SILICON VALLEY'S SPEECH: TECHNOLOGY GIANTS AND THE DEREGULATORY FIRST AMENDMENT

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The technology giants that dominate Silicon Valley are facing unprecedented calls for regulation across a wide range of policy areas, ranging from content moderation and surveillance to competition, privacy, and consumer protection. But, as this Article explains, the First Amendment may stymie such efforts in ways that go far beyond the much-discussed "First Amendment Lochnerism." Because technology companies' core business activity is the facilitation of communication through computer code, they are particularly well suited to wield a deregulatory First Amendment.

To avoid the First Amendment becoming a new, digital *Lochner*, this Article argues that First Amendment doctrine must sharply distinguish between arguments made on behalf of the First Amendment rights of users, which should be embraced, and those made on behalf of the companies themselves, which should be credited only if they advance the First Amendment interests of society, not merely those of the companies themselves. This Article concludes by using the recently enacted Florida law limiting social-media content moderation as a case study for how courts and other legal actors can determine what degree of First Amendment protections is appropriate for Silicon Valley's speech.

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Introduction

The technology giants of Silicon Valley and its satellites—companies, like Amazon, Apple, Facebook, Google, and Microsoft, that increasingly control our on- and off-line lives—used to be the poster children for the theory that the Internet was an exception to the general need for government regulation. From John Perry Barlow's libertarian declaration of the Internet's independence from "Governments of the Industrial World, you weary giants of flesh and steel,"[1] to more measured but still emphatic arguments from technology elites and scholars, the consensus has long been that as long as the government removed legal obstacles to the rapid growth of technology platforms—for example, by immunizing platforms for the actions of their users[2]—Silicon Valley's natural genius could be trusted, under the watchful eye of market forces, to innovate, scale, and generally improve our lives.

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[1] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Found. (Feb. 8, 1996), https://perma.cc/M5U9-XSNQ.

[2] *See* Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639 (2014).

But with Silicon Valley's mistakes and scandals looming just as large as its successes, its regulatory exceptionalism may be coming to an end. From Facebook's role in facilitating Russian meddling in the 2016 presidential election and Amazon's increasing monopoly-like power over Internet commerce, to Twitter's controversial banning of President Donald Trump and Apple's campaign to encrypt its way onto the wrong side of law-enforcement agencies around the world, there is a growing recognition that technology companies should no longer be able to remain "above" regulation. As Jonathan Zittrain observes, we are entering a new "era of digital governance," moving "from a discourse around rights . . . to one of public health, which naturally asks for a weighing of the systemic benefits or harms of a technology, and to think about what systemic interventions might curtail its apparent excesses."[3]

This new skepticism towards laissez-faire technology policy is bipartisan, even if the different sides differ in their diagnoses and prescriptions. The right's main complaint is that social media companies (purportedly) censor conservative speech and its solution is state laws limiting the ability of platforms to moderate content.[4] On the left, leaders of the "neo-Brandeisian" school of antitrust, which worries about how market concentration harms competition beyond simply raising consumer prices, have assumed high-level policy positions in the new Biden administration.[5]

A key task for policymakers and scholars in the coming years will be to develop a framework for regulating technology companies. But this will be a challenging task, in part because technology companies operate in so many areas. It is thus important to find commonalities across different regulatory areas so as to draw generalizable lessons, and so this Article takes the topic of this symposium—content

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[3] Jonathan L. Zittrain, Three Eras of Digital Governance (2019), https://perma.cc/L4KW-YZNG.

[4] *See infra* Part III.B.

[5] Lina Khan, whose critique of Amazon played a major role in revitalizing left-wing antitrust, *see* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017), currently chairs the Federal Trade Commission, and Tim Wu, a major proponent and popularizer of the neo-Brandeisian movement, *see* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018), is a Biden administration adviser and was a key figure behind the administration's executive order on competition policy, which includes several provisions related to the technology industry, Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021); *see also* Ryan Tracy, *Meet Tim Wu, the Man Behind Biden's Push to Promote Business Competition*, WALL ST. J. (July 9, 2021).

moderation—and situates it as but one of several related regulatory domains, from government surveillance and privacy law to consumer protection and antitrust.

My main argument is that an important commonality across these regulatory areas is the potential for the First Amendment to act as a potent tool against government regulation. The First Amendment's prohibition on government action "abridging the freedom of speech" has primarily been understood to encompass two more specific prohibitions: the prohibition on government restriction of speech, and a prohibition on government compulsion of speech. As scholars have long noted, because the First Amendment's scope is quite malleable, it is easy for companies to engage in "First Amendment opportunism" to advance their legal positions using the First Amendment.[6] As I describe in Parts I and II, because the core business of all leading technology companies is the facilitation of communication via computer code, First Amendment doctrine supports plausible deregulatory arguments across a variety of policy areas. This Article thus contributes to the broader literature on the deregulatory uses of a "Lochnerized" First Amendment,[7] specifically the ways that the First Amendment is leading in the direction of a "digital *Lochner*."[8]

The Article's normative and doctrinal contributions come in Part III. As I explain in Part III.A, not all deregulatory uses of the First Amendment are bad; in particular, companies can play an important role in defending the First Amendment rights of their users against government infringement. But when major technology companies invoke their own First Amendment rights to resist government action intended to advance societal free expression values, courts should be highly skeptical. In Part III.B, I use the ongoing controversy over Florida's law limiting social-media content moderation to illustrate a new approach to evaluating Silicon

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

[7] *See, e.g.*, Amanda Shanor, *First Amendment Coverage*, 93 NYU L. REV. 318, 331 n.57 (2018) (collecting sources).

[8] Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1731 (2020); *see also, e.g.*, James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014); Jeff Kosseff, *First Amendment Protection for Online Platforms*, 2 COMP. L. & SEC. REV. 199 (2019); Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988 (2019); Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

Valley's First Amendment arguments, one that puts the rights of users and the speech interests of society front and center.

I. THE POWERFUL COMBINATION OF SPEECH AND SILICON VALLEY

A. Why Speech?

There are many open-ended provisions in the Constitution, and so it's worth asking why technology companies would ground their constitutional arguments in free speech rather than, for example, substantive due process and freedom of contract, as deregulation's proponents did during the era of *Lochner v. New York*.[9] One reason is that Lochnerism, at least when it comes to economic regulation, is still a broadly discredited judicial ideology,[10] and so substantive due process is no longer a credible option as a matter either of doctrine or legal culture. But this does not explain why the First Amendment has come to play the role that *Lochner* once did.

Part of the answer is the high status that free-expression arguments have in American legal culture and among the general public. The rhetorical "magnetism"[11] of the First Amendment is of long duration[12] and is a key component of the Constitution's central place in America's civic religion. As Lee Bollinger notes, "Free speech has become so much more than just a legal principle. It has become a part of the national identity, and in so many ways we have learned to define ourselves as people through the process of creating the principle itself."[13] Among ordinary Americans the First Amendment—specifically the right to free speech—is

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[9] 198 U.S. 45 (1905).

[10] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011). Some have tried to rehabilitate *Lochner*, *see, e.g.,* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); Randy E. Barnett, *After All Those Years,* Lochner *Was Not Crazy—It Was Good*, 16 GEO. L.J. LAW & PUB. POL'Y 437 (2018), but this remains a decidedly minority position, both in the academy and in the courts, *see, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (citing Justice Holmes' dissent in *Lochner* that the Constitution "does not enact Mr. Herbert Spencer's Social Statics.").

[11] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787–93 (2004).

[12] *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

[13] Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, *in* THE FREE SPEECH CENTURY 1, 4 (Lee C. Bollinger & Geoffrey Stone eds., 2019).

consistently both the most recognized and most valued right.[14] And because the First Amendment's speech protections generally extend further than in other developed regions, Europe in particular, the American free speech tradition further contributes to American perceptions of exceptionalism.[15] Whether this is all to the good is contested,[16] but as a descriptive matter it is the case.

A second reason for the corporate attraction to the First Amendment is that suits brought under the First Amendment require the government to satisfy a higher burden than in many other types of regulation. For example, to defend against the claim that an economic regulation violates due process, the government need only establish a "rational basis" for that action.[17] A claim that an administrative action is substantively (rather than procedurally) flawed requires a demonstration that it was "arbitrary, capricious, [or] an abuse of discretion."[18]

But as long as a litigant can establish that their free-speech rights are implicated by a government action—and, as we shall see, technology companies have plenty of ways of making that argument—the government's burden increases dramatically. Almost all restrictions on speech are subject to strict scrutiny,[19] which requires both a compelling government interest and narrowly tailored government

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[14] *See, e.g.*, Christopher Coble, *Law Day in the USA: Which Rights Do Americans Love Best?*, FINDLAW (Apr. 30, 2015), https://perma.cc/WE7G-B3QG; Peter Moore, *First Amendment Is the Most Important, and Well Known, Amendment*, YOUGOV (Apr. 12, 2016), https://perma.cc/9KDM-ZPHH.

[15] *See generally* Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277 (2008).

