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Algorithms and Misinformation: The Constitutional Implications of Regulating Microtargeting

Talia Bulka*

The increased popularity of social media in recent years has brought with it unwanted consequences. Most notably, the world is experiencing a widespread epidemic of online misinformation and disinformation. In the form of news stories and advertisements, false information about candidates like Joe Biden, Hillary Clinton, and Donald Trump has spread over Facebook, Instagram, Twitter, and TikTok. Since false information is often more sensational than the truth, this information is reposted and shared until it reaches millions of people. However, the real culprit of this misinformation phenomenon is microtargeting—algorithms that exploit users' personal information and previous media interactions to target specific posts to individual users. These algorithms send posts to users' newsfeeds without regard for the credibility of the information, leading users to believe that what they are seeing is true. Further, microtargeting intensifies political party polarization because users are only shown posts with which they already agree. Can the government do anything about this? This Comment examines the extent to which microtargeting can be regulated without exceeding the confines of the First Amendment.

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INTRODUCTION

Social media users and online news readers have been swarmed with information regarding various political candidates in the form of political advertisements and news stories. Unfortunately, however, much of this information is false or misleading. Inaccurate information may affect voters' perception of certain issues and influence their voting choices. It can even sway the outcome of elections.

Microtargeted news stories and advertisements are some of the primary culprits spreading false political information to individual users.[1] Using algorithms, platforms display content to individual users based on their interests, deriving this information from users'

[1] *See* Sara Brown, *MIT Sloan Research About Social Media, Misinformation, and Elections*, MIT SLOAN SCH. OF MGMT. (Oct. 5, 2020), https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections [https://perma.cc/9PVK-2LEL].

data and previous media interactions.[2] Since content is displayed based on user preference and not accuracy of information, it is difficult for the viewer to discern what information is accurate. While legislators and the public alike have called for a ban on microtargeting, such a law would likely violate the First Amendment because algorithms associated with microtargeting purposely transmit substantive information.

This Comment proceeds as follows: Part I describes the role that microtargeted stories and advertisements can have in spreading false information. Part II asserts that algorithms used for microtargeting are protected speech. Finally, Part III concludes by arguing that the regulation of microtargeting could be accomplished through a content-neutral statute

I. BACKGROUND

A. Fake News

The 2020 election cycle was like no other.[3] The COVID-19 pandemic pushed millions of Americans to vote early or by mail-in ballots.[4] However, this newly popularized voting method came with a

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[2] Lata Nott, *Political Advertising on Social Media Platforms*, ABA (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/ [https://perma.cc/SW4P-NETZ]; *see* Veronika Balbuzanova, *First Amendment Considerations in the Federal Regulation of Social Media Networks' Algorithmic Speech, Part I*, ABA (Jan. 29, 2021), https://www.americanbar.org/groups/litigation/committees/privacy-data-security/articles/2021/first-amendment-social-media-algorithmic-speech-part-1/ [https://perma.cc/KJ28-E6ZJ].

[3] The 2020 election saw twenty-seven percent of Americans vote in person on Election Day, compared to 2018 where fifty-five percent voted in person on Election Day. Drew DeSilver, *Amid Pandemic, the Long Decline of In-Person Voting on Election Day Is Likely to Accelerate This Year*, PEW RSCH. CTR. (Nov. 3, 2020), https://www.pewresearch.org/fact-tank/2020/11/03/amid-pandemic-the-long-decline-of-in-person-voting-on-election-day-is-likely-to-accelerate-this-year/ [https://perma.cc/TH3A-QS5S].

[4] According to the Pew Research Center, twenty-seven percent of Americans voted in person before 2020 Election Day, forty-six percent voted by absentee or mail-in ballot, and only twenty-seven percent voted in person on Election Day. *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct: The Voting Experience in 2020*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/ [https://perma.cc/7W6U-6YHR].

surge of disinformation[5] and misinformation.[6] Stories circulated on social media and various news sites alleged ballots were being shredded, discarded, stolen, or cast by deceased citizens.[7]

Though most allegations were proven false,[8] millions of Americans were already convinced that the stories of manipulated ballots were legitimate.[9] Many far-right conservatives were persuaded that President Biden was trying to "steal" the election, leading to a movement that used the hashtag, "#StopTheSteal."[10] Facebook attempted to shut down groups and pages aimed at "stopping the steal," but having already collected over 2.5 million followers, it was too late[11] to stop the circulation of this fake news.[12]

This is not the first time that false information posed issues in a Presidential Election. In 2016, numerous fake news stories spread across the internet regarding Hillary Clinton and Donald Trump.[13]

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5 Disinformation is defined here as "deliberately misleading or biased information" or "manipulated narrative or facts." *Disinformation*, DICTIONARY.COM, https://www.dictionary.com/browse/disinformation [https://perma.cc/5W2E-TZHQ].

6 Misinformation means "false information that is spread, regardless of whether there is intent to mislead." *Misinformation*, DICTIONARY.COM, https://www.dictionary.com/browse/misinformation [https://perma.cc/CCK9-FL32].

7 *See* ELECTION INTEGRITY P'SHIP, THE LONG FUSE: MISINFORMATION AND THE 2020 ELECTION 50, 54 (June 15, 2021), https://stacks.stanford.edu/file/druid:tr171zs0069/EIP-Final-Report.pdf [https://perma.cc/T6W7-ENLK].

8 *See id.* at 54.

9 Rob Kuznia et al., *Stop the Steal's Massive Disinformation Campaign Connected to Roger Stone*, CNN BUS. (Nov. 14, 2020, 11:08 AM), https://www.cnn.com/2020/11/13/business/stop-the-steal-disinformation-campaign-invs/index.html [https://perma.cc/L3RW-QQ4B].

10 *See* ELECTION INTEGRITY P'SHIP, *supra* note 7, at 50.

11 Kuznia, *supra* note 9.

12 Fake news is defined as "false news stories, often of a sensational nature, created to be widely shared or distributed for the purpose of generating revenue, or promoting or discrediting a public figure, political movement, [or] company." *Fake News*, DICTIONARY.COM, https://www.dictionary.com/browse/fake-news [https://perma.cc/E7HW-H5SX].

13 *See* RICHARD GUNTHER ET AL., OHIO STATE UNIV., *Fake News May Have Contributed to Trump's 2016 Victory*, (Mar. 8, 2018), https://s3.documentcloud.org/documents/4429952/Fake-News-May-Have-Contributed-to-Trump-s-2016.pdf [https://perma.cc/TC2W-X9TY]; *see also* James S. Robbins, *No Collusion: How Americans Were Fed a False Tale About Donald Trump's 2016 Campaign*, USA TODAY (Nov. 9, 2021, 4:00 AM), https://www.usatoday.com/story/opinion/2021/11/09/trump-collusion-indictment-false-accusations/6336510001/?gnt-cfr=1 [https://perma.cc/G6SB-5KVP].

