continuously draw almost 260 million watts—about a quarter of the output of a nuclear power plant.”); Quentin Hardy, *VMware Lets a Thousand Clouds Contend*, N.Y. TIMES (Aug. 27, 2012), <http://bits.blogs.nytimes.com/2012/08/27/vmware-let-a-thousand-clouds-contend> (“Google has 1.5 million servers . . . conducting Web searches and placing ads on the results . . .”). Data centers consume up to 1.5% of the energy in the world. Levy, *supra*.

34. See, e.g., Quentin Hardy, *Active in Cloud, Amazon Reshapes Computing*, N.Y. TIMES (Aug. 27, 2012), <http://www.nytimes.com/2012/08/28/technology/active-in-cloud-amazon-reshapes-computing.html> (“[J]ust one of the 10 data centers in Amazon’s Eastern United States region has . . . more than 80,000 servers.”); see also Quentin Hardy, *BITS; Cisco’s Plan For Next 10 Years*, N.Y. TIMES (Mar. 18, 2013), <http://query.nytimes.com/gst/fullpage.html?res=9A04EFDA1038F93BA25750C0A9659D8B63> (“Cisco has already deployed about \$180 billion worth of network equipment into the world . . .”).

35. See John Markoff & Saul Hansell, *Hiding in Plain Sight, Google Seeks More Power*, N.Y. TIMES (June 14, 2006), <http://www.nytimes.com/2006/06/14/technology/14search.html?pagewanted=all> (“Google, Microsoft and Yahoo! are spending vast sums of capital to build out their computing capabilities to run both search engines and a variety of Web services that encompass e-mail, video and music downloads and online commerce.”).

36. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 54–57 (1967) (describing focal points as “each person’s expectation of what the other expects him to expect to be expected to do.”). Schelling illustrated the concept with the following problem: Tomorrow you have to meet a stranger in New York City. Where and when do you meet them? The answer is remarkably consistent. See *id.* at 55 n.1. (The answer is in Footnote 56).

speak and listen now possess a degree of control over access to commerce, speech, and social interaction never before known.³⁷

Platform control means content control. A media company can unilaterally alter, remove, or advertise on top of an artist's creation.³⁸ A social media company can decide that a politically unpopular group is bad for business, and quietly or overtly exclude them from the conversation.³⁹ Digital publishers can deprive users of access to content en masse or individually—instantaneously and totally.⁴⁰

37. See Julie Adler, *The Public's Burden in A Digital Age: Pressures on Intermediaries and the Privatization of Internet Censorship*, 20 J.L. & POL'Y 231, 236–37 (2011).

38. YouTube, the Internet's most popular video-sharing website, employs a system called "Content ID" that automatically flags videos as belonging to copyright holders and then gives the content-owner three choices for how to deal with the content: they can monetize it, track it, or block it. See Bryan E. Arsham, Note, *Monetizing Infringement: A New Legal Regime for Hosts of User-Generated Content*, 101 GEO. L.J. 775, 791 (2013). The system also sweeps content the copyright holder does not own—content that constitutes "fair use" of copyrighted material—within its ambit as well. See Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed by Lionsgate*, REBELLIOUS PIXEL (Jan. 9, 2013), <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate> ("This is what a broken copyright enforcement system looks like.").

39. Political censorship is quiet but seemingly rampant on social networks and search engines, though it is often claimed to be inadvertent. From the Left come cries of art and intimacy treated as pornography. See Miguel Helft, *Art School Runs Afoul of Facebook's Nudity Police*, N.Y. TIMES (Feb. 18, 2011), <http://bits.blogs.nytimes.com/2011/02/18/art-school-runs-afoul-of-facebooks-nudity-police>; Amy Lee, *Facebook Apologizes for Censoring Gay Kiss Photo*, HUFFINGTON POST (June 19, 2011), http://www.huffingtonpost.com/2011/04/19/facebook-gay-kiss_n_850941.html; Jennifer Nix, *Art or Pornography? You Should Decide—Not Facebook*, HUFFINGTON POST (June 22, 2012), http://www.huffingtonpost.com/jennifer-nix/facebook-censorship_b_1616735.html. ("Facebook now claims the authority to determine what does and does not constitute art."). From the Right come claims of explicit ideological censorship dressed up as censorship for bullying or harassment. See Joe Newby, *Is Facebook Actively Censoring Conservative Bloggers?*, EXAMINER (Jan. 3, 2013), <http://www.examiner.com/article/is-facebook-actively-censoring-conservative-bloggers>; Erik Wemple, *Facebook Admits Error in Censoring Anti-Obama Message*, WASH. POST (Oct. 31, 2012), http://www.washingtonpost.com/blogs/erik-wemple/post/facebook-admits-error-in-censoring-anti-obama-message/2012/10/31/d6063c22-235e-11e2-ac85-e669876c6a24_blog.html ("Facebook took the image down . . . and froze the account for 24 hours, in effect stifling SOS on Facebook."). See also EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* 205–44 (2011) (describing similar events); MOROZOV, *supra* note 29, at 140–80 (describing same events).

40. In July 2009, Amazon remotely deleted, without notice or compensation, two George Orwell e-books from thousands of Kindle devices. The books were *Animal Farm* and *1984*. See Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>. As one purchaser explained, "I never imagined that Amazon actually had the right, the authority or even the ability to delete something that I had already purchased." *Id.* For academic commentary on the notion of what one might call "remote" exclusion, see

Platform control means control over who may enter, who must leave, who may speak, who must defer, and who must remain silent. One's access to a platform may be cut off totally and permanently without notice or opportunity for recourse.⁴¹ One may be deprived of vested status and membership,⁴² or be barred from participation on

Michael Seringhaus, *E-Book Transactions: Amazon "Kindles" the Copy Ownership Debate*, 12 YALE J.L. & TECH. 147, 176 (2010); Joseph E. Van Tassel, *Remote Deletion Technology, License Agreements, and the Distribution of Copyrighted Works*, 97 VA. L. REV. 1223 (2011).

41. See, e.g., *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012); Summary of Pleading at 1, *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (No. 11 Civ. 918) (alleging that the account was disabled suddenly and without explanation). As Mustafa Fteja explains in his handwritten response to the question on the complaint form—“[b]riefly describe the reasons why you should be granted what you are requesting”—“Facebook has become a serious tool for communication. I rely on Facebook to communicate with family and friends around the world. The nature of Facebook disabled account doesn't let your contact know that your account was disabled. Contacts assume that I cut ties with family and friends causing me severe personal harm, and hurt my personal feelings by discriminating.” Complaint Form at 2, *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (No. 11 Civ. 918).

42. The banning of the prominent Wikipedia Editor “Essjay” was one of the most significant and controversial events in the history of Wikipedia. Essjay held himself out as a college “professor,” told other editors that he held doctoral degrees in theology and Canon law, and worked as a tenured professor at a private university. Through the use of his persona, Essjay became a respected and trusted member of Wikipedia, eventually rising to the highest level of authority in the community, ultimately being elected a “bureaucrat”—a user of such regard that he held total discretionary control over membership, access, and editing on Wikipedia. He also sat on ArbCom, Wikipedia's Supreme Court. He could ban anyone, and edit anything, and even make other Bureaucrats. He resolved disputes between editors and helped to resolve one of the most important controversies the encyclopedia has ever faced (the Seigenthaler controversy). In fact, Essjay was Ryan Jordan, a twenty-four-year-old community college dropout. In a trial process that can only be described as tortious, and after hundreds of hours of investigation and debate, Essjay left Wikipedia. See Noam Cohen, *A Contributor to Wikipedia Has His Fictional Side*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/technology/05wikipedia.html?pagewanted=all>; *Essjay controversy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Essjay_controversy (last visited Nov. 19, 2013); Stacy Schiff, *Know It All: Can Wikipedia Conquer Expertise?*, THE NEW YORKER (July 31, 2006), http://www.newyorker.com/archive/2006/07/31/060731fa_fact. Transcripts and the record in the matter of Essjay remain available on Wikipedia. See *User:Essjay/RFC*, WIKIPEDIA, <https://en.wikipedia.org/wiki/User:Essjay/RFC> (last visited Nov. 19, 2013). An exchange near the end of the more than fifty-thousand-word administrative proceeding is particularly telling—“Now that Essjay has retired from Wikipedia and has foregone his various flags, it's time to end the pile on. Let's get on with building an encyclopedia [written by:] MER-C 03:30, 4 March 2007. . . . I don't think there's a 'pile-on.' Essjay was one of the most trusted Wikipedians in the history of this project, and his deception touches everyone who ever loved this place. . . . [written by:]—CH 03:38, 4 March 2007 (UTC).” *Id.* Though there is no definitive academic account, a good first cut at history can be found in Shun-Ling Chen, *Wikipedia: A Republic of Science Democratized*, 20 ALB. L.J. SCI. & TECH. 247, 285–88 (2010). The Essjay Controversy led many to lobby for more code-based restrictions on editing Wikipedia. *Id.* at 287. For

the basis of criteria over which one has no control and cannot change.⁴³ One may be excluded from participation on the basis of the viewpoint or content of his message, the manner of his presentation, or, indeed, for nearly any reason at all. The right to exclude from access may be the most strongly guarded legal right on the Internet.⁴⁴

3. *How Speech as a Means of Conveying an Idea and Speech as a Commodifiable Object Become Entangled on the Digital Landscape*

The information individuals disclose possesses ever-increasing value, even as it becomes increasingly difficult to protect from alienation. Platform providers may freely condition access and participation on the disclosure and unrestricted right to use an individual's private information.⁴⁵

more about ArbComm's function, structure, and practices, see generally David A. Hoffman & Salil K. Mehra, *Wikitruth Through Wikiorde*, 59 EMORY L.J. 151, 154 (2009).

43. See, e.g., *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d at 831 (alleging discrimination); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1113–14 (N.D. Cal. 2011) (alleging violation of American's with Disabilities Act because plaintiff suffers from bipolar disorder); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 453–61 (2000) (calling status discrimination "endemic" and content discrimination "far more prevalent" than status discrimination).

44. Self-help remedies are easy for platforms to effectuate: simply delete or disable a user's post or account. Such a deletion, if wrongful, would be a breach of contract or a tort. But, under federal law, a user's failure to respect a platform's decision to restrict his or her access to the platform is a federal crime. If a platform website tells an individual they are banned for life and are forbidden to reestablish an account, a subsequent attempt to access the platform violates the Federal Computer Fraud and Abuse Act, which carries penalties on the order of decades in prison. See Orin Kerr, *More Thoughts on the Six CFAA Scenarios About Authorized Access vs. Unauthorized Access*, THE VOLOKH CONSPIRACY (Jan. 28, 2013), <http://www.volokh.com/2013/01/28/more-thoughts-on-the-six-cfaa-scenarios-about-authorized-access-vs-unauthorized-access> (arguing with respect to hypothetical #6, involving a "free social networking site in which users must register and obtain an account" where a user creates a third account after having his account twice-deleted, Professor Kerr writes "[t]his is one is a little tricky, but I think it should be treated as prohibited unauthorized access"); see also Christine D. Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 MD. L. REV. 320, 323–24, 331 (2004); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1599–1600, 1644–60 (2003); Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1578–83 (2010) (discussing a case in which a prosecution was brought under the CFAA for violation of MySpace's Terms of Service while noting that what was improper about the prosecution was not that a platform provider can use the CFAA to enforce any access and use restrictions it chooses, but rather that "no one actually treats TOS as if they govern access rights").

45. See, e.g., *Data Use Policy – Information We Receive About You*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info> (last visited Nov. 19, 2013) [hereinafter

One's deeply held beliefs, wants, desires, and needs cannot be shared with others without also being appropriated by the intermediary.⁴⁶ Even one's likeness may be appropriated for use in platform marketing, promotion, and for use as a marketing tool to one's closest friends and confidants.⁴⁷ Moreover, these intensely

Facebook Privacy Policy] (explaining that Facebook collects and uses deep granular data about you from you and from others and shares it with advertising partners); *Privacy Policy*, GOOGLE, <http://www.google.com/intl/en/policies/privacy> (last visited Nov. 19, 2013) [hereinafter Google Privacy Policy] (explaining that Google collects, stores, and uses any information you input on a Google service including credit card and contact information, and any information it can glean from your device, including geographic location, tracking information, patters, habits, and demographics).

46. Facebook's enhanced search tool "graph search" is nearing deployment. The company advertises an archetypical search as a search for "books my friends like." See Paul Boutin, *Search Tool on Facebook Puts Network to Work*, N.Y. TIMES (Mar. 20, 2013), <http://www.nytimes.com/2013/03/21/technology/personaltech/facebooks-graph-search-makes-use-of-friends-and-likes.html?pagewanted=all>. There are more troubling searches one might run. Forbes presented this list of actual searches:

1. "Current employers of people who like Racism"
2. "Spouses of married people who like . . . Ashley Madison"
3. "Family members of people who live in China and like . . . Falun Gong"
4. "Islamic men interested in men who live in Tehran, Iran"
5. "People who like Focus on the Family . . . and Neil Patrick Harris . . ."
6. "Single women who live nearby and who are interested in men and like Getting Drunk"
7. "Mothers of Catholics from Italy who like Durex"

See Kashmir Hill, *Facebook Graph Search Shows You 'Married People Who Like Prostitutes' and 'Employers of People Who Like Racism,'* FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/kashmirhill/2013/01/23/facebook-graph-search-embarrassing>. While the author of the Forbes article argues that "[t]he exposure of this information in this form isn't a matter of private information being breached; instead it's a matter of obscurity being reduced," *id.*, that is not quite right. It is not entirely clear that employers are aware that their employees "Like" groups that have been tagged "racist" or that the employees even know that the groups they have liked are so categorized.

