CONSTITUTIONAL ACCOUNTABILITY CENTER

Speech and Its Relationship to Equality: Constitutional Values in the Digital Age†

BY DAVID H. GANS ‡

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Introduction

Our Constitution promises both free speech and equality. The First Amendment's guarantee of freedom of speech ensures the structural role of free speech in a democracy. It safeguards democratic deliberation, protects individual autonomy, and prevents the government from silencing speakers it disagrees with. The Fourteenth Amendment's guarantee of the equal protection of the laws promises equality under the law for all persons. This means that the government must respect the equality and dignity of every person residing in the United States and may not single out disfavored groups of people for discriminatory treatment.[1] How should we reconcile these two co-equal constitutional values of speech and equality when they come into conflict? All too often, courts privilege speech over equality, pretending there is only a single constitutional value, rather than multiple values, at play.[2] These are pressing issues both in the courts, where conservative activists are insisting that the First Amendment confers a license to discriminate,[3] and outside the courts, where there is a robust debate

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‡ David H. Gans is Director of Constitutional Accountability Center's Human Rights, Civil Rights, and Citizenship Program.

[1] David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment* (2011), https://www.theusconstitution.org/wp-content/uploads/2017/12/Perfecting_the_Declaration.pdf.

[2] *See* john a. powell, *Worlds Apart: Reconciling Speech and Equality*, 85 Ky. L. J. 9, 19 (1997) (observing that "[t]he most common response to the dilemma of the incommensurability of the free speech and equality narratives is simply to favor one over the other" and that "[o]ne way" this is done "is simply to deny that there is a conflict"); Jamal Greene, *Foreward: Rights as Trumps?*, 132 Harv. L. Rev. 28, 74 (2018) (criticizing American courts for "obscur[ing] the stakes of constitutional conflict . . . by substantively ignoring or erasing inconvenient constitutional values").

[3] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia,* 922 F.3d 140 (3d Cir. 2019), *cert. granted,* 140 S. Ct. 1104 (2020).

over what free expression means in the digital age and how and whether to regulate hateful content on social media platforms and how to protect individuals from cyber harassment.[4]

In this issue brief, I develop a progressive reading of the First Amendment, which seeks to read the Constitution's guarantees of speech and equality in harmony, rather than setting them on a collision course with each other.[5] This more holistic view of the First Amendment has two key elements.

First, throughout history, the First Amendment has been a powerful force for equality, protecting dissenting speakers who sought to challenge government subordination of disfavored groups, and to help ensure equal dignity for all. Our constitutional history shows that speech restrictions were often used to subordinate marginalized groups. Protecting speech is critical to ensure equality for all. The struggle of African Americans, workers, women, immigrants, members of the LGBTQ community, and others for equal citizenship is, in part, a First Amendment story. The First Amendment helps to ensure that powerless individuals can speak out and contest their oppression. As Frederick Douglass observed, freedom of speech is the "great moral renovator of society and government. . . . That, of all rights, is the dread of tyrants. It is the right which they first of all strike down. They know its power."[6]

Second, our constitutional commitment to freedom of speech does not require us to sacrifice the constitutional goal of realizing equal protection for all persons. Our Constitution safeguards both, and we must attend to both. In a number of different contexts, the Supreme Court has done exactly that, grappling with and paying respect to principles of free speech and of equality.[7] As these cases show, our First Amendment doctrine does not require walling off constitutional principles of freedom of speech from the rest of our nation's foundational charter. First Amendment doctrine permits courts to take account of harms to constitutional values, such as equality, and to uphold government regulation against a First Amendment challenge on that basis. Well-established First Amendment doctrines give government broad powers to prevent discrimination and help realize constitutional values of equality.

Keeping these two principles in mind can help us strike a balance between constitutional values of free speech and equality online. Although the Constitution does not apply to nongovernmental actors, social media companies developed their models for governing their platforms largely with free speech norms in mind.[8] The heated debate we are witnessing over social media is often couched in terms of free speech values. Thus, even though social media companies have a legal right to delete any content they choose, there is a broad consensus that they should take constitutional values into account. But free speech is not the only relevant constitutional value—social media companies should consider other constitutional values as well.

Freedom of speech in the digital age offers both promise and peril. The internet offers tremendous opportunities for freedom of expression. It allows all of us the opportunity to share information and

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[4] *See e.g.* Jack M. Balkin, *Free Speech Is a Triangle*, 118 Colum. L. Rev. 2011 (2018); Tim Wu, *Is the First Amendment Obsolete?,* 117 Mich. L. Rev. 547 (2018); Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!),* 95 Wash. U. L. Rev. 1353 (2018).

[5] For an introduction to progressive theories of the First Amendment, see Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 Colum. L. Rev. 1953 (2018).

[6] Frederick Douglass, A Plea for Free Speech in Boston (Dec. 9, 1860), *in Frederick Douglass Papers*, Series 1: Speeches, Debates, and Interviews, Vol 3: 1855-1863, at 422 (John W. Blassingame and John R. McKivigan et. al., digital ed.), https://frederickdouglass.infoset.io/islandora/object/islandora:2129#page/1/mode/1up.

[7] See, e.g. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Virginia v. Black*, 538 U.S. 343 (2003); *Masterpiece Cakeshop,* 138 S. Ct. 1719 (2018).

[8] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1621 (2018) (arguing that "American lawyers trained and acculturated in American free speech norms and First Amendment law oversaw the development of content-moderation policy" and that their "normative background in free speech had a direct impact on how they structured their policies").

express our views, receive untold amounts of information, and communicate with like-minded persons around the globe almost instantaneously.[9] But it also presents dangers as well. Social media amplifies hateful voices to reach millions of people across the United States, helps them spread violent terror, and perpetuate harmful propaganda. As Twitter's co-founder, Ev Williams, explained "[i]t amplifies a lot of bad aspects of humanity. It's very powerful at that and very powerful at connecting people with terrible ideas and amplifying those and making them seem like they're good ideas."[10] Online harassment silences women, people of color, and LBGTQ persons, often making it impossible for them to enjoy the expressive opportunities that the internet affords.[11] The complex problem that we face is how to maximize the opportunities the internet offers, while acting to limit its destructive capabilities.

Over the course of the last fifteen months, we have had almost daily reminders of how urgent these problems are. Consider a few examples from just the first months of 2019. In March, a man entered a mosque in Christchurch, New Zealand, and opened fire, killing fifty people and injuring fifty more. This shooting, which was live-streamed on Facebook, was designed to go viral. As Kevin Roose observed, "a surprising thing about it is how unmistakably *online* the violence was."[12] "[I]t felt like a first — an internet-native mass shooting . . . ."[13] The video of the attack was uploaded to Facebook 1.5 million times during the first twenty-four hours of the attack. Facebook blocked 1.2 million of those uploads, but 300,000 copies remained up on the site, allowing them to be viewed, shared, and spread on Facebook.[14] In April, during the live-stream of a congressional hearing on hate crimes and the rise of white nationalism, YouTube was forced to disable comments, after the comments section was swamped by a ton of hateful, racist insults and diatribes.[15] In May, a conservative Facebook page, Politics WatchDog, released a doctored video of House Speaker Nancy Pelosi, which made it seem as if she had given a speech while intoxicated. This was not a parody, but a fabrication, which was posted, shared, and promoted as the truth. Although patently false and deliberately deceptive, the video was spread to millions.[16]

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[9] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 2-6 (2004).

[10] Eric Johnson, *Twitter Co-Founder Ev Williams Says Social Media Will Get Better . . . Eventually*, Vox (May 24, 2019), https://www.vox.com/recode/2019/5/24/18637875/twitter-ev-williams-medium-social-media-kara-swisher-collision-conference-decode-podcast-interview.

[11] Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 98 (2009) (arguing that "[r]estraining a mob's most destructive assaults is essential to defending the expressive autonomy and equality of its victims"); Wu, *supra* note 4, at 562 (discussing "online trolling as a means of punishing speakers" through "vicious swarm-like attacks" in order to "harass and humiliate targets"); Charlie Warzel, "*A Honeypot for Assholes": Inside Twitter's 10-Year Failure to Stop Harassment,* BuzzFeed News (Aug. 11, 2016), https://www.buzzfeednews.com/article/charliewarzel/a-honeypot-for-assholes-inside-twitters-10-year-failure-to-s.

[12] Kevin Roose, *A Mass-Murder of, and for, the Internet*, N.Y. Times (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/technology/facebook-youtube-christchurch-shooting.html.

