CAN THE FIRST AMENDMENT SCALE?

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American judges today preside over a laissez-faire regime of "editorial discretion" for private media entities. That approach promotes freedom of speech when applied to entities such as newspapers that handle content at a relatively small scale. But applied to entities such as Facebook that handle millions of items of third-party content a day, the laissez-faire approach threatens free speech by concentrating unchecked censorial power in the hands of a few companies. That outcome is probably avoidable, but only at the price of difficult transformations in First Amendment law that seem to carry their own significant risks. These changes will include a weakening in the editorial concept and a diminished role for the judiciary in defining the public law of free speech.

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Introduction

When editors decide what not to print, they exercise a kind of censorial judgment. Authors sometimes dispute these judgments. Contemporary First Amendment doctrine works hard to confine those disputes to the editor's office. Attempts by public authorities to override editorial judgments over content are considered invalid, and essentially anyone with selective power over the transmission of third-party content is considered "editorial." This regime ensures that contract will govern any controversies between authors and editors that spill into the courtroom.

But like contract law itself, the First Amendment's editorial protections produce different effects at different scales. Both contract law and editorial protections promote pluralism and choice, at least in principle, when they are applied to small enterprises; but when they are applied to the interior operations of large-scale organizations, they serve mainly as a legal backbone for efficient private governance. And if the editor/censors who inspired so much First Amendment doctrine in the twentieth century worked as artisans in workshops, then Facebook runs the editorial equivalent of a Tesla plant, turning out editorial judgments by the millions every day.

High industrialization of this kind often leads to changes in the way that industries are governed. Today Tesla Motors operates within an agency-driven regulatory environment.[1] But Tesla's 19th-century predecessors operated under a very different regime. Common law set the pace, and legislation and regulation played at most a marginal role. Rules rather than standards predominated. This rigidity left little room for judges to balance equities in any given case. And the most frequently decisive rule—namely, the threshold requirement that injured plaintiffs establish privity of contract with the manufacturer—pushed auto safety policy firmly into the realm of private ordering.[2] Injured plaintiffs' rights in tort

[1] For example, both the NHTSA and EPA regularly impact GM's decision-making.

[2] Winterbottom v. Wright, 10 M & W, 152 Eng. Rep. 109 (Exch. Pleas 1842).

depended not on the common law, but on contractual terms that consumers played no role in drafting.[3]

The contemporary law of editorial disputes has much the same flavor, with a couple of variations. The first is that our First Amendment common law, unlike the old law of tort, affirmatively *displaces* most legislative or regulatory policy from the field—and where online editorial disputes are concerned, 47 U.S.C. § 230(c)(2) mostly forecloses judicial policymaking as well. The second is that the law of free speech doesn't rely on privity doctrine to push disputes into the realm of private ordering; instead, it does so through First Amendment protections for editorial discretion and through a generous interpretation of § 230(c)'s twin shields against publisher liability.[4]

There is nothing illogical about extending this approach to a Facebook-like platform engaged in world-scale speech governance—indeed that approach offers the path of least resistance at both a conceptual and a practical level. But this approach would also concentrate an incredible amount of unchecked yet state-like censorial power in the hands of a few people. That is a strange role for the First Amendment to play. Avoiding this absurdity is possible, but it will require our model of free speech law to undergo significant reinvention.

The arc of auto safety's reinvention is well-known. *Winterbottom v. Wright*'s privity bar produced cruel outcomes that later courts attempted to avoid by piling a series of common-law exceptions onto the rule.[5] Eventually the *Buick v. MacPherson* opinion set privity aside in favor of a much more flexible standard based on the foreseeability of the plaintiff's injury.[6] This adjustment refocused judicial decision-making (and hopefully the automakers themselves) on safety rather than

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[3] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to The Consumer)*, 69 YALE L.J. 7 (1960); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

[4] For the First Amendment, see Miami Herald v. Tornillo, 418 U.S. 241 (1974); Zhang v. Baidu, 10 F. Supp. 3d 433 (S.D.N.Y. 2014); La'Tiejiera v. Facebook, 272 F. Supp. 3d 981 (S.D. Tex. Aug. 7, 2017). On § 230(c)(1), *see* Zeran v. America Online, Inc., 129 F. 3d 327 (4th Cir. 1997).

[5] These cases involve "inherently dangerous products" like boiler pots, poisons, and scaffoldings. *See, e.g.,* Thomas v. Winchester, 6 N.Y. 397 (1852) (liability for damages from poison sold as mislabeled drug); Statler v. Ray. Mfg. Co., 195 N.Y. 478, 482 (1909) (manufacturer liable for damages from a "negligent[ly] construct[ed]" coffee urn).

[6] MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

on contract-law abstractions. Subsequent common-law innovations enlarged automakers' sphere of public responsibility further.[7] But no amount of innovation in the common law could overcome the judiciary's inherent limits as a regulatory institution—its limits on standing and remedies, its generalistic expertise, its reactive rather than proactive orientation. Congress ultimately mitigated these institutional shortfalls by assigning the problem of auto safety to agency regulators.

I think it is likely that the law surrounding platform content governance will go at least part of the way down this same path—first a softening of doctrinal rules in the direction of standards and proportionality, and second a wider role for complex public regulation in content governance issues. Just as very little depends on whether Tesla motors is in contractual privity with an injured passenger, the law may eventually come to recognize that very little public policy should turn on the question whether Facebook is styled an "editor" or a "passive conduit."

In this Essay, I will briefly discuss some ways that First Amendment doctrine in its present shape overprotects the censorial prerogatives of giant, centralizing speech governors like Facebook. I will also allude to the ways that conventional First Amendment analysis might be modified to accommodate a wider role for public policy. Finally, I will discuss the institutional limitations that will make it difficult for courts to oversee this kind of policy regime without significant and unprecedented levels of administrative support.

I. BALANCING PLATFORM AND PUBLIC INTERESTS

Facebook makes lots of content decisions about the third-party content it hosts, and many of these seem unavoidably expressive.[8] But Facebook is one company and its users are billions. The company's stake in expressing itself editorially is genuine if perhaps a little abstract, while the downstream impacts of these practices on user speech interests generally are concrete, indisputable and enormous. Laws regulating Facebook's content practices may generally harm these downstream interests, or they may help them; much is debatable here.[9] But at any

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[7] Greenman v. Yuba Power Prods., 59 Cal. 2d 57 (1963).

[8] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Eric Goldman, *Content Moderation Remedies*, MICH. TECH. L. REV. (forthcoming); Craig Silverman, *Black Lives Matter Activists Say They're Being Silenced by Facebook*, BUZZFEED NEWS (Jun. 19, 2020, 7:59 AM).

[9] On the danger of collateral censorship, *see generally* Daphne Keller, *Internet Platforms: Ob-*

rate we should ultimately judge the wisdom of laws regulating Facebook's content policies in terms of their downstream effects on speech rather than the extent of their incursions onto the company's own expressive turf.

I suspect this is how most lawyers actually think about these issues as policy. Even the most strident defenders of platform editorial freedom tend to rest their case on the concept's downstream benefits to users and the public sphere as a whole rather than on, say, Facebook's interest in corporate self-fulfillment.[10] If that is the case, then the best reason for the law to treat a platform's own expressive rights as formally significant is for their instrumental role in serving a broader range of expressive interests that are ultimately more important.