47. Instagram changed its Terms of Service to clarify that it could freely share photos used on the popular photo sharing website with Advertisers and others as it saw fit—prompting an instant and enormous backlash. See Jenna Wortham & Nick Bilton, *What Instagram's New Terms of Service Mean for You*, N.Y. TIMES (Dec. 17, 2012), <http://bits.blogs.nytimes.com/2012/12/17/what-instagrams-new-terms-of-service-mean-for-you> ("You could star in an advertisement—without your knowledge."). As a law firm analyzing the Instagram controversy commented, Instagram—just like Yahoo!, Flickr, and other media platforms—could already do that under the industry-standard Terms of Service. See *Intstagram—Why the Backlash?*, MAYER BROWN (Mar. 11, 2013), <http://www.mayerbrown.com/Instagram—why-the-backlash-03-11-2013> ("Instagram was given a licence to exploit users' photos in just about any way imaginable This meant that Instagram could already—before the December change—use non-private photos in its own advertising."). The takeaway, it is suggested, is not to limit the scope of the Terms of Service but to keep the Terms of Service as vague, broad, and as close to the industry-standard terms as possible. *Id.*

personal elements of individual identity can be subpoenaed, sold, and freely disclosed by these third-party intermediaries.⁴⁸

4. *How Power over Content and Access Allows Platforms to Expropriate Individual Speech*

Even as information about individuals sweeps increasingly beyond their control, the fruits of their creativity must be given away as a condition of obtaining the privilege of access. Writings, photos, videos, compositions, all belong as much to the platform provider as to the artist, creator, or chronicler who set them down.⁴⁹ Some platforms go even further, conditioning participation and access on an individual forever giving up all intellectual property entitlement to the works she creates.⁵⁰ Creators are increasingly confronted with

48. See, e.g., Google Privacy Policy, *supra* note 45 (explaining that Google freely shares “non-personally identifiable information publicly and with our partners” and also shares whatever it knows whenever such sharing is, *inter alia*, incidental to a legal proceeding of almost any kind, necessary to resolve “technical issues,” and/or to protect Google’s or other Google customers’ “property”).

49. See, e.g., *Facebook Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Nov. 19, 2013) [hereinafter Facebook Terms of Service] (“For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License).”); *YouTube Terms of Service*, YOUTUBE, <http://www.youtube.com/static?template=terms> (last visited Nov. 19, 2013) [hereinafter YouTube Terms of Service] (“[B]y submitting Content to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and YouTube’s (and its successors’ and affiliates’) business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels.”); see also Carmit Soliman, *Remixing Sharing: Sharing Platforms As A Tool for Advancement of UGC Sharing*, 22 ALB. L.J. SCI. & TECH. 279, 293–306 (2012) (explaining that YouTube, Flickr, Facebook, MySpace, and Blogger all ascribe to the industry practice of “issu[ing] themselves licenses to use [User Generated Content]”).

50. See *Wikipedia Terms of Use*, WIKIPEDIA, http://wikimediafoundation.org/wiki/Terms_of_Use (last visited Nov. 19, 2013) [hereinafter Wikipedia Terms of Service] (“[A]ll users contributing to the Projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely When you submit text to which you hold the copyright, you agree to license it under: Creative Commons Attribution-ShareAlike 3.0 Unported License (“CC BY-SA”), and GNU Free Documentation License (“GFDL”) (unversioned, with no invariant sections, front-cover texts, or back-cover texts).”). This licensing requirement—which is effectively an agreement to renounce one’s claims to any copyright over her creations—applies to content contributed to any and all WikiMedia platform projects. See *id.* (“No revocation of license: Except as consistent with your license, you agree that you will not unilaterally revoke or seek invalidation of any license that you have granted under these Terms of Use

difficult choices about the cost of losing control of their creations and the cost of losing access to an audience.

B. The Importance of Control of Information

How important is control over information to the total social, commercial and political life of the nation? As of 2012, there were 2.4 billion Internet users worldwide, with 274 million in North America.⁵¹ Of the United States population, 84% of adults are Internet users.⁵² Facebook had 1 billion active users, while Twitter had 200 million, and Google saw 135 million monthly active users on its social network Google+.⁵³ There were 1.2 trillion Google searches, and Google held 67% of the U.S. search market.⁵⁴ There were 2.7 billion Facebook likes each day, and 24.3% of the top 10,000 websites were integrated with Facebook.⁵⁵ Facebook saw 300 million photos added each day, for a total of 7 *petabytes* of photos each month.⁵⁶ Four billion hours of video were watched on YouTube each month, and 181.7 million Americans watched online videos in December of 2012.⁵⁷

Life in all its particulars is increasingly integrated with the Internet and increasingly lensed through powerful platforms. As of 2010, the average person visited 2,646 web pages across 89 domains each month.⁵⁸ The most visited sites, however, were visited by an astounding proportion of these users: 82% visited Google, 62%

for text content or non-text media contributed to the Wikimedia Projects or features, even if you terminate use of our services.”).

51. *Internet 2012 in Numbers*, PINGDOM (Jan. 16, 2013), <http://royal.pingdom.com/2013/01/16/Internet-2012-in-numbers>.

52. Frederic Lardinois, *Forrester: 84% Of U.S. Adults Now Use The Web Daily, 50% Own Smartphones, Tablet Ownership Doubled To 19% In 2012*, TECHCRUNCH (Dec. 19, 2012), <http://techcrunch.com/2012/12/19/forrester-84-of-u-s-adults-now-use-the-web-daily-50-own-smartphones-tablet-ownership-doubled-to-19-in-2012>. A “user” is defined as one who visits the Internet at least once a month. *Id.* Eighty-four percent of those 245 million users, however, access the Internet *daily*. *Id.*

53. *Internet 2012*, *supra* note 51.

54. *Id.*

55. *Id.*

56. *Id.* (For those visiting this footnote from Footnote 36, the answer is Noon at the Ticket Booth in the Grand Central Terminal.).

57. *Id.*

58. *How the World Spends its Time Online*, VISUAL ECONOMICS, <http://www.creditloan.com/blog/how-the-world-spends-its-time-online/> (last visited Dec. 4, 2013).

visited Bing, 54% visited Facebook, 53% visited Yahoo!, 48% visited Microsoft, 47% visited YouTube, and 35% visited Wikipedia.⁵⁹

The average American spends approximately 30 hours a month online.⁶⁰ Social networking accounts for 20.1% of the time, while 8.1% was spent on online games, 5.2% on video and movies, 3.2% on search, and 7.1% on email.⁶¹ The average Facebook user spends seven hours each month on Facebook.⁶² One hundred and five million Americans watch online videos each day,⁶³ and the average YouTube viewer watches five hours of videos each month.⁶⁴ American adults now spend as much time on their mobile devices as they do reading newspapers and magazines.⁶⁵ As of 2009, Americans were estimated to consume 34 gigabytes of information each day.⁶⁶

Multiplayer videogames are now a significant part of American social life. In 2011, the U.S. market alone was worth \$2.12 billion and was comprised of roughly 47 million users (about 15% of the U.S. population).⁶⁷ Roughly 20 million individuals subscribe to Massively Multiplayer Online Role Playing Games (persistent virtual worlds).⁶⁸

59. *Id.*

60. Sarah Perez, *Nielsen: TV Still King in Media Consumption; Only 16 Percent of TV Homes Have Tablets*, TECHCRUNCH (Jan. 7, 2013), <http://techcrunch.com/2013/01/07/nielsen-tv-still-king-in-media-consumption-only-16-percent-of-tv-homes-have-tablets>.

61. *Id.*

62. Josh Constine, *People Are Facebook'ing-and-Buying More Than Ever, Even If They Don't Realize It*, TECHCRUNCH (June 6, 2012), <http://techcrunch.com/2012/06/06/facebooking/>.

63. Josh Constine, *100 Million Americans Watch Online Video Per Day, Up 43% Since 2010* –comScore, TECHCRUNCH (Feb. 9, 2012), <http://techcrunch.com/2012/02/09/100-million-american-watch-video/>.

64. Leena Rao, *comScore: The Average YouTube Viewer Watches 5 Hours Of Videos A Month*, TECHCRUNCH (June 17, 2011), <http://techcrunch.com/2011/06/17/comscore-the-average-youtube-viewer-watches-5-hours-of-videos-a-month>.

65. Erick Schonfeld, *People Spend As Much Time On Mobile As Reading Newspapers And Magazines*, TECHCRUNCH (Dec. 15, 2010), <http://techcrunch.com/2010/12/15/time-mobile-newspapers>. Americans also now spend more time on Facebook Mobile than Facebook's website. Josh Constine, *Americans Now Spend More Time On Facebook Mobile Than Its Website*, TECHCRUNCH (May 11, 2012), <http://techcrunch.com/2012/05/11/time-spent-on-facebook-mobile>.

66. Nicholas DeLeon, *Study: Americans consume 34 gigabytes of information per day*, TECHCRUNCH (Dec. 9, 2009), <http://techcrunch.com/2009/12/09/study-americans-consume-34-gigabytes-of-information-per-day>.

67. *Graphs MMO Revenues*, GAMESINDUSTRY.COM, <http://archive.is/EvwFw> (last visited Dec. 4, 2013).

68. *See Total MMORPG Subscriptions and Active Accounts Listed on This Site*, MMODATA.NET, <http://users.telenet.be/mmodata/Charts/TotalSubs.png> (last visited Nov. 19, 2013).

The economic significance of the time and resources Americans spend in these worlds can be crudely approximated by the black market for their in-game currencies. In 2009 alone, this was a billion dollar industry employing 400,000 people in Asia.⁶⁹

In 2011, the top five most-pirated PC games—Crysis 2, Call of Duty: Modern Warfare 3, Battlefield 3, FIFA 12, and Portal 2—were each downloaded more than three million times.⁷⁰ At least three of these games—Crisis 2, Call of Duty, and Battlefield—are primarily multiplayer games. As of 2009, the average gamer spent anywhere between fifteen and nineteen hours per week playing videogames.⁷¹ In 2012, the average Xbox owner spent four and a half hours per week using the console.⁷²

Transactions on the Internet now account for, or contribute to, a significant portion of all commercial activity in the United States. Over \$1 trillion in U.S. commercial transactions were web-influenced in 2010, and that number is expected to grow to over \$1.4 trillion by 2014.⁷³ Total U.S. Internet commerce will be \$231 billion in 2013.⁷⁴ Amazon alone will account for roughly \$80 billion of those sales.⁷⁵

69. Nicholas DeLeon, *Let's quit our jobs and become World of Warcraft gold farmers*, TECHCRUNCH (Mar. 6, 2009), <http://techcrunch.com/2009/03/06/lets-quit-our-jobs-and-become-world-of-warcraft-gold-farmers>. One might also note that Blizzard's \$1 billion in subscription revenue in 2007 equaled one-eighth of the movie industry's total revenue that year. Peter J. Quinn, *A Click Too Far: The Difficulty in Using Adhesive American Law License Agreements to Govern Global Virtual Worlds*, 27 WIS. INT'L L.J. 757, 769 (2010).

70. Ernesto, *Call of Duty: Black Ops Most Pirated Game of 2010*, TORRENTFREAK (Dec. 28, 2010), <http://torrentfreak.com/call-of-duty-black-ops-most-pirated-game-of-2010-101228>.

71. Nicholas DeLeon, *Is the Recession Causing People to Play More and More Video Games?*, TECHCRUNCH (July 7, 2009), <http://techcrunch.com/2009/07/07/is-the-recession-causing-people-to-play-more-and-more-video-games>.

72. See Tadhg Kelly, *What Games Are: The "Beyond Games" Mirage*, TECHCRUNCH (Feb. 17, 2013), <http://techcrunch.com/2013/02/17/what-games-are-the-beyond-games-mirage>.

73. Erick Schonfeld, *Forrester Forecast: Online Retail Sales Will Grow to \$250 Billion by 2014*, TECHCRUNCH (Mar. 8, 2010), <http://techcrunch.com/2010/03/08/forrester-forecast-online-retail-sales-will-grow-to-250-billion-by-2014>.

74. See Natasha Lomas, *Forrester: U.S. Online Retail Sales to Rise to \$370BN by 2017 (10% CAGR) as Ecommerce Motors on With Help From Tablets and Phones*, TECHCRUNCH (Mar. 13, 2013), <http://techcrunch.com/2013/03/13/forrester-2012-2017-ecommerce-forecast>.

75. See Leena Rao, *Amazon Misses: Q4 Sales Up 22 Percent to \$21.3B, Net Income Down 45 Percent to \$97M*, TECHCRUNCH (Jan. 29, 2013), <http://techcrunch.com/2013/01/29/amazon-misses-q4-sales-up-22-percent-to-21-3b-net-income-down-45-percent-to-97m>; Rip Empson, *WTF: Amazon Barely Ekes Out Profit on \$21B in Sales, Hits Negative P/E, Misses Estimates, Guidance, Yet Stock Jumps 10%*, TECHCRUNCH (Jan. 29, 2013), <http://techcrunch.com/2013/01/29/wtf-amazon-barely-ekes-out-profit-on-21b-in-sales-hits->

eBay and Paypal expect to do \$20 billion in mobile commerce in 2013.⁷⁶ Marc Andreessen, co-founder of Netscape, predicts that eventually e-commerce will eliminate traditional brick-and-mortar commerce entirely.⁷⁷

As more of social, political, and economic life pours onto the Internet and onto these centralized platforms, it becomes more essential to join and participate in them. The Internet is not a complement to the ordinary incidents of democratic life so much as a substitute for them. Every hour spent in a virtual world is an hour outside the real one. And, as ordinary civic organizations lose critical mass, the center of gravity is shifting to the Internet. While it is true that the Internet offers enormous opportunities to discover thousands, even millions, of others with whom to discuss, to debate, and to share, it is difficult to regard this choice as entirely volitional. The places to participate and engage must be taken as they are; no individual can join the network on her own terms.

Control over data and access to knowledge will necessarily assume ever-greater importance as we move closer to a mature information society. The question is: Who will ultimately be responsible for ensuring and safeguarding the sanctity of individual self-determination and freedom in this society, whatever its ultimate form? This responsibility must be carried by some entity committed to individual dignity, equality, and liberty. It cannot be left solely to platform owners to sustain.⁷⁸

negative-pe-misses-estimates-guidance-yet-stock-jumps-10 (“Amazon is the Walmart of the Internet.”).

76. Leena Rao, *eBay and PayPal Expect to Do \$20 Billion Each in 2013 Mobile Commerce*, TECHCRUNCH (Jan 16, 2013), <http://techcrunch.com/2013/01/16/ebay-and-paypal-expect-to-do-20-billion-each-in-2013-mobile-commerce/>.

77. Sarah Lacy, *Andreessen Predicts the Death of Traditional Retail. Yes: Absolute Death*, PANDODAILY (Jan. 30, 2013), <http://pandodaily.com/2013/01/30/andreessen-predicts-the-death-of-traditional-retail-yes-absolute-death>.

78. See Rachel Whetstone, *Free Expression and Controversial Content on the Web*, GOOGLE: OFFICIAL BLOG (Nov. 14, 2007), <http://googleblog.blogspot.com/2007/11/free-expression-and-controversial.html> (“Google is not, and should not become, the arbiter of what does and does not appear on the web. That’s for the courts and those elected to government to decide.”), accord Rachel Whetstone, *Our Approach to Free Expression and Controversial Content*, GOOGLE: OFFICIAL BLOG (Mar. 9, 2012), <http://googleblog.blogspot.com/2012/03/our-approach-to-free-expression-and.html> (“Four years ago we first outlined our approach to removing content from Google products and services. Nothing has changed since then . . .”).