[13] *Id.*

[14] Kate Klonick, *Inside the Team at Facebook That Dealt With the Christchurch Shooting*, New Yorker (Apr. 25, 2019), https://www.newyorker.com/news/news-desk/inside-the-team-at-facebook-that-dealt-with-the-christchurch-shooting; Charlie Warzel, *We're Asking the Wrong Questions of YouTube and Facebook After New Zealand*, N.Y. Times (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/opinion/facebook-youtube-new-zealand.html.

[15] Zack Beauchamp, *YouTube Cut Comments On Hate Crimes Hearing After They Became . . . Hate Speech*, Vox (Apr. 9, 2019), https://www.vox.com/policy-and-politics/2019/4/9/18302000/house-hate-crimes-hearing-youtube-comments.

[16] Kara Swisher, *Nancy Pelosi and Fakebook's Dirty Tricks*, N.Y. Times (May 26, 2019), https://www.nytimes.com/2019/05/26/opinion/nancy-pelosi-facebook-video.html?smid=nytcore-ios-share.

In October of 2019, Facebook announced a huge change in policy. Going forward, it would allow politicians to run advertisements that spread outright lies.[17] Previously, such content would have run afoul of Facebook's community standards, but the company announced a blanket exemption to its advertising policy to allow political figures and parties to tell lies. Going forward, no matter how many lies are contained in an advertisement, Facebook will allow it on its platform. Senator Elizabeth Warren charged that the company had become a "disinformation-for-profit machine."[18] Even before this change, Facebook had been used to spread lies, foment racial division, and suppress the vote in communities of color.[19] This new change gravely exacerbates the threat Facebook and other social media companies pose to our democracy.

Today, as we battle a deadly coronavirus pandemic, we are in the middle of what the Director General of the World Health Organization has called an "infodemic," where misinformation "spreads faster and more easily than this virus."[20] Here, too, Facebook's policy of creating special rules for politicians has been part of the problem. After President Trump suggested disinfectants and UV lights could cure COVID-19, thousands of social media users shared these patently false cures. They were left up, allowing clearly false information to circulate. Facebook and other social media platforms have taken some steps to combat the spread of false information, but one recent study found that, on Facebook, nearly one-quarter of the platform's false and misleading content remained up.[21] Most disturbing, those spreading lies about COVID-19 have found a way to create "zombie content" that can be spread even after being removed from a site.[22] Misinformation is only part of the problem. Conspiracy theorists have used YouTube and other platforms to harass innocent people, such as Maatje and Matt Benassi, whose lives were upended based on the lie that they were responsible for starting the pandemic.[23]

As these many examples highlight, social media companies exert incredible power over our public discourse. As Facebook co-founder Chris Hughes argued in the *New York Times*, "Mark [Zuckerberg] alone can decide how to configure Facebook's algorithms to determine what people see in their News Feeds . . . . He sets the rules for how to distinguish violent and incendiary speech from the merely

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[17] Judd Legum, *Facebook Says Trump Can Lie In His Facebook Ads*, Popular Information (Oct. 3, 2019), https://popular.info/p/facebook-says-trump-can-lie-in-his; Cecilia Kang, *Facebook's Hands-Off Approach to Political Speech Gets Impeachment Test*, N.Y. Times (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/technology/facebook-trump-biden-ad.html.

[18] Elizabeth Warren (@ewarren), Twitter (Oct. 1, 2019), https://twitter.com/ewarren/status/1183019880867680256.

[19] Sherrilyn Ifill, *Mark Zuckerberg Doesn't Know His Civil Rights History*, Wash. Post. (Oct. 17, 2019), https://www.washingtonpost.com/opinions/2019/10/17/mark-zuckerberg-doesnt-know-his-civil-rights-history/; Vanita Gupta, *Facebook Is Threatening Our Elections—Again*, Politico Magazine (Oct. 11, 2019), https://www.politico.com/magazine/story/2019/10/11/facebook-threatening-elections-again-229844.

[20] Dep't of Global Comm., *UN Tackles 'Infodemic' of Misinformation and Cybercrime in COVID-19 Crisis*, United Nations, https://www.un.org/en/un-coronavirus-communications-team/un-tackling-'infodemic'-misinformation-and-cybercrime-covid-19.

[21] Chloe Hadavas, *There's a Problem With Facebook's Coronavirus Misinformation Features*, Slate (Apr. 17, 2020), https://slate.com/technology/2020/04/facebook-coronavirus-misinformation-problem.html.

[22] Joan Donavan, *Covid Hoaxes Are Using a Loophole to Stay Alive—Even After Content is Deleted*, MIT Tech. Rev. (Apr. 30, 2020), https://www.technologyreview.com/2020/04/30/1000881/covid-hoaxes-zombie-content-wayback-machine-disinformation/.

[23] Donie O'Sullivan, *Exclusive: She's Been Falsely Accused of Starting the Pandemic. Her Life Has Been Turned Upside Down*, CNN Business (Apr. 27, 2020), https://www.cnn.com/2020/04/27/tech/coronavirus-conspiracy-theory/index.html.

offensive . . . ."[24] Urging that Facebook be broken up, Hughes wrote that "[t]here is no precedent for his ability to monitor, organize and even censor the conversations of two billion people."[25] Our system of freedom of expression is in the hands of huge companies, whose bottom line is the pursuit of profit, and who are more concerned with generating likes and shares than with the content and quality of our public discourse.

In his much-read piece, Hughes urged creating a new federal agency to take over the job of regulating speech on social media, including setting limits on violence, hate speech, and misinformation. But that would involve a threat of massive government censorship. The Supreme Court, which has struck down limits on violent video games, lying about military honors, and hateful speech, seems unlikely to permit the kind of content-based regulation of online speech that Hughes envisions.[26] Ultimately, freedom of expression in the digital age depends on social media companies governing their platforms with a sense of responsibility for our public discourse. We, as a society, have to hold them responsible for the damage they do to our public discourse. We have to call them to account for all the ways they help amplify hate and misinformation.

So, how can social media companies do a better job of helping to realize our whole Constitution's values?

First, social media companies have to address how the algorithms they use amplify and distort public discourse and public debate. They have to interrogate the social media architecture that prioritizes engagement above all else and permits hate and misinformation to spread like wildfire. We can protect offensive but lawful speech without amplifying and rewarding the creation of extremist speech. In other words, free speech, as Renee DiResta has put it, does not have to mean free reach.[27] Balancing speech and equality need not always mean blocking unsuitable content.[28] Social media companies can explore ways to design their platforms so that hateful speech is more difficult to find in search results, is not recommended to others, and cannot be shared on the platform. Fabricated news—like the doctored Pelosi video—can and should be prominently labelled as such with a disclaimer.

Second, social media companies need to be more sensitive in how they moderate content. In the past, the platforms have applied their content moderation rules in a manner that flouts both principles of free speech and equality. Rules that were designed to limit hateful speech were applied, time and again, to silence women challenging sexism or people of color challenging police abuse and other forms of systemic racism.[29] Some content moderation is essential—no one thinks the Christchurch shooting

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[24] Chris Hughes, *It's Time to Break Up Facebook*, N.Y. Times (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html.

[25] *Id.*

[26] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); *United States v. Alvarez*, 567 U.S. 709 (2012); *Snyder v. Phelps*, 562 U.S. 443 (2011).

[27] Renee DiResta, *Free Speech Is Not the Same as Free Reach*, Wired (Aug. 30, 2018, 4:00 PM), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/; *cf. Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.")

[28] *See* Nathaniel Persily, *The Internet's Challenge to Democracy: Framing the Problem and Assessing Reforms* 39-40 (2019), https://storage.googleapis.com/kofiannanfoundation.org/2019/02/a6112278-190206_kaf_democracy_internet_persily_single_pages_v3.pdf (arguing that the "choices platforms make as to the relative priority of certain types of content are, in many respects, more important than the decisions as to what content to take down").

[29] See, e.g. Simon Van Zuylen-Wood, *"Men are Scum": Inside Facebook's War on Hate Speech*, Vanity Fair (Mar. 2019), https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech; Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, Pro

should have been left up—but, at times, the platforms have been too quick to censor speech for no good reason.

Third, transparency—what Jack Balkin calls "curatorial due process"—is essential.[30] The algorithms that shape our public discourse cannot be shrouded in secrecy. Social media plays a critical role in shaping public discourse. It should be governed by transparent rules spelled out in advance, not hidden out of public view. Unfortunately, we are still in the dark about much of the inner workings of the mainstream social media companies.[31]

This issue brief unfolds as follows. Parts I and II examine our fundamental constitutional guarantees of speech and equality, and how they relate to and inform one another. Part I emphasizes that equality is itself a free speech value, and that our First Amendment traditions developed, in part, out of the struggles of subordinated people seeking to have their voices heard. A core guarantee of the First Amendment is equality-promoting; it ensures all speakers—as a part of their equal dignity—have a right to be heard and to contest injustice. The Constitution, of course, does not only protect pro-equality speech; in some cases, there is a tension between constitutional values of speech and equality. As Part II demonstrates, the answer to this tension is not to privilege one constitutional value over the other; courts must strive to respect both constitutional guarantees. Although the Supreme Court's track record is mixed,[32] there are a number of doctrines that help strike a balance between constitutional principles of free speech and equality. Part III takes these two core principles and then offers some thoughts about how to apply them to the debate over how free speech principles translate to social media. A brief conclusion follows.