Editorial rights for traditional media institutions play this instrumental role fairly reliably over the long run. Few American lawyers would argue that a newspaper shouldn't have the right in the sixty days before an election to slant its editorial decisions hard against one candidate or the other. The point here isn't just that the newspaper has some moral right to expressive liberty; it is that aggressive, adversarial editorializing in newspapers promotes, at least plausibly, exactly the kind of democratic pluralism that the freedom of speech is designed to promote.

Suppose that Facebook threw its editorial weight around the same way, selectively amplifying and tamping newspaper coverage and get-out-the-vote messaging around competing candidates based on pure partisan preference.[11] Maybe there is some Randian case to be made that a predominant, arguably monopolistic social platform has a moral right to engage in activities that would be called election meddling if undertaken by a foreign government; but it seems tenuous to say in a case like this one that such a platform's interests would align meaningfully with any public-facing justification for free speech. Indeed, this kind of action would run sharply *against* most or all of these justifications.

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servations on Speech, Danger and Money, HOOVER INSTITUTION AEGIS PAPER SERIES NO. 1807 (2018); *see also* Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, LAWFARE (Dec. 7, 2020, 1:47 PM) (envisioning the outlines of a First Amendment jurisprudence of platform law based entirely on downstream user effects).

[10] Goldman, *supra* note 8; Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?,* 1 J. FREE SPEECH L. 97, 113 (2021) ("The reason we grant editorial rights to other media such as newspapers and websites that provide their own content is because we think public discourse is enhanced when publishers are able to present coherent, consistent products with consistent messages.") .

[11] Jonathan Zittrain, *Engineering an Election,* 127 HARV. L. REV. F. 335 (2014).

Of course, this is an extreme hypothetical—but I will also note that it is hard even to imagine how editorial rights for more traditional media institutions such as newspapers or even broadcasters could result in this kind of unilateral suppression. The point here, to be clear, is not to say that we should necessarily regulate Facebook's content moderation practices—only to say that the public-facing justifications for protecting editorial rights *as such* seem to fade out significantly, or at least to become significantly more fraught, as the editorial operation scales up.

It would therefore seem to make sense to weigh platform-regulating laws' constitutionality primarily in terms of their specific effects, good or bad, on downstream speakers. The problem is that contemporary First Amendment caselaw tends to reject the kind of balancing that would be necessary to translate this approach into doctrine.

A. Overestimating Facebook's Stake

First Amendment doctrine in recent decades shows a marked hostility toward arguments that some speech interests, though genuine, are fainter than others. Occasional holdover doctrines from previous eras allow direct balancing.[12] Elsewhere there are categories of "low-value" speech, also holdovers from earlier eras, that allow government to avoid the typical heightened scrutiny by regulating content within certain narrow specifications. But for the most part the Court in recent decades has turned away from these approaches.[13] Instead it has consolidated the law around an approach that focuses first on the presence or absence of content

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[12] For example, *see* Pickering v. Board of Educ., 391 U.S. 563 (1968) (established test weighing a public employee's interest in speaking on matters of public concern against the public employer's interest in administrative efficiency).

[13] *United States v. Stevens*, 559 U.S. 460 (2009), in particular, capped off the creation of new low-value categories on the (dubious) theory that the existing low-value speech categories are grounded in history rather than interest balancing. Other islands of doctrinal flexibility have sunk away over time as well. The Court has recently indicated that there is no rational-basis carveout for "professional speech" in closely-regulated industries, for example, *NIFLA* and *Central Hudson*'s intermediate-scrutiny standard for commercial speech has been trending for years in the direction of strict scrutiny. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 44 TENN. L. REV. 833, 857 (2017) (tracking a trend in First Amendment jurisprudence towards consistently subjecting restrictions on economic and commercial speech to strict scrutiny).

discrimination and second on means-ends testing.[14]

In principle, a law that discriminates on the basis of "content" triggers strict scrutiny even if the expressive burden is exceedingly small. And to be sure, some degree of overkill in the name of prophylaxis—as seen in cases like *Reed v. Gilbert*[15] and *Barr v. AAPC*[16]—is part of the deal. The result, however, is to stake almost everything on the threshold question of whether a regulated entity is engaged in expression *at all*, as opposed to whether the entity's speech has been burdened substantially or whether the discriminatory aspect of the regulation distorts public discourse in any substantial way.[17]

In communications law, this point translates to an essentially binary distinction in which "editorial" platform management receives full-strength protection and the activities of "passive conduits" receive none at all.[18] The lack of any clear intermediate option between these two alternatives—a (non-broadcast) communications provider is either the Miami Herald or AT&T—will make it hard to avoid overprotecting Facebook's content governance practices.

The intermediate scrutiny reached in the *Turner I* decision is sometimes held out as evidence of flexibility on this point, at least where cable television service is concerned. On the one hand, the Court noted that must-carry laws burdened cable providers' "editorial discretion" over what stations to carry; but it ultimately pulled back from strict scrutiny on the theory that the laws in question, which required carriage of local broadcasting stations, didn't directly govern program-

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[14] Langvardt, *supra* note 13; Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anti-Classificatory First Amendment*, 2016 SUP. CT. REV. 233.

[15] Reed v. Town of Gilbert, 574 U.S. 1059 (2014) (applying strict scrutiny to a municipal sign ordinance applying differential treatment to "temporary directional signs," formally a content-based regulation).

[16] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2235 (2020) (applying strict scrutiny to a robocall law that included an exemption for public debt-collection efforts).

[17] *Id.* at 2361 (Breyer, J., concurring in the judgment and dissenting in part) ("There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate.").

[18] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994).

ming decisions.[19] Instead, the Court upheld the must-carry rules under an intermediate scrutiny analysis in *Turner II* that rested in large part on the government's interest in preventing cable providers from abusing their bottleneck position between stations and viewers.[20] And as Genevieve Lakier has noted, these arguments do resonate at some level with *Red Lion*'s approving analysis of the equal time rule for powerful and potentially censorious broadcasters.[21] Yet it seems doubtful that the Court would have taken this approach if the FCC's must-carry rules had required ideological balance rather than carriage of local stations. If we grant the Court's (rather overextended) premise that bundling cable channels is an "editorial" endeavor, then a requirement to carry both FOX and MSNBC would interfere by definition with the cable provider's discretion to control the range of viewpoints conveyed in the bundled product. At a minimum, the Court would have had a much harder time avoiding strict scrutiny.

If this is correct, then the available doctrine really only provides two straightforward ways to analyze laws that would require Facebook to govern user content on a viewpoint neutral basis. First, if the regulated practices involve what we deem "editorial discretion," then a law requiring viewpoint-neutral content moderation (or, perhaps, content moderation that tracked First Amendment standards) would seem to trigger strict scrutiny by burdening Facebook's ability to deliver content (say the News Feed) according to its editorial preferences. If we don't call these practices "editorial," on the other hand, then they can presumably be regulated without any heightened First Amendment scrutiny at all.

At least some of the ways that platforms handle third party content can fit easily enough into the non-editorial category. Eugene Volokh has argued persuasively that there is a clear path in the doctrine toward saying that pure *hosting* decisions by massive platforms look more like the exercise of a simple property right than like the editorial decisions of a newspaper.[22] The Supreme Court, he ob-

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[19] *Id.*

[20] Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

[21] Genevieve Lakier, *Imagining an Anti-Subordinating First Amendment*, 118 COLUM. L. REV. 2117 (2019).