C. The Control of Information and the Changing Forms of Power

The significance of control over information is magnified by certain underlying changes in computing technology. Large increases in processing power, data storage capacity, and bandwidth give rise to several phenomena new to human experience. First is the granulation of access, privilege, and interaction. Not only can a content controller now limit the uses of any particular piece of media to an unprecedented degree—to one individual, one time—more significantly, one may now be treated as an individual in all one's interactions with the platform. With the loss of generality comes the accompanying loss of the protections afforded by that generality. Alone without the crowd, an individual now encounters the network as an individual woman, a system that already knows an enormous amount about her, and vastly outmatches her knowledge and processing capacity in crafting its decisions and shaping her experience. A single speaker is more easily targeted, and given platform providers' control over access, it is no longer possible to be an anonymous speaker or faceless member of a crowd.

Second is the separation of formal legal entitlement and actual entitlement—the separation, in some sense, of ownership from control. On one side, technological advances increasingly render an individual's technical ownership over content or data functionally irrelevant, as worldwide, transferable licenses are granted to platforms possessing far greater capacity to make use of that content and data than any generic individual might. One is frequently given “choices”—to opt out, to control one's information, to see all sides, to bargain—that are entirely illusory. On the other side, platform owners need never part with control over the content they provide. Platform owners can take matters into their own hands to an unprecedented degree without the need for recourse to any kind of legal arbiter. Software and media can be remotely deleted. Access can be instantaneously denied.

These are the phenomena legal scholars often describe when they ominously portend the implications of “Code” for the future of digital regulation.⁷⁹ These Code-based interventions are frequently far more powerful than any formal legal entitlements. Hypothetical rights to bargain over contracts ring hollow in a digital ecosystem in which using the network's most basic features requires investing one's

79. See LESSIG, *supra* note 18; see also JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008) (describing a future of closed platforms and “tethered” information appliances).

trust in a major media platform. Rights against discrimination, manipulation, deception, and defamation mean little when one cannot detect or deter their violation.

Power in our society is moving toward these platforms, enhanced by emergent technologies, and controlled by corporate entities. To the individual, these new forms of power increasingly shape the very roots of her experience. To the child of the digital age, it is as if it has always been so. Perhaps most importantly, the formal relationship between these technologies and judicial protections for freedom of expression means that the First Amendment increasingly protects these platforms from government regulation.

II. The Emerging System of Law

Power is a product of control, and can be shaped by legal institutions. While control over data, access, knowledge, and information clearly constitutes a new kind of power, law may be able to counter such power. But, if it is also “speech,” then it is beyond intervention. The question that arises is whether the control and manipulation of information, words, images, and other media is necessarily “speech.” This section seeks to understand how courts and legal and political actors, both formally and functionally, regard the control these platforms exert. The goal is to understand, as far as possible, the unique legal system that is emerging.

A. What Is Speech

The Supreme Court and the lower federal courts increasingly view speech as anything which is formally, analogically, or functionally equivalent to traditional speech. That is, if a type of content looks like speech in a traditional form, is analogous to speech in a traditional form, or is the functional equivalent of speech in a traditional form, it *is* speech for purposes of the First Amendment.

1. *Similar in Form to Traditional Speech*

The earliest speech opinions emphasized literal similarities between what happens on a computer and off. These opinions held that computer code was speech because it was composed of words.⁸⁰

80. See *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) (holding that computer source code is speech because “though unintelligible to many, [it] is the preferred method of communication among computer programmers”); *Bernstein v. U.S. Dep’t of Justice*, 176 F.3d 1132, 1141 (9th Cir. 1999) (holding that such speech is protected), *rev’d en banc*, 192

They emphasized that computer source code was merely a technical form of communication, much like what might be found in a scientific publication or a recipe. Once it was first decided that computer source code was speech because it was composed of a kind of specialized language, nearly every federal court joined in that rationale.⁸¹ Courts have found that both the executable object code—which even human beings trained in the use of computers have great difficulty deciphering—as well as the more readable source code, are both speech meriting First Amendment protection.⁸²

One case has held to the contrary. In *Commodity Futures Trading Commission v. Vartuli*, the program was to be operated “mechanically” and “without the intercession of the mind or the will of the recipient.”⁸³ As the Second Circuit Court of Appeals held, “the fact that the system used words as triggers and a human being as a conduit, rather than programming commands as triggers and semiconductors as a conduit, appears to us to be irrelevant for purposes of this analysis.”⁸⁴ This case is something of an outlier, however, and has not been followed.⁸⁵

2. Analogous to Traditional Speech

Nearly two decades after the lower federal courts began to grapple with the question of what counts as speech on a computer, the Supreme Court weighed in. In *Brown v. Entertainment Merchants Association*, the Supreme Court held that videogames are speech because they convey information in a manner analogous to works of literature.⁸⁶ This was an approach endorsed and explained by Judge

F.3d 1308 (9th Cir. 1999), *appeal later dismissed*; *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1126 (N.D. Cal. 2002); *Karn v. U.S. Dep’t of State*, 925 F. Supp. 1, 9 (D.D.C. 1996) (reasoning that “computer language source codes . . . are comprehensible to human beings when viewed on a personal computer”); *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1434–36 (N.D. Cal. 1996) (finding that computer source code is speech because it comprises a set of specialized instructions).

81. See, e.g., sources cited *supra* note 80.

82. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1099 (N.D. Cal. 2004) (describing and following the holdings of other federal courts on the issue).

83. *Commodity Futures Trading Comm’n v. Vartuli*, 228 F.3d 94, 111 (2d Cir. 2000).

84. *Id.*

85. See *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 287 (2d Cir. 2010) (Livingston, J., dissenting) (lamenting the Second Circuit’s hostility to *Vartuli*, reasoning “[l]anguage serves a variety of functions, only some of which are covered by the special reasons for freedom of speech” (quoting *Vartuli*, 228 F.3d at 111)).

86. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011); see also Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73, 75 (2012) (“Rather than reach beyond video games to software generally, the Court zeroed in on video games and held

Richard Posner in the Seventh Circuit almost ten years earlier in *American Amusement Machines Association v. Kendrick*, and the Supreme Court adopted his rationale almost in terms.⁸⁷ More than simply analogizing videogames to works of literature, the Supreme Court seemed to announce a rule that it would take an analogical approach wherever possible, proclaiming “the basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears.”⁸⁸

At least one lower federal court has endorsed the analogical approach, holding that blog posts and tweets are analogous to “Colonial bulletin boards.”⁸⁹

3. *Functionally Equivalent to Traditional Speech*

The most significant and potentially revolutionary decision in the area of digital speech, however, is not—at least on its face—a decision involving digital speech at all.⁹⁰ In *Sorrell v. IMS Health Inc.*, the Supreme Court announced that “the creation and dissemination of information are speech within the meaning of the First Amendment.”⁹¹

Sorrell considered whether the government could place restrictions on who could receive and use information about physicians’ prescription practices in Vermont.⁹² The Court found that the Vermont statute barring the sale, disclosure, and use of such information for marketing purposes imposed both content- and speaker-based restrictions on protected speech.⁹³ The Court was

that they were speech because they communicated ideas through familiar literary devices.”).

87. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (striking down a similar restriction on violent video games).

88. *Brown*, 131 S. Ct. at 2733 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

89. *United States v. Cassidy*, 814 F. Supp. 2d 574, 577–78 (D. Md. 2011), *appeal dismissed* (Apr. 11, 2012).

90. *Sorrell*, the case principally discussed in this section, is not necessarily novel or an unexpected departure. Over ten years before *Sorrell*, the Tenth Circuit arrived at a similar conclusion. See *U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (holding that Customer Proprietary Network Information is speech).

91. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). The Court explained: “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.” *Id.*

92. See *id.* at 2659.

93. See *id.* at 2667.

particularly troubled that such information could be sold or even given away as long as it was not sold to a proscribed entity or for a proscribed purpose.⁹⁴ Given the case's somewhat idiosyncratic facts, it is tempting to see *Sorrell* as a case that has little relevance to the Court's understanding of what counts as speech online. Indeed, it is tempting to argue that the Court in *Sorrell* "could not have possibly meant what it said" and that the language the Court chose was simply a rhetorical flourish,⁹⁵ or was perhaps too sweeping.

Close scrutiny of the case and its history, however, reveals the opposite. The litigants and judges in *Sorrell* seemed to understand the digital-speech ramifications of the Court's decision. In the case below the two most important precedents over which the majority and dissenting opinions divided were *Universal City Studios, Inc. v. Corley* and *Commodity Futures Trading Commission v. Vartuli*—two cases about whether and when a software program is speech.⁹⁶

In addition, the Supreme Court's finding that data in its rawest and most inarticulate form is speech has sweeping ramifications for online speech even if only by analogy. While economic regulations frequently restrict the usage of products and services, the First Amendment prohibits the government from engaging in such content discrimination when speech is at stake. Thus, as Justice Stephen Breyer noted in his dissent, the Court's holding protects information at such a high level of generality that even if one cannot articulate the medium or the message, as long as a litigant can reasonably make out a claim that what the government seeks to regulate is information because it *is* information, it becomes protected speech.⁹⁷

Moreover, even as *Sorrell* may appear on its face unrelated to the question of what counts as speech in the digital realm, the case has been received as a watershed with important ramifications for digital speech. As Google has begun to enlist advocates to lay a foundation for a First Amendment defense to intervention for anticompetitive

94. See *id.* at 2662.

95. See *Tutt, supra* note 86, at 74 (arguing that the Court's holding in *Sorrell* is "so broad and potentially far-reaching that the Court could not possibly have literally meant what it said"). For a discussion of the facts and holding in *Sorrell*, see *id.* at 75–76.

96. See *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 275 (2d Cir. 2010) (citing *Corley* for the proposition that "computer program is speech" in support of its holding); *id.* at 287–88 (Livingston, J., dissenting) (discussing *Corley* and *Vartuli* at length). See also *supra* note 80 and accompanying text.

97. See *Sorrell*, 131 S. Ct. at 2673–77, 2680–81 (Breyer, J., dissenting).

search rankings,⁹⁸ *Sorrell* has appeared and reappeared. In a White Paper that has now become an article entitled *Google: First Amendment Protection for Search Engine Search Results*, Eugene Volokh and his co-author Donald Falk prominently cited *Sorrell* on the way to concluding that Google Search results cannot be regulated.⁹⁹ Neal Katyal, former acting solicitor general and the United States' advocate in *Sorrell*, argues that *Sorrell* represents a seminal case—one that means Google is likely to win on a First Amendment defense should the government seek to bring an antitrust action against the company.¹⁰⁰

4. *The Puzzle of the Courts' Approaches*

There is a puzzle in each of the three approaches the courts have adopted—deciding what is and isn't speech based on whether it is literally like speech, analogous to speech, or is information—and the puzzle is that none of them take much account of what makes speech *special*. The sections of the opinions awarding information and videogames the privilege of denotation as “speech” under the First Amendment were minimal.¹⁰¹ The approaches advanced in the earliest opinions protecting computer code, relying on the fact that computer programs are literally instructions, were not much better.¹⁰²

While videogames are like literature because they have the capacity to engage our deepest emotions, many courts have held that other kinds of games and meaningful hobbies possess no similar First Amendment status.¹⁰³ And, while information may be important and

98. See Josh Blackman, *Professor Eugene Volokh, the Advocate*, JOSH BLACKMAN'S BLOG (May 21, 2012), <http://joshblackman.com/blog/2012/05/21/professor-eugene-volokh-the-advocate>.

99. EUGENE VOLOKH & DONALD M. FALK, *GOOGLE: FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS* 13 (2012), *reprinted in* 8 J.L. ECON. & POL'Y 883, 890 (2012).

100. Kirsten Downey, *Google Pondering First Amendment Defense*, FTC:WATCH No. 810, at 2–3 (July 2, 2012).

101. See *Sorrell*, 131 S. Ct. at 2667; *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011).

102. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447–49 (2d Cir. 2001).

103. See, e.g., *City of Dall. v. Stanglin*, 490 U.S. 19, 25 (1989) (recreational dancing); *There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994) (bingo); *AK Tournament Play, Inc. v. Town of Walkill*, No. 09–CV–10579 (LAP), 2011 WL 197216, at *3 (S.D.N.Y. Jan. 19, 2011) (poker), *aff'd*, 444 F. App'x 475 (2d Cir. 2011); *Lamle v. City of Santa Monica*, No. 04–CV–6355–GHK (SH), 2010 WL 3734868, at *7–10, n.19 (C.D. Cal. July 23, 2010) (Farook), *report and recommendation adopted*, 2010 WL 3734864 (C.D. Cal. Sept. 22, 2010); *Fox v. Blades*, No. CV06–96–S–BLW, 2006 WL

facts may be the beginning point of much human knowledge, “*everything* is ‘an expressive means for the exchange of information and ideas’ about itself, and this is just as true in realspace as in cyberspace.”¹⁰⁴

Years ago, in a concurrence in *Miller v. South Bend*, Judge Posner suggested that the labels “expression versus nonexpression, ideas versus emotions, art versus entertainment, or speech versus conduct” were all just “lawyers’ classification games.”¹⁰⁵ Cultural values determine the First Amendment’s scope and protections.¹⁰⁶ This principle, that the cultural position of a particular sphere of action or medium of expression should determine its entitlement to First Amendment protection, would seem to be a better way of deciding these questions than any of the courts’ current approaches.¹⁰⁷

B. Platform Providers’ Rights to Control and Discriminate

As the commercial and political power of platforms has grown, there have been increasing skirmishes in the courts over the rights of platform owners to control, edit, and discriminate as they see fit.¹⁰⁸

1. Automated Opinions

The emerging law understands automated content discrimination as the expression of opinion, rather than simple commercial conduct. Two federal court decisions have held that search results, including the choices of what to include in those results, are “speech” fully protected by the First Amendment.¹⁰⁹ Another federal court has

1006802, at *1 (D. Idaho Apr. 14, 2006) (“hobbycraft”); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995) (boxing), *aff’d*, 95 F.3d 224 (2d Cir. 1996).

104. Orin Kerr, *Are We Overprotecting Code? Thoughts on First-Generation Internet Law*, 57 WASH. & LEE L. REV. 1287, 1291 (2000) (emphasis in original).

105. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1100 (7th Cir. 1990) (Posner, J., concurring), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

106. *Id.*; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995) (“To summarize the argument so far: First Amendment analysis is relevant only when the values served by the First Amendment are implicated. These values do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication.”).

107. *See id.* at 1275–76; Tutt, *supra* note 86.

108. *See* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1439, 1453–56 (2011).