[16] Mary Anne Franks has recently made a powerful argument against the constitutional "cult of free speech." MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 105 (2019).

[17] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[18] 5 U.S.C. § 706(2)(A).

[19] Exceptions include restrictions on commercial speech and content-neutral time, place, and manner restrictions, both of which are reviewed under intermediate scrutiny, whereby the government must establish that its action furthers a substantial government interest and does not burden substantially more speech than necessary. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (content-neutral regulations); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (commercial-speech regulations). But, as will become clear in Part II, most government regulation of technology companies that implicates the First Amendment is neither content neutral nor aimed narrowly at prototypical commercial speech like advertising. And even to the extent that government regulation of technology companies can be framed as regulation

action.[20] Although claims that strict scrutiny always dooms government action—that it is "'strict' in theory and fatal in fact"[21]—are exaggerated,[22] it is still a highly demanding standard. For example, Adam Winkler's survey of all strict-scrutiny decisions between 1990 and 2003 shows that "[s]trict scrutiny was most fatal in free speech cases, where only 22 percent of challenged laws survived."[23] More generally, as Jedediah Purdy observes, the fact that First Amendment arguments are increasingly "sayable" imposes "(1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question."[24]

A third reason that deregulatory First Amendment arguments are popular is the momentum of legal change. As many commentators have observed, the First Amendment's speech protections are undergoing a period of doctrinal "uncertainty and flux," and the overall effect is to expand the scope of First Amendment protections.[25] Litigants will naturally thus gravitate toward such arguments if they think it will help them achieve their goals.[26] Legal victories can also strengthen the force of non-legal free-expression arguments (since society's sense of what counts

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of commercial speech, the Supreme Court has signaled that "heightened," not merely intermediate, scrutiny is the preferred test. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

[20] Simon Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

[21] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[22] *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) ("Overall, 30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld. Rather than "fatal in fact," strict scrutiny is survivable in fact."); Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349 (2011).

[23] Winkler, *supra* note 22, at 815.

[24] Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 209 (2014).

[25] Shanor, *supra* note 7, at 333; *see also* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–16 (2015).

[26] "[L]awyering in general is opportunistic, and necessarily and properly so . . . . [M]ost lawyers who raise constitutional claims or defenses do so not out of their own commitment to certain constitutional principles, but rather because they believe that the constitutional argument will increase their likelihood of winning. And in general, the same holds true of their clients." Schauer, *supra* note 25, at 1625.

as free-expression is partially a function of what the courts tell it), which in turn strengthen future legal arguments.

B. Why Silicon Valley?

All organizations can take advantage of free-expression arguments. Indeed, the leading recent corporate First Amendment cases—*Citizens United v. FEC*,[27] *Burwell v. Hobby Lobby Stores, Inc.*,[28] and *Sorrell v. IMS Health Inc.*[29]—didn't involve technology companies at all.[30] Yet large technology companies enjoy particular advantages when making First Amendment and free-expression arguments, and thus we should expect such arguments to increasingly come from technology companies.

First, technology companies are a particularly influential part of the economy. Part of this is their sheer size (depending on the day, the list of the world's biggest companies by market capitalization is dominated by the Silicon Valley giants), which allows these companies to invest more money in litigation and indirect sources of support—for example, media advertising or funding civil society. Part of it is the technology industry's prestige; their recent dip in popularity notwithstanding, Silicon Valley companies enjoy some of the highest brand recognition and favorability ratings, certainly higher than other industry sectors.[31]

These real-world factors matter for how, as Jack Balkin describes it, implausible, "off the wall" constitutional arguments get "on the wall": "How people characterize positions along the spectrum of plausibility is always potentially in flux. By making and supporting constitutional arguments repeatedly, people can disturb settled understandings and create new ones. Through political activism and legal advocacy, determined parties can push positions from off-the-wall to on-the-wall.

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[27] 558 U.S. 310 (2010).

[28] 573 U.S. 682 (2014).

[29] 564 U.S. 552 (2011).

[30] *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

[31] According to Fortune, the world's three most admired companies are Apple, Amazon, and Microsoft, followed closely by Alphabet (Google's parent company). *World's Most Admired Companies*, FORTUNE, https://perma.cc/3NJ8-JZ36 (last visited July 16, 2021). Facebook and Twitter are notably absent from the list, perhaps reflecting the controversies that have dogged both companies over the past several years.

Indeed, this is the standard story of most successful social movements."[32] Technology companies, with their legal, political, and cultural resources, are well placed to enable and take advantage of these legal transitions.

Second, unlike in most other industries, much of what technology companies do is to facilitate communications. Thus, speech-related issues come up constantly. For example, it's hard to think of a single part of Facebook, Twitter, or Google's business model that doesn't in some way involve facilitating or controlling communications. Even technology companies that we might not naturally think of as "communications" companies often have a strong communications component. For example, Amazon and other e-commerce sites like eBay and AirBnB facilitate communication between millions of buyers and sellers. Thus, when a technology company argues that some regulation impinges on its speech-related activity, the argument is more intuitive (and thus more legally compelling, at least as an initial matter) than when ExxonMobil or Monsanto makes the same argument. That's not to say that the technology-company argument will always win, or that a non-technology-company's argument will always lose, but only that, on average, the former will have a better chance.[33]

Third, because the main product of technology companies is software,[34] technology companies can benefit from the strong association of code with speech.[35] The legal origin of this claim is the *Bernstein* case from the late 1990s. At that time the government imposed national-security export restrictions on certain types of encryption software and algorithms. A cryptography graduate student named Daniel Bernstein developed an encryption algorithm, playfully named "Snuffle," which he sought to make public both through a research article describing the algorithm and source code implementing it. When the government told Bernstein that Snuffle

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[32] JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 181 (2011).

[33] *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. Rev. 323, 361–62 (2016).

[34] Even traditionally hardware-centric companies like Apple are shifting toward a more software-focused business model. *See* Joshua Fruhlinger, *For the First Time in Years, Apple is Hiring More Software People than Hardware People*, THINKNUM (Mar. 1, 2019), https://perma.cc/3APU-B96M.

[35] If, as the famous Silicon Valley venture capitalist Marc Andreesen has argued, "software is eating the world," Marc Andreesen, *Why Software Is Eating the World*, WALL ST. J. (Aug. 20, 2011), we will steadily see companies in other industries exploit the "code is speech" argument.

fell under the export-control restrictions and could not be publicly released absent prior government permission, he sued, arguing that the export-control restrictions served as an unlawful prior restraint on speech in violation of his First Amendment rights.

The district court held that Snuffle fell under the scope of the First Amendment. It held not only that the Snuffle source code was speech, but that even object code (compiled source code) would be speech: "Whether source code and object code are functional is immaterial to the analysis at this stage. . . . [T]he functionality of a language does not make it any less like speech."[36] On appeal, the Ninth Circuit affirmed the district court, though it noted that in doing so it "employ[ed] a somewhat narrower rationale than did the district court."[37] The Ninth Circuit held that, to the extent that "cryptographers use source code to express their scientific ideas," such code was speech protected by the First Amendment,[38] though it expressly took no position on other uses of source code or the First Amendment status of object code.[39] The decision was 2-1, with the dissenting judge emphasizing the functional nature of encryption source code.[40] The concurring judge, although agreeing that "the speech aspects of encryption source code represent communication between computer programmers," recognized the merits of the dissent's position and urged Supreme Court review. Perhaps unsurprisingly given the panel's fractured decision, the Ninth Circuit withdrew the panel opinion and granted rehearing en banc. But by this point the nature of the dispute between Bernstein and the government had changed, so the court never reheard the case, and the *Bernstein* cases have no legal status in the Ninth Circuit.

Nevertheless, the persuasive reach of these opinions has extended far beyond their controlling legal force. They have proved influential to other courts grappling with similar problems,[41] and, perhaps more importantly, they have an important

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[36] Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996).

[37] Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1135 (9th Cir.), *reh'g granted, op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

[38] *Id.* at 1141.

[39] *Id.* n.15.

[40] *Id.* at 1149 (Nelson, J., dissenting).

[41] *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 449 (2d Cir. 2001); *see also* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is

place in the mythology of the technology sector. Bernstein's saga is featured prominently in journalist Steven Levy's *Crypto*, the popular account of the "Crypto Wars" of the 1990s.[42] The Electronic Frontier Foundation (EFF), the leading digital civil-society organization, represented Bernstein—his lawyer, Cindy Cohn, is now EFF's executive director—and has described *Bernstein* as "a landmark case that resulted in establishing code as speech and changed United States export regulations on encryption software, paving the way for international e-commerce."[43]

Of course things are not as simple as the slogan "code is speech" would suggest. Properly understood, *Bernstein* stands for a far more limited and, in the twenty-first century, downright banal proposition: Just because something is code does not mean that it is *not* speech. But whether a particular piece of code is speech for First Amendment purposes—most importantly, whether the government action regulates the speech's expressive, rather than merely functional, aspect—is a separate question.[44] Nevertheless, *Bernstein* remains a potent legal and rhetorical tool in technology companies' free-expression arsenals.