[22] "The sum of all the sights and sounds in a mall, or all the channels on a cable system, or all the speech available from outside speakers in a university, doesn't qualify as a coherent speech product over which the property owner has the constitutional right of editorial choice [and by the same token] the pages or feeds that a platform hosts, and that users visit or subscribe to as they

serves, has rejected claims to the effect "'that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.'"[23]

But even if platforms were required to *host* material on a non-discriminatory basis, they would still have immense room to abuse their powers of amplification and recommendation. A decision to demote content critical of Mark Zuckerberg in user news feeds, for example, could achieve much the same censorial effect as removing the same content altogether. TikTok, notably, revolves primarily around amplification, recommendation, and a News Feed-like interface—the "hosting" function is relatively marginal.[24]

These kinds of decisions would be quite a bit harder to pass off as totally non-editorial.[25] And this is for a few reasons. First, the news feed—unlike the whole Facebook hosting service—really does hang together in much the same way as a newspaper. However chaotic the contents may appear, they add up to a single, readable thing—a guided experience. Second, posts are placed in ranked order, so that compelling Facebook to boost any one post would also force Facebook to

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prefer, are properly seen as 'individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience.'" Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 427 (2021).

[23] *See id.* at 466 (quoting *PruneYard*). *FAIR* and *Turner*, he notes, rejected similar claims—though *Turner* is muddled somewhat by the fact that it characterized cable systems' control over stations and programming as a form of "editorial discretion." *Id.* at 466–70.

[24] See John Herrman, *How TikTok Is Rewriting the World,* N. Y. TIMES, Mar. 10, 2019 ("TikTok . . . has stepped over the midpoint between the familiar self-directed feed and an experience based first on algorithmic observation and inference . . . [T]he first thing you see isn't a feed of your friends, but a page called 'For You.' It's an algorithmic feed based on videos you've interacted with, or even just watched. It never runs out of material. It is not, unless you train it to be, full of people you know, or things you've explicitly told it you want to see. It's full of things that you seem to have demonstrated you want to watch, no matter what you actually say you want to watch . . . Imagine an Instagram centered entirely around its 'Explore' tab, or a Twitter built around, I guess, trending topics or viral tweets, with 'following' bolted onto the side. Imagine a version of Facebook that was able to fill your feed before you'd friended a single person. That's TikTok.").

[25] *See* Netchoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876, at *9 (N.D. Fla. Jun. 30, 2021) (A recent Florida social media law "compel[s] the platforms to change their own speech . . . by dictating how the platforms may arrange speech on their sites. This is a far greater burden on the platforms' own speech than was involved in FAIR or PruneYard.").

demote at least one other post. Like a newspaper's pages, any given position in the News Feed qualifies as scarce real estate even though the News Feed itself is infinitely scrollable. Finally, the ranking of material in the News Feed does seem to "express," or at least reflect, some kind of view about what content a user is likely to engage with—as well as about what kind of content would be *appropriate* for the user to engage with.[26]

All of these considerations make Facebook look more like an editor in form at least some of the time. But in substance none of them offset the potential for Facebook (or some similar platform) to develop into a quasi-regulatory hegemon in public discourse. If anything, the basis for calling these activities "editorial" would be more plausible if its content moderation policies displayed clear ideological bias or craven self-interest. And it strikes me as overly optimistic to think that markets will discipline dominant platforms for the most realistic abuses of this power—say, suppression of criticism directed against the platform's owners, or subtle amplification of content favorable to chosen political candidates. (At the end of the day, Facebook users still want to see photos of their grandchildren.) I grant that platforms tend to switch course on isolated content decisions in response to public backlash—it has been said that this is the "one rule" of content moderation[27]—but so what? If anything, this responsiveness to majority preference would seem to cut *against* the counter-majoritarian strand in the free-speech idea.

Protecting editorial discretion traditionally *promotes* the interest in free speech by pushing editorial disputes out of public law and into various sites of private ordering. But when a single platform acts as editor for hundreds of millions or billions of users—as opposed to, say, the cable provider who bargains with a couple of hundred channels—the formal concept of editorial discretion becomes a practical mandate for national-scale speech governance by adhesion contract. The benefits of this system over a public one appear increasingly contingent, and the magnitude of potential harm increasingly grave, as the contributor-

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[26] Goldman, *supra note* 8; *see also* Evelyn Douek, *What Facebook Did for Chauvin's Trial Should Happen All the Time*, ATLANTIC, Apr. 21, 2021 (describing Facebook's strategy for de-amplifying inflammatory speech so it appears in less newsfeeds during times of societal tension), https://perma.cc/K2JY-66AM.

[27] Will Oremus, *The One Rule of Content Moderation That Every Platform Follows*, ONEZERO (Jun. 11, 2019), https://perma.cc/UQ8H-QSWB.

to-editor ratio scales up. As it stands, however, the mantra of "editorial" platform freedom shapes and stunts essentially all discussion of intermediary regulation in the United States.

B. Hostility to Arguments for "Leveling" Speaker Power

It might be possible, in principle, to regard the largest platforms as editors while still setting outside limits on their content governance practices. We might say, for example, that the government has an overriding interest in preventing certain gross abuses of "editorial" power at the very largest platforms. For a brief time, the Court seemed amenable to the idea that the First Amendment might provide at least some pro-regulatory ballast for these kinds of efforts. In *Red Lion v. F.C.C.,* Justice White wrote for the Court's majority that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[28]

The contemporary approach, however, seems to foreclose this kind of justification for policies that would loosen intermediaries' hold on public discourse. The point here is not merely that listeners and parties affected by speech almost always lack standing to sue under a First Amendment theory,[29] but that the doctrine strongly discourages policies that would restrict one party's discretion over content either to *assure access* to speech opportunities or to *level the playing field* of public discourse. Most justifications for regulating platforms' content practices will tend to fall somewhere between these two rationales.

Tornillo, as discussed above, largely precludes any access rights to private communications channels on a formalistic theory that they interfere with editorial expression. *Tornillo's* theory casts "editors" and "contributors" in a zero-sum

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[28] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[29] The caselaw recognizing rights of action for parties wishing to view or access information or expressive content is rather thin, and dates to the Warren and Burger Courts. See Stanley v. Georgia, 394 U.S. 557, 564 (1969) (vacating conviction for possession of obscene material); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980) (right of access to criminal trials); Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 13–14 (1986) (limited right of access to certain court documents); Bd. of Educ., Island Trees Union Free Sch. Dist., No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) ("[T]he right to receive ideas [here, from a school library] follows ineluctably from the sender's First Amendment right to send them.").

relationship where access rights for contributors necessarily subtract from the expressive rights of editors.[30]

The Court is equally hostile to policies intended to equalize or "level" expressive power in public debate—regulatory interests that at least arguably have some normative grounding in the First Amendment itself.[31] This strand of the doctrine is particularly explicit in the campaign finance cases, framed by the Court's famous dictum in *Buckley v. Valeo* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[32] And though the Court qualified that policy for a time in the 1990s and the early 2000s, the Roberts Court has recommitted to it and built on it.

Citizens United v. FEC, like *Buckley*, condemned efforts to level the playing field in political campaigns by muffling wealthy speakers including corporations and unions.[33] Other cases go further, condemning subsidies intended to *level up* the speech of candidates who lacked a wealthy backing.[34] These cases indicate that

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[30] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) ("The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. . . . [I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.").