An Ohio State University study found that a substantial number of citizens[14] did not vote for Hillary Clinton because of false claims that "Hillary Clinton [was] in very poor health,"[15] that "Pope Francis endorsed Donald Trump for president prior to the election,"[16] or that while serving as Secretary of State, Clinton "approved weapons sales to Islamic jihadists, including ISIS."[17]

At the same time, many Americans believed that Donald Trump colluded with Vladimir Putin to win the 2016 election.[18] Even after special counsel Robert Mueller's investigation found this accusation to be without merit, fifty-three percent of poll takers still believed that Trump or members of his campaign conspired with Russia to influence the election and prevent investigations into Russian influence on the Trump administration.[19]

Even without Trump's influence, however, Russia utilized disinformation to gain an advantage in the 2016 election.[20] During congressional hearings regarding the third-party use of social networks and online services in the 2016 elections, several media companies disclosed to Congress that Russian agents reached 126 million users on Facebook with inflammatory posts, sent over 131,000 messages on Twitter, and uploaded over 1,000 videos to Facebook.[21] But how did this misinformation and disinformation spread so quickly and widely? The fault seems to fall on microtargeting.

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14 The study analyzed the voting behaviors of 1,600 survey respondents nationally, 585 of which voted for Obama in 2012. GUNTHER, *supra* note 13.

15 Twenty-five percent of respondents in the national sample believed this claim, including twelve percent of past Obama voters. *Id*.

16 Ten percent of the national sample believed this, as did eight percent of Obama supporters. *Id.*

17 Thirty-five percent of the entire sample believed this claim, including twenty percent of Obama voters. *Id.*

18 Robbins, *supra* note 13.

19 *Id.*; Chris Kahn, *Despite Report Findings, Almost Half of Americans Think Trump Colluded with Russia: Reuters/Ipsos Poll*, REUTERS (Mar. 26, 2019, 6:09 PM), https://www.reuters.com/article/us-usa-trump-russia-poll/despite-report-findings-almost-half-of-americans-think-trump-colluded-with-russia-reuters-ipsos-poll-idUSKCN1R72S0 [https://perma.cc/C8XF-993R].

20 *See* Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html [https://perma.cc/5X63-VM62].

21 *Id.*

B. Defining Microtargeting

Microtargeting is the use of "hyper-detailed data profiles" to target individual users.[22] Companies like Facebook, Google, and Amazon[23] exploit their users' personal information, such as zip code, sex, and age,[24] as well as previous media interactions,[25] to tailor specific stories and advertisements to individual users.[26] By programming algorithms,[27] these platforms automatically select posts, links, and stories[28] that they believe will interest specific users and prioritize these stories at the top of users' search engine results and social media feeds.[29] The more information input into the algorithm, the higher the algorithm's accuracy and the more tailored the results will be to a specific person.[30] This method is not only employed by technology companies, but also by news publications such as *Forbes*, *The Washington Post*, *Bloomberg News*, and *Associated Press*.[31]

Microtargeting has many benefits.[32] First, it enables advertisers to target only those groups interested in their product or messaging, saving advertisers valuable time and resources.[33] By the same token, users receive information tailored to their specific interests instead

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[22] Nicholas Vinocur, *The Movement to End Targeted Internet Ads*, POLITICO (Apr. 2, 2021, 4:56 PM), https://www.politico.eu/article/targeted-advertising-tech-privacy/# [https://perma.cc/R7PU-C5HH].

[23] *See id.*

[24] *See* Nott, *supra* note 2.

[25] *See* Balbuzanova, *supra* note 2.

[26] *See id.*

[27] An algorithm is defined as "a sequence of instructions that tell a computer what to do." ACCESS NOW, HUMAN RIGHTS IN THE AGE OF ARTIFICIAL INTELLIGENCE 10 (2018) [hereinafter HUMAN RIGHTS], https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf [https://perma.cc/MK9S-7C56].

[28] *See* Stuart Minor Benjamin, *The First Amendment and Algorithms*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 606, 619 (Woodrow Barfield ed., 2020).

[29] *See id.* at 606; *see also* Balbuzanova, *supra* note 2.

[30] *See* Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 121–22 (2019).

[31] *See* BENJAMIN, *supra* note 28, at 619.

[32] *See generally* Alex Baiocco, *Benefits of "Microtargeting": Why Online Ad Targeting Tools Are Good for Free Speech and Democracy*, INST. FOR FREE SPEECH (May 25, 2021), https://www.ifs.org/research/benefits-of-microtargeting-good-for-free-speech-and-democracy/ [https://perma.cc/EZ33-RB9M].

[33] *See id.*

of every story and advertisement at large, creating a richer online experience.[34] In terms of political advertising, microtargeting also sends users focused and substantive messages about candidates, highlighting specific policy goals instead of broad and nondetailed information.[35]

Yet, algorithms associated with microtargeting are also responsible for spreading fake news.[36] Posts are brought to an individual's attention based on that person's likelihood of interest in a particular story, not the story's credibility.[37] For example, a personal blog about an election with the same look and feel as a story from *The New York Times* can confuse users into thinking they are reading news published by a trusted source.[38] Combine this tactic with catchy headlines and alluring images,[39] and it becomes increasingly difficult for certain users to distinguish between actual news and fake news.[40] If a user subsequently reposts a fake or misleading article, it becomes likelier that others will also encounter the article and, perhaps, be similarly misled, expediting the spread of false information.[41]

Additionally, many posts containing false information are not generated by human actors, but instead by artificial intelligence ("AI").[42] AI allows computer programmers to create an infinite

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34 *See id. But see* Ellen L. Weintraub, *Opinion: Don't Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST (Nov. 1, 2019), https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/ [https://perma.cc/7NDV-LB9Z] (explaining that microtargeting does not allow ads to be "widely available").

35 *See id.*

36 *See* Jonathan Haidt & Tobias Rose-Stockwell, *The Dark Psychology of Social Networks*, ATLANTIC (Dec. 2019), https://www.theatlantic.com/magazine/archive/2019/12/social-media-democracy/600763/ [https://perma.cc/F4RT-2AH8].

37 *See id.*

38 *See id.*

39 *See id.*

40 *See* Nott, *supra* note 2.

41 *See* JOHN VILLASENOR, BROOKINGS INST., HOW TO DEAL WITH AI-ENABLED DISINFORMATION (Nov. 23, 2020), https://www.brookings.edu/research/how-to-deal-with-ai-enabled-disinformation/ [https://perma.cc/ZC4F-N85P].