II. COMING REGULATORY BATTLES

This Part provides an overview of what I predict will be the main regulatory battlegrounds for Silicon Valley's free-expression arguments. Not all these arguments will be successful—though some already have been. But they are all doctrinally plausible and "on the wall," and, given their potentially broad reach, they are worth considering. In choosing which arguments to highlight, I have been guided by a combination of legal plausibility and real-world importance. Some of the arguments will probably not succeed in the courts (or in constitutional politics), but their impact would be so great if they did that it's worth taking them seriously.

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protected by the First Amendment."). Most recently this line of cases has popped up in the ongoing litigation over whether the government can restrict the online publication of blueprints for 3D-printed firearms. *See* Def. Distributed v. U.S. Dep't of State, 121 F. Supp. 3d 680, 691–92 (W.D. Tex. 2015), *aff'd*, 838 F.3d 451 (5th Cir. 2016).

[42] *See* STEVEN LEVY, CRYPTO: HOW THE CODE REBELS BEAT THE GOVERNMENT—SAVING PRIVACY IN THE DIGITAL AGE 297–302 (2001).

[43] Alison Dame-Boyle, *EFF at 25: Remembering the Case that Established Code as Speech*, ELECTRONIC FRONTIER FOUND. (Apr. 16, 2015), https://perma.cc/GJX3-L5WJ.

[44] *See* Kyle Langvardt, *The Replicator and the First Amendment*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 96–101 (2014); Neil Richards, *Apple's "Code = Speech" Mistake*, MIT TECH. REV. (Mar. 1, 2016), https://perma.cc/3NS7-EEM7. *See generally* Wu, *supra* note 8.

Many may resist some of the arguments described below because they conflict with strongly held legal or policy priors, especially for those who believe that government regulation plays an important role in our increasingly digital society and economy. Indeed, sharing that same belief, I myself have frequently been tempted to dismiss some of the more aggressive First Amendment arguments as beyond the legal pale. But history suggests that doctrinal priors, especially when it comes to constitutional law, should be held lightly. For example, the legal academy, with only a few exceptions, failed to predict—and indeed spent years vigorously arguing that it was impossible—that the Supreme Court would find the Affordable Care Act's individual mandate beyond the scope of Congress's Commerce Clause power.[45] It would be unfortunate if, when it came to the First Amendment, we were caught equally unawares.

A. Content Moderation

Given the topic of this symposium, I start with content moderation and the observation that there is no such thing as a "neutral" platform; as Tarleton Gillespie notes, "moderation is central to what platforms do, not peripheral," and "is, in many ways, *the* commodity that platforms offer."[46] Part of the appeal (or annoyance, depending on one's point of view) of buying an iPhone or iPad is that Apple bans "adult" content from its iOS App Store; by contrast, Google places far fewer restriction in its Android Play Store. Facebook and its subsidiary Instagram provide a different—and generally more sanitized—experience than does Twitter, which used to call itself the "free speech wing of the free speech party."[47] While platforms have traditionally not exerted the same level of control over user content that a traditional publisher would over the books or articles it published, this may be changing as platforms increasingly invest in both automated and human content moderation.[48]

First Amendment doctrine relating to content moderation is underdeveloped,

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[45] NFIB v. Sebelius, 567 U.S. 519, 561 (2012); *see also* David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuit Against PPACA?*, 2014 U. ILL. L. REV. 805.

[46] *See* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET 13 (2018).

[47] Josh Halliday, *Twitter's Tony Wang: "We Are the Free Speech Wing of the Free Speech Party,"* GUARDIAN (Mar. 22, 2012).

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

largely because statutory law has generally fully immunized moderation decisions. In particular, Section 230 of the Communications Decency Act (CDA) of 1996 grants platforms broad immunity, both when they choose to host or promote harmful or offensive user content[49] and when they choose to remove or otherwise moderate content.[50] Although Section 230 is a statute, it has long been interpreted through a First Amendment lens. Although Congress initially enacted section 230 for a narrow purpose—to incentivize websites to moderate what their users post, by removing the danger that such moderation would give rise to publisher liability—it was quickly interpreted by the courts as a broad grant of immunity for the purpose of encouraging free expression on the Internet. As the Fourth Circuit argued in the landmark Section 230 case *Zeran v. AOL, Inc.*:

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.[51]

Some scholars have argued that this view distorts Congress's intent,[52] but this First Amendment-inflected interpretation of Section 230 has remained dominant.[53]

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[49] "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

[50] "No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . ." *Id.* § 230(c)(2).

[51] Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[52] *See, e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404–08 (2017) (arguing that Section 230's intent was to *encourage* content moderation by removing the specter of defamation liability); *cf.* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021). For a discussion of the relationship between Section 230 and the broader Communications Decency Act, see Jeff Kosseff, *What's in a Name? Quite a Bit, If You're Talking About Section 230*, LAWFARE (Dec. 19, 2019), https://perma.cc/V45E-2REL.

[53] *See, e.g.*, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 29 (1st Cir. 2016); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099 (9th Cir. 2009).

But some scholars and litigants have gone farther, arguing not only that Section 230 should be interpreted against the backdrop of the First Amendment, but that the First Amendment *requires* at least some of the liability protections that Section 230 provides. Thus, as Jack Balkin argues, "Some aspects of intermediary immunity are probably required by the Constitution, so that if Congress repealed § 230, certain constitutional protections would still be in force."[54] For example, Balkin argues that strict liability for platforms might be unconstitutional,[55] as does Ashutosh Bhagwat,[56] and this is a position that at least one district court has adopted.[57]

Several ongoing lawsuits are testing the outer bounds of the First Amendment as it applies to platform content moderation. For example, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA)[58] amended Section 230 by removing the liability immunity for platforms that knowingly host content that facilitates sex trafficking.[59] In response, EFF, representing individuals, organizations, and Internet platforms, sued to have the law enjoined, arguing that FOSTA imposed a "content-based restriction on speech by selectively removing immunities designed to promote online freedom of expression."[60] Although the district court initially dismissed the suit for lack of standing, the D.C. Circuit reversed[61] and the district court's decision on the merits of the plaintiffs' First Amendment arguments is pending.

More recently, and in the wake of the high-profile banning of President Donald Trump from Twitter and Facebook after the January 6 attack on the Capitol, Florida

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[54] Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2046 (2018). *See also* Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (2018) (arguing that the First Amendment requires some of the protections provided by section 230).

[55] Balkin, *supra* note 54, at 2046.

[56] Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 130–31 (2021).

[57] *See* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1275–78 (W.D. Wash. 2012) (holding that a law imposing strict liability on platforms for posting content promoting the commercial sexual abuse of a minor violated the First Amendment).

[58] Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018).

[59] 47 U.S.C. § 230(e)(5).

[60] Complaint for Declaratory and Injunctive Relief at 40, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 18-cv-01552).

[61] Woodhull Freedom Found. v. United States, 948 F.3d 363 (2020).

passed a law restricting the ability of social-media platforms to moderate political candidates or media outlets.[62] The law was quickly enjoined in district court, largely on the grounds that it violated platforms' First Amendment editorial right to do decide what to permit on their platforms.[63] I address this example in detail in Part III.B below.[64]

B. Government Surveillance

Technology companies use a broad range of legal, technological, and social techniques to oppose government surveillance, and the First Amendment plays an important role in what I have previously called Silicon Valley's "techniques of resistance" against government surveillance.[65]

Sometimes companies invoke the rights of their users in addition to their own First Amendment rights. For example, after Twitter challenged an administrative subpoena to provide user information on the @ALT_USCIS Twitter account, set up after President Trump's inauguration to criticize the administration's immigration policies, the government withdrew its subpoena.[66] And Amazon challenged a law-enforcement murder-investigation subpoena for recordings from one of its Alexa smart speakers, arguing both that the subpoena would violate its users' First Amendment rights in the information they transmit to Amazon (in the form of

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[62] 2021 Fla. Sess. Law Serv. Ch. 2021-32 (S.B. 7072) (West) (codified at Fla. Stat. §§ 106.072, 287.137, 501.2041, and 501.212).

[63] NetChoice, LLC v. Moody, No. 21cv220, 2021 WL 2690876 (N.D. Fla. June 30, 2021).

[64] For other pieces in this symposium addressing the question of the First Amendment's right of platforms to moderate content, see Bhagwat, *supra* note 56; Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273 (2021); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021). For another recent treatment of this issue, see Mailyn Fidler, *The New Editors: Refining First Amendment Protections for Internet Platforms*, 2 NOTRE DAME J. ON EMERGING TECH. 241 (2021).

[65] *See generally* Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 122–49 (2018).