I. Equality as a Free Speech Value—Speech as an Engine of Equality

The core meaning of the First Amendment's guarantee of free speech is the equal right of all persons to express their ideas. The First Amendment prohibits the government from establishing an official orthodoxy. As Justice Robert Jackson wrote in the one of the most eloquent opinions in the First Amendment canon, "[i]f 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."[33]

Publica (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms; Jessica Guynn, *Facebook While Black: Users Call It Getting 'Zucked,' Say Talking About Racism Is Censored as Hate Speech*, USA Today (Apr. 24, 2019) (last updated Apr. 30, 2019), https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/.

[30] Balkin, *Free Speech is a Triangle*, *supra* note 4, at 2040-47.

[31] Farhad Manjoo, *What Stays on Facebook and What Goes?: The Social Network Cannot Answer*, N.Y. Times (July 19, 2018), https://www.nytimes.com/2018/07/19/technology/facebook-misinformation.html; Wael Ghonim & Jake Rashbass, *It's Time to End the Secrecy and Opacity of Social Media*, Wash. Post (Oct. 31, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/10/31/its-time-to-end-the-secrecy-and-opacity-of-social-media/?utm_term=.b68a4d091ec3.

[32] Leslie Kendrick, *Another First Amendment*, 118 Colum. L. Rev. 2095, 2098 (2018) (observing that "[e]xisting First Amendment doctrine has been variously regarded as an enemy to political, social, and economic equality").

[33] *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This basic understanding of the free speech guarantee has been shaped less by the First Amendment's text and history,[34] and more by a set of clashes over freedom of speech in America: seditious speech in the 18th century, anti-slavery speech in the 19th century, and dissident religious, labor, anti-war, communist, and civil rights speech in the 20th century.[35] Some of these fights were resolved in the courts, some in the court of public opinion, but all have contributed to the idea that dissent lies "at the center of the First Amendment tradition" and tilts sharply "against the unjust exercise of power."[36] Today, there is widespread agreement that the First Amendment ensures "'equality of status in the field of ideas,'"[37] reflecting the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[38] The First Amendment "remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[39]

Equality, thus, is baked into our most basic understanding of free speech.[40] Equality, as Kenneth Karst argued, is a central principle of the First Amendment.[41] As Karst made the case, "[e]quality of expression is indispensable to a society committed to the dignity of the individual."[42]

Not only is equality central to the way we understand free speech, free speech is critical to ensuring our Constitution's promise of equality. By ensuring the equal dignity of all speakers, the constitutional guarantee of the freedom of speech can serve as an engine for equality, giving individuals the right to organize, speak out, and contest their subordinate status.[43] Throughout our history, the government has sought to silence minorities in order to enforce their second-class status.[44] Throughout our nation's history, individuals have invoked the protection of freedom of speech to demand their rights to

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[34] Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 256 (2017) (arguing that "the early history of speech and press freedoms undercuts the mythological view that foundational principles of modern doctrine inhere in the original Speech Clause").

[35] *See* Michael Kent Curtis; *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000); Lee C. Bollinger & Geoffrey R. Stone, eds., *The Free Speech Century* (2018).

[36] Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* 128 (1999).

[37] *Police Dep't of the City of Chicago v. Mosely,* 408 U.S. 92, 96 (1972) (quoting A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1948)).

[38] *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[39] *Cohen v. California*, 403 U.S. 15, 24 (1971).

[40] Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 Duke J. of Const. L. & Pub. Pol'y 13, 45 (2017) (observing that "the modern conception of free speech cannot be understood without reference to its frequent and consequential intersections with Fourteenth Amendment equality claims and principles").

[41] Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

[42] *Id.* at 26.

[43] *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 Colum. L. Rev. 2117, 2120 (2018); *id.* at 2124 (observing that by striking down "discriminatory speech laws" aimed "at the bottom of the political and social hierarchies . . . the Court also promoted substantive equality"); Zick, *supra* note 40, at 18 ("[O]ne of the most critical rights recognized on behalf of equality proponents has been *expressive equality*—the right to speak, publish, and associate on equal terms with others").

[44] Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95, 109 (1990) (observing that "because an important part of a group's subordination consists in silencing, their emancipation requires a generously defined freedom of expression"); Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1695 (1993) ("[S]ilence and denial have been the linchpins of second-class status.").

be counted as a basic part of the body politic. In this way, freedom of speech has been instrumental to securing equal citizenship.[45] Three examples help flesh out this dynamic.

Consider first the debates over anti-slavery speech in the 19th century, in which abolitionists attacked laws designed to prevent any questioning of the institution of slavery. Beginning in the 1830s, Congress instituted a gag rule on abolitionist petitions, federal officials censored the mails, and one slaveholding state after another passed laws criminalizing anti-slavery speech.[46] These laws, as Frederick Douglass wrote, reflected the idea that "'[o]ne end of the slave's chain must be fastened to a padlock in the lips of northern freemen, else the slave himself will become free.'"[47] Bans on anti-slavery speech produced a steady stream of free speech arguments, linking speech and equality.

Abolitionists stressed that "'free enquiry and discussion is the corner stone of liberty; and the safeguard of truth, and is dreaded only by tyrants and the wicked: and that is the RIGHT of American citizens to discuss the subject of slavery as well any other subject; and to express their opinions freely, and fully; privately and openly.'"[48] Frederick Douglass argued that "[t]o suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker."[49] Douglass insisted that "[t]hrones, dominions, principalities and powers, founded in injustice and wrong, are sure to tremble if men are allowed to reason of righteousness, temperance and a judgment to come in their presence. Slavery cannot tolerate free speech."[50] As Douglass stressed, the ability to speak was a critical bulwark against injustice and subordination. He insisted that freedom of speech must be "accorded to the humblest as freely as to the most exalted citizen. . . . A man's right to speak does not depend upon where he was born or upon his color. The simple quality of manhood is the solid basis of the right—and there let it rest forever."[51] By claiming equal respect for his speech, Douglass demanded the right to participate in the political life of the nation on the basis of equality.

These arguments helped to change the Constitution. In the aftermath of the Civil War, the Fourteenth Amendment required states to respect the fundamental rights set out in the Bill of Rights, including the guarantee of freedom of speech. The paradigmatic speakers the Fourteenth Amendment aimed to protect were African Americans like Douglass and their allies, whose pro-equality speech had been silenced in the name of protecting slavery from any criticism.[52]

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[45] Zick, *supra* note 40, at 29 (discussing the ways in which "dissident speakers" invoked their First Amendment rights to "demand[] public recognition of and respect for their basic rights to be present").

[46] *See* Curtis, *supra* note 35, at 131 (discussing "various approaches" used "to silence abolitionists"); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 235 (1998) ("The Slave Power posed a threat to Freedom—of all kinds—and could maintain control only through suppression of opposition speech, with gag rules on antislavery petitions, bans on 'incendiary' publications, censorship of the mails, exclusions of outside agitators, banishments of dissenters, intrusions on the right of peaceable assembly, and so on.").

[47] David W. Blight, *Frederick Douglass: Prophet of Freedom* 272 (2018) (internal citation omitted).

[48] Curtis, *supra* note 35, at 209 (internal citations omitted).

[49] Douglass, *Free Speech in Boston, supra* note 6, at 423.

[50] *Id* at 422.

[51] *Id*. at 424.

[52] Cong. Globe, 38th Cong., 1st Sess. 1202 (1865) ("The press has been padlocked, and men's lips have been sealed . . . . Submission and silence were inexorably extracted. Such . . . is the free discussion which slavery tolerates."); Cong. Globe, 39th Cong., 1st Sess. 1066 (1866) ("[F]or the last thirty years a citizen of a free State dared not express his opinion of slavery in a slave State."); *id*. at 1013 ("[T]he system would not be secure if men . . . were permitted to discuss [slavery] in any form, and hence freedom of speech and the press must be suppressed as the highest of crimes.").

This dynamic relationship between speech and equality has repeated itself many times. Perhaps the most salient modern examples are the free speech claims made by the civil rights movement of the 1950s and 1960s and the LGBTQ movement.