42 *See id.* Some scholars define AI as "the science of making machines do things that would require human intelligence if done by [humans]." HUMAN RIGHTS, *supra* note 27, at 8.

number of fake profiles that appear legitimate.[43] The AI then encourages users to view and interact with the fake accounts based on users' previous engagements with similar profiles.[44] Since these fake accounts emulate authentic accounts, they can avoid detection software aimed at identifying fake profiles.[45]

C. Calls to Regulate Microtargeting

As noted above, disinformation and misinformation can have catastrophic effects on democracy.[46] In a political setting, the public receives "conflicting and contradictory" messages about the same candidate, making it difficult to determine what information, if any, is accurate and where a given candidate truly stands on a particular issue.[47] Further, individuals are primarily shown posts with which they already agree, creating an echo chamber that entrenches users' existing views and leading to increased polarization between political parties and viewpoints.[48] The public does not encounter every advertisement or story, resulting in few opportunities for counter speech on contradictory or false information.[49]

Some technology companies aware of fake news' consequences have attempted to curb the spread of false information independently. For instance, Meta's[50] various platforms aim to flag posts containing misinformation with the help of independent fact-checkers.[51] If a post is labeled "false," the company reduces its distribution to individual newsfeeds.[52] Additionally, Meta attempts to

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43 VILLASENOR, *supra* note 41.

44 *See* HUMAN RIGHTS, *supra* note 27, at 16.

45 VILLASENOR, *supra* note 4.

46 *See supra* notes 3–21 and accompanying text.

47 Vinocur, *supra* note 22.

48 *See* Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/ [https://perma.cc/ME3S-XMTC].

49 Weintraub, *supra* note 34.

50 Previously known as Facebook, Meta now owns both Facebook and Instagram.

51 Guy Rosen, *How We're Tackling Misinformation Across Our Apps*, META (Mar. 22, 2021), https://about.fb.com/news/2021/03/how-were-tackling-misinformation-across-our-apps/ [https://perma.cc/6ZXH-ECKH].

52 *See id.*

connect users to reliable information by attaching this information to certain posts.[53] In comparison, Twitter limits the impact of misleading posts by not featuring posts containing misinformation on users' newsfeeds.[54] Twitter also hides tweets containing false information behind warning screens[55] and suspends accounts engaged in spreading disinformation.[56]

TikTok is another platform taking steps to reduce misinformation by fact-checking content related to topics where misinformation is common, such as COVID-19 and political elections.[57] If the platform is unable to verify information in a post, TikTok will include a label specifying that the information is unverified.[58] Further, before sharing questionable content, users receive a "caution" message, encouraging them to think twice before sharing.[59]

Yet, misinformation and disinformation still spread at rapid rates.[60] There are a number of factors contributing to widespread dissemination. First, content spreads across multiple platforms, preventing false information from being contained by the content moderation actions of a single platform.[61] In addition, it can be difficult to verify whether information is necessarily true or false with complete certainty.[62] Facebook, for instance, only addresses information

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53 *Id.*

54 *See* Shannon Bond, *Twitter Expands Warning Labels to Slow Spread of Election Misinformation*, NPR (Oct. 9, 2020, 12:00 PM), https://www.npr.org/2020/10/09/922028482/twitter-expands-warning-labels-to-slow-spread-of-election-misinformation [https://perma.cc/V882-FWNQ].

55 *Id.*

56 Brakkton Booker, *Facebook Removes 'Stop the Steal' Content; Twitter Suspends QAnon Accounts*, NPR (Jan. 12, 2021, 12:54 PM), https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/12/956003580/facebook-removes-stop-the-steal-content-twitter-suspends-qanon-accounts [https://perma.cc/G83T-MHXF] ("Twitter said it has suspended more than 70,000 accounts sharing content about QAnon, the fringe far-right conspiracy theory . . . .Among the false claims QAnon proponents put forward is that President Trump is fighting a cabal of Satan-worshiping pedophiles.").

57 Alexandra Marquez, *TikTok to Warn Users About Sharing Misleading Content*, NBC NEWS (Feb. 3, 2021, 5:34 PM), https://www.nbcnews.com/tech/tech-news/tiktok-warn-users-about-sharing-misleading-content-n1256668 [https://perma.cc/Q4S5-MU72].

58 *Id.*

59 *Id.*

60 *See* ELECTION INTEGRITY P'SHIP, *supra* note 7, at 220.

61 *Id.* at 221.

62 *See id.*

lacking a factual basis to ensure the platform does not interfere with individual expression.[63] Thus, when a post combines personal experience with potentially misleading information, Facebook may decide that the information does not meet its threshold of falsity and will thereby choose not to moderate the content.[64]

Since company self-regulation is often insufficient and impracticable, there have been calls to regulate microtargeting at the federal level. In a *Washington Post* op-ed, Federal Election Commission Chair Ellen L. Weintraub argued that eliminating political-advertisement microtargeting would be a suitable solution to remedy current issues surrounding political advertising.[65] Since advertisements would be intentionally, widely accessible to the public, disinformation and misinformation could be more readily identified and flagged or delisted, which would lead to greater accountability among advertisers.[66] Doing so could also curb much of the polarization caused by those who only see stories with which they already align.[67] Additionally, allowing users to see all political advertisements would create ample opportunity for counterspeech.[68] Specifically, Weintraub argues that "ads that are more widely available will contribute to the robust and wide-open debate that is central to our First Amendment values."[69]

Congress has also responded to these concerns. California Representative Anna Eschoo reintroduced a bill in the House of Representatives that would prohibit microtargeting related to political advertising.[70] Known as the Banning Microtargeted Political Ads Act of 2021 ("BMPAA"),[71] the law would ban certain online platforms[72]

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63 *Id.*

64 *See id.*

65 Weintraub, *supra* note 34.

66 *Id.*

67 *Id.*; *see also* Auxier, *supra* note 48 and accompanying text.

68 Weintraub, *supra* note 34.

69 *Id.*

70 Press Release, Anna G. Eshoo, House of Representatives, Rep. Eshoo Reintroduces Legislation to Ban Microtargeted Political Ads (Aug. 5, 2021), https://eshoo.house.gov/media/press-releases/rep-eshoo-reintroduces-legislation-ban-microtargeted-political-ads [https://perma.cc/PK3Y-TPFV].

71 Banning Microtargeted Political Ads Act of 2021, H.R. 4955, 117th Cong. § 1 (2021).

72 A "covered online platform" is defined in this bill as:

from targeting[73] the "dissemination of a political advertisement."[74] However, the prohibition would not apply to individuals who consent to such targeting or those who have connected devices located in broad geographies like states, municipalities, and congressional districts.[75]

If broadly applied, a ban on microtargeting could force platforms to cease using algorithms altogether to generate content, or at the very least, force changes in algorithmic inputs.[76] Assuming citizens have a sufficiently prevalent desire to regulate microtargeted political advertisements, is a wholesale ban on microtargeting constitutional? What about a regulation forcing platforms to change the kind of information input into algorithms, effectually altering the algorithmic output?