[66] *See* Jordan Brunner, *Twitter Drops Complaint Against DHS*, LAWFARE (Apr. 7, 2017), https://perma.cc/6GES-6VRP. More recently, Twitter has argued that a Department of Justice subpoena for user information on the @NunesAlt account parodying representative Devin Nunes is a "mechanism to attack its users' First Amendment rights." Twitter Inc.'s Motion to Quash Subpoena & Vacate Nondisclosure Order & Memorandum in Support at 2, In re Grand Jury Subpoena GJ2020111968168 & Application of the U.S. of Am. for an Order Pursuant to 18 U.S.C. § 2705(b), No. 20-sc-03082 (D.D.C. Mar. 10, 2021).

their search queries) and Amazon's own First Amendment rights (in the form of the responses its software provides to those queries).[67] Amazon ultimately dropped its challenge after the defendant gave it permission to share the requested recordings.[68]

A rich target for First Amendment challenges has been nondisclosure orders, which prevent technology companies that receive surveillance orders from notifying their users or from publishing detailed statistics. In one case, Microsoft successfully argued that the Stored Communication Act's nondisclosure provisions[69] violated both its own and its users' First Amendment rights.[70] In the wake of Microsoft's lawsuit, the Department of Justice ended its policy of routinely using nondisclosure orders when issuing SCA orders, and Microsoft dropped its lawsuit.[71] And in an ongoing case, Twitter is challenging the Department of Justice's prohibition on its ability to publish the precise number of foreign intelligence surveillance orders it has received as a violation of its First Amendment rights. Twitter lost the argument at the district court[72] but has appealed to the Ninth Circuit.[73]

The highest-profile First Amendment challenge to government surveillance came during Apple's challenge to a court order compelling Apple to write software that would help the FBI access the locked iPhone of one of the shooters in the 2015 San Bernardino terrorist attack.[74] Among several other arguments, Apple contended that the First Amendment protected it from writing code that "advances" a view with which the company disagreed—namely, that it was ever appropriate for the government to access an individual's encrypted Apple device.[75] I discuss this

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[67] *See* Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant at 9–12, Arkansas v. Bates, No. CR-2016-370-2 (Cir. Ct. Ark. Feb. 17, 2017).

[68] Iman Smith, *Amazon Releases Echo Data in Murder Case, Dropping First Amendment Argument*, PBS NEWS HOUR (Mar. 8, 2017), https://perma.cc/S9AC-Q9MJ.

[69] 18 U.S.C. §§ 2703, 2705(b).

[70] *See* Microsoft Corp. v. U.S. Dep't of Justice, 233 F. Supp. 3d 887, 895–97 (W.D. Wash. 2017).

[71] *See* Ellen Nakashima, *Justice Department Moves to End Routine Gag Orders on Tech Firms*, WASH. POST (Oct. 24, 2017).

[72] Twitter, Inc. v. Barr, 445 F. Supp. 3d 295, 305 (N.D. Cal. 2020).

[73] Twitter, Inc. v. Garland, No. 20-16174 (9th Cir.).

[74] I discuss the legal battle in detail in Rozenshtein, *supra* note 65, at 127–30.

[75] Apple Inc's [sic] Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search,

case in more detail in Part III.B below.

C. Competition

Supported by an influential group of scholars,[76] technology companies have raised First Amendment defenses against claims that their search-engine results unfairly demote or exclude specific results. In one influential early case, a court held that Google's search-engine results—specifically the output of its PageRank algorithm—are "constitutionally protected opinions" and thus cannot be the basis of a suit for tortious interference with contractual relations.[77] Google has also raised First Amendment defenses to claims that its search-engine results are anticompetitive.[78] Thus, although antitrust law has historically raised few First Amendment concerns,[79] including when it comes to the media industry,[80] this may change as companies use all the legal tools at their disposal to head off the growing movement

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and Opposition to Government's Motion to Compel Assistance at 33, In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, No. 5:16-cm-00010-SP (C.D. Cal. Feb. 25, 2016).

[76] *See generally, e.g.*, Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883 (2012); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1469–71 (2013); Grimmelmann, *supra* note 8, at 917–22.

[77] Search King Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); *see also* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007) (holding that requiring Google to place "ads for . . . websites in prominent places on their search engine results . . . would compel it to speak in a manner deemed appropriate by Plaintiff and would prevent Google from speaking in ways that Plaintiff dislikes"); Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 440 (S.D.N.Y. 2014) (holding that requiring the defendant to be liable for search-engine designs that favor certain expression violates the First Amendment).

[78] *See* KinderStart.com, LLC v. Google, Inc., No. 06-2057, 2007 WL 831806, at *17 (N.D. Cal. Mar. 16, 2007); *see also* Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. Rev. 35, 37 (2015).

[79] As Fredrick Schauer has observed, the First Amendment has applied to antitrust only "when it has invaded traditional First Amendment domains, as with concerted action to urge legislation (the so-called Noerr-Pennington doctrine) or with otherwise unlawful boycotts that are more political than economic in motivation." Schauer, *supra* note 11, at 1781; *see also* Richard Epstein, *The Irrelevance of the First Amendment to the Modern Regulation of the Internet*, 23 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 100, 111 (2014).

[80] *See* Associated Press v. United States, 326 U.S. 1, 19–20 (1945) (rejecting First Amendment challenge to government antitrust suit against the Associated Press).

to apply antitrust law to Silicon Valley.[81]

First Amendment arguments are similarly raised in the related area of common carrier regulation for internet service providers, which, while not usually included under the Silicon Valley label, are at least close cousins. For example, while still a judge on the D.C. Circuit, Justice Brett Kavanaugh argued that the FCC's net neutrality rules—which would have prohibited Internet service providers from blocking, slowing down, or charging different rates for specific content transiting their networks—violated the First Amendment rights of internet service providers to choose what content to transmit along their networks.[82]

D. Privacy and Data Protection

The United States has historically lagged behind other jurisdictions, especially the European Union, in enacting comprehensive data protection legislation and regulation. Thus there is no analog to the European Union's General Data Protection Regulation (GDPR). But the situation may be changing. The GDPR proved influential as a model for the California Consumer Privacy Act of 2018 (CCPA),[83] which imitates the GDPR in several important respects. For example, the CCPA instantiated a more limited version of the GDPR's "right to erasure" in that it allows consumers the right to delete information that companies have collected from them.[84]

Unfortunately for proponents of the CCPA and similar regimes,[85] sweeping data-protection laws are vulnerable to First Amendment challenges, especially after the Supreme Court's opinion in *Sorrell v. IMS Health Inc.*,[86] in which the Court held

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[81] *See, e.g.*, Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2018).

[82] United States Telecomms. Ass'n v. FCC, 855 F.3d 381, 484–93 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

[83] Cal. Civ. Code § 1798.100 (West 2018).

[84] *Id.* § 1798.105. Section 105(d)(4) provides an exception in that companies need not delete information if the company needs it to "exercise free speech [or] ensure the right of another consumer to exercise his or her right of free speech." The question, of course, is what "free speech" means. If companies convince courts that the First Amendment includes the right to keep any and all data about users, then this part of the CCPA will be a dead letter.

[85] 2019 in particular was a bellwether year for state privacy legislation, with measures being introduced in dozens of states around the country. *See Consumer Data Privacy Legislation*, NAT'L CONF. STATE LEGIS. (June 7, 2019), https://perma.cc/PP49-PYMR.

[86] 564 U.S. 552 (2011).

that a Vermont law that restricted the sale of data on physician prescribing practices violated the First Amendment. *Sorrell* has been recognized as posing a potentially serious threat to data-privacy laws across the board.[87] For example, *Sorrell* could easily be applied to invalidate that part of the CCPA that requires companies to notify users before selling their information and allow them to opt out of the sale.[88]

Some privacy scholars have argued that *Sorrell* was wrongly decided and that, in any case, it does not foreclose data-privacy law.[89] As a theoretical matter these arguments may well be right; the Supreme Court is always free to overturn or limit precedent. But given the current composition of the Court, it is just as (if not more) likely that *Sorrell* presages a highly skeptical judicial approach to privacy regulation.

All of this will cast a long shadow over ongoing attempts to create a federal data-privacy law. There is in principle broad agreement that one federal law would be preferable to a patchwork of state laws. Privacy advocates hope the law will provide strong coverage for consumers no matter what state they live in. And companies (and free-market legislators) would prefer only one regulatory mandate and thus a provision broadly preempting state law.[90] But to the extent that courts apply the logic of *Sorrell* and like cases, we could end up with a regime in which state law is preempted (or simply held unconstitutional under the First Amendment) while federal law lacks substantial bite.

E. Consumer Protection

Data-protection laws generally seek to empower individuals by giving them choices over how their data is used—hence the ubiquity of notice regimes. But

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[87] *See, e.g.*, Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 855 (2012); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014); Garden, *supra* note 33, at 335–36.

[88] *See* Jeff Kosseff, *Ten Reasons Why California's New Data Protection Law is Unworkable, Burdensome, and Possibly Unconstitutional*, TECH. & MARKETING L. BLOG (July 9, 2018), https://perma.cc/9SCA-Y6MZ; *see also* Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO STATE L.J. 839, 862–64 (2017).

[89] *See, e.g.*, NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 82–84 (2015). Others, like Jack Balkin, do not attack *Sorrell* directly but nevertheless argue that data-privacy regulation would be constitutional. *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

[90] *See* Emily Birnbaum & Harper Neidig, *State Rules Complicate Push for Federal Data Privacy Law*, HILL (Mar. 5, 2019).

some products are considered so potentially harmful that a more direct regulatory approach is called for. This is particularly true when it comes to addictive products.