The Warren Court repeatedly vindicated the First Amendment in a long series of decisions protecting the right of civil rights groups to associate and striking down the Jim Crow South's efforts to shut down speeches, marches, rallies, and other forms of protest aimed at attacking racial segregation.[53] Some of these cases revolutionized the law, such as *New York Times v. Sullivan*, which constitutionalized libel law and gave full-throated protection to speech critical of the government, and *NAACP v. Alabama*, which recognized a First Amendment right to associate freely with others and protected members of the NAACP from violent reprisals. Others closely scrutinized the factual record to vindicate the principle that "[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."[54] In case after case, the Supreme Court refused to permit authorities to silence advocates for equality.

Speech served as an engine for equality, allowing Martin Luther King, Jr. and countless others to make the case to the nation that Jim Crow was fatally inconsistent with our Constitution's promise of equality. King championed the First Amendment, stressing that "the greatness of America is the right to protest for right."[55] By speaking out, the civil rights movement laid claim to the promise of equal citizenship that the Constitution promised. As King said, "We are determined to be people. . . . [W]e are saying that . . . we are God's children, we don't have to live like we are forced to live."[56]

The First Amendment's guarantee of freedom of speech and association has also been integral in bending the arc of progress toward LGBTQ liberty and equality. As Dale Carpenter has written, "[t]he First Amendment created gay America. For advocates of gay legal and social equality there has been no more reliable and important constitutional text."[57] The First Amendment has been called the "first queer right."[58] This suggests that, for the LGBTQ community, identity and speech are tightly bound up together. As Nan Hunter made the point, "in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component of the very identity itself."[59] The act of coming out—of claiming the right to be LGBTQ—represents, as David Cole and William Eskridge have written, "an insistence on the right to dissent, and the right to equal respect for dissent that is implicit in our First Amendment tradition."[60]

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[53] *See, e.g. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (protecting NAACP membership lists from disclosure); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing conviction of 187 civil rights demonstrators); *New York Times*, 376 U.S. 254 (limiting use of libel laws to shield southern officials from criticism); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965) (reversing convictions of 2,000 civil rights demonstrators). For discussion, see Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 Sup. Ct. Rev. 59, 77-82.

[54] *Edwards*, 372 U.S. at 237.

[55] Martin Luther King, Jr., "I've Been to the Mountaintop," Address Delivered at Bishop Charles Mason Temple (Apr. 3, 1968).

[56] *Id.*

[57] Dale Carpenter, *Expressive Association and Anti-discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1525 (2001).

[58] Scott Skinner-Thompson, *The First Queer Right*, 116 Mich. L. Rev. 881, 882 (2018) (reviewing Carlos Ball, *The First Amendment and LGBT Equality: A Contentious History* (2017)).

[59] Hunter, *supra* note 44, at 1718.

[60] David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R-C.L. L. Rev. 319, 351 (1994).

At a time when LGBTQ persons were treated as second-class citizens in all sorts of ways, the courts vindicated their First Amendment rights. In the 1950s and 1960s, the Supreme Court protected gay magazines and erotic material from censorship, reasoning that their "portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates."[61] In the 1970s and 1980s, in a line of lower court victories, the federal courts of appeal consistently struck down the refusal of state universities to recognize or fund LGBTQ student organizations.[62] Building off precedents largely won by the civil rights movement, courts repeatedly held that "government may not discriminate against people because it dislikes their ideas."[63] These courts affirmed that "[i]ndividuals of whatever sexual persuasion have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo."[64] These victories offered early vindications of equal treatment, equal citizenship, and equal rights for LGBTQ persons. As one court held, "[a]t the heart of the freedom guaranteed by our Constitution is the freedom to choose — even if that choice does not accord with the state's view as to which choice is superior."[65] Free speech arguments served as precursors that led to the landmark Fourteenth Amendment rulings holding that LGBTQ persons had a fundamental right to sexual autonomy and to marry in order to "define and express their identity."[66]

Today, it is easy to forget all the ways in which free speech and equality work together. The Supreme Court's conservative majority, over the last decade, has been busy weaponizing the First Amendment, fashioning it into a deregulatory tool to strike down laws conservatives dislike.[67] But understanding speech as an engine of equality remains crucially important, as illustrated by recent cases involving Black Lives Matter,[68] challenges to new laws designed to make it harder for people to run voter

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[61] *Manual Enters. v. Day*, 370 U.S. 478, 490 (1962); *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (summarily reversing decision, 241 F.2d 772, 773 (9th Cir. 1957), upholding postmaster's refusal to distribute "'One,' which carries with it the designation, 'The Homosexual Magazine'").

[62] *See, e.g. Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974*); Gay All. of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977*); Gay Students Servs. v. Tex. A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F. 2d 361 (8th Cir. 1988); see Hunter, *supra* note 44, at 1695 (observing that "no other block of cases can rival the success rate of the cases seeking recognition and even funding of lesbian and gay student organizations, all of which were brought on First Amendment grounds and ultimately won by plaintiffs").

[63] *Gay & Lesbian Students Ass'n,* 850 F. 2d at 368.

[64] *Gay Alliance*, 544 F.2d at 166; *Gay Students,* 509 F.2d at 660 (holding that "efforts to organize the homosexual minority, 'educate' the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent . . . the very 'core' of association cases decided by the Supreme Court"). Cases involving employees fired for coming out or demanding legal protections also offered opportunities for LGBTQ free speech victories. *See Van Ooteghem v. Gray*, 628 F.2d 488, 493 (5th Cir. 1980) (holding that "the ability of a member of a disfavored class to express his views on civil rights publicly and without hesitation — no matter how personally offensive to his employer or majority of his coemployees — lies at the core of the Free Speech Clause of the First Amendment"), *aff'd en banc,* 654 F.2d 304 (5th Cir. 1981); Hunter, *supra* note 44, at 1701 (reviewing caselaw).

[65] *Gay Student Servs.*, 737 F.2d at 1329.

[66] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

[67] See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. Times (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html

[68] *See Doe v. McKesson*, 935 F.3d 253 (5th Cir. 2019) (permitting suit by a police officer against Black Lives Matter for negligence in organizing and leading a demonstration that would turn violent), *cert. pet. filed,* No. 19-1108 (filed Mar. 5, 2020); Garrett Epps, *Speech Rights For Trump, But Not DeRay McKesson*, The Atlantic (Apr. 30, 2019), https://www.theatlantic.com/ideas/archive/2019/04/doe-v-mckesson-lawsuit-black-lives-matter/588346/.

registration drives,[69] or peacefully protest,[70] as well as cases involving retaliation against immigrants for speaking out against ICE.[71]

II. Taking Account of Speech and Equality

The First Amendment's promise of "equality of status in the field of ideas,"[72] of course, does not only protect "the right to protest for right"[73] that Martin Luther King celebrated; it also protects hateful ideas, including those that abhor our constitutional value of equality and celebrate practices we condemn as unjust. As the Supreme Court recently observed, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[74] Our commitment to protect the speech we hate does not, however, mean giving up our constitutional commitment to equality for all persons. As Alexander Tsesis has written, "[f]ree speech is not a separate value, standing over and above any other in the constitutional hierarchy" but rather "one that fits within a broader construct of constitutional law."[75] Our constitutional values of speech and equality are not at war with one another, even if they sometimes exist in tension with each other. We have an obligation to take account of both free speech and equality. We may not privilege one part of the Constitution over another. After all, as Justice Clarence Thomas has observed, "[t]hat the First Amendment gives way to other interests is not a remarkable proposition."[76]

At times, the Supreme Court has been quite hostile to balancing speech against other interests. In striking down a federal ban on so-called "animal crush" videos, Chief Justice John Roberts called "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits."[77] As Chief Justice Roberts wrote, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the

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[69] *See* Cliff Albright, *Tennessee's Vengeful Lawmakers*, N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/opinion/tennessees-voter-registration-drives.html (discussing bill passed to penalize voter registration drives in the wake of successful turnout of voters of color in 2018 mid-term elections); *League of Women Voters v. Hargett,* 19-cv-00385, 2019 WL 4342972 (M.D. Tenn. Sept. 12, 2019) (preliminarily enjoining law).

[70] *US Protest Law Tracker*, Int'l Ctr. For Not-For-Profit L., http://www.icnl.org/usprotestlawtracker/; Complaint, *Dakota Rural Action v. Noem*, No. 5:19-cv-5046 (D.S.D. Mar. 28, 2019) (Dkt. No. 1) (challenging to new South Dakota law that limits the right to protest under the pretext of preventing riots).

[71] *Ragbir v. Homan*, 923 F.3d 53, 70 (2d Cir. 2019) (finding "[e]gregious" First Amendment violation where "the Government singled [an individual] out for deportation based not only on the viewpoint of his political speech, but on the public attention it received").