Before discussing the constitutional implications of microtargeting, a broader question must be answered: are algorithms speech entitled to First Amendment protection at all?

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any website, web application, mobile application, connected device application, digital application (including a social network, or search engine), or advertising network (including a network disseminating advertisements on another website, web application, mobile application, connected device application, or digital application) that disseminates political advertisements, except that such term does not include a website, application, or network (or a subsidiary or affiliate of such a website, application, or network) that, during the [twelve]-month period ending on the date of the dissemination of the political advertisement involved, collected or processed personal information relating to fewer than 50,000,000 individuals.

Id. § 325(d)(3).

73 "Target" means:

to perform or cause to be performed any computational process designed to select an individual, connected device, or group of individuals or connected devices to which to disseminate the political advertisement based on personal information pertaining to the individual or connected device or to the individuals or connected devices that make up the group.

Id. § 325(d)(15).

74 *Id.* § 325(a)(1).

75 *Id.* § 325(b)(1)–(2)(A); *see also* Press Release, Eshoo, *supra* note 70.

76 As discussed above in the text accompanying *supra* notes 70–73, the BMPAA is aimed at changing the algorithmic input that companies use. Specifically, the Act would restrict the use of personal information by companies as algorithmic inputs. Changing what goes into an algorithm will consequently change the output.

II. ALGORITHMS AND THE FIRST AMENDMENT

This Comment argues that algorithms programmed to categorize content based on user preferences—namely ones employed by online platforms—should receive full First Amendment protections consistent with current Supreme Court doctrine, since they purposely transmit content-based information. Both the degree of automation in these processes and platforms' endorsement of displayed content are inconsequential to this conclusion, as will be illuminated in the context of the prevailing views on the issue. On one hand, Professor Stuart Minor Benjamin argues that substantive algorithmic outputs are speech for First Amendment purposes.[77] This contrasts with legal scholar Tim Wu's theory of algorithms; specifically, that most are purely functional and are not protected speech.[78]

A. Algorithms as Protected Speech

Benjamin's Article examining the relationship between algorithms and the First Amendment begins with an examination of *Brown v. Entertainment Merchants Association*,[79] where the Court concluded that video games merit First Amendment protection.[80] This holding is significant because the Court explicitly created a low threshold for what constitutes speech.[81] Benjamin then discusses the Court's decision in *Turner Broadcasting System, Inc. v. FCC*, where cable operators carrying more than twelve channels or having more than 300 subscribers challenged a statute requiring them to set aside up to one-third of their airtime for commercial broadcast stations.[82] Cable operators transmit speech through "original programming" or by employing "editorial discretion" over which stations or programs to include.[83] In doing so, the Court found that cable operators

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77 Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013).

78 Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1526 (2013).

79 564 U.S. 786 (2011).

80 Benjamin, *supra* note 77, at 1458. The Court stated that "[e]ven if we can see in them 'nothing of any possible value to society . . . , they are as much entitled to the protection of free speech as the best of literature.'" *Brown*, 564 U.S. at 796 n.4 (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

81 Benjamin, *supra* note 77, at 1458–59.

82 512 U.S. 622, 630 (1994).

83 Benjamin, *supra* note 77, at 1459 (quoting *Turner*, 512 U.S. at 636).

"communicate messages on a wide variety of topics" and are entitled to First Amendment protection.[84] The Court held that the statute encroached upon First Amendment rights by reducing the number of channels over which cable operators exercised "unfettered control."[85]

From this decision, Benjamin deduces that to merit First Amendment protection, cable operators must create or choose "substantive messages" to air, and subsequently communicate such messages to the public.[86] Accordingly, algorithms should be entitled to similar protection since they, too, purposely display substantive advertisements and news stories tailored to specific users.[87]

Benjamin contends that substantive communications can be sent with or without algorithmic involvement, but algorithms are helpful in automating the communication process.[88] For example, the First Amendment would protect someone who hangs a physical bulletin board and posts every article she finds with the words "God is dead" on it because the board communicates a message regardless of whether the individual actually wrote the accompanying articles.[89] Thus, if the individual automates the process by having a computer search for the articles and automatically post them to a virtual bulletin board, the First Amendment would still apply.[90] The analysis is the same whether the process is physical or automatic.[91]

The same is true for search engines. For instance, when Google ranks its search results based on what it believes users want to see, the ranking itself communicates a substantive message, even though Google does not create the speech.[92] Google selects information to show based on its perceived importance, value, and relevance to users.[93] This, too, aligns with the Court's requirement that a

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84 *Id.*
85 *Turner*, 512 U.S. at 637.
86 Benjamin, *supra* note 77, at 1459.
87 *See id.* at 1470.
88 *See id.* at 1464–65, 1470.
89 *Id.* at 1464.
90 *Id.* at 1465.
91 *Id.*
92 *See id.* at 1470.
93 *See id.*

substantive message be sent and received for the First Amendment to apply.[94]

However, Benjamin clarifies that algorithms simply speeding computer transmission or facilitating network efficiency do not communicate substantive messages, and, thus, are not afforded First Amendment protections.[95] Benjamin is essentially correct in his argument; however, this point warrants greater clarification and examination. Specifically, one is not required to create content to merit First Amendment protection; one is only required to intentionally display the content.[96] Supreme Court jurisprudence addressing radio, television, and internet transmissions makes this clear.

In *FCC v. League of Women Voters of California*, the statute at issue prohibited noncommercial educational broadcasting stations from receiving certain federal grants if the stations engaged in "editorializing."[97] The Court held this violated the First Amendment since radio broadcasters were engaged in a "vital and independent form of communicative activity."[98] Therefore, the government should rely on the broadcaster's judgment, which includes editorializing.[99] Further, public reception of "social, political, esthetic, moral, and other ideas" through broadcasting is at the heart of the First Amendment.[100] This decision highlights that transmitting substantive content to the public is no less an act protected by the First Amendment than creating or endorsing content. Though the issue in this case relates to editorializing, the Court's point was that

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94 *See* Benjamin, *supra* note 28, at 622.

95 Benjamin, *supra* note 77, at 1481.

96 "If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category . . . ." Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (quoting the lower court's decision in Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999)).

97 468 U.S. 364, 366 (1984).

98 *Id.* at 378.