Kyle Langvardt has done the most to explore how digital technology—in particular games and social media—are similar to (and thus should be regulated as) addictive products and services like alcohol, tobacco, and gambling.[91] As Langvardt notes, addiction is both a goal of technology developers and an increasingly serious consequence. There are a variety of different types of potential regulation: low-touch interventions like requirements to "display general messages about risks associated with tech addiction and overuse,"[92] design mandates to encourage users to moderate their use, and, in the most extreme case, outright bans on design features considered too dangerously addictive. Regulations could come from a variety of sources—new or existing federal and state statutes, the Federal Trade Commission's general power to police "unfair and deceptive practices," and even common law torts—but virtually all would "likely be challenged as infringements on free expression."[93]

Of course this is not to say that such challenges would be successful. Plaintiffs would have to establish both that the First Amendment applied and that the government action violated the relevant tier of scrutiny. Langvardt argues convincingly that current doctrine need not invalidate all, or even most, reasonable government attempts to regulate addictive technology.[94] But the very fact that the first major scholarly work on the regulation of addictive technology devotes so much space to analyzing the potential First Amendment issues with such regulation underscores how serious of a threat the First Amendment would be to such regulation. At least some First Amendment challenges will no doubt prove successful, and the very possibility of a First Amendment challenge will, at least on the margin, discourage government regulators from acting.

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[91] Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129 (2019). Another recent analysis is Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 99–101 (2021).

[92] Langvardt, *supra* note 91, at 154.

[93] *Id.* at 171.

[94] *See id.* at 171–84.

III. First Amendment First Principles

As the above examples show, in area after area, applying current First Amendment doctrine threatens to immunize vast swaths of economic activity from government regulation. On the other hand, companies are often best positioned to vindicate the First Amendment rights of their users, especially when it comes to speech and surveillance. The rest of this Article grapples with the question of how to avoid digital *Lochner* while protecting user rights.

A. User Rights and Societal Impacts

An important way to resist digital *Lochner* is to clearly differentiate when companies are arguing on behalf of their users' First Amendment rights from when they are arguing on behalf of their own rights. In the former case, First Amendment arguments can play a critical role in buttressing the power of the individual against the state.

As Jack Balkin has explained, the traditional model of the First Amendment was dyadic: speakers spoke, and the government tried to stop them from doing so.[95] In this model, the First Amendment's proper target was restricting government censorship. But digital technology has turned this dyadic model into a triadic one: the main day-to-day regulator of individuals' speech is no longer the government but rather the technology platforms and their associated digital infrastructure. This has properly raised concerns about the government using its regulatory tools to indirectly censor speech by targeting platforms rather than users directly.[96]

Thus, when Twitter resists subpoenas on the basis of its targeted users' First Amendment rights to anonymous speech or Microsoft fights a nondisclosure order, the platforms are exercising (metaphorically, at least) a kind of *parens patriae* standing, litigating on behalf of their users' rights just as state governments sometimes invoke their residents' rights.[97] And even when a technology company cannot identify a particular user whose interests are harmed by government action, it might still be able to argue that there are individuals who would nevertheless be injured. For example, if the government were to require that certain content be removed from social-media platforms, a company could frame its challenge around

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[95] See Balkin, *supra* note 54, at 2015.

[96] *See* Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. Davis L. Rev. 1149, 1186–89 (2018).

[97] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 519–21 (2007).

the First Amendment rights of the speakers and listeners who would directly be affected by the regulation.

But not at all First Amendment arguments are so grounded in user rights. Frequently companies raise their own First Amendment rights. Here the argument for applying the full degree of First Amendment protections is substantially less compelling, because not all the traditional justifications for First Amendment protection apply. To see why this is so it is important to go back to the underlying values that the First Amendment is meant to promote—to the First Amendment's first principles, so to speak.[98]

There is no single agreed-upon theoretical justification for the First Amendment's speech protections, but rather a plurality of different, sometimes overlapping, accounts.[99] But whatever their details, they tend to fall into one of two categories: on the one hand, accounts that focus on the entitlement of individuals to speak or listen, and, on the other hand, accounts that focus on free speech's positive effects on society as a whole.[100] Example of the first kind of theoretical justification are accounts grounded in autonomy and dignity, whereby speech is protected because it is key to human flourishing.[101] An example of the second kind of theoretical justification is the famous "marketplace of ideas" theory, by which unfettered speech is the best way for society to discover truth.[102] Other theories share features of the individual and societal-based accounts; for example, one way that speech is justified is on the grounds that it encourages democratic self-governance, both by creating better democratic citizens (an individual benefit) and an overall democratic polity (a societal benefit).[103]

Whatever the role that autonomy-based accounts should play in First Amendment cases regarding individuals, they should have little place when it comes to the

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[98] *Cf.* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

[99] *See, e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT 8–10 (4th ed. 2014); David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. SLIP OPINIONS 87, 94–97 (2015).

[100] *Cf.* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1268–89 (2005).

[101] *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 92–93 (2012).

[102] *Id.* at 90.

[103] *Id.* at 91–92.

First Amendment rights of corporations. After all, autonomy-based arguments only make sense when one can identify a human being whose autonomy interests are implicated. And while corporations are, of course, collections of individuals, the whole point of the corporate form is that, by being able to act through a separate legal person, the individual employees, managers, and owner of the corporation cannot themselves claim the rights of that legal person.[104] That does not mean that corporations cannot have constitutional rights, but rather that these rights should be limited to those that are appropriate to the corporate form.[105]

With the autonomy argument disposed of, the only reason to grant a technology company First Amendment rights is that doing so is good for society—again, whether in terms of promoting the expressive autonomy and dignity of individual speakers, or improving the marketplace of ideas or democratic discourse. In other words, as Kent Greenfield argues:

> The constitutional analysis should begin with the presumption that corporations should receive the rights incidental to serving that economic purpose and should not receive those that are not germane to that purpose. This presumption may be overcome in specific contexts or to further other constitutional values, but that is the starting place for analysis.[106]

For an example of this distinction, consider one of the First Amendment arguments that Apple made in its dispute with the FBI:[107] that the government's demand that Apple write code that would help the FBI access the locked iPhone amounted

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[104] *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 9 (2018); *see also* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WISC. L. REV. 451, 451 (arguing that "*Citizens United*, which prohibited the government from restricting independent expenditures for corporate communications, and held that corporations enjoy the same free speech rights to engage in political spending as human citizens, is grounded on the erroneous theory that corporations are 'associations of citizens' rather than what they actually are: legally autonomous entities that are conceptually distinct from those who own their stock").

[105] Even a case like *Hobby Lobby*, which puts forward an aggressive view of corporate rights, relied on the closely held nature of the corporation at issue. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014). My view, which is shared by many commentators, *see, e.g.*, GREENFIELD, *supra* note 104, at 9–11, is that *Hobby Lobby*'s reliance this factor was a mistake and should not have overcome the fundamental fact of corporate legal separateness. But *Hobby Lobby* demonstrates that all of the Justices are aware that the issue of corporate separateness is a relevant issue for First Amendment analysis.

[106] *Id.* at 20.

[107] *See supra* notes 74–75 and accompanying text.

to a demand to express a viewpoint—that government access to encrypted devices is sometimes legitimate—"that is deeply offensive to Apple."[108] Apple analogized its case to one in which the state "force[d] an artist to paint a poster, a singer to perform a song, or an author to write a book, so long as its purpose was to achieve some permissible end."[109]

The comparison to the First Amendment rights of individual creators is telling. It is of course true that the First Amendment generally prevents the government from compelling an individual to express speech. Thus, assuming that the code at issue was expressive in a First Amendment sense, the First Amendment could well have prohibited the government from issuing an order to a particular Apple engineer to write code that expressed a view with which the engineer disagreed, on the grounds that it would violate the engineer's autonomy and dignity. But Apple itself—in contrast to its CEO Tim Cook, its engineers, or its shareholders—has no autonomy interests, least of all in not writing code with which "it" disagrees.

This does not mean that Apple had no legitimate First Amendment argument, only that such an argument should have been grounded in the effect of the government order on the First Amendment rights of others or on broader societal values like the promotion of democracy. As scholars like Neil Richards and Andrew Woods suggested at the time,[110] Apple could have argued that the government's order would undermine the trust that iPhone users had in the security of Apple products and services, which could chill their willingness to engage in unfettered speech. Whether or not this would have been a winning argument would, of course, depend on empirical claims about the effect of government unlocking orders on user behavior, as well as a balancing of the security and liberty interests at stake. But this approach would at least have asked the right question: not whether Apple has a First Amendment right to not create code with which it disagrees (whatever that means), but whether forcing Apple to write that code would harm the values the First Amendment is meant to protect.

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[108] Apple Inc.'s Reply to Government's Opposition to Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search at 24, In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 16-cm-00010 (C.D. Cal. Mar. 15, 2016).

[109] *Id.* at 24–25.