109. *See* *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (“The First Amendment guarantees an individual the right to free speech, ‘a term necessarily comprising the decision of both what to say and what not to say . . .’ [T]he injunctive relief sought by Plaintiff contravenes Defendants’ First Amendment rights.”); *Search*

found that software that informs users that they have malware on their computer, and offers to facilitate its deletion, “is a form of speech” analogous to the expression of an opinion.¹¹⁰

2. *The State Action Principle*

A platform’s right to engage in content discrimination begins at the moment one engages the platform. The federal courts are unanimous: Platform providers are not “quasi-public utilities” nor “places of public accommodation” and they cannot be sued for engaging in content-discrimination under a theory that the First Amendment applies to them.¹¹¹

The Third Circuit Court of Appeals has gone further, recognizing that 47 U.S.C. § 230(c)(2) protects media companies from ordinary commercial and tort-based liability for content-based censorship.¹¹² The Third Circuit upheld the constitutionality of Section 230(c)(2)

King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (Google’s ranking decisions are “constitutionally protected opinions” that are “entitled to full constitutional protection.”).

110. See *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1081–83 (C.D. Cal. 2003); see also *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1098, 1110–13 (C.D. Cal. 2004) (finding that the software’s “speech” was not only not commercial speech, but was speech on a matter of public concern).

111. *Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (“Plaintiffs counter that AOL is a ‘quasi-public utility . . .’ There is nothing in the record that supports the contention that AOL should be considered a state actor.”); see also *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 511 (D.C. Cir. 1999) (holding domain name assignment is not State action); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1116 (N.D. Cal. 2011) (finding Facebook is not a “place of public accommodation”); *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 in the run-up to a gubernatorial election); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (holding that AOL’s warnings and account termination, even if done simply to suppress plaintiff’s pro-Islamic statements, were unreachable because AOL is not a state actor); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000) (holding that defendant’s policy of filtering out certain domain names did not violate the First Amendment because domain name assignment is not state action); *Sanger v. Reno*, 966 F. Supp. 151, 163 (E.D.N.Y. 1997) (“Because these Internet providers are not state actors, they are 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, 443–44 (E.D. Pa. 1996) (holding that AOL is not a state actor).

112. The statute immunizes from liability providers and users of interactive computer services who voluntarily make good faith efforts to restrict access to material they consider to be objectionable. See 47 U.S.C. § 230(c)(2) (2012); see also Balkin, *supra* note 18, at 434 & n.31 (“Section 230 is by no means a perfect piece of legislation; it may be overprotective in some respects and underprotective in others Section 230(2), for example, gives conduit owners complete discretion to censor traffic in addition to the section 230(1) immunity.”).

immunity in the face of a First Amendment challenge to the statute, reasoning that the First Amendment does not prohibit blanket immunity from suit over private censorship.¹¹³ The Third Circuit Court of Appeals emphasized that in the treatment of users' speech, platform companies are not bound to the same First Amendment requirements of nondiscrimination and even-handedness as the government is.¹¹⁴

3. *Code as Conduct*

Even as platform controllers and discriminators have obtained protection from regulation because their automated content-discrimination merely expresses an opinion, those who have sought to spread programs and program code that can subvert and circumvent restrictions designed to protect intellectual property have found no friend in the First Amendment. Federal courts, in the same opinions in which they recognize that code is speech, have just as readily sanctioned it for violating otherwise neutral, generally applicable laws.¹¹⁵

4. *Utility as Speech*

To the extent there is a unifying principle, it would seem it is an economic one—a notion that the speech that counts is speech that is economically useful. The business torts brought against Google, Microsoft, Yahoo!, and Lavasoft were otherwise indistinguishable from the claims brought against the individuals who posted code and linked to potentially infringing copyrighted material in *Corley* and *Elcom*. Yet, there is no mention of the speech-conduct distinction, or of a lower standard of scrutiny, in *LavaSoft*, *Langdon*, or *Search King*—the cases calling algorithmic outputs opinions. The harms in the latter three cases were not rooted in the persuasive power of the “speech” at issue, but that Google made it more difficult to find the plaintiffs’ websites in its search results, and that Ad-Aware facilitated the deletion of the plaintiffs’ spyware.

113. See *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) (“AOL is a private, for profit company and is not subject to constitutional free speech guarantees.”).

114. *Id.*

115. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454–56 (2d Cir. 2001); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1128–32 (N.D. Cal. 2002).

5. *Emanations from Outside the Digital Realm*

The Supreme Court and at least one lower federal court are engaged in a project of remodeling the First Amendment. The penumbra of this project will influence decisions with respect to online platforms. In *United States v. Alvarez*, the Supreme Court announced that false and misleading speech is now on a plane of protection similar to ordinary speech.¹¹⁶ The Court argued that the kinds of false speech that can be regulated are limited in number, that one must have a *mens rea* before the government may punish false speech, and that the cure for false and misleading statements is not restrictions on such statements but the speech correcting them.¹¹⁷ *Alvarez* is a strong libertarian opinion, but its implications for the digital realm—where deception and manipulation are automated, difficult to detect, and tempting to engage in—are potentially far-reaching.

The D.C. Circuit Court of Appeals' recent decision in *R.J. Reynolds Tobacco Co. v. Food & Drug Administration* will also reverberate in the digital realm.¹¹⁸ There, the court held that the FDA's tobacco labeling requirements violated the First Amendment by compelling speech.¹¹⁹ While the case perhaps makes more sense in the physical world—where a variety of non-speech remedies can be crafted to counteract harmful commercial conduct—in the digital world, where every intervention must necessarily burden what a platform can say and how it can say it, the case and its progeny may erect a powerful barrier to intervention.¹²⁰

C. Control of Information and the Power of Government

As the notion of what counts as protected speech grows, the power of government to intervene in the online ecosystem diminishes. This diminished power is moderated further by the literal similarities between the old speech and the new, the explicit protections from suit over content censorship provided by 47 U.S.C. § 230(c)(2), and the

116. See *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012).

117. See *id.* at 2545, 2549–50; see also *id.* at 2546 (“This opinion . . . rejects the notion that false speech should be in a general category that is presumptively unprotected.”).

118. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).

119. *Id.* at 1217–22.

120. The Supreme Court's cases may already erect a significant barrier to remedies to content discrimination. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that the remedy for critical speech cannot be a requirement that newspapers print a reply tendered by the person criticized).

contractual agreements to which all individuals must submit to make use of Internet platforms at all. In the face of these obstacles, what powers does government have? There are, it seems, two: fiction and discretion.

1. *Ordinary Limitations on the Powers of Government*

It first bears mentioning that courts have not relinquished their traditional role as guardians of the First Amendment where that role remains clear. As more traditional speech has moved onto the Internet, the courts have continued to carefully police government-sponsored content and viewpoint discrimination. Federal courts nationwide have struck down limits on sex-offenders' access to digital tools such as social networking websites, instant messaging software, and chat programs.¹²¹ They have treated Facebook posts, MySpace profiles, Tweets, and Blogs as written published opinions disseminated to a narrow or a general audience as determined by their context.¹²² Even the odd case of *Bland v. Roberts*, which has received much coverage in the media—a decision that could be taken to hold that Facebook “likes” are not entitled to First Amendment protection at all—is not as crude as media accounts have suggested.¹²³ The decision, rather, seems to hold that a Facebook “like” is not speech “on a matter of public concern” as the Supreme Court’s First Amendment retaliation jurisprudence requires.¹²⁴ In the *Bland*

121. See *Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 694, 697–99 (7th Cir. 2013); *Doe v. Nebraska*, 8:09CV456, 2012 WL 4923131 (D. Neb. Oct. 17, 2012); *Doe v. Jindal*, 853 F. Supp. 2d 596, 604–06 (M.D. La. 2012). But see generally *United States v. Collins*, 11-CR-00471-DLJ PSG, 2012 WL 3537814 (N.D. Cal. Mar. 16, 2012) (upholding limits of use of Twitter and IRC as conditions of release pending trial).

122. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207–09 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (U.S. 2012) (holding that a student’s MySpace profile was entitled to First Amendment protection); *United States v. Cassidy*, 814 F. Supp. 2d 574, 576–78, 582–84 (D. Md. 2011) (holding that blog posts and tweets are to be generally regarded publicly expressed opinions, not private communications).

123. *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012). Media accounts of the case indicate that the Court found that a Facebook “like” is not expressive for First Amendment purposes at all. See, e.g., The Associated Press, *Clicking ‘Like’ on Facebook Is Not Protected Speech, Judge Rules*, N.Y. TIMES (May 5, 2012), <http://www.nytimes.com/2012/05/06/us/clicking-like-on-facebook-is-not-protected-speech-judge-rules.html>.

124. The cases cited by the court in *Bland* and the specific context of the case make clear that the court was deciding as to whether the speech rose to the level of a comment on a matter of public concern. See *Bland*, 857 F. Supp. 2d at 603–04. This is a heightened showing of importance that lower courts have interpreted Supreme Court jurisprudence to require. See also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (conditioning First Amendment protection from retaliation on the Speech’s relevance to a matter of “public concern”).

court's defense, other courts across the nation have found that significantly more "speech-like" speech than a Facebook "like" has also failed to meet this burden.¹²⁵

2. *The Magnification of Governmental Power by Executive Discretion*

The federal government's competition and consumer protection agencies have begun to emerge as the Internet's speech regulators.¹²⁶ With the First Amendment looming over them, and with the much-lauded and highly protective 47 U.S.C. § 230 against them,¹²⁷ these regulators route-around difficult questions of whether content discrimination by powerful platforms is "speech." They employ competition, consumer protection, and privacy enforcement powers to effectuate what are essentially First Amendment values. This lends these agencies wide discretion—and thereby great power—over what content decisions media platforms make while they evade judicial scrutiny.

The way these agencies—most prominently the Federal Trade Commission ("FTC")¹²⁸—regulate the new speech is by moving the questions from what counts as "speech" to what counts as deception

125. See generally *Lalack v. Oregon*, 3:11-CV-01285-BR, 2013 WL 819789 (D. Or. Mar. 5, 2013) (holding that employee's report of Facebook activities of other employees was not speech on a matter of public concern sufficient to form the basis of a retaliation claim); *Velazquez v. Autonomous Municipality of Carolina*, CIV. 11-1586 SEC, 2012 WL 6552789 (D.P.R. Dec. 14, 2012) (holding that plaintiff's Facebook posts criticizing the Police Department may rise to the level of speech on a matter of public concern, but that there was not enough evidence to rule on the issue at the pleading stage, making it a contested issue of material fact); *Gresham v. City of Atlanta*, 1:10-CV-1301-RWS, 2011 WL 4601020 (N.D. Ga. Sept. 30, 2011) adhered to on reconsideration, 1:10-CV-1301-RWS, 2012 WL 1600439 (N.D. Ga. May 7, 2012) (holding that plaintiff's Facebook post related to a matter of public concern, but commenting that the court "considers this a close question").

126. At least in the United States. See Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1820 (2012) ("The most significant effort to modify Facebook's policies by the U.S. government occurred in December 2011, when the Federal Trade Commission ("FTC") sought to resolve a complaint against Facebook for its privacy practices."); Alexandra Paslawsky, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 FORDHAM INT'L L.J. 1485, 1494–95, 1517–20 (2012) (describing the efforts of the FTC and FCC); Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1382–83 (2012).

127. See Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 943 (2008) (lauding 47 U.S.C. § 230's protections and extolling its importance).

128. Though the FCC and other federal agencies—even the State Department—have involved themselves in an important way. See, e.g., Jacob Michael Kaufman, *G2G, Yo Quiero TB: Taco Bell Found Not Liable for Franchisee Text Message Campaign*, SOCIALLYAWARE (Sept. 6, 2012), <http://www.sociallyawareblog.com/2012/09/06/g2g-yo-quiero-tb-taco-bell-found-not-liable-for-franchisee-text-message-campaign>.

and unfairness.¹²⁹ These regulators are invested with the power to define these words.¹³⁰ Their authority to dictate the speech of individuals and platform companies is, therefore, broad. It is a violation of the FTC's guidelines for a platform company to engage in content discrimination that is favorable to a marketing partner without disclosure.¹³¹ The FTC scrutinizes these companies' business practices under the guise of antitrust scrutiny, and negotiates consent decrees requiring structural actions that significantly affect how these platforms structure user speech and experiences.¹³² The FTC recently investigated Twitter's restrictions on data use by platform application developers, sending a message to social networking companies of the costs of such practices.¹³³ The FTC has obtained consent decrees from Facebook, Google, and Twitter requiring that they not employ consumer data in ways the FTC deems unfair and deceptive—effectively imposing direct regulations on how such data is used.¹³⁴ The FTC held Google accountable for Google Buzz, not because Google committed any particular tort for its negligent handling of users' private information, but for violating its own privacy policy, thus engaging in what the FTC characterized as a deceptive trade

129. See William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1134–58 (2009) (describing these as “paradigmatic legal responses”).

130. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511–12 (1989).

131. See FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2011); see also Julie Brill, *Privacy & Consumer Protection in Social Media*, 90 N.C. L. REV. 1295, 1306–07 (2012) (describing two analogous enforcement actions); Paul Moura, *Harmless Tweets or Deceptive Speech? The Problem of Stealth Marketing in New Media, the Dual Regulatory Roles of the F.T.C., and the Market for Social Capital*, 33 WHITTIER L. REV. 613, 614, 630–33, 638–50 (2012) (identifying potential First Amendment concerns with such deceptive speech disclosure requirements, and arguing that the FTC should tread lightly).

132. See Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1793–95 (2012); see also Gönenç Gürkaynak et al., *Antitrust on the Internet: a Comparative Assessment of Competition Law Enforcement in the Internet Realm*, 14 BUS. L. INT'L 51, 59–60 (2013) (discussing analysis of social networking mergers by DOJ and the FTC).

133. *Id.* at 1794. See also *id.* at 1795 (“At least one consumer group has filed complaints with the FTC alleging that Facebook has entered into exclusionary contracts with game developers. Facebook and Google have traded allegations relating to the ability to obtain (or block) information from each other’s site, a practice called ‘scraping.’”).

134. See Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1581–82 (2012).

practice.¹³⁵ The FTC and the White House hope to make platform companies commit to tight, industry-wide codes of conduct so that the FTC can, with the force of law, regulate compliance with such codes.¹³⁶ The federal government hopes that platform providers will submit to legally enforceable commitments to censor themselves (and, collaterally, their users) thereby eluding the First Amendment.