99 *Id.* Editorialize is defined here as "to set forth one's position or opinion on some subject in, or as if in, an editorial or "to inject personal interpretations or opinions into an otherwise factual account." *Editorialize*, DICTIONARY.COM, https://www.dictionary.com/browse/editorialize [https://perma.cc/D8FZ-VN8W].

100 *Id.* at 377.

legislators should exercise caution when regulating broadcasters since they transmit messages to the public.[101]

Similarly, in *United States v. Playboy Entertainment Group, Inc.*, the Court ruled that a strict scrutiny analysis should apply to issues arising from cable-operated channels.[102] The ruling was made without reference to whether cable operators created or endorsed specific television shows or movies; it only prohibited operators from choosing a general category of content to display (e.g., sexually oriented programing).[103] Hence, the First Amendment does not require high levels of association between the speaker and the content. Algorithms surely meet this low threshold because they display substantive messages based on user relevancy.[104]

The internet warrants even more protection. In *Reno v. ACLU*, the Supreme Court affirmed the district court's decision striking down a statute that prohibited the electronic transmission or digital display of indecent or patently offensive messages.[105] The Court noted that the internet is the "most participatory form of mass speech," and is therefore deserving of the highest First Amendment protection.[106] Again, the First Amendment discussion at issue centered around forbidding individuals from choosing which content to display—but this time, on the internet.[107] In the digital context, it seems there is even less leeway to regulate communication than that permitted in the broadcast media realm.

This analysis is important when applied to algorithms. When a search engine uses an algorithm to discern what content to display, the output should be protected speech. It is irrelevant whether the search engine itself creates or specifically endorses the content it displays.[108] The content merits First Amendment protection because

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101 *See id.*

102 529 U.S. 803, 813 (2000); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) (explaining that laws regulating content are subject to strict scrutiny).

103 *See Playboy Ent. Grp*., 529 U.S. at 809.

104 *See* Benjamin, *supra* note 77, at 1474.

105 *See* 521 U.S. 844, 858–59 (1997).

106 *Id.* at 863 (quoting the lower court's decision in ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996)) (internal quotations omitted).

107 *See generally id.*

108 *See* text accompanying *supra* notes 97–106.

the algorithm chooses to display certain substantive messages over the internet based on relevance to users.[109] End of story.

Benjamin's theory also emphasizes that humans create algorithms.[110] He argues that if AI becomes so advanced that machines themselves begin choosing what messages to communicate without any human input, then algorithms may not be considered speech for First Amendment purposes.[111]

However, the First Amendment does not and should not focus on the level of human input used to program a given algorithm. In deciding whether a computer code is protected speech, the Second Circuit discussed the process of computer code accomplishing a task.[112] For a computer code to yield results, a human must conduct some action, even if it is only one click at the beginning.[113] However, such momentary human action does not qualify the code as speech.[114] The real question is whether the code displays a substantive message,[115] and the degree of human input is unimportant to that question.[116]

Applying this to algorithms, even if AI advances to the point where humans are no longer involved in choosing what messages to communicate, the analysis should still focus on whether the output is a substantive message, not whether a human was involved in

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109 *See* Benjamin, *supra* note 77, at 1470.

110 *Id.* at 1478; *see also* Benjamin, *supra* note 28, at 631.

111 Benjamin, *supra* note 77, at 1481. "At that point, we might say that the connection to the human creators is sufficiently attenuated that the results no longer reflect humans' decisions about how to determine what to produce, such that there is no longer a human sending a substantive message." Benjamin, *supra* note 28, at 630.

112 *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001).

113 *Id.*

114 *Id.*

115 The court describes a substantive message in terms of the code's "expressive elements." *Id.*; *see also* Green v. U.S. Dep't of Just., 392 F. Supp. 3d 68, 86 (D.D.C. 2019) ("Code is speech precisely because, like a recipe or a musical score, it has the capacity to convey information to a human."); 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, . . . it is protected by the First Amendment.").

116 "[T]he fact that the system used words as triggers and a human being as a conduit, rather than programming commands as triggers and semiconductors as a conduit, appears to us to be irrelevant for purposes of [a First Amendment] analysis." Commodity Futures Trading Com'n v. Vartuli, 228 F.3d 94, 111 (2d Cir. 2000).

sending the message. A human necessarily created the AI, which should be sufficient itself to merit First Amendment protection.[117]

Further, courts are ill-equipped to answer the question of whether there is human interaction involved in algorithmic decision-making.[118] Media scholar Siva Vaidhyanathan writes that even the most knowledgeable technology experts are not experts specifically in Google or Facebook's operations, nor do they fully understand the specific code deployed in each platform or the way society shapes itself around data flows.[119] Even Facebook founder Mark Zuckerberg is likely unknowledgeable with such intricacies.[120] Accordingly, judges certainly should not base First Amendment analyses on the level of human interaction utilized by AI; in fact, they should not factor such interactions into the equation at all.

The oral arguments in *Gill v. Whitford* illustrate this point. The appellee's lawyer attempted to explain the fairly simple process of computerized, data-driven gerrymandering maps and its impact on democracy.[121] Chief Justice Roberts responded, "[I]t may be simply my educational background, but I can only describe [this] as sociological gobbledygook."[122]

This type of ignorance toward modern technology has real-world implications. For example, judges are asked to issue Fourth

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117 Even if AI acts human-like, real human input will always be necessary. For example, algorithms employed by social media platforms cannot account for societal implications in the content they display. *See* Antony Brydon, *Why AI Needs Human Input (and Always Will)*, FORBES (Oct. 30, 2019, 7:30 AM), https://www.forbes.com/sites/forbestechcouncil/2019/10/30/why-ai-needs-human-input-and-always-will/?sh=771ae51f5ff7 [https://perma.cc/T7Q9-5FMM].

118 For example, in connection to self-driving cars, judges are being called on to decide whether the car manufacturers or drivers are responsible for accidents. Thus far, judges have yet to rule on issues of this nature. *See* Melissa Whitney, *How to Improve Technical Expertise for Judges in AI-Related Litigation*, BROOKINGS INST. (Nov. 7, 2019), https://www.brookings.edu/research/how-to-improve-technical-expertise-for-judges-in-ai-related-litigation/#footnote-1 [https://perma.cc/5SEY-PSNT].

119 Siva Vaidhyanathan, *There's No Such Thing as a Tech Expert Anymore*, WIRED (Aug. 4, 2020, 8:00 AM), https://www.wired.com/story/theres-no-such-thing-as-a-tech-expert-anymore/ [https://perma.cc/2VTZ-9NJQ].

120 *See id.*

121 Transcript of Oral Argument at 39, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

122 *Id.* at 40 (No. 16-1161).

Amendment search warrants for electronic data access without knowing how the technology works or how invasive it can be.[123] Based on these consequences, judges should not rule on technology they do not use in their everyday lives.