[110] *See* Richards, *supra* note 44; Andrew Keane Woods, *Trust, Apple, and the First Amendment*, LAWFARE (Feb. 23, 2016), https://perma.cc/5MEF-9JLL.

Reframing First Amendment arguments about technology-company rights as arguments about users rights and broader First Amendment values has several advantages. First, it allows us to forgo the difficult search for trans-substantive First Amendment rules that apply across policy areas, since the right answer will differ depending on whether we're talking about surveillance or content moderation or competition law.

Second, this new framework clarifies the nature of what is at stake: rather than pitting the social interest behind the government action against the "right" of a company, the analysis balances the societal interests of the government against the societal First Amendment interest of letting the company resist the regulation. This allows for a more proportional, policy-focused analysis[111] rather than a formalistic battle of doctrinal rights, because it recognizes that, even where the First Amendment singles out institutions for protection (as it does the press), grants of First Amendment rights beyond natural persons can only be justified on instrumental, and thus "empirically contingent," grounds.[112]

Of course, none of the policy analysis that this approach to the First Amendment involves is easy or straightforward, and different analysts will bring different assumptions and priors. For example, those who put more faith in the self-correcting capacity of the market may argue for an "information libertarianism" that views government regulation in digital information markets as liable to do more harm than good.[113] Others, especially those associated with the emerging "law and political economy" movement, may view government regulation as a necessary counterweight to the market dominance of large technology companies.[114] Depending on the policy context, I find myself sympathetic to both of these positions. But the broader point is that this is the sort of debate we should be having: how different

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[111] *See* Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. (forthcoming 2021). On the benefits of proportionality analysis for rights adjudication, see generally Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

[112] Schauer, *supra* note 100, at 1269.

[113] *See generally* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335 (2017).

[114] *See, e.g.*, Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 202–03 (2014); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 973 (2020); Symposium, *Free Expression in an Age of Inequality*, 118 COLUM. L. REV. 1953 (2018).

government regulations of the technology industry advance or hinder First Amendment values, rather than on the nature of the speech "rights" of technology companies.

B. A Case Study: The Florida Social Media Law[115]

To see how an outcomes-based approach can help sort out the First Amendment claims of technology giants, and to bring the discussion in this Article back to the topic of this symposium, content moderation, consider the ongoing legal controversy over the Florida social-media law, Senate Bill (SB) 7072.[116]

SB 7072, championed by Florida's Republican governor Ron DeSantis, was enacted in May 2021 in the wake of Twitter and Facebook's banning of Donald Trump after the January 6 attack on the Capitol. Purporting to limit the ability of social media platforms to moderate user content, SB 7072 is something of a legislative grab bag, with provisions ranging from mandates that social-media platforms disclose their moderation decisions and policies[117] to antitrust penalties.[118] But two features of the law have attracted the greatest public notice. The first are the law's prohibitions on "deplatforming" political candidates[119]—removing them from the platform temporarily or permanently[120]—or "shadow banning" them—limiting the exposure of their posts to other platform users.[121] Platforms are subject to a variety of penalties for violating these provisions, up to a fine of $250,000 per day for deplatforming political candidates.[122] The law also prohibits "actions to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."[123]

The response to SB 7072 from both the legal and technology communities has

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[115] This section is closely adapted from Alan Z. Rozenshtein, *The Real Takeaway From the Enjoining of the Florida Social Media Law*, LAWFARE (July 9, 2021), https://perma.cc/KYM3-3T3T.

[116] 2021 Fla. Sess. Law Serv. Ch. 2021-32 (S.B. 7072) (West) (codified at Fla. Stat. §§ 106.072, 287.137, 501.2041, and 501.212).

[117] Fla. Stat. § 501.2041(2)(a), (c), (e), (g).

[118] *Id.* § 287.137(2)–(3).

[119] *Id.* § 106.072(2).

[120] *Id.* § 501.2041(1)(c).

[121] *Id.* § 501.2041(1)(f), (2)(h).

[122] *Id.* § 106.072(3).

[123] *Id.* § 501.2041(2)(j).

been scathing. Michael Froomkin has called the law "so obviously unconstitutional, you wouldn't even put it on an exam."[124] Howard Wasserman states that the constitutional questions the law raises are "not even close" and that because social media platforms are private companies, "[t]hey have a right to decide who gets on and off their platform."[125] The law was immediately challenged by NetChoice, a major trade association for social media platforms and ecommerce sites, as violating, among other things, the First Amendment rights of social media platforms.

The day before the law was set to go into effect, its content-moderation provisions were enjoined in federal court.[126] The district court enjoined the law on multiple grounds, including that it violated Section 230's "Good Samaritan" immunity.[127] But the bulk of the court's opinion centered on the question of whether the First Amendment protected the rights of social-media platforms to decide what to host.

In certain respects, the court's analysis is a good illustration of how the level of First Amendment protections granted to a technology company can be tailored based on the extent to which those protections advanced the First Amendment's broader social values. In particular, the court recognized that speech platforms constitute a spectrum, ranging from hands-on publishers to neutral conduits, and that social-media platforms constitute a novel position between these two extremes.

On the publisher end are entities that exert substantial editorial control over the speech that occurs on their platforms and, in so doing, come to be identified with that speech. The classic example is a newspaper, which not only individually chooses each story it prints but also gives its imprimatur to those stories as worthy of public dissemination and discussion. As the court noted, in *Miami Herald Publishing Co. v. Tornillo*[128] the Supreme Court struck down a "right of reply" statute

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[124] Gilad Edelman, *Florida's New Social Media Law Will Be Laughed Out of Court*, WIRED (May 24, 2021).

[125] Joshua Ceballos, *Experts Say DeSantis' De-Platforming Proposal Violates First Amendment*, MIAMI NEW TIMES (Feb. 8, 2021), https://perma.cc/PHH9-AHVN.

[126] NetChoice, LLC v. Moody, No. 21cv220, 2021 WL 2690876 (N.D. Fla. June 30, 2021). As this Article was going to press, Florida's appeal before the Eleventh Circuit was pending. Notice of Appeal, *NetChoice*, No. 21cv220 (N.D. Fla. July 12, 2021).

[127] *NetChoice*, 2021 WL 2690876, at *6.

[128] 418 U.S. 241 (1974).

(coincidentally also in Florida) that would obligate newspapers that criticized a political candidate to print that candidate's reply.[129]

The district court cited two more Supreme Court decisions striking down laws that raised similar First Amendment concerns. In *Hurley v. Irish-American Gay, Lesbian Bisexual Group*[130] the Court held that a privately organized parade could not be forced to include a gay-rights group—in the Court's reasoning, the parade organizers could not help but be identified with each of the parade participants, so the organizers had to be permitted to exercise discretion in choosing who participated.[131] And in *Pacific Gas Electric Company v. Public Utility Commission*[132] the Supreme Court held that the government could not force a public utility to include third-party views with which the utility disagreed in the same mailing envelope that the utility routinely used to communicate to its customers its opinions on matters of public concern.[133]

It makes sense that the First Amendment would provide strong protections in these situations: The sorts of government compulsions in these cases have a high potential to distort public discourse. They can crowd out other kinds of speech: with newspapers because of editorial capacity; with parades because of the physical capacity limits on the number of participants; and with mailers because the limited physical space available to deliver a message. Affirmative publication obligations can also disincentivize entities from speaking to begin with. For example, a newspaper may choose not to cover politics at all so as to avoid right-of-reply obligations;[134] parade organizations may decline to hold a parade so as not to include groups they dislike; and a utility may forego customer mailings so as to avoid having to amplify its opponents' messages. And if affirmative publication obligations create the false impression that an entity endorses speech it is required to carry, public discourse is distorted because listeners are misled as to who supports what speech.

On the other end of the platform spectrum are entities that operate as passive

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[129] *Id.* at 258.

[130] 515 U.S. 557 (1995).

[131] *Id.* at 574–76.

[132] 475 U.S. 1 (1986).

[133] *Id.* at 20–21.

[134] *See Tornillo*, 418 U.S. at 257.

and pervasively available conduits for speech. Here the Supreme Court has upheld laws that require private platforms to give access to would-be speakers, and Florida's argument relied heavily on these cases. In *PruneYard Shopping Center v. Robins*[135] the Court held that a privately owned shopping mall did not have a First Amendment right to exclude members of the public who were canvassing for petitions. The Court leaned primarily on the grounds that the shopping mall remained free to disclaim any endorsement of the canvassers, and "the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner."[136] Similarly, in *Rumsfeld v. FAIR*,[137] the Supreme Court upheld a law that denied funding to universities that did not permit on-campus military recruiters (usually because the universities objected to the then-existing ban on gays in the military); it held that the funding condition did not infringe on the First Amendment rights of universities because universities were free to communicate their opposition to the military policy and a reasonable observer was unlikely to confuse the presence of a recruiter on campus with the university endorsing the recruiter's policies.[138]

The logic of these cases is the natural converse of the logic of cases like *Tornillo*. In these cases the government action increased the amount and diversity of speech—there was little chance that the private entities would shut down so as to avoid having to host speech they disagreed with, and there was little danger of misleading the public as to who actually supported the speech in question.