There are costs to regulating platforms in this manner. Regulation through competition enforcement and consumer protection agencies necessarily warps and narrows the speech values the government promotes and restricts.¹³⁷ Indirect and evasive mechanisms, such as coerced privacy policies and impossible-to-satisfy mandatory disclosure requirements enhance the potential for abuses of discretion. It also serves to mask the important First Amendment issues at stake in these decisions.¹³⁸ Yet, scholars and privacy advocates are beginning to call for investing in these agencies even more permeating and capacious authority.¹³⁹

3. *The Perils of Fiction and Discretion: The Example of Wikileaks*

Investing the government's powers to regulate speech on platforms in broad grants of discretionary authority creates significant risks. The dangers were revealed in the government's efforts to punish and censor Wikileaks for disclosing government secrets. While no new laws were passed, and no laws facially implicating the First Amendment were ultimately enforced, Wikileaks' access to

135. See Francoise Gilbert, *FTC v. Google: A Blueprint for Your Next Privacy Audit*, 16 J. INTERNET L. 1, 15–17 (2012); see also Brill, *supra* note 131, at 1298 (“We believed that, contrary to Google’s representations, Google provided Gmail users with ineffective options for declining or leaving the social network.”). Ms. Brill is an FTC Commissioner.

136. See Thomas Hemnes, *The Ownership and Exploitation of Personal Identity in the New Media Age*, 12 J. MARSHALL REV. INTELL. PROP. L. 1, 30 (2012).

137. It is perhaps ironic that the one kind of subtle manipulation and censorship from which consumers are shielded is commercial manipulation. See Moura, *supra* note 131, at 622 (noting that “the FTC has indicated that its enforcement of Section 5 only targets [commercial speech]”); see also Matthew Sundquist, *Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World*, 25 REGENT U. L. REV. 153, 173–75 (2013) (characterizing privacy enforcement as *the* overriding concern in the federal regulation of online platforms).

138. Cf. MOROZOV, *supra* note 39, at 89 (“Officials in some Gulf states are calling for the creation of blogging associations, while one of Russia’s top bureaucrats recently proposed to set up a ‘Bloggers’ Chamber’ that can set standards of acceptable behavior in the blogosphere, so that the Kremlin does not have to resort to formal censorship.”).

139. See, e.g., G.S. Hans, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for A New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 197–200 (2012).

hosting, domain name servers, bandwidth, and funds were restricted, disrupted, and even completely cut off as a result of government pressure on third-party companies.¹⁴⁰ The Wikileaks episode reveals that “[c]ommercial owners of the critical infrastructures of the networked environment can deny service to controversial speakers,” and the government “can use this vulnerability to bring to bear new kinds of pressure” that were once less salient, less available, and less easily effectuated before the Internet’s rise.¹⁴¹

Apart from the Wikileaks episode, private companies have also voluntarily complied with U.S. Treasury Department export controls and other requests by Executive Branch actors to engage in literal and tacit censorship. The web hosting company BlueHost, for example, cut off access to over 300 million potential customers in what it characterized as “sanctioned” jurisdictions in 2009,¹⁴² while the social network LinkedIn suspended all accounts originating in Syria.¹⁴³ Though there is “no evidence” that the U.S. Government demanded such censorship, the costs of uncertainty and a tacit fear of government discretion seemed to motivate these actions.¹⁴⁴

III. An Internet Without Law

The technological, social, and legal consequences attending these changes on the rights of individuals and the constitutional values of freedom, dignity, and individual self-determination are difficult to overstate. It is important to see that at war are two conceptions of “speech”—one that places the rights of individuals at the apex, and one that places the rights of institutions at the apex. These conceptions are in a desperate struggle.

A. The Erosion of Independence

Individuals, groups, companies, and nations are touched by the power of platforms to dictate the terms of the digital landscape. The company that depends entirely for its economic fate on a position in a

140. See Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 18–19 (2012); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 311, 330–31, 365–67 (2011).

141. Benkler, *supra* note 140, at 311.

142. See Ethan Zuckerman, *Intermediary Censorship*, in ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS, AND RULES IN CYBERSPACE 71, 74–78 (Ronald J. Deibert et al. eds., 2010).

143. *Id.* at 77–78.

144. *Id.* at 74–80.

Google search ranking or access to Twitter's data stream are subject to the whims of powerful private interests in a way that greatly influences both what is said, and how it is said.¹⁴⁵

But, more than commercial interests are at stake. These platforms' choices have the power to shape our cultural conversation—the speech and association rights of individuals—in ways that are both subtle and overt. As the Occupy Wall Street protests caught fire, attracting support, enthusiasm, outrage, controversy, and intense media scrutiny, the #occupywallstreet hashtag nonetheless failed to achieve the status of a Twitter Trend.¹⁴⁶ The Twitter algorithm, with its emphasis on *new* news, discovery, disruption, and cross-cluster penetration¹⁴⁷ was presumably unconcerned with the expressive implications that granting or withholding #occupywallstreet the special status of a trend entailed. Twitter's algorithm implements a set of values for Twitter that impact society, but it is unclear whether Twitter ever carefully considered this impact.¹⁴⁸

An unreflective reliance on search and sorting algorithms—about which most people know almost nothing about—can subtly influence our dispositions and attitudes.¹⁴⁹ In the run-up to the 2012 presidential election, Google results tended to return positive articles about Barack Obama and negative articles about Mitt Romney.¹⁵⁰ Search engines tend to privilege their own services when returning

145. For companies that depended on their position in Google's search rankings, see, for example, *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); and *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003). For an example of a company dependent on Twitter's data, see J. Alexander Lawrence & Amanda Bakale, *PeopleBrowsr Wins Round One Against Twitter*, SOCIALLYAWARE (Dec. 5, 2012), <http://www.sociallyawareblog.com/2012/12/05/peoplebrowsr-wins-round-one-against-twitter> (“The Superior Court of the State of California has entered a temporary restraining order requiring Twitter to continue to provide PeopleBrowsr with access to the Firehose, Twitter's complete stream of all public tweets. Through the Firehose, Twitter provides third-party access to over 400 million daily tweets.”).

146. See Tarleton Gillespie, *Can an Algorithm Be Wrong?*, LIMN (Mar. 27, 2012), <http://limn.it/can-analgorithm-be-wrong>.

147. See *id.* (describing how the Twitter algorithm decides what is trending).

148. See *id.*

149. See Eric K. Clemons & Steve Barnett, *Quick: Is Someone Trying to Steal Your Agora?*, HUFFINGTON POST (Dec. 22, 2010), http://www.huffingtonpost.com/eric-k-clemons/quick-is-someone-trying-t_b_800536.html; Eric K. Clemons & Josh Wilson, *Can Google Influence an Election?*, HUFFINGTON POST (Oct. 9, 2012), http://www.huffingtonpost.com/eric-k-clemons/google-election-2012_b_1952725.html.

150. See Rob Enderle, *The United States of Google*, TECHNEWSWORLD (Oct. 1, 2012), <http://www.technewsworld.com/story/The-United-States-of-Google-76273.html>.

search results, with Google among the most likely to favor its own.¹⁵¹ Ranking algorithms, like the online mediascape itself, are acutely susceptible to manipulation.¹⁵² Many “memes”—discrete units of culture that spread quickly across the Internet¹⁵³—are constructed: “made, not born.”¹⁵⁴ Because memes are identifiable, Google, YouTube, Twitter, and Facebook are in an arms race to tailor their algorithms to find and promote the most infectious memes.¹⁵⁶ Additionally, memes grab attention, bring satisfaction, and foster platform loyalty.¹⁵⁷ What memes do not do is reflect the full spectrum of human experience, nor, often, cultural and political discussion of a particularly nuanced, deep, or reflective kind.¹⁵⁸

151. See BENJAMIN EDELMAN & BENJAMIN LOCKWOOD, MEASURING BIAS IN “ORGANIC” WEB SEARCH (Jan. 19, 2011), <http://www.benedelman.org/searchbias>; Amir Efrati, *Rivals Say Google Plays Favorites*, WALL ST. J. (Dec. 12, 2010), <http://online.wsj.com/article/SB10001424052748704058704576015630188568972.html>; David Segal, *A Bully Finds a Pulpit on the Web*, N.Y. TIMES (Nov. 26, 2010), <http://www.nytimes.com/2010/11/28/business/28borker.html?pagewanted=all>.

152. See RYAN HOLIDAY, TRUST ME I’M LYING: CONFESSIONS OF A MEDIA MANIPULATOR 19–21 (2012).

153. For a tongue-in-cheek collection of definitions, see *Meme*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=meme> (last visited Nov. 19, 2013).

154. HOLIDAY, *supra* note 152, at 15–16. This is a theme throughout the book.

155. MOROZOV, *supra* note 29, at 156. I found many of the academic articles in footnotes 156–58 through the efforts of Evgeny Morozov to whom I owe a debt of gratitude. See *id.* at 156–63 and sources cited therein.

156. See, e.g., B.J. MENDELSON, SOCIAL MEDIA IS BULLSHIT 46 (2012) (describing operation of the YouTube algorithm); Taina Bucher, *A Technicity of Attention: How Software ‘Makes Sense’*, 13 CULTURE MACHINE 1, 6–11 (2012), available at <http://culturemachine.net/index.php/cm/article/viewArticle/470>; Taina Bucher, *The Friendship Assemblage: Investigating Programmed Sociality on Facebook*, 7 TELEVISION & NEW MEDIA 1, 2–3, 7–8, 9–10 (2012), available at <http://tvn.sagepub.com/content/early/2012/08/14/1527476412452800.abstract> (describing how one of the essential ways in which Facebook connects people and ensures user satisfaction is by limiting exposure to difference); Taina Bucher, *Want To Be On Top? Algorithmic Power and the Threat of Invisibility on Facebook*, 14 NEW MEDIA & SOC’Y 1164, 1174–78 (2012), available at <http://nms.sagepub.com/content/14/7/1164> (describing and critiquing how Facebook’s ranking algorithm selects stories).

157. See HOLIDAY, *supra* note 152, at 51–52 (“The web has only one currency, and you can use any word you want for it—valence, extremes, arousal, powerfulness, excitement—but it adds up to false perception.”); *Id.* at 82–84 (describing a rule that “[f]orty percent of every article must be cut,” and citing studies showing that blog posts ordinarily range in length from 200 to 500 words); C.W. Anderson, *Deliberative, Agonistic, and Algorithmic Audiences: Journalism’s Vision of Its Public in an Age of Audience Transparency*, 5 INT’L J. COMM. 529, 541–43 (2011).

158. See HOLIDAY, *supra* note 152, at 49 (quoting Jonah Peretti, “the virality expert behind both the *Huffington Post* and *BuzzFeed*”; “[I]f something is a total bummer, people don’t share it.’ And since people wouldn’t share it, blogs won’t publish it.”). Google and Facebook’s algorithms will endeavor to bury it too.

Speech values and self-determination are also influenced by exclusion and deletion. Accidental censorship is inevitable in a world mediated by algorithms.¹⁵⁹ But, it is not random. What often falls into the zone of error is speech that we have spent nearly a century struggling to protect. Speech that tests boundaries, challenges existing notions, and subverts expectations is most likely to be what the algorithms target. They label such speech lewd, indecent, pornographic, harassing, bullying or hateful—categories of content-discrimination the federal government protects from suit in 47 U.S.C. § 230(c)(2).¹⁶⁰ Google expelled *Guernica*, a literary magazine, from the AdSense program because *Guernica* ran a short story by Clancy Martin entitled *Early Sexual Experiences*.¹⁶¹ Martin is not prone to lewd and indecent speech. His work typically appears in the likes of *Harper's*, *McSweeney's*, *The London Review of Books*, and the *New York Times*.¹⁶² Google's algorithm, nonetheless, labeled *Early Sexual Experiences* as pornography.¹⁶³

There are other examples. Sahara Reporters is a website that coordinates the efforts of dozens of Nigerian citizen journalists. In response to a particularly shocking instance of police brutality, the editors chose to run the extremely graphic photos that resulted.¹⁶⁴ Google's algorithms found them too violent and it suspended Sahara Reporters from AdSense.¹⁶⁵

Facebook's content-censoring algorithms are similarly unforgiving. Facebook's algorithm will promptly delete Gustave Courbet's 150-year-old painting *L'Origine du monde* (*The Origin of the World*) if one tries to post it—and such louts run the added risk of

159. Jonathan Zittrain & John Palfrey, *Internet Filtering: The Politics and Mechanisms of Control*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 29, 46 (Ronald J. Deibert et al. eds., 2008) (“Internet filtering is almost impossible to accomplish with any degree of precision.”).

160. See 47 U.S.C. § 230(c)(2) (2012).

161. See MOROZOV, *supra* note 29, at 140–41.

162. See Clancy Martin, *Early Sexual Experiences: A Writer Recollects*, GUERNICA (Feb. 15, 2011), http://www.guernicamag.com/features/martin_2_15_11; see also Macy Halford, *Weekly Reader*, THE NEW YORKER: PAGE-TURNER (Feb. 18, 2011), <http://www.newyorker.com/online/blogs/books/2011/02/weekly-reader.html> (“I chanced on Clancy Martin's account of his early sexual experiences in *Guernica*'s new issue, which was graphic and disturbing (perhaps this was the intention).”).

163. See MOROZOV, *supra* note 29, at 141.

164. See *id.*

165. See *id.*

having their accounts suspended even for trying.¹⁶⁶ Photos of women's body-painted breasts displayed in support of a Breast Cancer Awareness Project were labeled pornographic and automatically deleted.¹⁶⁷ Facebook removed a gay kiss.¹⁶⁸ Facebook disabled the account of a woman who posted photos of her friend holding her newborn child shortly after birth,¹⁶⁹ and it censored a photo of a large nude statue on public display at the Burning Man festival.¹⁷⁰ Facebook's efforts have had a profound distortive effect. At least one art museum has chosen to censor its own photo exhibition—a Robert Mapplethorpe retrospective¹⁷¹—to avoid the wrath of Facebook's algorithm.¹⁷²

While Facebook's algorithms label art as pornography, they also label provocative political speech as harassing, bullying, irrelevant or nonproductive; Facebook removes that as well. According to a 2011 report by the John Milton Project for Religious Free Speech, nearly all major platform companies—from Google to Facebook—"have 'actively' censored Christian and conservative viewpoints."¹⁷³ In the anxious final weeks of the 2012 presidential election, Facebook took

166. See G. Roger Denson, *Courbet's Origin Of The World Still Too Scandalous For Media-Savvy Facebook!*, HUFFINGTON POST (Nov. 11, 2011), http://www.huffingtonpost.com/g-roger-denson/courbets-1866-the-origin-_b_1087604.html.

167. *Breast Cancer Body Paintings Called Pornographic By Facebook*, HUFFINGTON POST (Dec. 6, 2011), http://www.huffingtonpost.com/2011/11/03/breast-cancer-body-painti_n_1074725.html.