B. Algorithms Beyond Functionality

On the other end of the spectrum, Tim Wu argues that generally, algorithms are functional and should not be considered protected speech.[124] To merit First Amendment protection, Wu believes speech must meet four criteria: personhood, speech, motive, and abridgment.[125] The following discussion focuses specifically on personhood and speech.

Beginning with personhood, courts have ruled that a speaker must be a "person" to warrant First Amendment protection.[126] Although algorithmic output may be the speech of the algorithm's creator, Wu asserts it is only a vessel for the author's ideas and that the algorithm is not the speaker itself.[127] Just like a typewriter used to write a novel is not considered a speaker, algorithmic outputs of computer programs are not speakers; they are purely functional

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123 *See* Marla N. Greenstein, *Judges Must Keep Up with Technology: It's Not Just for Lawyers*, ABA (Nov. 1, 2014), https://www.americanbar.org/groups/judicial/publications/judges_journal/2014/fall/judges_must_keep_up_with_technology_its_not_just_for_lawyers/ [https://perma.cc/4RSD-8TRM].

124 *See* Wu, *supra* note 75, at 1526.

125 *Id.* at 1500.

126 *See id.* at 1500–02. In the case of *Blackie the Talking Cat*, a couple trained their cat, Blackie, to say certain phrases in English in exchange for donations. In response to opposition to a demand that required the couple to obtain a business license, the court held that since Blackie was not a person, his free speech was not infringed upon. Miles v. City Council, 710 F.2d 1542, 1543, 1544 n.5 (11th Cir. 1983). Similarly, courts have held that young people have fewer First Amendment rights than adults. Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260, 266 (1988) (explaining that First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (internal quotations omitted)). However, the Supreme Court ruled that corporations are granted First Amendment protections, implicitly conceding corporation's equal standing with humans. *See* Citizens United v. FEC, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"(quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978))).

127 *See* Wu, *supra* note 75, at 1504–05.

vessels to transmit information and are too far removed from the original information.[128] As another example, unlike Twitter users who retain First Amendment rights, Twitter itself does not have First Amendment rights in their users' tweets.[129] Though the company facilitates tweets by controlling the character count and posting the information, merely creating the software does not merit First Amendment protections.[130]

To be protected under the First Amendment, a communication must also be "speech."[131] Communications that lack ideas or content are not considered speech, blurring the line between speech and algorithmic outputs.[132] Wu highlights that if the First Amendment protected every type of communication, then honking a car horn would be considered speech.[133] Further, the First Amendment would start to clash with other laws and regulations, such as contract law, employment law, and securities regulation.[134]

Wu is imprecise in his characterization of algorithms as simply a vessel for a speaker's ideas;[135] the algorithmic output *is* the speech. As Benjamin discusses, automating the communication of a message does not detract from the speech component, but instead eases the communication process.[136] Just as a human can post an article to a bulletin board and receive protection, so should an algorithm that automates posts.[137] Therefore, an algorithm is unlike a typewriter or

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128 *Id.* at 1505.

129 *Id.*

130 *See id.* at 1505–06.

131 *Id.* at 1500.

132 *See id.* at 1508. In *Brown v. Entertainment Merchants Association*, the Court held that video games are protected by the First Amendment, though the Court does not extend this coverage to all computer programs. *Id.* at 1514 (discussing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011)). *But see* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64, (2006) (holding that schools are not considered speakers when they host recruiting receptions because merely hosting recruiters is not an expressive activity).

133 *See* Wu, *supra* note 75, at 1508.

134 *Id.*

135 *See* text accompanying *supra* notes 127–28.

136 *See supra* notes 88–91 and accompanying discussion.

137 *See supra* notes 88–91 and accompanying discussion. The algorithmic output is essentially a proxy for human speech, with little regard for how automated the process becomes.

a tweet[138] because the output is the speech itself, not just a means of transferring speech.

Moreover, the fact that an algorithm speaks on behalf of a human does not warrant less protection for such speech. Restricting speech based on the speaker's identity is "all too often simply a means to control content."[139] The Constitution prohibits the government from singling out a class of speakers as a whole,[140] so the same logic should follow even if that class of speakers is algorithms.

Further, the concept of speech is interpreted broadly by courts. A message filled with "dry information" and "devoid of advocacy, political relevance, or artistic expression" is still protected speech.[141] For example, information on a beer label[142] or a credit report[143] are both protected. Similarly, code only readable by a computer still maintains First Amendment protections because it conveys a message.[144] Thus, algorithms that transmit substantive messages should be protected.

According to Wu, courts should use the four criteria to decide whether algorithmic outputs enjoy First Amendment protections.[145] Wu focuses on functionality[146] as the deciding factor to evaluate personhood and speech.[147] Specifically, the First Amendment already

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138 *See supra* text accompanying notes 128–130.

139 Reed v. Town of Gilbert, 576 U.S. 155, 170 (2015) (quoting Citizens United v. FEC, 558 U.S. 310, 340 (2010)).

140 *See id.*

141 IMS Health, Inc. v. Sorrell, 630 F.3d 263, 271–72 (2d Cir. 2010) (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 446 (2d Cir. 2001)), *aff'd*, 564 U.S. 552 (2011).

142 *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995).

143 *See generally* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

144 *See Universal City Studios*, 273 F.3d at 448 ("Instructions that communicate information comprehensible to a human qualify as speech whether the instructions are designed for execution by a computer or a human (or both).").

145 Wu, *supra* note 75, at 1517. The criteria include personhood, speech, motive, and abridgment. *Id.* at 1500.

146 The functionality doctrine, sometimes described as the "nonfunctionality requirement," is a legal concept primarily used in intellectual property law. It denies the usual protections of intellectual property law to expressive works if the work is primarily intended to perform a task unrelated to the goals of the law. *Id.* at 1518.

147 *See id.* at 1517.

contains a de facto functionality doctrine.[148] If an actor's involvement with information is too distant or mechanical—meaning the individual does not choose the content, possess specific knowledge of the information, or identify as the publisher of the information—it is not considered speech.[149] In *Turner*,[150] cable operators only enjoyed First Amendment protections because they exercised editorial discretion over, and were identified with, the content they carried.[151] Conversely, telephone companies do not retain First Amendment rights since they merely carry information from place to place without any association or regard to content.[152]

Moreover, Wu contends that the First Amendment does not protect communications that act as tools.[153] For example, in deciding whether a navigational chart was defective, courts declined to analyze the First Amendment claims.[154] This illustrates that some communications do not express viewpoints but are instead meant to accomplish something on their own.[155]

Applying the functionality doctrine to algorithms, Wu predicts that blog posts, tweets, photo streams, and product reviews will merit First Amendment protections since they are forms of expression, despite being generated by computer programs.[156] However, search engines should not enjoy the same protections.[157] Search engines like Google merely index and rank information to help users find relevant websites; they do not sponsor or publish information

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148 *Id.* at 1520.