[72] *Police Dep't,* 408 U.S. at 96 (quoting A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1948)).

[73] Martin Luther King, Jr., *supra* note 55.

[74] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[75] Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. Rev. 1, 17 (2016).

[76] *Virginia v. Black*, 538 U.S. 343, 399 (2003) (Thomas, J., dissenting).

[77] *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Government outweigh the costs."[78] In striking down a law criminalizing lies about military service, Justice Anthony Kennedy claimed that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[79] To protect the "vast realm of free speech and thought," Justice Kennedy demanded "adherence to those categories and rules."[80] This strict categorical approach seems hard to square with what we know about the original meaning of the guarantee of freedom of speech.[81] It also fails to capture the reality of what Richard Fallon has called the "eclectic, multifaceted doctrinal structure that actually exists under the First Amendment."[82]

Weighted balancing of some kind has been baked into First Amendment law ever since Justice Oliver Wendell Holmes declared that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[83] A host of free speech scholars have argued that some weighing of speech and other considerations—whether constitutionally-based or not—is "pervasive and unavoidable."[84] As Erica Goldberg has written, "[a] jurisprudence that never engaged in balancing would be absolutist in ways that both overprotect and underprotect speech. Some kind of consideration of speech harms and benefits to determine which speech is constitutionally protected . . . is unavoidable at some point in the First Amendment analysis."[85] Further, although the First Amendment is fundamental to our democracy and public discourse, it cannot be assumed that "speech values are always more important than the values with which they conflict."[86] Distrust of the government as a speech regulator—arguably the primary force animating First Amendment law—is simply not "broad and deep enough to mandate a stringent, across-the-board rule against government regulation based on content."[87] Sometimes, as Rebecca Brown has observed, "government has a good

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[78] *Id.*

[79] *United States v. Alvarez,* 567 U.S. 709, 717 (2012) (plurality opinion) (quoting *Stevens*, 559 U.S. at 468).

[80] *Id.* at 718.

[81] Campbell, *supra* note 34, at 257 (arguing that the original meaning of "the First Amendment did not enshrine a judgment that the costs of restricting expression outweighs the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good").

[82] Richard H. Fallon, Jr., *Sexual Harassment, Content-Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 Sup. Ct. Rev. 1, 35; *see also* Steve Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendmen*t, 78 Nw. U. L. Rev. 1212, 1283 (1983) ("Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation.").

[83] *Schenck v. United States*, 249 U.S. 47, 52 (1919). First Amendment doctrine is a mix of categorical rules and balancing tests, but even some of the categorical rules reflect balancing free speech values against other considerations. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis,* 84 N.Y.U. L. Rev. 375, 397 (2009) (describing "blending of categorical and balancing approaches" in First Amendment doctrine).

[84] Erica Goldberg, *Free Speech Consequentialism*, 116 Colum. L. Rev. 687, 693 (2016).

[85] *Id.* at 689. This is exemplified by Justice Hugo Black's free speech jurisprudence, which refused to engage in balancing, but also refused to protect an array of plainly expressive conduct. *See Street v. New York*, 394 U.S. 576, 610 (1969) (Black, J., dissenting); *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting) (dissent joined by Justice Black calling wearing of a "Fuck the Draft" jacket "mainly conduct and little speech").

[86] Steve H. Shiffrin, *The First Amendment, Democracy, and Romance* 132 (1990).

[87] Fallon, *supra* note 82, at 33; Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 S. Ct. Rev. 233, 285 (arguing that "free speech law has never been organized around the idea of a content-blind society"); Ashutosh Bhagwat, *In Defense of Content Regulation,* 102 Iowa L. Rev. 1427, 1430 (2017)

reason to regulate content to prevent harm" and sometimes "principles of democracy, equality, and liberty can be promoted, rather than offended, by allowing it do so."[88]

In fact, the Supreme Court's understanding of what constitutes unprotected or proscribable speech often turns on other constitutional values as well, including equality. Take the case of cross burning.

In the 2003 case of *Virginia v. Black*, by a 6-3 vote, the Supreme Court upheld, in large measure, a Virginia statute banning cross-burning with intent to intimidate. The opinions in *Black* take account of both speech and equality, thanks in large measure to the usually silent Justice Clarence Thomas, whose questioning during oral argument forced the Court to deal with the reality of what cross burning means and its role in terrorizing African Americans and others.[89]

Justice Sandra Day O'Connor's majority opinion laid out the long history of the Klu Klux Klan's use of "cross burnings as a tool of intimidation and a threat of impending violence," discussing the Klan's acts of terror against African Americans and others.[90] She called the "burning of a cross" a "'symbol of hate'" and observed that "often the cross burner intends that recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful."[91] Her opinion recognized that the "First Amendment permits Virginia to outlaw cross burnings done with intent to intimidate because burning a cross is a particularly virulent form of intimidation."[92] Justice Thomas dissented, objecting to the invalidation of a narrow part of the law, but his analysis of cross burning had much in common with Justice O'Connor's. Justice Thomas argued that cross burning "has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[93] Quoting from a lower court ruling, he argued that, to African Americans, cross burnings symbolize "'[m]urder, hanging, rape, lynching. Just anything bad that you can name. It is the worst thing that could happen to a person.'"[94] He explained that "those who hate cannot terrorize and intimidate to make their point."[95] This history—recounted both in the majority opinion and in Justice Thomas's opinion—provided the answer to the claim that cross burning was "singled out because of disapproval of its message of white supremacy."[96] Both the majority and Justice Thomas construed the free speech guarantee in a manner that takes account of our long history of

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(discussing cases where "the blanket assumption that all distinctions among categories of protected speech are presumptively invalid . . . produces judicial evasion").

[88] Rebecca L. Brown, *The Harm Principle and Free Speech,* 89 S. Cal. L. Rev. 953, 957 (2016); Lakier, *supra* note 87, at 267 (discussing a number of areas of free speech law where "content distinctions play an important regulatory role").

[89] See Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 Geo. L.J. 575, 608 (2005) ("Anyone who listened to or witnessed the Supreme Court's oral argument in *Black* could not help but be struck by the manner in which Justice Thomas's comments on the meaning of cross burnings single-handedly changed the nature of the proceedings."). Prior to *Black*, the Supreme Court's approach to cross burning, reflected in its decision in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), was very dismissive of equality, but, as Charles notes, *Black* changed the law to take account of the implications cross burning has for equality. Charles, *supra*, at 575 (describing *Black* as a "complete reversal in the Court's approach to the constitutionality of anti-cross-burning statutes").

[90] *Black*, 538 U.S. at 354.

[91] *Id.* at 357 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).

[92] *Id.* at 363.

[93] *Id.* at 391 (Thomas, J., dissenting).

[94] *Id.* at 391-92 (quoting *United States v. Stillman*, 922 F.2d 1370, 1378 (9th Cir. 1991)).

[95] *Id.* at 394.

[96] *Id.* at 383 (Souter, J., concurring in the judgment in part and dissenting in part).

discrimination and empowers the government to protect people of color from cross burning and other forms of terror.

The various First Amendment tests the Supreme Court uses in adjudicating free speech challenges require courts to take account of other constitutional or important public values in determining whether to strike down or uphold a statute.[97] As the Court's decisions reflect, judges must "reconcile our commitment to free speech with our commitment to other constitutional rights."[98] If content-based distinctions can be upheld based on the interest in protecting judicial integrity, safeguarding the right to vote, or combating terrorism, there is no principled reason why they cannot be justified to help ensure full and equal dignity for all. Just as "interests can be balanced against each other," so too, as Steve Shiffrin has urged, "constitutional stories" can "be set beside each other and accommodated."[99]

A number of well-established First Amendment doctrines play a critical role in this regard. Perhaps the most important of these is the speech-conduct distinction, which ensures that the First Amendment cannot be used to create a license to discriminate.[100] Because the government has wide leeway to regulate conduct, "Congress . . . can prohibit employers from discriminating in hiring on the basis of race," and thereby "require an employer to take down a sign reading 'White Applicants Only.'"[101] As First Amendment law makes clear, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[102] Others, such as the captive audience doctrine, give the government the power to redress objectively hostile working and educational environments that are polluted with discrimination.[103]

The recent decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* offers a useful illustration of how courts can, and do, strive to account for both speech and equality in First Amendment cases. *Masterpiece*, which set aside a ruling that a baker who refused to bake a cake for a same-sex wedding violated the state's nondiscrimination mandate, has been properly criticized for vindicating a tenuous claim of anti-religious animus, particularly when compared with *Trump v.*

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[97] *See, e.g.*, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (judicial integrity); *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (combating terrorism); *Burson v. Freeman*, 504 U.S. 191 (1992) (protection of the right to vote); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (eradicating discrimination).