168. Lee, *supra* note 39.

169. Ryan J. Foley, *Facebook Apologizes For Censoring Birth Photographer Laura Eckert*, HUFFINGTON POST (Jan. 6, 2011), http://www.huffingtonpost.com/2011/01/07/facebook-apologizes-birth-photographer_n_805823.html.

170. Elinor Mills, *Oops! Facebook mistakenly censors Burning Man art*, CNET (Sept. 15, 2010), http://news.cnet.com/8301-27080_3-20016543-245.html?part=rss&subj=news&tag=2547-1_3-0-20.

171. Mapplethorpe's work has long posed a challenge to the First Amendment. The NEA's funding for a retrospective of his work caused Congress to revise the NEA's grant criteria, which ultimately gave rise to *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 603–04 (1998).

172. *Swedish Photography Museum Censors Photos To Avoid Facebook Conflict*, HUFFINGTON POST (Sept. 16, 2011), http://www.huffingtonpost.com/2011/09/15/swedish-photography-museu_n_965358.html.

173. See Jeremy Kryn, *Facebook, Google, Social Media Sites 'Actively' Censor Christian Content: Study*, LIFESITENEWS (Sept. 21, 2011), <http://www.lifesitenews.com/news/facebook-google-social-media-sites-actively-censor-christian-content-study>. The referenced study is: CRAIG L. PARSHALL, ET. AL., TRUE LIBERTY IN A NEW MEDIA AGE: AN EXAMINATION OF THE THREAT OF ANTI-CHRISTIAN CENSORSHIP AND OTHER VIEWPOINT DISCRIMINATION ON NEW MEDIA PLATFORMS (2011), available at <http://content.nrb.org/Webdocs/Legal/True%20liberty-in-a-New-Media-Age9-15-11.pdf>.

down a “popular piece of political propaganda” showing Barack Obama alongside Osama Bin Laden.¹⁷⁴ The message was “partisan, simplistic, and arguably misleading,” but as media accounts of the incident hastened to note, “that’s true of most political memes.”¹⁷⁵ Even though the meme went viral every time it was posted, Facebook not only deleted it thrice, but it froze the originating account for twenty-four hours, preventing the group from posting anything at all.¹⁷⁶ Facebook threatened to shut down the Facebook page “Chicks on the Right” for posting a message critical of Jay Carney, the White House Press Secretary.¹⁷⁷ Facebook also threatened to ban the associated personal account.¹⁷⁸ Conservative political activist Diane Sori’s account has been frozen at least six times for failing to speedily delete posts and failing to block users whose posts violate Facebook’s terms of service on the Sarah Palin Facebook fan page, which Sori administers.¹⁷⁹ Feeling unfairly targeted on Facebook, the Tea Party is now launching its own right-wing social network alternative to Facebook called “Tea Party Community,”¹⁸⁰ which already boasts

174. Will Oremus, *Did Facebook Censor an Anti-Obama Meme?*, SLATE (Oct. 31, 2012), http://www.slate.com/blogs/future_tense/2012/10/31/facebook_censors_anti_obama_navy_seals_meme_apologizes_breitbart_outraged.html.

175. *Id.*

176. *Id.*

177. Jason Howerton, *Facebook Apologizes for Threatening to Shut Down Conservative Fan Page Over Post Critical of Obama Admin.*, THE BLAZE (Jan. 23, 2013), <http://www.theblaze.com/stories/2013/01/23/facebook-apologizes-for-threatening-to-shut-down-conservative-fan-page-over-post-critical-of-obama-admin>. The post linked to a third-party blog post entitled “*You Know What? Liberal Hypocrisy is Starting to Cause Me Actual Physical Pain.*” and concluded with the message “Jay Carney can kiss my assular area.” *Id.*

178. Mockarena, *Forward This to Everyone You Know. Facebook Is Trying to Shut Us Down*, CHICKS ON THE RIGHT: BECAUSE CONSERVATISM NEEDS A MAKEOVER (Jan. 22, 2013), <http://chicksontheright.com/categories/the-makeover-and-or-miscellaneous/item/23715-forward-this-to-everyone-you-know-facebook-is-trying-to-shut-us-down#pagejump>. Amy Jo Clark and Miriam Weaver run the *Chicks On the Right* website under the pseudonyms Daisy and Mockarena. See Todd Starnes, *Conservatives Launch Facebook Alternative*, FOX NEWS (Jan. 31, 2013), <http://radio.foxnews.com/toddstarnes/top-stories/conservatives-launch-facebook-alternative.html>.

179. Liz Klimas, *Conservatives Continue to Accuse Facebook of Unfairly Blocking Them—Three New Cases Reported*, THE BLAZE (Mar. 27, 2013), <http://www.theblaze.com/stories/2013/03/27/conservatives-continue-to-accuse-facebook-of-unfairly-blocking-them-three-new-cases-reported>. The Group is “Barracuda Brigade for Our American Girl! 2012.” *Id.*

180. See Jason Howerton, *Conservatives Launch New Social Network to Escape Facebook ‘Censorship’—Will You Join?*, THE BLAZE (Jan. 31, 2013), <http://www.theblaze.com/stories/2013/01/31/conservatives-launch-new-social-network-to-escape-facebook-censorship>.

over 50,000 profiles.¹⁸¹ The Tea Party Community's homepage identifies itself as a "safe haven" for conservative political speech.¹⁸²

American conservatives are not the only group Facebook's algorithms silence. The author of *A Queer Thing Happened to America* saw the Facebook page promoting his book speedily removed.¹⁸³ Facebook also deleted an Arabic-language Facebook group with over 350,000 members that had called for a third intifada against Israel.¹⁸⁴ Chinese dissidents and politically unpopular social movements in authoritarian nations are the most frequently censored groups of all.¹⁸⁵

Digital speech intermediaries possess and exercise a new kind of control over the speech of individuals, associations, groups, and communities. It is sometimes the product of human decisions to exclude and censor from the common spaces that have become the forums for communication on the Internet. But more important than these human-driven interventions are the interventions of algorithms. Algorithms possess a power human censors never had. They have the capacity to engage in person-by-person and conversation-by-conversation regulation of the interactions between individuals and their online communities. Even though the decisions algorithms make often have enormous impacts on the lives of real people, they also often filter and distort in a way their programmers could never

181. *See id.*

182. *See* TEA PARTY COMMUNITY, <https://www.teapartycommunity.com> (last visited Nov. 19, 2013); *see also* Starnes, *supra* note 178 (describing the Tea Party Social Network and quoting Miriam Weaver, "Conservatives are desperate right now to find an outlet where they can speak freely and not worry about liberal trolls and censorship"). According to the article, "liberal 'trolls' are taking advantage of a Facebook algorithm that focuses on pages with controversial content" to silence conservative ideas they disagree with. *Id.*

183. *See* Michael Brown, *The Facebook Censor Strikes*, TOWN HALL (June 13, 2012), http://townhall.com/columnists/michaelbrown/2012/06/13/the_facebook_censor_strikes/page/full.

184. *See* Meredith Jessup, *Facebook Shuts Down 'Third Intifada' Group*, THE BLAZE (Mar. 29, 2011), <http://www.theblaze.com/blog/2011/03/29/facebook-shuts-down-third-intifada-group> ("While I oppose 'censorship,' I'm glad that Facebook has some standards of human decency."); *see also* Alex Margolin, *Facebook Refuses to Remove Group Calling for Third Intifada*, BACKSPIN (Mar. 29, 2011), <http://honestreporting.com/facebook-refuses-to-remove-group-calling-for-third-intifada/> (noting that Facebook shut down the group an hour after the article posted).

185. *See* MOROZOV, *supra* note 39, at 101–05 (describing how authoritarian regimes outsource censorship to companies like Facebook and Google). *See also id.* at 214 ("[A] 2009 study found that Microsoft has been censoring what users in the United Arab Emirates, Syria, Algeria, and Jordan could find through its Bing search engine much more heavily than the governments of those countries.").

have foreseen and did not intend. To grant these platforms and their algorithms insulation from legal regulation under the guise of protecting the “freedom of speech” set forth in the First Amendment stands to mean that there will be no necessary nexus—as there is in the physical world—between public values and the ability to speak and be heard.¹⁸⁶ Decisions about who may speak, who may participate, and who must stand silent will be more than merely privatized; they will be delegated to machines.

B. From Government Power to Private Power

There is no question that algorithms will play an increasingly important and sophisticated role in how individuals interact with one another. Rather, the question is whether the ways in which those algorithms are structured, the values they implement, and the ways they make decisions, will ultimately reside solely in the hands of private interests or if those decisions will be something that laws will have the capacity to shape.

Without government, it is almost certain that the ways in which people interact with one another will be guided by values orthogonal to those that have ordinarily been thought central to the First Amendment. Speech that might brook disagreement or start an argument—speech that might provoke, anger, or cut deep—is unlikely to be shared or promoted.¹⁸⁷ Even if it is shared and debated, perhaps out of vitriol alone, it might prompt some to leave the platform, or change the atmosphere of the conversations that occur. This may reduce the amount of uplifting and optimistic speech individuals engage in as they are drawn into debates about difficult partisan questions. If left purely to the market, platform providers will not tolerate speech that damages their commercial interests in this way.

These circumstances would seem to call for tough choices about what our society values. There is a challenging balance that must be

186. In the physical world, the First Amendment is shaped by a myriad of public values that are difficult, if not impossible, to replicate online. Public forums, such as schools, churches, and community centers are more easily built and made useful than a “local” community social network ever could be. Distributing a newspaper to the members of one’s community was as easy as printing and distributing it on the sidewalk, on porches, or in the park. But, in an era of Amazon Prime—when fewer and fewer ever venture forth into the “physical” public square to speak and be heard—it will be only through digital intermediaries that these messages get out. When that is so, it is worth considering whether these private intermediaries can be told to shoulder public responsibilities.

187. See HOLIDAY, *supra* note 152, at 49.

struck between competing irreconcilable interests. On the one hand, there is valuable speech that relates to community, shared values, and family; on the other hand, there is political speech that arouses rancor, dissention, and unorthodox views. We, as a polity, stand on the verge of tough questions about how to balance these interests in a meaningful way. We might think, in other words, that our society will soon confront a *political* question about how to strike an appropriate balance between individuals' interests in speaking freely and platforms' interests in censoring and organizing their users' speech commercially.

But, if the doctrines in the courts hold sway, there will not be a question to answer. There will be no balancing because the First Amendment will have already decided the question. Platforms' content-discrimination will be fully protected by the First Amendment. This is the vision ascendant in the federal courts. If no change is made, it will only harden further into amber in the years to come.

The case of Karen Beth Young illustrates how conventional First Amendment doctrine ignores the power of private platforms to profoundly shape the speech and autonomy of individuals.¹⁸⁸ Karen Beth has bipolar disorder,¹⁸⁹ causing her to behave in unconventional ways and saddling her with unconventional needs.¹⁹⁰ But, on Facebook, she found an unprecedented opportunity to connect with others.¹⁹¹ On Facebook, Karen Beth started "some very sincere relationships . . . [a]lbeit online, they were genuine and heartfelt."¹⁹² She soon had 5,000 Facebook friends, and Facebook required that she convert her account to that of a "Public Figure."¹⁹³ Dismayed by this because it would require her to expose much private information to the entire world, rather than her 5,000 friends (whom Karen Beth

188. For an excellent discussion, see Kashmir Hill, *Maryland Woman Sues After Being Banned by Facebook*, FORBES (Sept. 1, 2010), <http://www.forbes.com/sites/kashmirhill/2010/09/01/maryland-woman-sues-after-being-banned-by-facebook> (calling the Facebook "justice system" "Kafkaesque").

189. Amended Complaint for Injunctive Relief and Damages at 2, *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (No. 5:10-cv-03579-JF/PVT).

190. *Id.*

191. *Id.* at 2, 4, 5.

192. *Id.* at 9.

193. *Id.*

considered “real friends”¹⁹⁴), she started a Facebook petition to remove the 5,000 friend cap for private accounts.¹⁹⁵

Facebook disabled her account and all the pages she administered, which affected the speech interests of thousands who regularly interacted through pages set up by Karen Beth.¹⁹⁶ In her efforts to restore her account, Karen Beth used Facebook’s automated systems, sent numerous emails, called the Facebook offices, and eventually drove from her home on the east coast to Facebook’s headquarters in the Silicon Valley where she met a receptionist who would not identify herself.¹⁹⁷ Finally, Karen Beth sued Facebook pro se.

In *Young v. Facebook, Inc.*, Karen Beth’s lawsuit against Facebook included claims for deprivations of her First and Fourteenth Amendment rights and a failure on the part of Facebook to comply with the Americans with Disabilities Act (which requires places of public accommodation to account for the needs of those with special needs).¹⁹⁸ The District Court for the Northern District of California dismissed her First Amendment claim because Facebook is not a state actor,¹⁹⁹ and her Americans with Disabilities Act claims because Facebook is not a place of public accommodation.²⁰⁰

At no point did the court in *Young* grapple with the speech interests at stake in the case. Resolving the question on the grounds that Facebook simply owed Karen Beth no duty at all, the court believed that whatever speech interests she and the thousands of others who lost access to her pages possessed were so minimal they did not warrant careful examination. But, even if the court had held that she could bring suit against Facebook, 47 U.S.C. § 230 would have shielded Facebook from liability.²⁰¹ And, even if the court had navigated past the state action issues, the immunity statute, and the Facebook Terms of Service Karen Beth signed, it still may have held

194. *Id.*

195. *Id.* (The petition was entitled “Join Karen, petition Facebook Say No To 5000 Friends.”).

196. *Id.* at 10.

197. *Id.* at 8.

198. *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1113 (N.D. Cal. 2011). *See also Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *2 (N.D. Cal. Oct. 25, 2010).

199. *Young*, 2010 WL 4269304, at *2.

200. *Young*, 790 F. Supp. 2d at 1116.

201. *See Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003).

that Facebook had the right to engage in editorial decisions of its choosing because such decisions are Facebook's speech.²⁰²

Young is important for it reveals a seismic distortion in the values underlying the First Amendment.²⁰³ In a society that purports to hold individual autonomy and the right to speak and be heard at the apex of First Amendment values, there are now at least four levels of immunity for content-based censorship: (1) terms of service agreements that all users must sign waiving the ability to bring claims of unfair termination, censorship or exclusion; (2) the federal laws that immunize platforms from liability for content-discrimination; (3) that platforms are not recognized as state actors or places of public accommodation and thereby owe no duties to those who use them; and (4) the First Amendment itself, which courts are increasingly interpreting to mean that all decisions about what happens on an online platform constitute the speech of the platform and are therefore beyond the reach of law. All the forces of positive law now array themselves against the vindication of that most elemental of all First Amendment claims—that one has been unjustly silenced. More astoundingly, that silencing may not even have been the product of a deliberate human decision, but a software glitch. Algorithmic speech now possesses, it seems, greater constitutional protection than human speech.