149 *Id.* at 1521.

150 *See supra* discussion accompanying notes 82–85.

151 *See* Wu, *supra* note 75, at 1521 (discussing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636–37 (1994)).

152 *See id.*

153 *Id.* at 1522.

154 *Id.* at 1522 n.125; *see also* Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 342–43 (9th Cir. 1981) (holding that a navigational chart was defective for the purposes of products liability without analyzing the claim under the First Amendment); Fluor Corp. v. Jeppesen & Co., 170 Cal. App. 3d 468, 475 (Ct. App. 1985) (applying strict liability for a defective navigational chart without analyzing the First Amendment claim).

155 *See* Wu, *supra* note 75, at 1523.

156 *Id.* at 1524.

157 *See id.* at 1526.

themselves.[158] These search engines' primary purpose is to serve as tools for users, not to persuade the users on specific topics.[159]

However, one does not have to create content for it to merit First Amendment protection;[160] transmitting a general type of content is enough.[161] In *Turner*, the Court required cable operators to carry commercial broadcast stations.[162] The issue was that operators were not permitted to pick which channels to transmit,[163] not that they were being forced to endorse or identify with certain channels.[164]

This is dissimilar from telephone companies. Like courier services,[165] telephone companies carry information without regard to the content.[166] The companies do not exercise choice in what content is transmitted.[167] Further, when laws attempted to restrict telephone usage for certain types of calls, namely "phone sex," such restrictions were struck down under the First Amendment.[168]

Algorithms that display search results are more like broadcasters than telephone companies. Google search results are derived from a user's searched terms, personal information, and all past media

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158 *Id.* at 1528.

159 *See id.* at 1530. Wu argues that Benjamin's theory (that Google search results are protected simply because they communicate information based on importance, value, or relevance to the users) fails. If such were the case, then a coffeemaker design could also be protected if the product was meant to convey the ideas of "precision" or "perfection," clearly an overbroad interpretation of the First Amendment. *See supra* notes 92–94 and accompanying text; *see also* Wu, *supra* note 75, at 1529 & n.167.

160 *See supra* notes 96–106 and accompanying text.

161 *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984) ("[B]roadcasters are engaged in a vital and independent form of communicative activity.").

162 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 630 (1994).

163 *Id.*

164 The case makes no mention of cable operators being forced to endorse or identify with any channels. *See generally id.*

165 Wu, *supra* note 75, at 1520.

166 *See id.* at 1497.

167 Telephone companies handle information, but do not identify with the information they handle. *See id.* at 1520.

168 *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 122, 131 (1989) (holding that the Communications Act prohibition of indecent or obscene commercial telephone communications ("dial-a-porn") was in violation of the First Amendment); *see also* Barr v. Am. Ass'n of Pol. Consultants Inc., 140 S. Ct. 2335, 2348 (2020) (concluding that a statute prohibiting all robocalls to cell phones, except those relating to government-debt, violated the First Amendment).

interactions.[169] The algorithm chooses what to display;[170] it is dissimilar to a telephone or courier service that is not engaged in any form of choice.

Wu is correct that purely functional tools should not elicit First Amendment protections,[171] but he is likely incorrect in his application to most algorithms. As Benjamin admits, algorithms that merely speed computer transmission or facilitate network efficiency do not receive First Amendment protections.[172] But, the algorithms at issue here are different. They are tools because they transmit information and choose which content to display, even if in a seemingly insignificant way.[173] In *e-Ventures Worldwide, LLC v. Google, Inc*., a district court concluded that because Google's search results are based on relevancy to a user's search, the results are opinions and, therefore, merit First Amendment protection.[174] The ranking and display of information was sufficient to qualify as actual speech, not just a tool.[175]

Based on the arguments set forth in this Part, microtargeting by algorithms merits First Amendment protection. Microtargeting is accomplished by humans programming algorithms to display stories or advertisements based on users' personal information and previous media interactions.[176] These algorithms are not merely vessels transmitting information; they are choosing which content to transmit based on specific, pre-determined criteria.[177] Thus, the outputs should be considered speech, just as it would if a human personally decided what to display on each users' feed. Further, the focus on advanced AI's decision-making processes should be irrelevant under a First Amendment analysis. However, even if human are factored into the analysis, humans create AI to disseminate stories and advertisements; even if the human creator is far removed from the

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169 *See supra* notes 23–29.

170 *See supra* notes 23–29.

171 *See* Wu, *supra* note 75, at 1497.

172 Benjamin, *supra* note 77, at 1481.

173 *See supra* notes 23–29.

174 e-Ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016).

175 *See id.*

176 Nott, *supra* note 2; *see also* Balbuzanova, *supra* note 2.

177 *See* Nott, *supra* note 2; Balbuzanova, *supra* note 2.

decision-making process at the output stage, it is still that human's speech.[178]

III. REGULATING MICROTARGETING

This Part examines the breadth of Congress' authority to regulate or ban microtargeting in the context of First Amendment speech categories, including commercial speech regulations, content-based regulations, and content-neutral regulations. A statue seems most likely to fail constitutional scrutiny if drafted to be a commercial speech regulation, content-based regulation, or content-neutral regulations, at least in most cases; any motivation to abridge free speech will unlikely pass constitutional muster. However, if the primary motive of a content-neutral regulation is unrelated to the interest in stopping political misinformation, there is a greater chance that it will pass constitutional muster.

A. Commercial Speech Regulations

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held that the First Amendment applies to commercial speech.[179] Thus, speech that merely proposes a commercial transaction is protected.[180] In reaching this conclusion, the Court discussed how freedom of speech not only protects speakers, but also the rights of people to "receive information and ideas," also known as the "right to receive."[181] Receiving commercial information is in the public's best interest because it encourages consumers to be well-informed in their economic decisions.[182] However, commercial speech can be regulated if an advertisement is false or misleading in any way or if an advertisement proposes an illegal transaction.[183]

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178 *See supra* notes 112–22.

179 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

180 *Id.* at 762.

181 *Id.* at 756–57 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)). "If there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 757.

182 *Id.* at 765.

183 *Id.* at 771–72.