[98] *Burson*, 504 U.S. at 198.

[99] Shiffrin, *Dissent, supra* note 36, at 65.

[100] *See* Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. Chi. L. Rev. 873, 902 (1993) (urging reliance on speech-conduct distinction "to enhance the rights of minorities and women, while also respecting core principles of the First Amendment").

[101] *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,* 547 U.S. 47, 62 (2006); Kagan, *supra* note 100, at 885 ("When an employer fires an employee because she is black, the government may impose sanctions without constitutional qualm. This is so even when the discharge is accomplished . . . through some form of expression, for whatever expression is involved is incidental both to the act accomplished and the government's decision to prevent it.").

[102] *Forum for Acad. & Inst. Rights,* 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

[103] *See Harris v. Forklift Sys.*, 510 U.S. 17 (1993); J.M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. 2295, 2310 (1999) ("[A] person trapped in a hostile work environment is a 'captive audience' for First Amendment purposes with respect to the speech and conduct that produce the discrimination."); Fallon, *supra* note 82, at 43, 44 (arguing that "the case for extending" captive audience doctrine "to the workplace is strong" because it is "typically infeasible to flee the workplace to escape sexual harassment" and "no one should have to endure a gauntlet of discriminatory insult or ridicule or suffer demeaning sexualization as a condition of employment"). As Fallon notes, Title VII's requirement of an objectively hostile work environment can "play a crucial, mediating role in the effort to accommodate equality and dignitary interests without trampling on free speech values." *Id.* at 44.

Hawaii,[104] where the Court turned a blind eye to far more blatant discrimination.[105] But, for all its faults, *Masterpiece* gets this much right—it does not sideline constitutional principles of equality.

Justice Kennedy's majority opinion recognized, from the outset, the Court's obligation to ensure "the proper reconciliation" of the power of government to safeguard "the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services" and "the right of all persons to exercise fundamental freedoms under the First Amendment."[106] Justice Kennedy affirmed that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and that "[t]he exercise of their freedom on terms equal to others must be given . . . respect by the courts," while also recognizing that "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."[107]

Critically, Justice Kennedy recognized that, as a general matter, the conflict between speech and equality must be resolved in favor of equality. "[I]t is a general rule," Kennedy wrote, that "religious and philosophical objections" to same-sex marriage "do not allow business owners and other persons in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[108] This means that "all purveyors of goods and services who object to gay marriages for moral and religious reasons" may not "put up signs saying 'no goods or services will be sold if they will be used for gay marriages,'" which would "impose a serious stigma on gay persons."[109] Kennedy's framing of the constitutional balance between speech and equality was exactly right; his ultimate resolution of that conflict on the facts of the case was troubling, arguably manufacturing a claim of animus to find a way to rule for the baker.

The Supreme Court has not always lived up to its responsibility to strike a balance between constitutional guarantees of speech and equality. Critics of the Court's First Amendment jurisprudence have long railed against the ways that the Court's rulings have entrenched inequality. This concern will likely grow as the Roberts Court continues to use First Amendment as a pro-corporate deregulatory tool. But, as *Masterpiece* reflects, the problem is not the Constitution or even the Court's doctrinal framework, but the Court's willingness to privilege speech over other constitutional norms. Indeed, First Amendment doctrine provides the tools to strike a balance between competing constitutional values of speech and equality. Our existing First Amendment framework provides a metric to assess whether the Court is respecting our whole Constitution and to criticize their decisions when they privilege one part of the Constitution over another.[110]

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[104] 138 S. Ct. 2392 (2018).

[105] *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 135, 136 (2018) (arguing that "the Court misread the facts to find intentional hostility in the application of civil rights law where none existed" and finding "after the travel ban case . . . no principled application [and] no integrity" in "animus doctrine").

[106] *Masterpiece*, 138 S. Ct. at 1723.

[107] *Id.* at 1727.

[108] *Id.*

[109] *Id.* at 1728-29.

[110] For examples, *see, e.g.* Richard L. Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* 36 (2016) (criticizing Supreme Court's campaign finance jurisprudence for "tak[ing] off the table real concerns about political inequality in a system of increasingly unlimited political money"); powell, *supra* note 2, at 81, 82 (criticizing Supreme Court decisions concerning hate speech for "treating free speech principles as foundational and equality concerns as subsidiary or irrelevant" and using "[t]he threat of censorship . . . to end the conversation about other harms"); Nan D. Hunter, *Accommodating The Public Sphere: Beyond a Market Model*, 85 Minn. L. Rev. 1591, 1591 (2001) (criticizing *Boy Scouts v. Dale*, 530 U.S. 640 (2000), for resolving the "tension between equality and freedom" in a manner that "weakens the claim to open participation in our civic culture by lesbians and gay men").

III. Balancing Constitutional Values in the Digital Age

There is a robust debate today over how platforms should regulate speech on social media, almost all of it focusing on whether the platforms' content moderation policies are consistent with free speech values. This is too narrow in multiple ways. In the first place, free speech values do not exist above other constitutional principles. We must strike a balance between constitutional values of freedom of speech and equality. But most of the debate treats free speech as the only relevant part of our constitutional heritage. In the second place, content moderation policies, while extremely important, are only one piece of the puzzle. We cannot understand how to reconcile our constitutional values without understanding three related and interlocking problems: (1) the many ways the algorithms employed by social media companies have helped to amplify extreme, hateful speech, effectively giving those who spread hate a virtual bullhorn; (2) content moderation policies that empower the companies to silence certain voices, and (3) the social media companies' lack of transparency about their decision-making processes. The result is a toxic environment that, all too often, rewards the most extreme content.

Social media companies do not treat all expression equally. They are constantly making choices about which content to prioritize and recommend. Algorithms—the composition of which are shrouded in secrecy—control what you see first on your newsfeed on Facebook; algorithms control what videos are recommended to viewers on YouTube. Thanks to these algorithms, "[s]ocial media platforms," as Kara Swisher has written, "are designed so that the awful travels twice as fast as the good."[111] Hate, fear, provocation, and outrage generate clicks, which produce "engagement," which produce more time spent online and more advertising revenue.[112] This effectively rewards some of the most incendiary speakers.[113] The ability to pay to boost content only adds to the problem.[114]

Consider a few examples. During the 2016 presidential election, YouTube recommended to viewers who watched Donald Trump's rallies a wide array of racist content, including "white supremacist rants, Holocaust denials and other disturbing content."[115] A Wall Street Journal investigation found that

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[111] Kara Swisher, *I Thought the Web Would Stop Hate, Not Spread It,* N.Y. Times (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/opinion/cesar-sayoc-robert-bowers-social-media.html.

[112] *See* Tobias Rose-Stockwell, *This is How Your Fear and Outrage Are Being Sold For Profit*, Quartz (July 28, 2017), https://qz.com/1039910/how-facebooks-news-feed-algorithm-sells-our-fear-and-outrage-for-profit/.

[113] Warzel, *We're Asking the Wrong Questions of YouTube and Facebook After New Zealand*, *supra* note 14, (discussing how the "architecture of social networks . . . incentivize and reward the creation of extremist communities and content").

[114] Renee DiResta & Tristan Harris, *Why Facebook and Twitter Can't Be Trusted to Police Themselves,* Politico (Nov. 1, 2017), https://www.politico.com/magazine/story/2017/11/01/why-facebook-and-twitter-cant-be-trusted-to-police-themselves-215775 ("The self-serve ease and affordability of Facebook's ads tool, and the fact that the platform can turn content viral quickly, is why advertisers and manipulators alike love it."); Yaël Eisenstat, *I Worked On Political Ads at Facebook. They Profit By Manipulating Us*, Wash. Post (Nov. 4, 2019), https://www.washingtonpost.com/outlook/2019/11/04/i-worked-political-ads-facebook-they-profit-by-manipulating-us/ ("Facebook profits partly by amplifying lies and selling dangerous targeting tools that allow political operatives to engage in a new level of information warfare. Its business model exploits our data to let advertisers aim at us, showing each of us a different version of the truth and manipulating us with hyper-customized ads.").

[115] Zeynep Tufecki, *YouTube, The Great Radicalizer*, N.Y. Times (Mar. 10, 2018), https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html.