[31] Davis v. FEC, 554 U.S. 724, 751–52 (2008) (Stevens, J., dissenting) (Arguing that voters deserve "courtesy" and an "opportunity to reflect . . . flooding the airwaves with slogans and sound bites may well do more to obscure the issues than to enlighten listeners."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) ("The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas.").

[32] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

[33] Specifically, the Court's opinion rejected a prior holding that there is a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Citizens United v. FEC, 558 U.S. 310, 348, (2010) (citing Austin v. Michigan Chamber of Com., 494 U.S. 652, 660 (1990), *overruled by Citizens United*).

[34] *See Davis* (condemning matching funds that kicked in when a candidate's opponent spent over $350,000 from personal funds); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 729 (2011) (condemning matching funds that kicked in "when the amount of money a

leveling *itself* has become, for First Amendment purposes, a solidly forbidden public objective.[35] In a preliminary injunction order against Florida's recent attempt to regulate platform content moderation, in fact, a federal district court cited that line of cases for the proposition that "leveling the playing field—promoting speech on one side of an issue or restricting speech on the other—is not a legitimate state interest."[36]

Whatever the merits of the Court's the anti-levelling fixation in its campaign-finance decisions, they would seem to dissipate dramatically if a Facebook-scale platform—or perhaps an even larger and more dominant one—decided to make the most of its right to engage in independent "advocacy" by suppressing disfavored political advocacy in the final run-up to an election. Perhaps at some point the Court's hostility to "leveling the playing field" might yield to a specific and well-demonstrated interest in preventing one or two dominant platforms from *re-engineering* the playing field.

Today's Court rejects this kind of move by temperament, systematically elevating formal neutrality over substantive neutrality not just in speech but in other areas—race in particular. Even there, however, the Court's embrace of formal neutrality in the form of "colorblindness" is not absolute. The Court has drawn up a generally high wall against race-based affirmative action: strict scrutiny applies even to policies drawn to benefit historically-disadvantaged racial groups, and the Court has refused to count the general interest in remedying what it calls "past societal discrimination" as "compelling."[37] Yet the Court has left a small

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privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate.").

[35] *See generally* Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for* Arizona Free Enterprise v. Bennett, 46 IND. L. REV. (2013).

[36] Netchoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876, at *11 (N.D. Fla. Jun. 30, 2021).

[37] City of Richmond v. J.A. Croson Co. 488 U.S. 469, 499 (1989) ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."); *see id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every

opening for race-conscious measures that are supported by "particularized findings" of discrimination.[38] The less "structural" and the more concrete the discriminatory harm, the more amenable the Court is to public intervention.

Citizens United looks a bit like this. On one hand, the Court rejected the government's goal of avoiding favoritism toward political spenders as "unbounded and susceptible to no limiting principle,"[39] a social-science kind of problem of a sort that modern Court majorities often dismiss.[40] A narrowly (and naively) defined interest in preventing "dollars for political favors," meanwhile, qualified as the kind of hard, specific stuff that could justify at least *some* campaign finance regulation.[41] Maybe the same is true of some future case in which a giant platform is not merely "drowning out" competing speakers, but cutting them off. There are no clear lines dividing these pairings, because they are ultimately questions of degree. This makes it hard to know where the Court's seemingly ironclad commitment to formal neutrality breaks off.

C. Conclusion on Balancing

Two deep-seated habits in First Amendment jurisprudence, then, combine to produce a privately-ordered approach to the problem of platform governance. First, the existing doctrine seems to characterize almost all content-based decisions by speech intermediaries as "editorial" speech subject to some degree of First Amendment protection. Second, the Court in recent decades[42] reads the First

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disadvantaged group.").

[38] *Id*. at 498. The Court, of course, has also made substantial room for race-conscious admissions policies at higher-education institutions, but it has strained to disentangle the justification for these policies—the interest in student diversity—from the interest in remedying racial discrimination. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. . . . Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

[39] *Citizens United*, 558 U.S. at 359 (quoting McConnell v. FEC, 540 U.S. 93, 296 (2003) (opinion of Kennedy, J.), *overruled by Citizens United*).

[40] For other examples of this tendency, *see* Kyle Reinhard, *"Sociological Gobbledygook":* Gill v. Whitford, Wal-Mart v. Dukes*, and the Court's Selective Distrust of "Soft Science"*, 67 UCLA L. Rev. 700 (2020).

[41] *Citizens United*, 558 U.S. at 359 (quoting FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985)).

[42] Midcentury cases take a more pro-regulatory stance, notably *Associated Press v. United*

Amendment as an entirely deregulatory rather than pro-regulatory instrument where "editorial" activity is concerned. Public regulation can override or adjust the bargain for various reasons when it is supported by a compelling governmental purpose, but those reasons do not include any publicly-defined interest in *improving* public discourse.

Conceptually, one might rationalize this arrangement as one in which editorial control functions as a kind of property endowment that speakers and audiences bargain around. The "editor"—a newspaper, say—bargains with authors on one side for content and with readers on the other side for payment. Each party brings various assets to the table. The reader brings money or attention to the publisher. The author expands the newspaper's audience by bringing star power, quality of work, excitement, etc. to the final marketed product. The newspaper provides some combination of payment, prestige, and reach to the author. And the newspaper provides the *reader* a combination of goods including adherence to journalistic norms.

Within the "mainstream" media market, this kind of ongoing bargain really does seem to promote a public interest in journalistic professionalism. Adherence to journalistic norms enhances a media organization's selling proposition to both much of the audience and to authors who seek prestige and respect. But this fortuitous alignment between private bargaining and the public interest depends heavily on what the real-life audience demands.[43] In a disturbing and comprehensive

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States, 326 U.S. 1, 20 (1945) ("It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom") and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"). *Turner,* decided near the turn of the century, contains some language to the same effect. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 663 (1994) ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment"). However, this is only in the context of what the Court characterized as a content-neutral decision. *Citizens United* contains similar listener-centered rhetoric from the same author (Justice Kennedy), but there it is deployed in support of laissez-faire and as a refutation of the government's asserted interest in leveling speech opportunities. *Citizens United*, 558 U.S. at 356 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

[43] YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND

study, Yochai Benkler et al. argue that a large but highly insular right-wing media ecosystem has essentially discarded journalistic norms in order to meet its audience's demand for "identity-affirming content."[44] Still more provocatively, Benkler's study suggests that journalistic norms prevail within *mainstream* media in large part because they make Fox News look stupid in comparison—thereby affirming the identity of mainstream news' mostly left-of-center audience.[45]

At any rate, this kind of ongoing bargain does not offer a remotely plausible mechanism to align private content moderation with liberal speech values. It is of course true that a ragged few users with concerns about censorship sometimes flee to rogue platforms such as Parler, Gab, or MeWe. But this kind of movement seems more likely to fit into Benkler et al.'s pessimistic "identity affirmation" model than into a model in which civic-minded users are bargaining over the legalistic details of platform administration.[46] And the numbers are too small to matter anyway.[47]

This is not to say that private norms around content moderation don't exist at all; it seems they do.[48] But these norms seem to emerge more from company culture rather than some market-wide editorial bargain. Legal staff set high-level rules and policies, often in consultation with academics and civil society. Non-legal staff might also pressure the company to change course on specific speakers or content, as seen during the 2020 protests following the murder of George Floyd.[49] But none of this prevents a new platform from taking a baser approach.