Combining these two groups of cases gives a set of factors that we can use to determine when a government restriction on a platform's ability to exclude speech is constitutionally problematic. And the question thus facing the district court was where on the spectrum of private speech platforms to put social media companies like Facebook and Twitter. Its conclusion—that social media platforms fall somewhere in the "middle" of this divide and that "it cannot be said that a social media platform, to whom most content is invisible to a substantial extent, is indistinguish-

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[135] 447 U.S. 74 (1980).

[136] *Id.* at 87.

[137] 547 U.S. 47 (2006).

[138] *Id.* at 69–70.

able for First Amendment purposes from a newspaper or other traditional medium"[139]—is an important holding because it recognizes, in ways that legal and political discourse around online content moderation generally has not, that social media platforms cannot easily be shoehorned into traditional First Amendment rules based on a simplistic model of platform "rights." Rather, thinking about the legal architecture supporting content moderation requires going back to the underlying goals of the First Amendment—increasing individual autonomy, creating a marketplace of ideas, and encouraging democratic self-government—and crafting a new set of doctrinal rules for these new kinds of speech platforms.

In its attempt to undertake that analysis for social media companies in the context of the Florida law, the district court got it partly right and partly wrong, in ways that illustrate the promise of policy analysis and the perils of not taking it far enough. On the one hand, the court identified the most constitutionally problematic features of the Florida statute. For example, the Florida law prohibits a social media platform from "censor[ing]" any "journalistic enterprise based on the content of its publication or broadcast," where censorship includes "post[ing] an addendum to any content or material posted by a user."[140] But as the court recognized, this prevents a social media platform from attaching a disclaimer to content that it finds offensive or with which it does not want to be identified.[141] And by preventing platforms from adding labels to content, the Florida law undermines what has become an important tool in the fight against misinformation and foreign interference. This provision thus violates the First Amendment requirement that the public be able to accurately tell who supports what speech and that platforms be able to express their own opinions.

The court also convincingly demonstrated the deeply partisan motivations of the Florida government, pointing to Florida governor DeSantis's signing statement railing against "the leftist media and big corporations."[142] Given the dangers that propaganda poses to democratic self-government, First Amendment concerns are at their highest when the government engages in viewpoint-based discrimination, including when it compels speech to favor a particular side of the argument.

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[139] NetChoice, LLC v. Moody, No. 21cv220, 2021 WL 2690876, at *9 (N.D. Fla. June 30, 2021).

[140] Fla. Stat. 501.2041(1)(b).

[141] *NetChoice*, 2021 WL 2690876, at *3.

[142] *Id.* at *10.

Finally, the court highlighted the many drafting problems with the law, which "is riddled with imprecision and ambiguity"[143]—not to mention an embarrassing carveout for theme parks, which in the court's view exposed a legislature that, while purporting to be deeply concerned about censorship, is "apparently unwilling to subject favored Florida businesses to the statutes' onerous regulatory burdens."[144] Given all these problems, it was not unreasonable to enjoin the entire law, rather than hunting and gathering for parts that could be salvaged.

But while the problems the court identified do indeed doom the Florida law, they are not inherent to all attempts to limit the extent to which social media platforms can control their users' speech. Unfortunately, the extreme problems with the Florida law led the court to overstate the general case against such regulations, in a classic case of hard cases making bad law—or at least bad dicta.

Throughout the opinion, the court undervalued the government interest behind laws limiting content moderation. For example, it dismissed Florida's invocation of First Amendment values as "perhaps a nice sound bite," but nothing more, because, under "accepted constitutional principles," the First Amendment "does not restrict the rights of private entities not performing traditional, exclusive public functions."[145] The point about state action is correct,[146] but that doesn't mean that there's no broader societal free expression interest in limiting the First Amendment rights of social media platforms, if this action leads to greater expressive opportunities for people in general. Speech does not become less valuable—even if it does become less constitutionally protected—merely by going through private, rather than public, channels. Nor is it rare for legislation to regulate private companies so

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[143] *Id.* at *11.

[144] *Id.* at *10.

[145] *Id.* at *7.

[146] *See* Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–30 (2019). Jed Rubenfeld has argued that social media platforms are state actors by virtue of the "Good Samaritan" immunity they receive under Section 230 of the Communications Decency Act, Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019), https://perma.cc/5KZE-HSVX, and this argument has recently made an appearance in former president Donald Trump's lawsuit against Facebook, Twitter, and Google, *see* Shane Goldmacher, *Trump Sues Tech Firms for Blocking Him, and Fund-Raises Off It*, N.Y. TIMES (July 7, 2021). I criticize Rubenfeld's argument in Alan Z. Rozenshtein, *No, Facebook and Google Are Not State Actors*, LAWFARE (Nov. 12, 2019), https://perma.cc/G4RM-XRNL.

as to increase the expressive capabilities of ordinary people. Rather, such legislation has been so common throughout the 19th and 20th centuries as to constitute, in Genevieve Lakier's formulation, an entire "non-First Amendment law of freedom of speech."[147]

Failing to appreciate this point led the court to mischaracterize the government interest in limiting content moderation. The court argued 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."[148] But whatever the partisan motives of the Florida law (and they were certainly front and center), part of the concern it was tapping into was not simply that conservative political voices are disadvantaged online (though whether this is a well-founded fear is doubtful[149]), but rather that the outsized power of social media gatekeepers threatens to sharply reduce speech opportunities for all speakers.

This concern is the other implication of the triadic relationship between speakers, platforms, and the government that Balkin has described.[150] Because digital platforms play a greater day-to-day role than does the government in dictating what people can and cannot say, the ability of users to express themselves may on the margin depend on the ability of the government to restrain platform censorship. Given the size and power of these platforms, sometimes only the government can function as an adequate counterweight. The problem with the Florida law is not that Florida decided to act as that counterweight on behalf of its citizens but, rather, the way it did so.

But the court's biggest failure to think through the full policy implications of granting social-media platforms First Amendment rights came in its mischaracterization of the relationship between market power and the constitutionality of government must-carry regulations. For its argument that "the concentration of market power among large social-media providers does not change the governing First

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

[148] *NetChoice*, 2021 WL 2690876, at *11.

[149] *See, e.g.*, Paul M. Barrett & J. Grant Sims, NYU Stern Ctr. for Bus. & Hum. Rts., False Accusation: The Unfounded Claim that Social Media Companies Censor Conservatives (2021).

[150] *See supra* notes 95–96 accompanying text.

Amendment principles,"[151] the court relied on *Tornillo*, which recognized the problem of newspaper monopolies but nevertheless struck down the right-of-reply statute.[152]

But *Tornillo* is a poor guide for applying the First Amendment to the content moderation decisions of social media platforms. The only part of the decision relevant to limiting social media content moderation—relevant because platforms do not have to deal with the same limitations of space and editorial capacity as do traditional media outlets—is famously conclusory and under-reasoned. Here is the argument *in full* from *Tornillo*:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[153]

Other than a footnote quoting a scholar worrying that "editorial selection opens the way to editorial suppression,"[154] that's the entirety of the analysis. But the Court provides no reason, except for the footnote's oblique reference to a generic slippery-slope argument, for why editorial regulation always undermines First Amendment values. Indeed, the categorical nature of the Court's holding demonstrates the distorting influence of treating the First Amendment rights of media entities the same way one would treat the First Amendment rights of individuals.

The failure of the Supreme Court to explain precisely why government inter-

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[151] *NetChoice*, 2021 WL 2690876, at *7.

[152] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 247–54 (1974) (canvassing arguments describing the monopolistic power of many newspapers).

[153] *Id.* at 258 (footnote omitted).

[154] *Id.* at 258 n.24 (quoting 2 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)).

ference in editorial decision-making is always impermissible is particularly problematic because *Tornillo*'s expansive rhetoric cannot be read literally as a correct statement of First Amendment doctrine (let alone the First Amendment itself). Five years before *Tornillo*, the Court upheld, in *Red Lion Broadcasting Co. v. FEC*,[155] the "fairness doctrine," which required TV and radio broadcasters to present both sides of controversial issues in such a way as to "accurately reflect[] the opposing views"[156] and to provide targets of criticism the opportunity to respond on-air.[157] Although the Court emphasized that government regulation of broadcast media was inevitable given the limited amount of spectrum and thus the need for government licensing,[158] it also stressed the broader danger of media concentration to public discourse, precisely the stance that *Tornillo* seemed to reject:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It 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, whether it be by the Government itself or a private licensee.[159]

Not only did *Tornillo* not overrule *Red Lion*, but it didn't even mention it, so perfunctory was its analysis.

In relying on *Tornillo* the district court also ignored the fact that *Tornillo*'s expansively laissez-faire vision did not survive in future cases. Two decades after *Tornillo*, the Supreme Court upheld a government mandate that cable companies carry local channels. In *Turner Broadcasting System, Inc. v. FCC*[160] the Court distinguished *Tornillo* on the ground that technological differences between cable and newspapers meant that monopoly in the cable market could justify interference with the editorial decisions of cable operators: Because cable providers control the physical infrastructure that enters consumers' homes, and the economics of laying cable lead to natural monopolies, government regulation is not per se a violation of

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[155] 395 U.S. 367 (1969).