YouTube often "fed far-right or far-left videos to users who watched relatively mainstream news sources."[116] "Given its billion or so users," Zeynep Tufecki observed, "YouTube may be one of the most powerful radicalizing instruments of the 21st century."[117] Other examples abound. YouTube recommended videos produced by Alex Jones, the hate-mongering right-wing conspiracy theorist, a stunning 15 billion times before the platform banned Jones.[118] A recent report in the New York Times shows that, despite a legion of criticism, YouTube's algorithms continue to be skewed in ways that favor incendiary content.[119] Facebook's algorithms work in a similar way. "[O]n Facebook, Donald J. Trump fares better than any other candidate, and anti-vaccination theories like those peddled by Mr. [Glenn] Beck easily go viral," while stories about police brutality often remain in the shadows.[120] In 2018, Instagram helped to spread conservative claims that mail-bomb attacks on leading Democratic critics of President Trump were a hoax.[121] Facebook and Instagram also push users to more extreme content, such as unscientific anti-vaccination propaganda, through their search engine recommendations, which can auto-populate in a way that drives users toward hate and misinformation.[122] Facebook groups, too, help "push[] users into conspiracy theorist groups, or into those geared toward trolling, harassment, or illicit online activity."[123] These examples are just the tip of the iceberg, but they illustrate how platforms are tilting our public discourse in a manner that foments hatred and helps it to spread.

The platforms' use of algorithms that amplify extreme, hateful speech makes the platforms' content moderation policies and execution that much more important. Moderating the content of billions of individuals is an unbelievably difficult endeavor. Even the best system of content moderation will make mistakes. There have been notable success stories, such as efforts to limit the spread of terrorist propaganda on social media.[124] But there have been significant failures as well. Hate continues to

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[116] Jack Nikas, *How YouTube Drives People to the Internet's Darkest Corners*, Wall St. J. (Feb. 7, 2018), https://www.wsj.com/articles/how-youtube-drives-viewers-to-the-internets-darkest-corners-1518020478.

[117] Tufecki, *supra* note 115.

[118] *See* Michael Hiltzik, *Ex-Google Manager Leads a Drive To Rein In the Pernicious Impact of Social Media*, L.A. Times (May 10, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-tristan-tech-20190510-story.html.

[119] Kevin Roose, *The Making of a YouTube Radical*, N.Y. Times (June 8, 2019), https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html.

[120] Zepnep Tufecki, *The Real Bias Built in at Facebook*, N.Y. Times (May 19, 2016), https://www.nytimes.com/2016/05/19/opinion/the-real-bias-built-in-at-facebook.html.

[121] Casey Newton, *How Platforms Are Driving Users to Misinformation About Mail Bombs,* The Verge (Oct. 27, 2018), https://www.theverge.com/2018/10/27/18029490/cesar-sayoc-mail-bombs-twitter-instagram-misinformation.

[122] Julia Carrie Wong, *How Facebook and YouTube Help Spread Anti-Vaxxer Propaganda*, The Guardian (Feb. 1, 2019), https://www.theguardian.com/media/2019/feb/01/facebook-youtube-anti-vaccination-misinformation-social-media; Newton, *supra* note 121 (discussing how Instagram "auto-populated suggested searches for anyone who began to search for Soros: 'soros caravan,' 'soros bomb,' 'soros jew,' all of which could lead users to further misinformation").

[123] Craig Silverman, et al., *How Facebook Groups Are Being Exploited to Spread Misinformation, Plan Harassment, and Radicalize People*, BuzzFeed News (Mar. 19, 2018), https://www.buzzfeednews.com/article/craigsilverman/how-facebook-groups-are-being-exploited-to-spread#.jmnkyY9VO4; Emma Graham-Harrison, *Far-right Facebook Groups 'Spreading Hate to Millions in Europe,'* The Guardian (May 22, 2019), https://www.theguardian.com/world/2019/may/22/far-right-facebook-groups-spreading-hate-to-millions-in-europe?CMP=share_btn_tw.

[124] Ryan Broderick & Ellie Hall, *Tech Platforms Obliterated ISIS Online. They Could Use The Same Tools on White Nationalism,* BuzzFeed News (Mar. 20, 2019), https://www.buzzfeednews.com/article/ryanhatesthis/will-silicon-valley-treat-white-nationalism-as-terrorism.

flourish online.[125] According to one December 2018 survey, 53% of Americans experienced some form of online hate or harassment and 37% reported experiencing severe hate or harassment.[126] The platforms are continuing to improve in this regard, but they still have work to do.[127]

Not only does hateful content flourish, but in many instances, content moderators have silenced the very speakers their rules aimed to protect, applying their "hate speech" rules arbitrarily to silence those seeking to protest injustice. In 2017, Pro Publica broke the news that Facebook's rules gave more protection from hate speech to white men than to black children based on the odd theory that unprotected subgroups of a protected class deserve less protection.[128] As the report explained, Facebook regularly deleted posts by or suspended the accounts of Black Lives Matter activists and others criticizing police abuse, particularly when they called white people out for racism.[129] Women criticizing sexism face similar treatment. In 2017, when a female comedian wrote "Men are scum," Facebook banned her from the platform for a month.[130] LGBTQ people who used the word "dyke" also had their posts taken down; those posting LGBTQ videos have run into problems as well.[131] Efforts to provide accurate sex education have been squelched.[132] Content moderation, at least thus far, has not shown much sensitivity to nuance or context. The result is censorship of a number of dissident voices, those most likely to be drowned out on social media.

Making matters worse, content moderation policies do not have to provide anything resembling due process, leaving users feeling frustrated when their posts are deleted. This creates a huge legitimacy gap. The platforms wield immense power in a manner that leaves users powerless. As Kate Klonick's comprehensive study of social media content moderation policies revealed, "[t]here is very little transparency from these private platforms."[133] The companies' secret processes create the potential for

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[125] Taylor Hatmaker, *Tech Is Not Winning the Battle Against White Supremacy*, Tech Crunch (Aug. 16, 2017), https://techcrunch.com/2017/08/16/hatespeech-white-supremacy-nazis-social-networks/ ("Whether it's 4chan or Facebook, if you go looking for hate online, you'll find it. Dredging up racist, anti-Semitic content often in seeming violation of a company's stated policy takes seconds — trust me, I went looking."); Jane Lytvynenko, *Anti-Muslim Hate Speech Is Absolutely Relentless on Social Media Even as Platforms Crack Down On Other Extremist Groups*, BuzzFeed News (Mar. 18, 2019), https://www.buzzfeednews.com/article/janelytvynenko/islamophobia-absolutely-relentless-social-media.

[126] *Online Hate and Harassment: The American Experience*, Anti-Defamation League , https://www.adl.org/onlineharassment.

[127] Facebook, *Community Standards Enforcement Report* (May 2019), https://transparency.facebook.com/community-standards-enforcement#hate-speech (reporting an Increase in "the percent of hate speech Facebook found proactively before users reported it—from 51.5% in Q3 2018 to 65.4% in Q1 2019").

[128] Angwin & Grassegger, *supra* note 29.

[129] *Id.*; Guynn, *supra* note 29.

[130] *See* Van Zuylen-Wood, *supra* note 29.

[131] *Id.;* Megan Farokhmanesh, *YouTube Is Still Restricting and Demonetizing LGBT videos — and Adding Anti-LGBT Ads to Some,* The Verge (June 4, 2018), https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm.

[132] Amber Madison, *When Social Media Companies Censor Sex Education*, The Atlantic (Mar. 4, 2015), https://www.theatlantic.com/health/archive/2015/03/when-social-media-censors-sex-education/385576/; Bérénice Magistretti, *Facebook's Ad Policies Are Hurting Women's Health Startups,* Venture Beat (Apr. 5, 2018, 1:33 PM), https://venturebeat.com/2018/04/05/facebooks-ad-policies-are-hurting-womens-health-startups/.

[133] Klonick, *New Governors, supra* note 8, at 1665; Catherine Buni & Soraya Chemaly, *The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech*, The Verge, https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-

arbitrary enforcement, and, indeed, Klonick found that "private platforms are increasingly making their own choices around content moderation that give preferential treatment to some users over others."[134] As designed, she found, "a fair opportunity to participate is not currently a prioritized part of platform moderation systems."[135] This is slowly beginning to change in some respects, but we are still a long way from a system that provides what Jack Balkin has called "curatorial due process."[136]

How can we ameliorate these complex, difficult problems, which go to the heart of freedom of speech, equality, and public discourse in the digital age?

Social media companies should protect our whole Constitution's core values, including free speech, equality and due process, but it would be a mistake to apply the Constitution directly to social media companies, who are, of course, private, not governmental, actors. Social media has been called the "modern public square,"[137] but it is not actually publicly owned or managed. In fact, it is a good thing that the companies' private regulation of their own platform is not constrained by the First Amendment's limitations on government.[138] Because content discrimination is baked into how social media works, applying the First Amendment directly would sharply limit the power of social media platforms to operate.[139] If First Amendment doctrine applied, the companies would likely be hamstrung in their ability to curb all sorts of hateful and abusive content, violent content, fake news, and other kinds of misinformation.[140] "All but the very basest speech would be explicitly allowed and

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speech ("The details of moderation practices are routinely hidden from public view, siloed within companies and treated as trade secrets when it comes to users and the public.").