The most straightforward selling point for the laissez-faire approach in the

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RADICALIZATION IN AMERICAN POLITICS (2018).

[44] *Id.*

[45] *Id.*

[46] Parler's user agreement at one time permitted the company to indemnify Parler for any liability that might result from their activity on the platform. Jessica Schulberg, *On Parler, The Right-Wing Social Media Site, Free Speech Isn't Free*, HUFFPOST (Jun. 26, 2020, 7:55 PM), https://perma.cc/6B6B-EJTU.

[47] At a high point, Parler had roughly 15 million users. Jack Nicas & Davey Alba, *How Parler, a Chosen App of Trump Fans, Became a Test of Free Speech,* N. Y. TIMES, Feb. 15, 2021.

[48] *See generally* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1616–30 (2018).

[49] Sheera Frenkel et al., *Facebook Employees Stage Virtual Walkout to Protest Trump Posts*, N.Y. TIMES, Jun. 1, 2020.

pre-platform era was simply that it removed the one hegemonic "governor"—i.e., the government—from the scene. This guaranteed speakers at least the theoretical recourse of finding fallback editors who would agree to publish their work. But that framing will tend to ring less true in an environment where editorial prerogative is heavily concentrated. At some point it becomes more a question of *how* than *whether* to regulate—a choice between a public governor and a few private governors who are free to act outside of legal restriction.[50] There may well be value in allowing monopolistic or oligopolistic private governors absolute dominion over the content they host—but that ultimately depends on who the reigning private governors are and how much we fear the potential for public overreach.

The really important question, in other words, is how to choose or allocate power between competing governance institutions. Arcane conceptions that Facebook is an "editor" cloud the picture. And at a practical level, it is unclear that the project of free expression would suffer all that much if courts ignored Facebook's editorial interest altogether. Laws that suppress speech on Facebook would still trigger First Amendment claims from the users who were affected—just as they do today. These claims would presumably constrain governmental meddling just as powerfully, and for better-articulated reasons, than claims based on the more abstruse "editorial" theory.[51]

Laws meant to *protect* speech from private content moderation, meanwhile, might not trigger any user-based First Amendment claim unless, for example, they applied on an impermissibly selective basis.[52] Some may say that this is exact-

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[50] Obviously, Facebook, or even a much more dominant version of Facebook, lacks certain important attributes of state power—chiefly the powers to use physical violence or confiscate property as punishments for rule-breaking. But this distinction is largely irrelevant for our purposes, because those powers are technically unnecessary to censor online content.

[51] For examples of this approach, see Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (sex workers and associated organizations challenging a statute imposing liability on platforms hosting prostitution-related communications); U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020) (WeChat users challenging executive order prohibiting "transactions" with the social platform).

[52] Florida's recent social media law, for example, includes special restrictions on platform governance that applied only to speech by and about candidates for public office. *See* Fla. Stat. Ann. § 106.072 (West 2021) (Social Media Deplatforming of Political Candidates); Fla. Stat. Ann. § 501.2041 (West 2021) ("A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by

ly why First Amendment doctrine needs to extend full-strength editorial protection to Facebook. But that strikes me as backwards. Instead, I would draw one of two alternative implications from the likelihood that users would lack standing to challenge a must-carry law. First, it could be that a law that none of Facebook's users could find standing to challenge is one that Facebook can challenge well enough through the political process.

Or maybe the problem is that First Amendment doctrine, as many have observed, should take account of a wider and less speaker-centric range of First Amendment interests than it does today. If First Amendment doctrine gave more weight to "listener" interests, for example, then perhaps Facebook users could challenge must-carry laws that effectively polluted their newsfeeds with "lawful-but-awful" content.[53] Or, as various scholars have suggested, perhaps the harms individuals suffer from online harassment and trolling could be cognized as harms to First Amendment interests in light of their chilling effects on speech;[54] insofar as that is the case, then these harms might give users standing to bring First Amendment challenges against laws that force platforms to carry harassing or trolling speech.[55]

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the social media platform to be a candidate.").

[53] *See* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 194 (2021). (Of course there could be Article III generalized grievance issues and the like.)

[54] *See* Danielle Keats Citron, *Cyber Civil Rights,* 89 B.U. L. REV. 61, 101 (2009) ("A mob's online attacks do not involve discourse on political issues. Quite the contrary, the attacks deprive vulnerable individuals of their right to engage in political discourse."); *see also* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1447 (2011) (discussing ways that hate speech and harassment deter civic engagement); *see also* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1321 (2017) (arguing that "the failure to prohibit nonconsensual pornography has a uniquely chilling effect on political speech—the very form of speech that is supposed to receive the greatest protection by the First Amendment"); *see also* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1476 (2013) (arguing that "in a small but significant subset of cases—'private chill' cases—courts should consider the source of chill to be private action, rather than governmental action, even though state action is present.").

[55] Note that if First Amendment law does move in the direction of greater cognizance of these issues, then it seems likely that the Court will also come to define a new category of low-value speech around trolling and harassment (or, given the Court's disavowal of categorical balancing in

In any event, these issues deserve to be taken up on their own merits. As new issues arise, the First Amendment should engage with them on their own terms rather than through the hollow legalism of editorial rights. Justice Brandeis' dissent in *INS v. AP* captures the situation well:

> The unwritten law possesses capacity for growth . . . by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.[56]

The legislative approach would require two transformations in the doctrine. First, the doctrine will have to give less weight to platform editorial rights than it does today. This could come about in two ways. One way would be to move toward a proportionality-based model more typical of modern constitutional democracies and, within that model, simply acknowledge that the public interests vastly overbalance the platform's interest in speaking. Another more typically American approach would simply treat platform speech management as a form of conduct. There probably isn't much functional difference between these approaches.

Second, the doctrine will have to embrace a wider role for regulation as a guarantor for expressive freedom. It is fine to regard content-based "fairness doctrines" with suspicion; but if the interest in levelling speech opportunities is regarded as an *illicit* reason to engage in content-based discrimination, something like animus in equal protection law, then the First Amendment applied to a suffi-

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United States v. Stevens, 559 U.S. 460, 470 (2010), something functionally equivalent to a low-value category). And if First Amendment doctrine has moved in that direction, then it seems likely that any common-carrier requirement would also give platforms leeway to combat trolling or harassing content.

[56] Int'l News Serv. v. Associated Press, 248 U.S. 215, 262–63 (1918) (Brandeis, J. dissenting).

ciently concentrated market becomes effectively self-negating.

II. INSTITUTIONAL ROLES

Suppose, then, that a new law imposes restrictions on Facebook's scope of editorial discretion, and that these restrictions are upheld under softened First Amendment doctrines of the type described above. Getting to this point, as discussed above, will require courts to take a sharp turn against the doctrinal currents that have dominated First Amendment law since, roughly, the late 1980's.[57] But that will be the easy part.

A deeper challenge remains, which is that even a seemingly austere viewpoint-neutrality mandate will be difficult for courts to oversee effectively without significant agency support. The effect will be to push the public law of free speech out of its traditional judge-directed common-law milieu and place it primarily in the realm of administrative law. Here a new "management side"[58] of free speech may come to eclipse the more familiar rights-based model in significance—as indeed it already has at Facebook.