[156] *Id.* at 377.

[157] *Id.* at 373–74.

[158] *Id.* at 386–89.

[159] *Id.* at 390.

[160] 512 U.S. 622 (1994). The actual mandate was upheld in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

the First Amendment.[161]

But this logic implicitly abrogates *Tornillo*'s seemingly categorical dismissal of market concentration and monopoly power as relevant to First Amendment analysis. Thus, as Yochai Benkler has explained, the upshot of the Supreme Court's must-carry First Amendment cases is this:

> Government regulation of an information production industry is suspect. But government nonetheless may act to alleviate the effects of a technological or economic reality that prevents "diverse and antagonistic sources" from producing information and disseminating it widely. The necessary inquiry in each case is whether there is enough factual evidence to support the government's claim that its intervention is needed to prevent centralization of information production and exclusion of "diverse and antagonistic sources."[162]

In other words, now courts are just haggling over the price.

Although the extent to which the major social media platforms exhibit monopolistic behavior remains a contested empirical question, the point is that it is a *relevant* one regarding whether platforms should be able to use the First Amendment to defend against government regulation of their content-moderation decisions. And it is relevant because it goes to the key question in the First Amendment inquiry: not whether platforms have a constitutional entitlement to total editorial discretion over what they choose to host, but whether allowing them such discretion benefits the marketplace of ideas, the promotion of democratic culture and discourse, and the human flourishing of their users.

To be sure, the impact of a platforms' market power on the proper degree of First Amendment protection for its editorial decisions is not the only difficult question when it comes to analyzing the constitutionality of government regulation of platform content moderation. The Florida law raises two additional issues that are likely to be central to the analysis of future regulations of platform moderation.[163]

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[161] *Turner Broadcasting*, 512 U.S. at 656–57.

[162] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 374 (1999).

[163] As this Article was going to press, Texas Republicans were attempting to pass their own version of a law, Senate Bill 12, restricting the content-moderation practices of social-media platforms. *See* Cassandra Pollock, *Texas Gov. Greg Abbott Sets July 8 Date for Special Legislative Session on Voting Bill, Other Issues*, TEX. TRIB. (June 22, 2021), https://perma.cc/QC5Y-CN4E.

The first is the extent to which a government restriction interferes with the platform's ability to operate. For example, a blanket ban on any sort of moderation would quickly turn platforms into cesspools of misinformation, harassment, and obscenity. Thus, as the court notes, "[i]n the absence [of] curation, a social-media site would soon become unacceptable—and indeed useless—to most users."[164] This is similar to the argument that Apple should have made in its fight with the FBI: that the challenged government action undermined First Amendment values because it made the company less useful to actual speakers.[165]

Similarly, the type of restriction on moderation matters. For example, in addition to preventing platforms from kicking political candidates off the platforms entirely, the Florida law would prevent platforms from "shadow banning," not removing content but making it less available on other users' feeds.[166] But the technological sophistication of social-media platforms is largely in the recommendation algorithms. Thus, government restrictions on shadow banning would have to be so fine-grained and intrusive that they may well impose a disproportionate burden on internet platforms and their users. By contrast, the law's requirements of transparency in content moderation decisions[167] and giving users the option to view their feeds in chronological order, rather than based on recommendation algorithms,[168] may be more feasible for platforms to comply with.

The second difficult legal issue is what role content neutrality should play in First Amendment analysis of government restrictions on content moderation. A key concept in First Amendment law is the distinction between content-neutral regulations (also called time, place, and manner regulations) on speech and those that are content based. Thus, while banning parades in the middle of the night is a content-neutral regulation, banning political parades is content based. Content-based restrictions are presumptively unconstitutional and subject to strict scrutiny—the highest standard for constitutional review—while content-neutral regulations are subject to lower (but still demanding) intermediate scrutiny. The reason

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[164] NetChoice, LLC v. Moody, No. 21cv220, 2021 WL 2690876, at *7 (N.D. Fla. June 30, 2021).

[165] *See supra* note 110 and accompanying text.

[166] Fla. Stat. 501.2041(2)(h).

[167] *Id.* (2)(a), (c), (e), (g).

[168] *Id.* (2)(f)(2).

for this difference is that content-based restrictions, even if they purport to be neutral with respect to the actual viewpoint of the speech, more acutely raise, as the Supreme Court has noted, "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[169]

The content-neutral versus content-based distinction is important not only when the government restricts speech but also when the government compels it. In particular, in the case of must-carry requirements, the concern with content-based mandates is that they could crowd out other views and perspectives. Thus, in *Turner*, the main reason that the Supreme Court evaluated (and ultimately upheld) the must-carry requirement for cable companies under intermediate, rather than strict, scrutiny is that the requirement to carry local cable stations did not distinguish between the content that those stations carried.[170] But the Florida law, the district court noted is "about as content-based as it gets" because it singles out political speech for protection.[171]

To this, one might argue that *Turner*'s focus on content-neutral must-carry requirements should not carry over to social media because social media platforms are not limited in the amount of speech they can carry in the way that cable companies are—Facebook doesn't have to jam content into an hour-by-hour programming schedule. The problem with this argument is that it ignores the actual bottleneck for social media platforms: it's not the ability of platforms to serve content (which is indeed effectively infinite, at least for the larger platforms), but rather the ability of audiences to consume it. Digital bandwidth is unlimited, but user attention (and the news-feed real estate that dominates it) most certainly is not.[172] Thus, by supporting the speech of political candidates, the Florida law would limit user attention for nonpolitical speech.

The better response is to accept that the Florida law is content based, but to argue that in this case this is a feature, not a bug. By limiting the must-carry requirement only to the speech of political candidates and journalistic institutions, the

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[169] Simon Schuster v. Crime Victims Bd., 502 U.S. 105, 116 (1991).

[170] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641–52 (1994).

[171] NetChoice, LLC v. Moody, No. 21cv220, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021).

[172] *See* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548 (2018) ("The most important change in the expressive environment can be boiled down to one idea: it is no longer speech itself that is scarce, but the attention of listeners.").

Florida law imposes a lower burden on social media platforms than would a broader, content-neutral regulation. In other words, the more content neutral the must-carry requirement is, the less narrowly tailored it is, at least from the perspective of the financial and administrative costs for platforms. Moreover, if there's any category of speech that is core to the protections of the First Amendment, it is political speech[173] so there is some logic to singling out political (and journalistic) speech for protection.[174]

The complexity of the legal and policy issues around platform must-carry regulations demands much future work. Fortunately, there is a growing willingness across the ideological legal spectrum to see these as serious, nuanced issues rather than obviously unconstitutional lost causes. Notably, much of this willingness is coming from the conservative and libertarian right, which has historically been highly solicitous of the First Amendment claims of corporations. For example, Eugene Volokh, who previously took an expansive position on the First Amendment rights of internet companies in the context of search engine results,[175] argues in this symposium that certain forms of "common carrier" regulations on social media platforms would be constitutional, along doctrinal lines similar to the ones advanced here.[176] And Justice Clarence Thomas, no opponent of broad First Amendment rights for commercial entities,[177] has similarly suggested that the government can regulate social media platforms as common carriers or the related category of public accommodations.[178] The growing recognition among right-leaning elites of the need to limit the First Amendment claims of digital platforms is an indication that the multi-decade expansion of corporate First Amendment rights may finally

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[173] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[174] This argument should not be taken too far, however, because singling out the speech of politicians for special protection can give politicians an unfair speech advantage over ordinary individuals when it comes to political speech.

[175] *See* Volokh & Falk, *supra* note 76.

[176] *See* Volokh, *supra* note 64.

[177] *See, e.g.*, Adam Liptak, *Justice Defends Ruling on Finance*, N.Y. TIMES (Feb. 3, 2010).

[178] *See* Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

be slowing and that courts may be willing to look at corporate First Amendment cases through the lens of societal First Amendment values, not the rights entitlements of technology giants.

Conclusion

As Lina Khan and David Pozen predict, "figuring out how to regulate digital firms such as Facebook, Google, and Twitter is one of the central challenges of the 'Second Gilded Age."[179] This Article has attempted to advance this research agenda by offering a framework through which to analyze the First Amendment arguments made by technology companies. Because of the variety of policy areas in which such arguments can arise, there is no single answer as to when the First Amendment should come into play and, if so, what the results should be. But one thing is clear: while Silicon Valley's speech should sometimes be protected under the First Amendment, it should not be protected for its own sake; what is truly valuable from the perspective of the First Amendment is the right of users to speak and the audience to listen.

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[179] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497, 540 (2019); *see also* Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 Buff. L. Rev. 979, 980 (2018) ("The Second Gilded Age begins, more or less, with the beginning of the digital revolution in the mid-1980s, but it really takes off in the early years of the Internet Age in the mid to late 1990s, and it continues to the present day.").