[134] Klonick, *New Governors*, *supra* note 8, at 1665; *see* David Pozen, *Authoritarian Constitutionalism in Facebookland*, Knight First Amendment Institute (Oct. 30, 2018), https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland (noting the "potential for arbitrary and cynical assertions of authority from on high in Facebookland—and of the potential disconnect between the policies that Facebook adopts and the policies that a more democratic alternative would generate").

[135] Klonick, *New Governors, supra* note 8, at 1665.

[136] Balkin, *Free Speech is a Triangle*, *supra* note 4, at 2046; *see id.* at 2044 ("[T]o the extent that digital curators block, censor, or take down content from their end users, they have obligations of due process toward their end users.").

[137] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); *see* Citron & Richards, *supra* note 4, at 1356 (criticizing "the Court's magical thinking about the Internet").

[138] Arguments for treating Facebook and other platforms as state actors typically depend on the idea that the platforms are the equivalent of a company town and thus qualify as state actors under *Marsh v. Alabama*, 326 U.S. 501 (1946). *See, e.g.*, Daniel Rudovsky, Note, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. Ann. Surv. Am. L. 741, 777 (2017) ("Facebook is the town in *Marsh v. Alabama*. Only it appears to be a virtual town, and Facebook has essentially created a government over that virtual town."). In *Marsh*, the Court reversed the criminal conviction of a Jehovah's witness for distributing literature in a company town, refusing to permit those who "live in or come to" a company town to be "denied freedom of press and religion simply because a single company has legal title to all the town." *Marsh,* 326 U.S. at 505. The Court insisted that "the managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the [c]onstitutional guarantees." *Id.* at 508. But *Marsh* has long been read as a very narrow exception to the usual rule that private actors are not bound by constitutional limitations. Generally speaking, "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). As explained in the text, treating Facebook and other platforms as a state actor is more likely to be harmful than helpful.

[139] Balkin, *Free Speech is a Triangle*, *supra* note 4, at 2027 (arguing that "under a First Amendment regime, social media sites would be unable to curate content in order to provide personalized feeds").

[140] *Id.* at 2026 (arguing that "[u]nder current First Amendment doctrine, sites might not be able to ban hate speech or other kinds of abusive and emotionally upsetting speech that make the site far less valuable for the vast majority of customers"); Citron & Richards, *supra* note 4, 1371 (arguing that "[t]here is good in having private platforms wield some bounded power to address online abuse and other activity that imperils free expression").

protected—making current problems of online hate speech, bullying, and terrorism . . . unimaginably worse."[141] The state action doctrine, which requires action by the government to trigger First Amendment scrutiny, gives social media companies room to develop creative solutions to reconcile constitutional principles of freedom of speech and equality.

Social media provides rich expressive possibilities, but it also creates grave dangers to our system of free expression and democratic self-governance and our law's promise of equality. The chief danger is the power the platforms possess to manipulate and distort public discourse and amplify hateful, incendiary, and misleading content. Addressing the ways in which social media amplifies certain views and disfavors others is perhaps the most important task that faces Google, Facebook, and others. The platforms have to interrogate the algorithms that shape what we see first. They have to interrogate how advertising, search engines, and recommendations help give a virtual bullhorn to some extreme and harmful content. They have to examine the role they play in abetting widespread harassment that, all too often, silences certain speakers. They have to scrutinize the role groups on platforms like Facebook play in spreading hatred and misinformation.

In short, platforms would be unwise to pursue engagement above all else, regardless of the costs. They arguably have a responsibility to act to ensure that the internet ecosystem limits—not amplifies—the spread of hatred, extreme, incendiary content, and propaganda.[142]

This is undoubtedly a difficult task, but the social media companies do not need to start from scratch. In 2019, in response to concerns about misinformation about vaccines, Facebook announced a number of measures designed to strike a balance between "'reach and speech,'"[143] including "remov[ing] groups and pages that share anti-vaccine misinformation from its recommendations" and preventing advertisers from "target[ing] people who Facebook's advertising algorithm identifies as interested in 'vaccine controversies.'"[144] These hardly exhaust what is possible. There is clearly room for more aggressive solutions to address algorithmic amplification of hateful, harmful speech. Platforms could also prevent others from sharing harmful content, exclude such content from search results, and refuse to recommend such content to others. They could downgrade borderline content, so that it appears low down in the news feed, despite the fact that it often produces significant engagement.

If companies should do more to address algorithmic amplification, they might also consider showing more restraint in how they apply their content moderation rules. In recent years, we have seen a number of content moderation decisions that verge on overkill, such as taking down comments such as "men are scum," and censoring posts expressing anger and frustration about police abuse and racist treatment. Facebook even deleted a post quoting from a part of the Declaration of Independence as hate speech.[145] It is hard to see what good is served by censoring these expressions. This is not to say that content moderation is illegitimate. Platforms should not provide a stage for terrorist activity, violent videos, like the Christ Church shooting, and those who traffic in hate or lies, such as Alex Jones

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[141] Klonick, *New Governors, supra* note 8, at 1659.

[142] Wu, *supra* note 4, at 570 (observing that "the platforms are vulnerable to tactics that weaponize speech and use the openness of the internet as ammunition" and suggesting that "the platforms need to do more to combat these problems for the sake of workable self-governance in the United States").

[143] Reis Thebault, *Facebook Says It Will Take Action Against Anti-Vaccine Content. Here's How It Plans to Do It,* Wash. Post (Mar. 7, 2019), https://www.washingtonpost.com/business/2019/03/07/facebook-says-it-will-take-action-against-anti-vax-content-heres-how-they-plan-do-it/?utm_term=.2a52967c6516.

[144] Rachel Becker, *Facebook Outlines Plans to Curb Anti-Vax Conspiracy Theories*, The Verge (Mar. 7, 2019), https://www.theverge.com/2019/3/7/18255107/facebook-anti-vaccine-misinformation-measles-outbreaks-group-page-recommendations-removal.

[145] Jason Silverstein, *Facebook Thought Declaration of Independence Quotes Were Hate Speech*, CBS News (July 5, 2018), https://www.cbsnews.com/news/facebook-thought-declaration-of-independence-quotes-were-hate-speech/.

and his ilk. They should do everything in their power to prevent harassment of all kinds, which silences members of the LGBTQ community, people of color, and women of all backgrounds, and discourages them from participating online. But the platforms have been far too willing to censor content in heavy-handed ways, quite often to suppress the speech of historically marginalized groups. That turns free speech and equal protection values on their head.

Importantly, because of the immunity conferred by Section 230 of the Communications Decency Act,[146] social media companies have leeway to employ a system of content moderation that is sensitive to our whole Constitution's deepest values. Nothing in the statutory framework governing social media companies prevents the careful balancing of constitutional values. While there is a serious debate about the scope of the immunity conferred by Section 230, some form of immunity has been seen as critical to ensuring vibrant digital expression and enabling platforms to strike a balance that does justice to our whole Constitution's fundamental values, as even critics of Section 230 acknowledge.[147]

Finally, the platforms should embrace transparency, in line with the constitutional value of due process. The algorithms that powerfully shape our public discourse should not be shrouded in secrecy. At the very least, they should be available for study so that researchers and organizations can better understand how they work and what content they favor and disfavor. The platforms also need to do more to make content moderation more transparent. Users and the public should know the rules governing content moderations, how they have been applied in practice, and how they can seek recourse when their content is removed from the platform. Users deserve a reasoned explanation of why a particular post or comment violated the rules, so they can appeal the decision. In short, the system should have all the hallmarks of procedural fairness that we associate with due process.

Conclusion

Our Constitution promises both freedom of speech and equality, requiring us to take account of both fundamental constitutional values and to reconcile and accommodate them when they are in tension with one another. Striking this balance is never easy, but it is essential if we are to do justice to the whole Constitution.

The Constitution does not dictate how social media companies regulate their platforms, but understanding the constitutional duty to strike a balance between speech and equality can help inform efforts to address the immensely complicated and difficult problems of platform governance. This constitutional balance requires a system of online expression that ensures robust exchange of ideas, but also limits the spread of hateful speech, misinformation, and harassment. The health of our public discourse depends on it.

[146] 47 U.S.C. § 230.

[147] *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 413 (2017) (recognizing "how § 230 immunity has benefitted digital expression specifically and democracy generally").