A. Case Volume

The Social Security Administration—by far the most prolific adjudicator in the federal government—processes several hundred thousand disability claims annually.[59] District Courts hear appeals in ten to twenty thousand of these cases every year.[60] Administrative law scholars beginning with Jerry Mashaw in the 1970s have questioned whether this scattering of individual case appeals can possibly help to improve the overall quality of SSA adjudications.[61]

This is for a number of reasons. One is that the appeals ratio is so low that line

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[57] *See* Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court,* 84 TENN. L. REV. 833 (2017) (arguing that the Supreme Court's conservative bloc had consistently rejected concepts including proportionality and the pro-regulatory First Amendment since at least 1989 when Justice Kennedy took his seat).

[58] Jerry Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

[59] Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1104 (2018).

[60] In 2020, for example, district courts heard 17,776 SSA appeals. *Federal Judicial Caseload Statistics 2020*, UNITED STATES COURTS (2020) https://perma.cc/AC95-REJW.

[61] Mashaw, supra note 58.

adjudicators have little reason to worry about reversal by an Article III judge—and this is especially so given that SSA adjudicators must decide several hundred cases per year. A second reason is that it is difficult to develop and distribute a body of precedent among a staff of adjudicators as populous and time-strained as the SSA's. This makes it unlikely in any given case that a district judge can ascertain in the first place whether they are "dealing with an isolated problem or the tip of an iceberg of similar but unappealed cases."[62] It also makes it unlikely that any precedent a district judge *does* create will backpropagate effectively to the army of line administrators who are responsible for deciding the overwhelming majority of cases.

Human content moderators at Facebook, by a wide estimate, decide twelve to twenty million cases *every day*[63]—an adjudicatory firehose a few thousand times faster than the SSA or any other agency in the federal government. Case volume is likely to pose a serious problem even if only a small ratio of content moderation "appeals"—more accurately civil claims brought against Facebook on behalf of censored users—ever make it to a judicial forum. And the lower the appeals ratio, the more dubious the benefit of judicial review in the first place.[64]

B. Decisional Complexity

Nor is case volume the only area in which judicial oversight of platform content moderation decisions would involve unprecedented difficulty. The substantive complexity and diversity of cases would also be profound.

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[62] Mashaw, *supra* note 58, at 775.

[63] Facebook moderators were once widely reported to decide roughly one case every ten seconds. The company has reportedly slowed the pace considerably since then, with one recent report claiming that content moderators in a Berlin office were limited to 400 or 500 cases a day. Alex Hern, *Revealed: Catastrophic Effects of Working as a Facebook Moderator,* THE GUARDIAN, (Sept. 17, 2019, 8:07 AM), https://perma.cc/5EVD-RNUC. Today the company employs 30,000 content moderators, according to one late-2018 report. Scott Simon & Emma Bowman, *Propaganda, Hate Speech, Violence: The Working Lives of Facebook's Content Moderators,* NPR (Mar. 2, 2019, 8:23 AM), https://perma.cc/4DEP-T7PT. If each of them works at the pace reported at the Berlin office, it comes out to between twelve and twenty million.

[64] *See* David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform,* 72 STAN. L. REV. 1, 22 (2020) ("To the extent that such rights can improve the overall accuracy of an agency's decision-making, as a practical matter they do so only if unrelated individuals collectively exercise their rights in significant enough numbers and with some degree of unintended coordination. This happy result is unlikely.").

At the SSA, adjudicators use a set of "grid rules" to determine whether a disability applicant "cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[65] The grid rules are a set of tables organized around age, education, previous work experience, and the applicant's "residual functional capacity" (the ability to do sedentary, light, or heavy work).[66] The grid rules squeeze much of the discretion and interpretive work out of case-by-case disability adjudication, which in turn simplifies the range of issues confronting Article III courts on review in a typical case.

Facebook's non-AI moderators take a grid-like approach to content moderation as well, with "community standards" that are hardened as far as possible into checklists and bullet-points rather than the more searching approach that rules at the courts.[67] But Facebook's "grid" is much more multifaceted than the SSA's, which is an unavoidable byproduct of the extremely broad set of issues content moderators have to tackle.[68] Case-based judicial oversight would presumably require courts to consider the legality of various aspects of Facebook's speech rules, just as courts today might hear occasional challenges to the administrative judgments reflected in the SSA's disability grid. But unlike the SSA grid rules, an apex social platform's rule-set could present a virtually inexhaustible set of questions for judicial review.

The most obvious layer of the problem would have to do how platforms define "offending" content. Any law designed to head off abuses of platform "editorial" power would presumably set limits in this area. These limits will almost certainly present substantial complexities in application. There is no simple way, for example, to require platforms to set "viewpoint-neutral" rules. The concept is subtle enough in traditional First Amendment caselaw;[69] but it acquires additional

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[65] 42 U.S.C. § 423(d)(2)(A).

[66] 20 C.F.R. § Pt. 404, Subpt. P, App. 2; *see also* Heckler v. Campbell, 461 U.S. 458, 468 (1983) (holding that "general factual issue[s] may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing.").

[67] *Community Standards*, FACEBOOK, https://perma.cc/7LXT-864C.

[68] *Id.*https://www.facebook.com/communitystandards/

[69] For nonintuitive applications of the viewpoint-neutrality principle, see R.A.V. v. St. Paul, 505 U.S. 377 (1992); Rosenberger v. Rector, 515 U.S. 819 (1995); Christian Legal Society v. Martinez, 561 U.S. 661 (2010); IMS Health v. Sorrell, 564 U.S. 552 (2011).

problems on a giant social platform that may find itself required to host massive amounts of "lawful-but-awful" content if the requirement of viewpoint-neutrality is applied too mechanically. This doesn't necessarily mean that apex social platforms *shouldn't* be required to follow a viewpoint-neutrality principle in some form, but it does mean that a whole literature of exceptions would be necessary to reconcile the rule with sound platform management. And if history is any guide, the platforms' definitions of offending content will undergo constant updates, often in response to emergent events or trends.[70]

Then there is a second, underappreciated dimension to the problem: courts would also have to decide on the legality of the "remedies"[71] platforms apply to offending content. Platforms constantly develop new tools to "moderate" content that violates the rules.[72] Content can be removed outright; its virality can be slowed-down; content can be de-monetized, so that their creators don't collect ad revenue from it; it can be marked as false or suspicious; it can come with trigger warnings or age advisories that users must "click through." Analogous actions may be taken against user accounts: bans, suspensions of various lengths, demonetization, de-amplification.

As Daphne Keller points out, First Amendment law in its present form is largely indifferent to the question of "remedies";[73] instead the degree of scrutiny to apply turns above all else on whether and how state actors draw lines between different types of content. Platforms do give weight to "remedial" distinctions, though, and any legal regime that ultimately comes to govern them should do the same. This is because a Facebook-like authority, by necessity, relies much more heavily on censorial intervention than traditional public policing authorities have had to. In an environment where direct censorship is the rule rather than the exception, the gradations in "remedy" matter immensely.[74]

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[70] Facebook made a number of specific updates to its Community Standards, for example, in response to the COVID-19 pandemic. *COVID-19 and Vaccine Policy Updates & Protections,* FACEBOOK, https://perma.cc/L6P4-GYW4.