C. The Courts' Cyber Utopianism

The reasons that the courts muscularly protect the speech of Internet platforms vary, but there has been, up to now, an underlying vision that unites them. This vision is the union of two powerful strands of First Amendment thought. The first, and less significant strand, is a general suspicion of all government intervention.²⁰⁴ But the second, and much more powerful strand, has been the courts' belief that the Internet is a fundamentally unintermediated

202. See sources cited *supra* note 14.

203. Compare *Young*, 2010 WL 4269304, and *Green*, 318 F.3d at 472, with *Associated Press v. United States*, 326 U.S. 1, 7 (1945) (holding that it “degrade[s]” the First Amendment to use it as a shield for business practices that restrict the “dissemination of information from diverse and antagonistic sources”).

204. For a prominent recent case in which this was the Court's overriding concern, see *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911 (2010). See also Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 146, 155 (2010) (describing how even the most permissive judges find speech suspect when drawn along “suspect lines,” and the least permissive find all government attempts to regulate speech highly suspect).

medium²⁰⁵—providing for the first time ever a million soapboxes on a million tiny streetcorners.²⁰⁶ This vision undergirds perhaps the most important judicial decision concerning Internet speech, the case of *Reno v. American Civil Liberties Union*.²⁰⁷

Congress passed the Communications Decency Act of 1996 (“CDA”) to protect children from the evils of online pornography and sexual victimization.²⁰⁸ As incoherent as it was unconstitutional,²⁰⁹ the Act sought to prohibit the knowing transmission of obscene or indecent messages to any recipient under 18 years of age,²¹⁰ and the knowing sending or displaying of patently offensive messages in a manner that was available to a person under 18 years of age.²¹¹ Vague and overbroad, the CDA was rapidly struck down by two different three-judge panels.²¹²

In a unanimous opinion authored by Justice John Paul Stevens, the Supreme Court also struck down the CDA.²¹³ Given the Court’s decision, it is hard to say precisely what prompted Justice Stevens to write so lengthy an opinion. One subsection is titled simply “The Internet” and eleven separately numbered sections canvas every conceivable argument.²¹⁴ Perhaps it was because the case was the Court’s first opportunity to comprehensively address freedom of speech on the Internet,²¹⁵ or perhaps it was precisely because the case was easy. Whatever the reasons, however, *Reno v. American Civil*

205. See Yoo, *supra* note 4, at 701–04.

206. See, e.g., Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1670 (1998); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1834 (1995); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1082–83 (1994).

207. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

208. See, e.g., *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1581 (1999); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 630–31 (1998).

209. See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 189 (1997) (calling it “badly drafted, inconsistently worded, and palpably unconstitutional”).

210. See 47 U.S.C. § 223(a) (1994 ed., Supp. II).

211. *Id.* at § 223(d).

212. See *Shea v. Reno*, 930 F. Supp. 916, 950 (S.D.N.Y. 1996); *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996).

213. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997).

214. See *id.* at 849–85.

215. See Steven G. Gey, *Reopening the Public Forum—from Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1610–11 (1998).

Liberties Union provided Justice Stevens an extraordinary opportunity to rhapsodize on liberty.

And, Rhapsodize he did. “Anyone with access to the Internet,” he wrote, can take advantage of “electronic mail (e-mail), automatic mailing list services, . . . ‘newsgroups,’ ‘chat rooms,’ and the ‘World Wide Web.’”²¹⁶ This place and all of its benefits are “available to anyone, anywhere in the world, with access to the Internet.”²¹⁷ For users, the Internet is comparable to both “a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”²¹⁸

In Justice Stevens’ view, more important than the benefits the Internet offered users was what it offered publishers:

From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. “No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.”²¹⁹

And, later in the opinion:

[T]he Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images,

216. *Reno*, 521 U.S. at 851.

217. *Id.*

218. *Id.* at 853.

219. *Id.*

as well as interactive, real-time dialogue. 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. As the District Court found, “the content on the Internet is as diverse as human thought.”²²⁰

Justice Stevens’ vision of the Internet was as a stateless libertarian utopia, limitless in possibility, vast in scope, destined to vindicate the First Amendment’s highest aims. The Internet would be an unregulated marketplace of ideas and the ultimate demonstration of the power of that marketplace.

The implications of *Reno v. ACLU* could hardly be weightier, for it embossed a potent image that still exerts considerable force even as it drifts further and further from reality.²²¹ *Reno v. ACLU* imported into First Amendment thought the notion that the Internet can suffer no scarcity, abide no censorship, and offer everyone an audience. The Internet would be a Speech Utopia. But, just as utopia literally means “no place,” the courts read *Reno v. ACLU* to mean that the First Amendment demands “no law.”

This play has been staged before and we are entering its second act. The protection of data, editorial control, and platform rights in the name of liberty mirrors the rigid protection for liberty of contract *Lochner* once enshrined.²²² The question of what it means to have the “freedom” of speech has drifted from a freedom centered on individual liberty to a freedom centered on powerful institutions, implemented as a blanket prohibition on government action. This is backward, not because it enhances the power of a few speakers at the expense of the many, but because it means that our discourse stands

220. *Id.* at 870.

221. See WU, *supra* note 18 (discussing the way in which new media platforms eventually come to be controlled by powerful centralized interests).

222. Cf. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 400–01 (1990) (arguing that a *Lochner*-ian vision of the First Amendment would hold that lacking the resources to speak constitutes no First Amendment harm); cf. also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 27–28 (2004) (making the slightly different point that powerful corporate interests are attempting to coopt the meaning of liberty to protect corporate and commercial speech interests in the modern information society).

to be manipulated and controlled in ways society cannot reflect upon nor shape. The First Amendment values speech to the limits of human thought, but Facebook and Google value speech to the limits of its commercial value.

What is at stake, then, is the very idea that government intervention can protect the freedom of speech and even enhance that freedom. The closed, platformed, and unregulable Internet remains perhaps only a glimmer on the horizon, but it poses difficult questions that society should probably have a hand in answering: What happens to dissent, tolerance, and civic engagement when speech is routed, controlled, and suppressed invisibly and instantaneously?²²³ How will our notions of justice, fairness, and equality be shaped when the marketplace of attention—rather than the marketplace of persuasion—becomes the primary exchange upon which ideas trade? What will become of society if individuals have the sense that they cannot speak freely for fear that some intermediary will quietly sensor their thoughts?

IV. The Place of Speech in Society: An Old Debate Revisited

The vision of speech that now prevails—as absolutely protected from the action of the state—represents the end of a great and necessary movement. It represents victory for the notion that the ideas that matter cannot be selected in advance. And, it signifies an enormous respect for conscience and autonomy. But, it is a bludgeon. The notion that the government has *no* role to play has served us well, but in the age of digital intermediaries with enormous capacity to control and shape our cultural conversation, the consequences of withdrawing government entirely defeat the very ends non-interference was meant to protect. It might, therefore, be profitable to revisit the origins of the institution of speech itself and, in doing so, perhaps briefly rearticulate its purposes.

A. Speech and Liberty

Speech is more an institution than an action. The freedom of speech preserves the right to speak, but only incidentally and not even primarily.²²⁴ Fraud, conspiracy, and treason are ordinarily best

223. See MOROZOV, *supra* note 39, at 197–203.

224. See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 274–76 (2009).

accomplished in words, but we infrequently shield them.²²⁵ Paintings, seldom inscribed in words, are at the freedom's core.²²⁶

Speech, as an institution, serves many functions. One of these is to protect conscience from coercion.²²⁷ This can be accomplished, as for centuries it has been, by building a wall between the individual and the state. Within the citadel, on the rostrum, the speaker cannot be touched. He cannot be silenced. He must be free to say his piece, take his stand, bring to light his facts, make his case. He, the lone dissenter, is our culture's paragon.²²⁸ We array all our institutions so as to let him speak and, in doing so, we vindicate our highest aims. It is the essence of esteem for deliberation, respect for conscience, and the ultimate admission of our belief in our own capacity for error. Off the rostrum, the dissenter must respect the laws, but while on it, he may urge us all to break them.²²⁹

These beliefs are rooted in a history. They begin more than half a millennium ago with the rise of printing.²³⁰ Before the invention of the printing press, speech had no particular salience as an untouchable component of cultural and political life.²³¹ Much as any other conduct, it could be deterred or it could be punished, but it was of modest importance. Without the ability to reach a mass audience, speech was not conceptually or practically important.²³²

There was a sudden change with the invention of the press. Moveable type destabilized existing hierarchies.²³³ Individuals for the first time could share information and beliefs widely and permanently. The state, still attached to old values and old frames, sought control.²³⁴ The creation of the printing press enhanced the power of the individual to influence the affairs of the state and of

225. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992).

226. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 569 (1995).

227. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

228. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–13 (1986).

229. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969).

230. See M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have A Message*, 57 GEO. WASH. L. REV. 1459, 1462–66 (1989).

231. See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 264 (1994).

232. See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 14–15 (1983); see M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 136 (1989).

233. See M. Ethan Katsh, *Communications Revolutions and Legal Revolutions: The New Media and the Future of Law*, 8 NOVA L. REV. 631, 646–55 (1984).

234. See KATSH, *supra* note 232, at 137–38.

society, and in doing so, brought for the first time into profound conflict individual conscience, private power, and government authority.²³⁵

The idea embedded in freedom of speech—the very reasons for it, and our notions of it—are ineluctably wrapped in the most important disruption that followed from this fateful invention: the Reformation.²³⁶ It was a Bible Gutenberg printed.²³⁷ At a time when faith permeated every facet of individual and communal life, the notion that one might hold the words of God—and thereby know them—possessed unimaginable power.²³⁸ But, to obtain them required the means of mass reproduction and mass communication.²³⁹ Martin Luther's theses could never have spread to every corner of the world without the technology of the press.²⁴⁰

Technologies possess a reflexive quality. As we shape them, so they shape us. The notion that one could obtain the words of God introduced into Western thought the then revolutionary idea that one was entitled to interpret them²⁴¹—to know them for oneself.²⁴² This idea soon gave rise to another, even more revolutionary idea that would shape the renaissance, spark the enlightenment, and change the world.²⁴³ Not only was it allowable to look at the text, Protestants

235. See Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 298 (2001).

236. See Ronald K.L. Collins, *Paratexts*, 44 STAN. L. REV. 509, 532–33 (1992); Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 324–27 & nn.1–5. (2003); Katsh, *supra*, note 230, at 1468 n.41.

237. See JAMES THORPE, *THE GUTENBERG BIBLE: LANDMARK IN LEARNING* 26 (2d ed. 1999)

238. See ROBERT BROWN, *THE SPIRIT OF PROTESTANTISM* 67–68 (1965); A.G. DICKENS, *THE ENGLISH REFORMATION 189–93* (1971); LOUIS BOUYER, *LITURGICAL PIETY* 253–54 (1955).

239. See A.G. DICKENS, *REFORMATION AND SOCIETY IN SIXTEENTH-CENTURY EUROPE* 51 (1966).

240. See ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 303–07 (1979).

241. Rather than their adherence to the faith, the Anglican Book of Common Prayer asked only that priests resolve to teach the doctrine that he was “persuaded may be concluded, and proved by the scripture.” *FIRST BOOK OF COMMON PRAYER OF EDWARD VI*, Ordinal 494 (1869) (1st ed. London 1549).

242. See MARSHALL McLuhan, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 206 (1962, U.S. prtg. 1964).

243. See Calvin Massey, *Civic Discourse Amid Cultural Transformation*, 12 CARDOZO STUD. L. & LITERATURE 193, 194–98 (2000).

soon understood that the text alone possessed authority²⁴⁴—*Sola scriptura* (“by scripture alone”).²⁴⁵ The printing press took from Rome and Westminster something a millennium of warfare never had.²⁴⁶ The ideas of individual man, for perhaps the first time, mattered more than any official orthodoxy.

How dangerous this was. Yet, as the forces of the Church and the state struck back, its adherents grew only more tenacious.²⁴⁷ Laws against sedition became more invasive and more permeating.²⁴⁸ Searches were conducted under general warrants to wipe out dissidents and radicals.²⁴⁹ New laws were enacted, punishments escalated, licensing laws decreed, and old laws distorted to encompass the speech of the radicals.²⁵⁰ These changes were not marks of a strong state, but emblems of a weakness.²⁵¹ And they circled in on themselves. As the state sought to suppress ever more, citizens became more distrustful, more concerned with individual rights, and more certain that individual liberty and dignity should be Western culture’s most fundamental commitments.²⁵²

244. See Westminster Confession of Faith I.9 (1647), reprinted in UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, BOOK OF CONFESSIONS 6.0009 (2d ed. 1970); J. SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN ESQ. 25–26 (London 1699).

245. Thomas C. Grey, *The Constitution As Scripture*, 37 STAN. L. REV. 1, 5–6 (1984) (“the bible was its own interpreter”).

246. ELIZABETH L. EISENSTEIN, THE PRINTING REVOLUTION IN EARLY MODERN EUROPE 165–68 (2005).

247. See LEONA ROSTENBERG, THE MINORITY PRESS & THE ENGLISH CROWN 4 (1971) (“[T]he official attempt to stifle the minorities in England failed. Long after the defeat of the Armada the orthodox movement persisted in England. The ‘Puritannicall spirits’ so abhorred by James I triumphed completely and mastered the realm bequeathed by him to his son.”); FREDERICK SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776 141, 179 (1965).

248. See Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520–1640*, 146 U. PA. L. REV. 323, 417–32 (1998).

249. See Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 717–22 (1985).

250. Lawrence S. Zacharias, *The Narrative Impulse in Judicial Opinions*, 23 LAW & LITERATURE 80, 90–93 (2011).

251. See HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 92–93 (Carl J. Friedrich ed., 1968) (“[S]ince authority always demands obedience, it is commonly mistaken for some form of power or violence. Yet authority precludes the use of external means of coercion; where force is used, authority itself has failed.”).

252. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 323–25 (2008); Zacharias, *supra* note 250, at 92 (“[T]his was a new reality that Englishmen were experiencing for the first time after 1580. In this context, ‘Elizabethan Englishmen began

From these beginnings there is etched somewhere deep in our social consciousness—passed down in a father’s glance, a mother’s stare—an ineradicable image from the 1580s.²⁵³ An image of rebel Puritans working desperately through the night, hands shaking, etching ungrammatical words on cheap paper, moving the presses to escape capture²⁵⁴ as English censors roam the streets.²⁵⁵ These Puritan publishers, outlaws in an authoritarian state, would be tortured and imprisoned if they were captured.²⁵⁶ Yet they published because they believed so strongly in the message they had to share.²⁵⁷

This image flickers forward through the centuries. It is our vision of expression. It is the man before the tank, Solzhenitsyn in the Gulag, the Twitter revolutionary.²⁵⁸ These images—all from authoritarian regimes—are what we point to because they embody our notion of why we protect expressive freedom. Those radical Puritans working furiously through the night are who we are trying to shield with this First Amendment of ours.

The roots of the First Amendment, thus, run deep. So deep we scarcely see them. The First Amendment acknowledges a pre-political commitment at our society’s heart. It is a right to decide for ourselves the merits and demerits of a claim. It has never been about building a wall—senseless and unfeeling—that bars the state from all

to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing.”).

253. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 7 (Jamie Kalven Jr. ed., 1988) (“First and most important, the freedom of speech clause of the First Amendment has been the beneficiary of the religion clauses.”).

254. See Janet Halley, *Of Time and the Pedagogy of Critical Legal Studies, Commentary to DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHIES: A POLEMIC AGAINST THE SYSTEM* 189–90 (2004).

255. See Zacharias, *supra* note 250, at 92.

256. Some of these Puritan publishers were, in fact, captured and tortured. See Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 120–22 (1992); Meyerson, *supra* note 235, at 301–02.

257. See WILLIAM PIERCE, *AN HISTORICAL INTRODUCTION TO THE MARPRELATE TRACTS: A CHAPTER IN THE EVOLUTION OF RELIGIOUS AND CIVIL LIBERTY IN ENGLAND* 219–40 (1908). For an account of at least some of the ways this radicalism echoed and influenced English thinking in the decades that followed, see CHRISTOPHER HILL, *MILTON AND THE ENGLISH REVOLUTION* 93–116 (1977).

258. See, e.g., MOROZOV, *supra* note 39, at 1–5; ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1st ed. 1973); James Barron, *Crackdown in Beijing: One Man Can Make a Difference: This One Josted Briefly with Goliath*, N.Y. TIMES (June 6, 1989), <http://www.nytimes.com/1989/06/06/world/crackdown-beijing-one-man-can-make-difference-this-one-josted-briefly-with.html?pagewanted=all>.

participation in the sphere of speech.²⁵⁹ Rather, the institution of speech was meant to draw a circle around individual man, a circle within which he possesses the liberty to choose what he will believe, and find others he might convince to do the same.

B. Speech as a Means and Not an End

This vision of the history and potential future of speech is one of a robust and still deeply libertarian institution. It is a vision of speech as performing the function of maintaining individuality, tolerance and multiplicity in society by creating a sphere beyond coercive reach. But it understands that speech is a means, and not an end. That speech serves some purpose in society.²⁶⁰ Until relatively recently, this was how the judiciary understood it as well.²⁶¹

Neither Justice Holmes nor Justice Brandeis ever thought speech, as speech, was an end unto itself.²⁶² For each, the point and purpose of speech was to carve a space in our political discourse in which it could persuade on the merits of its arguments. In *Abrams*, *Gitlow*, and *Whitney*, these Justices—who laid the foundation for so many of the cases that came after—relied on the notion that the First Amendment protects speech so as to protect an individual’s opportunity to persuade and be persuaded.²⁶³ This is an aim motivated by a profound respect for both individual autonomy and the power of speech to legitimize the exercise of authority. This is entwined in Brandeis’ famous lines: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²⁶⁴ “Such must be the rule if authority is to be reconciled with freedom.”²⁶⁵

259. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785–87 (1987).

260. See, e.g., Balkin, *supra* note 140, at 20.

261. See *KALVEN*, *supra* note 253; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.”).

262. See *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (articulating that the purpose of First Amendment protection is to preserve a sphere in which speech is given the opportunity to persuade on its merits); *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.”).

263. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 337–38 (1991).

264. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

265. *Id.*

Even Justice Hugo Black—for whom “no law” meant “no law”²⁶⁶—believed that the state had some role to play where it could enhance, rather than diminish, those aims. In *Associated Press v. United States*, Justice Black wrote on behalf of the Court that it “degrade[s]” the First Amendment to use it as a shield for business practices that restrict the “dissemination of information from diverse and antagonistic sources.”²⁶⁷ In *Marsh v. Alabama*, he wrote that where private actors occupy positions akin to public ones, they possess “an identical interest in the functioning of the community in such manner that the channels of communication remain free.”²⁶⁸ As late as 1980, this principle—that the government could enact speech-enhancing legislation—was solid First Amendment doctrine.²⁶⁹

Now, it wobbles. In the thirty years since *PruneYard Shopping Center v. Robins*, the notion of speech as a means to an end has somehow collapsed into an end itself. In *R.A.V. v. City of St. Paul*, the Supreme Court declared its new understanding of the First Amendment: that, heretofore, it would operate as the Fourteenth Amendment liberty of contract once did.²⁷⁰ The Court would apply strict scrutiny to everything that touched upon speech, not just regulations that endangered important speech interests.²⁷¹ If not for the dangers this doctrine now poses to the very interests it seeks to protect, this understanding might have been a great victory. Today,

266. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 717–18 (1971) (Black, J., concurring).

267. *Associated Press v. United States*, 326 U.S. 1, 7, 20 (1945); see also *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 602–03 (1953) (“The press . . . serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”); *Kan. City Star Co. v. United States*, 240 F.2d 643, 666 (8th Cir. 1957) (“Freedom to print does not mean freedom to destroy. To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends . . .”).

268. *Marsh v. Alabama*, 326 U.S. 501, 507 (1946).

269. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80–81 (1980); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 801 n.18 (1978) (“This court has held that application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment.”).

270. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992).

271. *Id.* at 384–86; see also Kagan, *supra* note 15, at 416–23 (explaining the puzzle of *R.A.V.* and attempting to proffer a justification for the Court's holding—ultimately finding one in deep suspicion of government motives whenever the government intervenes in a content-discriminatory manner).

however, it threatens to undermine the very interests in liberty and autonomy at the core of the First Amendment precisely because those interests stand to be increasingly conscripted and controlled by powerful private entities.

It is not that the Court has distorted First Amendment doctrine in moving toward the paradigm it has. Rather, we are experiencing a change in underlying facts about the world that will force a radical reimagining of how the values in the First Amendment are to operate.²⁷² The philosophy of *R.A.V.* and its progeny no longer protects the interests it was meant to. The preservation of First Amendment liberty in the new information society demands government empowerment to preserve the interests at the First Amendment's heart.

V. Toward a New Conception of Expressive Freedom

The changes wrought by the concentration of algorithmic power in the hands of a few platforms on our common discourse will require that the Court brush off some old First Amendment doctrines and fashion some new ones.

It is worth emphasizing that much of modern First Amendment doctrine need not change, even in the Internet's new speech context. As the preceding section showed, the principle guiding First Amendment doctrine has long been, and should be, *individual* liberty—concern with whether a government intervention enhances individual autonomy and promotes important political and cultural deliberation. Because government regulations that single out speakers and speech for their views and opinions are anathema to this purpose, courts should remain vigilant where the First Amendment's core concerns with content and viewpoint discrimination are plainly implicated. The overriding importance of applying strict scrutiny to legislation that targets speech on the basis of its content or viewpoint is unaffected by the technological power of Internet platforms.

But, on platforms that possess the kind of power Facebook and Google wield, at least five kinds of content-based government interventions should not be subjected to traditional heightened

272. Scholars have begun to grapple with this issue. See, e.g., LESSIG, *supra* note 18, at 318–19; Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 6–11 (2012); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1674–76 (2011); Christopher Wittman, *Information Freedom, A Constitutional Value for the 21st Century*, 36 HASTINGS INT'L & COMP. L. REV. 145, 146–47 (2013); Yoo, *supra* note 4.

scrutiny. First are those that seek to vindicate procedural justice values by, for instance, requiring that a platform provide some specified amount of process before terminating user accounts or censoring user speech. Second are those that require viewpoint neutrality or content-tolerance; for example, those requiring a social network or search engine to not discriminate against speech on the basis of its political viewpoint. Third are those that require transparency and disclosure; for example, those requiring that speech platforms explain openly how their ranking algorithms work. Fourth are those that limit the ability of these platforms to gather, transfer, and sell personal user data. Fifth are those that limit the ability of platforms to write contracts requiring users to alienate aspects of their identity or intellectual property.

These are all likely to be called content-based restrictions on platform “speech” under the rule the Supreme Court announced in *Sorrell*, and under modern First Amendment doctrine will be subjected to heightened (probably strict) scrutiny. There are some caveats to this rule, tucked away in the recesses of the First Amendment. Older First Amendment doctrine, such as that promulgated in *Associated Press v. United States* and *Marsh v. Alabama*, would have no trouble, for instance, upholding such regulations.²⁷³ Even modern First Amendment doctrine retains some space for such regulation, established in cases like *Turner Broadcasting v. FCC*.²⁷⁴ But the exceptions they carve are exceedingly narrow. For the most part, modern First Amendment law makes it extremely unlikely that most statutes drafted with these purposes will receive anything less than strict scrutiny.²⁷⁵

273. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80–81 (1980); *Marsh v. Alabama*, 326 U.S. 501, 507 (1946); *Associated Press v. United States*, 326 U.S. 1, 7, 20 (1945).

274. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 654–57 (1994) (explaining that any regulation limiting the editorial discretion of cable companies must be content-neutral, serve a significant governmental interest, and leave open alternative channels of communication).

275. In particular a case called *Tornillo* and another called *Pacific Gas*, coupled with *R.A.V.* and *Sorrell* mean that any content-based imposition on the editorial discretion of powerful speech platforms will nonetheless be subjected to strict scrutiny analysis. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992) (“[T]he First Amendment imposes . . . a ‘content discrimination’ limitation upon a State’s prohibition of [even concededly] proscribable speech.”); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 12 (1986) (responding to a requirement that public utilities include a third-party newsletter in their billing envelopes the Court responded by noting that “forced associations that burden protected speech are impermissible. The Commission’s order is inconsistent with these principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of

But, they should not be subjected to such heightened scrutiny requirements. The exceptionally complex interaction between individuals and digital speech platforms mediated by computer algorithms will require speech-regarding legislation of unprecedented depth and detail. Such complex statutory schemes, moreover, can be easily stymied where one element of the scheme is singled out and then struck down, even though it does not pose a threat to critical constitutional interests in the context of the statute as a whole. This is one of the most important principles underlying across-the-board deference to economic legislation. Even where no individual element of the statute is perfectly consistent with every constitutional value we might regard as prized, in the context of necessarily complex legislation meant to advance important constitutional values, the perfect is the enemy of the good.

Most important of all, not all content-based and viewpoint-based legislation is the same. There is a fundamental distinction—a distinction that *R.A.V.* and *Lochner* both ignored—between legislation that *promotes* individual liberty and legislation that *restricts* individual liberty. Laws that single out individuals or groups on the basis of their ideas are not the same as laws that seek to restrict the power of private actors to restrain the speech of others. Each of the five categories of interests that should be subject to reduced scrutiny seek to free individual speakers from the restraints that might be imposed upon them by others. By enhancing process, tolerance, access to information, and privacy, legislation designed to effectuate such aims differs markedly from archetypical content-based legislation. It does so precisely because it is directed at eliminating restraints that would otherwise be imposed by powerful institutions. Where legislation seeks to prevent platforms from restraining the speech of individuals by filtering it, distorting it, chilling it, or censoring it, that legislation should not be subjected to strict scrutiny.

the viewpoints of the selected speakers.”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down a statute that required that Florida newspapers print replies from political candidates to editorials attacking their personal character, the Court wrote that “[c]ompelling editors or publishers to publish that which ‘reason’ tells them should not be published” is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper.”).

A similar principle already quietly resides in the interstices of First Amendment doctrine, at least to some degree. In the 2001 case *Bartnicki v. Vopper*, for example, the Court confronted circumstances that placed two of the First Amendment's most compelling interests directly into conflict—"on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."²⁷⁶ Perhaps the Court only balanced these concerns in *Bartnicki* because it felt the conflict unavoidable, but the speech interests in cases like *Young* present no less compelling conflicts. Just as the Court was ultimately forced to assess the important speech interests on both sides in *Bartnicki*, so too should the courts grapple with the important speech interests that are at stake when Facebook censors art, political speech, news, and family photos. It is no argument to say that Facebook is a free service and that participation is a privilege. Not on a platform home to 1.1 billion active users across the globe that has become perhaps our society's most important center for political and civic life.²⁷⁷

Conclusion

The information age is a new paradigm, and new paradigms mean more than casting old ideas in new frames. New paradigms mean dislocation and division. New paradigms require an acceptance that when fact and principle diverge it is the facts, ultimately, that matter.²⁷⁸ We need a First Amendment that operates functionally, not formally—an Amendment that preserves, foremost, the rights of individuals to engage, participate, speak, persuade, and be persuaded on the merits. We need a new First Amendment if we are to navigate between the promise and perils of the New Speech.

Even in the current legal landscape where the First Amendment is hardly ever in issue because terms of service contracts and federal law align against the vindication of speech claims by individuals, courts would better serve First Amendment values if they articulated

276. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

277. See David Lat, *Facebook Banned Me! Worst. Week. Ever.*, N.Y. OBSERVER (Mar. 4, 2008), <http://observer.com/2008/03/facebook-banned-me-worst-week-ever/?show=all> ("[A]fter enduring the hell of five days without Facebook, I will not stray again. The sanction has served its purpose.").

278. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954); see also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421–22 (1960); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

the speech consequences of their decisions.²⁷⁹ By doing so, courts can help show the ways in which the First Amendment is disserved by the current legal regime which prevents all government interference with the censorship of private platforms.²⁸⁰ But, this will require recognition by the judiciary, and by society more broadly, of the ways in which the New Speech differs from the old. Until that recognition comes, we wait. And in the law's deep glens, in the streams and the starscapes crossed with vermiculate patterns, far off in the distance, "reawakens *Lochner*."²⁸¹

279. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 359–67 (2011) (describing the important role of Courts in articulating social and political values even where they are not institutionally suited to address the problem in a satisfactory way).

280. Courts should also try to deter attempts to evade the First Amendment by government and private actors who will endeavor to hiding important decisions about speech in Code they write and the consumer protection and competition policies they enforce. This may be an impossible goal to vindicate in the judiciary, but courts might nonetheless try.

281. *Sorrell*, 131 S. Ct. at 2685 (Breyer, J., dissenting).