[71] Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. (forthcoming 2021).

[72] *Id.*

[73] Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 237–39 (2021).

[74] Notably, the Facebook Oversight Board recently ruled that "[i]t is not permissible for Facebook to keep a user off the platform for an undefined period, with no criteria for when or whether

There is probably no simple way to tell platforms in a statute precisely which remedies on the menu are appropriate for which kinds of offending speech, and this is especially true in light of the fact that platforms experiment with new kinds of remedies all the time. Questions about remedy, like questions about permitted and unpermitted content, would most likely have to be resolved through statutory interpretation. First Amendment standards are likely to shade the analysis as well, even assuming the doctrinal overhauls discussed above.

The questions of what content a platform may moderate and what techniques it may use, in sum, combine to produce a set of questions that is probably as varied and complex as the traditional diet of First Amendment law. Unfortunately, First Amendment law will provide very few useful lessons in how to navigate that set of questions. First Amendment law, precisely because it forces an austere private-ordering strategy toward speech-related concerns, lacks the grid-like quality that platforms and bureaucracies more generally require to make decisions with acceptable consistency and efficiency. And even if the existing doctrine could be pounded into such a "grid," the grid would probably require extensive recalibration in light of the practical realities of a virality-driven online environment.[75]

C. Quality Assurance

A final dimension to the problem is more familiar in high-volume adjudications: the question of "quality assurance." Facebook CEO Mark Zuckerberg has estimated that the company's content moderators make "the wrong call in more

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the account will be restored." *Case Decision 2021-001-FB-FBR*, OVERSIGHT BOARD (Jan. 7, 2021) https://perma.cc/M67G-8FTQ. The Board also sought clarification from Facebook on "the platform's design decisions, including algorithms, policies, procedures and technical features." Facebook "declined to answer[,] . . . mak[ing] it difficult for the Board to assess whether less severe measures, taken earlier, may have been sufficient to protect the rights of others." Board member Alan Rusbridger had recently spoken publicly about the significance of content moderation remedies, commenting that "We're already a bit frustrated by just saying 'take it down' or 'leave it up' . . . What happens if you want to make something less viral? What happens if you want to put up an interstitial? What happens if, without commenting on any high-profile current cases, you didn't want to ban someone for life but wanted to put them in a 'sin bin' so that if they misbehave again you can chuck them off?" Alex Hern, *Alan Rusbridger Says Oversight Board Will Ask to See Facebook's Algorithm*, GUARDIAN, Mar. 2, 2021, https://perma.cc/A266-KTL8.

[75] Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach,* LAWFARE, at 25 (Nov. 2020), https://perma.cc/2ZSQ-RN4J (discussing the difficulties involved with translating First Amendment violent advocacy doctrines to the platformed context).

than 1 out of every 10 cases." [76] It is not obvious whether this should qualify as a "good" or a "bad" rate of error.[77] Today's SSA aims for a 15% error rate in disability cases; the Department of Health and Human Services aims for 5.4%.[78] But in any event the error rate matters, and in one way or another it would figure centrally in any public attempt to govern private content moderation practices. "Zero errors can be the target" in any such program, "but because that goal is unrealistic in any large program it is of limited value as a management tool."[79]

This shift toward a probabilistic mindset is yet another respect in which scale produces a transformative outcome. Courts typically enforce individual rights protections by asking, in a given case, whether the government has intruded on an individual's right in an impermissible way. But the "inherently systemic" nature of content moderation, as Evelyn Douek has argued, makes "an individualistic approach to online speech governance" impossible to scale.[80] In time, the paradigmatically individualistic law of free speech may be forced to take on the "strikingly managerial aspect"[81] that has characterized the law of procedural due process since *Mathews v. Eldridge*.[82] As Richard Fallon has observed, "Courts [con-

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[76] Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement,* FACEBOOK, https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/.

[77] *See* Paul Ohm, *Regulating at Scale*, 2 GEO. L. TECH. REV. 546, 552 (2018) ("Companies like Google and Facebook are able to train automated detection algorithms on massive amounts of training data. We should expect the models that result to be much better than 99% accurate. Because of the way AI power increases with scale, we might expect companies like these to be accurate 99.99% or 99.999% of the time. Our expectations of accuracy might grow with the scale of the training data. For every order-of-magnitude increase in size, we might expect a correlative order of magnitude improvement in the accuracy of the detection.").

[78] *See* SOCIAL SECURITY ADMINISTRATION OFFICE OF INSPECTOR GENERAL, ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY 1 (2017); DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL, MEDICARE CLAIMS ADMINISTRATION CONTRACTORS' ERROR RATE REDUCTION PLANS 2 (2014).

[79] Mashaw, *supra* note 58, at *796.*

[80] Evelyn Douek, *Governing Online Speech: From "Posts-As-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 791 (2021).

[81] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

[82] Mathews v. Eldridge, 424 U.S. 319 (1976).

sidering procedural due process claims] seldom inquire into whether procedures sufficed to ensure fair resolution of a particular case. Attention centers instead on whether decision-making structures are adequate to achieve, on average, a socially tolerable level of accuracy in the application of law to fact [and legal remedies strive to create] schemes and incentives adequate to keep government, overall and on average, tolerably within the bounds of law."[83]

Legal culture's reflexive answer to these kinds of problems, epitomized by the "due process revolution" of *Goldberg v. Kelly*,[84] is to require "some kind of a hearing."[85] The "hearing" may include confrontation rights, protective burdens of proof and production, opportunities for appeal, and so on; the degree of procedural formality depends on the overall balance of interests.[86] Many proposals to regulate or reform platform content moderation endorse this basic strategy, usually in combination with new transparency requirements.[87] Such tools are well within the judiciary's remedial wheelhouse, as well as the neoliberal comfort zone that has shaped American tech policy for decades.[88]

But those tools also have their limits. Giving platform users rights to challenge content moderation decisions, whether internally to the platform or in court, will likely improve results for the individuals who press them, but this does not neces-

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[83] Fallon, *supra* note 81. *See also* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2038–54 (2011) (arguing that the Supreme Court has generally ignored questions about administrative process in individual rights claims against administrative agencies).

[84] Goldberg v. Kelly, 397 U.S. 254 (1970).

[85] Bd. of Regents v. Roth, 408 U.S. 564, 590 n.7 (1972) ("Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.") (cleaned up).

[86] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

[87] *See* THE SANTA CLARA PRINCIPLES ON TRANSPARENCY AND ACCOUNTABILITY IN CONTENT MODERATION (2018), https://perma.cc/VM2L-3REN, as a set of benchmarks for voluntary adoption. For a legislative proposal along the same lines, see S. 4066, 116th Cong. (2020).

[88] *See* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 123 (2018) ("In its actual application . . . transparency has become increasingly associated with institutional incapacity and with agendas that seek to maximize market freedom and shrink the state . . . The link between open government and active government has become ever more attenuated.").

sarily translate to anything systemic.[89] And while requiring platforms to disclose more information about their content moderation systems would likely produce some systemic improvement, the meaningfulness of that will depend to a great extent on how concerned platform owners are about bad publicity and on whether government can credibly threaten to regulate in the event of poor industry performance.

A broader set of managerial and technical interventions may therefore be necessary to assure decisional accuracy at a systemic level. For human content moderators, these may include greater attention to training, workload, and well-being. For AI systems, these interventions may involve performance benchmarking[90] and algorithmic impact assessments.[91] And of course, these measures themselves would have to come up for periodic re-evaluation.

Between the staggering case volume, the range and complexity of the substantive issues, and the technical and managerial challenges involved with improving decisional accuracy, it should be clear that courts are in no position to oversee large-scale platform content governance practices without a very thick layer of administrative support.

Note, too, that when courts oversee a federal agency, that support occurs naturally at some level—other governmental authorities housed within the agency can act as "middle management" between frontline adjudicators and the federal district courts that oversee them. This is not the case, of course, at a privately-operated platform. Federal oversight of state governments under civil rights law might provide a closer precedent for this kind of situation. Conventional judicial

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[89] *See* Ames, *supra* note 64, at 23 ("Appellate dockets thus may neither reflect actual error patterns nor lead an agency to understand systematic sources of error . . . . [I]n practice, the agency must make some coordinated, managerial effort to gather and analyze data on appeals patterns and then act on what this information reveals. On its own, the mere provision of a right to appeal does not require or enable the agency to identify and correct systemic errors.").

[90] David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State,* 37 YALE J. ON REG. 800, 849 (2020).

[91] Dillon Reisman et al., *Algorithmic Impact Assessments: A Practical Framework For Public Agency Accountability*, AINOW (Apr. 2020), https://perma.cc/28JJ-F473; Margot E. Kaminski & Gianclaudio Malgieri, *Multi-Layered Explanations from Algorithmic Impact Assessments in the GDPR*, FAT* '20: PROC. CONF. ON FAIRNESS ACCOUNTABILITY & TRANSPARENCY 68, 70–72 (2020) (discussing proposals for algorithmic impact assessments).

oversight, exemplified by the "all deliberate speed" era of school desegregation and Voting Rights Act enforcement following *Shelby County v. Holder*, has often lacked the speed and flexibility necessary to prevent abuses by external state bureaucracies. Administrative strategies have historically performed better—conditioning federal Department of Education grants on nondiscrimination, for example,[92] or requiring states to preclear voting rules with the Justice Department or a three-judge panel.[93]

D. Existing Models

The idea that an administrative agency might oversee content choices, of course, is not totally unprecedented or incompatible with First Amendment jurisprudence. The Court in *Red Lion v. FCC*[94] endorsed the Federal Communications Commission's oversight of broadcast content, and *Turner*, as discussed above, upheld an assertedly content-neutral requirement that cable providers carry local broadcast and educational channels.[95] The D.C. Circuit in *U.S. Telecom v. FCC* upheld the 2015 Open Internet Order, authorizing the FCC to oversee a system of common carriage for internet service providers.[96]

It has become increasingly mainstream to suggest a "common carrier" or a "fairness doctrine" approach to regulating Facebook's content governance practices. But these phrases, whatever their usefulness as shorthand and their pedigree in FCC practice, fail to capture the administrative complexity or even the basic character of the challenge.

The "common carriage" concept is particularly unilluminating here. Congress seems to have recognized in drafting the Radio Act of 1927 that it could not

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[92] 42 U.S.C. § 2000d.

[93] 52 U.S.C. § 1304.

[94] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[95] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).

[96] U.S. Telecom Ass'n. v. FCC, 825 F. 3d 674, 690 (D.C. Cir. 2016). The order stated that "[a]ny person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule." *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), 30 F.C.C.R. 5601 (2015).

impose a duty of "common carriage" on radio broadcasters without making ordinary programming decisions impossible.[97] And though a requirement of common carriage for *hosting* decisions may well be feasible and administrable, the concept seems at least as inapplicable to decisions about amplification and prioritization in the news feed as in the past it was to broadcast program scheduling.

Fairness doctrine-style requirements of neutral treatment or evenhandedness hit somewhat closer to the mark as a defining principle, but in practice they will have to be specified into something much more elaborate to be of any use. The broadcasters subject to the fairness doctrine engaged in paradigmatically editorial decision-making at a small scale, not the large-scale quasi-regulatory activity of a Facebook-like platform. Public oversight of Facebook, unlike CBS, would in many ways operate as a structure for a public-private delegation.

Within this model, Facebook would look less like CBS than the Financial Industry Regulatory Authority (FINRA), the nongovernmental "self-regulatory organization" that regulates brokerages and exchange markets.[98] Since 1993 the Securities and Exchange Commission (SEC) has required American securities traders to register with a "self-regulatory organization" (SRO) such as FINRA as a condition of doing business. SRO adjudications are appealable to the SEC, and then to the U.S. District Court for the District of Columbia. The SEC, in turn, maintains control over FINRA policy through its power to revoke FINRA's license as an SRO.

To put it mildly, this is not the way the free speech system has traditionally worked. It is not even the way the FCC's broadcast licensing has worked. We are used to judicial primacy on the law of free speech, as well as a general hostility toward content-based licensing. Any workable system for overseeing platform content governance will probably force us to abandon those expectations. Yet the laissez-faire, platform-managed alternative produces effectively the same result; one might say that Facebook is *already* supplanting the traditional judge-led free speech tradition with a more administrative model.

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[97] Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2325 n.28 (2021).

[98] 15 U.S.C.A. § 78c; THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 14:28 (Disciplinary Authority of Self Regulatory Organizations) n.4, n.9 (2021).

Conclusion

Certain core First Amendment doctrines have the potential to hollow out the First Amendment's substantive aspirations if they are applied too mechanically to massive-scale content governance by online platforms. This outcome is probably avoidable, but only at the price of difficult transformations in First Amendment law that seem to carry their own significant risks.

Hence my view that just as the 19th century's conception of product liability law did not survive the rise of industrial manufacturing and distribution, the 20th century's ideal of free speech, or significant parts of it, may not survive the rise of industrial-scale private "content moderation." Scale will either sideline the First Amendment or transform its meaning radically. In either case, the apex platforms' gravity is enough to remake practical freedom of speech in their image—much as 20th century media institutions, in a gentler way, shaped the free speech conceptions we cling to today.

It's a bit of a Debbie Downer message. But the larger point is simply to show that the First Amendment—perhaps like much of our constitutional system—is coming due for some degree of reinvention. Fortunately, our specific doctrinal understandings are not hardwired into the constitutional text; they can change easily enough. The more stubborn problems come down to administration. And precisely because these problems are tough, they should be thought through in advance, before a truly malevolent actor gets control of a Facebook-style platform. *Tornillo*'s editorial concept, whatever its earlier merit, has metastasized into a taboo that too often chills open discussion of the problem among the expert establishment. The effect is to cede the issue to partisan demagogues with questionable motives and facts.[99] If the free speech system is above all else an experiment, then we must be eternally vigilant against its creeping tendency to become a religion.

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[99] Florida Governor Ron DeSantis' signing statement for Florida Senate Bill 7072 remarked that "[d]ay in and day out, our freedom of speech as conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." NetChoice, LLC v. Moody, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021). Meanwhile, Senator Josh Hawley, who proposed a bill to regulate social platforms' content moderation practices in 2019, later claimed that the publishing house Simon and Schuster had violated his First Amendment rights by dropping his publishing contract following the January 6 insurrection. Elizabeth A. Harris & Alexander Alter, *Simon & Schuster Cancels Plans for Senator Hawley's Book*, N.Y. Times, Jan. 7, 2021.