In light of this decision, a statute prohibiting online platforms from displaying false or misleading advertisements resulting from microtargeting would likely pass constitutional muster. But, a regulation of this nature would be inadequate to protect against the harms of microtargeting. First, content moderation would be extremely difficult. Some information cannot be proven false such that it could be filtered out.[184] Further, it may be challenging for an algorithm to filter or verify false information immediately, since AI technology cannot itself know whether information is truthful.[185] In addition, with the vast amounts of false information, retroactive deletion within a communication is insufficient since content can spread exponentially by the time it is deleted.[186]

Additionally, many of the problems with microtargeting are not related to advertisements. Microtargeting is used to transmit news stories to users;[187] only banning false and misleading advertisements would still leave multiple channels vulnerable to disinformation. Further, echo chambers caused by individualized newsfeeds[188] would still be an issue even if false news stories were banned, because advertisements and news stories that cause individuals to become polarized are not necessarily false.[189]

Consider a statute regulating the criteria of information put into an algorithm that is subsequently used to create advertising outputs. For example, the BMPAA, mentioned above, would ban online platforms from targeting political advertisements toward users, except when based upon location information.[190] Political elements aside, this law would usurp platforms' ability to fully decide what to show

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184 *See supra* text accompanying note 62.

185 "The problem with learning-based methods on fact-checking: moving targets, biased data, and unclear definitions. This is . . . what I have been pondering, and what I think is an impossible target for automation." Nathan Lambert, *AI & Arbitration of Truth*, TOWARDS DATA SCI. (June 1, 2020), https://towardsdatascience.com/ai-arbitration-of-truth-808b57a93a97 [https://perma.cc/UVK4-WJRK].

186 *See* text accompanying *supra* notes 11–12.

187 Benjamin, *supra* note 28, at 619.

188 *See supra* note 48 and attached discussion.

189 As discussed in the text accompanying *supra* note 48, one of the issues with echo chambers is that users are only shown posts with which they already agree; the posts do not necessarily have to be false.

190 *See supra* notes 7571–75 and accompanying text.

individual users.[191] Though there is no wholesale ban on specific types of content, algorithms—as a proxy for human speech—would be forced to display different content than if they were able to utilize the full input of available information. This burden on the First Amendment is no different than that at issue in *Virginia State Board of Pharmacy*, where pharmacists were banned from displaying drug prices in advertisements, precluding consumers from seeing such advertisements.[192]

However, statutes will be upheld if they pass the prescribed level of constitutional scrutiny. For commercial speech, the Court applies intermediate scrutiny, outlined in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* as follows: (1) the advertisement must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the governmental interest; and (4) the regulation must not be more extensive than necessary to serve that interest.[193]

Assuming the first prong is satisfied, a court must determine whether there exists a substantial governmental interest.[194] Courts have accepted certain governmental interests as sufficient, such as protecting citizens from misleading, fraudulent, and inaccurate information,[195] and preserving citizens' rights to vote freely and conduct reliable elections with integrity.[196]

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191 *See supra* note 76 and accompanying text.

192 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749–50 (1976).

193 447 U.S. 557, 566 (1980).

194 Thompson v. W. States Med. Ctr., 535 U.S. 357, 368 (2002) (concluding that a government interest in preserving the effectiveness and integrity of the drug approval process and the public health it provides as well as preserving the availability of compounded drugs was substantial). *But see* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (holding that a government interest in shielding recipients from offensive materials or aiding parents in controlling the manner of informing their children about contraceptives was not substantial).

195 *See* Edenfield v. Fane, 507 U.S. 761, 768–69 (1993) (banning personal solicitations by CPAs to protect consumers from fraudulent or deceptive information and to protect clients' privacy were considered substantial interests).

196 Burson v. Freeman, 504 U.S. 191, 198–99 (1992) ("The right to vote freely for the candidate of one's choice is the essence of a democratic society." (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964))). There is also a compelling interest in protecting voters

To be constitutional, a regulation must advance the substantial governmental interest in a "direct and material way."[197] The harms must be real, and the regulation must materially alleviate the purported harms.[198] This standard requires evidence in the form of studies or anecdotal evidence.[199] Citing history, consensus, or common sense can adequately show that a governmental interest is being furthered by a law.[200]

The last prong requires the regulation only be as extensive as necessary.[201] This is not a strict standard but requires a reasonable "fit" between the legislature's means and ends.[202] It must be narrowly tailored, not necessarily the least restrictive way to achieve the stated interest.[203]

The Supreme Court would likely strike down the BMPAA as unconstitutional. Beginning with the second prong, the Court would likely find that regulating microtargeting serves a substantial governmental interest. It spreads false information at an alarming rate and infringes upon the integrity of the electoral process—both of

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from confusion and undue influence as well as preserving the integrity of the election process. Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228, 231 (1989).

197 *Edenfield*, 507 U.S. at 767.

198 *Id.* at 770–71; *see Bolger*, 463 U.S. at 61, 73 (ruling that a statute prohibiting mailing unsolicited advertisements for contraceptives did not serve the government interest of protecting children from seeing the material since parents typically control the mail anyway).

199 *See Edenfield*, 507 U.S. at 772; *see also* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995). There, the government provided statistical and anecdotal evidence in the form of surveys indicating that citizens had negative feelings about direct mail advertising. *Id.* at 626–27.

200 *Burson*, 504 U.S. at 211.

201 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

202 Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

203 *Id.*; *see Fla. Bar*, 515 U.S. at 633–34 (1995) (concluding that prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days is reasonably tailored to the interest of eliminating targeted mailings causing distress to citizens and leaves multiple other channels for lawyers to advertise); *but see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489–90, 507 (1996) (holding that prohibiting advertising the price of alcoholic beverages and publishing any advertisements referencing the price of alcoholic beverages was more extensive than necessary to promote the state's goal of temperance since purchases can be limited with increased taxation or educational campaigns).

which the Court has found to be substantial governmental interests.[204]

The third prong is likely satisfied as well. As discussed above,[205] harm to democracy resulting from microtargeting is real and substantial. The public is given contradictory or false advertisements about the same candidate, making it difficult to determine what information is correct and what a given candidate supports.[206] Moreover, since users are shown posts with which they already agree, hyperpolarization is promoted among political parties.[207] Therefore, a statute banning all microtargeting from online platforms—except that based on location information—would resolve this problem, since the public would receive a wide range of information advertisements.[208]

However, the regulation would fail on the fourth prong. Even with an intermediate level of scrutiny, banning all political advertising would still be more extensive than necessary for the reasons described below.[209] A ban of this nature would also bring the statute into the realm of content-based speech, requiring a strict scrutiny analysis.[210]

B. Content-Based Speech Regulations

The government is prohibited from regulating speech based on its content or the message it conveys, because it is inequitable for the government to promote certain viewpoints over others.[211] Therefore, a law regulating content would be subject to strict scrutiny,

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204 *See Edenfield*, 507 U.S. at 768–69; *Burson*, 504 U.S. at 198–99.

205 *See supra* Part II.B–C.

206 Vinocur, *supra* note 22.

207 *See* Auxier, *supra* note 48.

208 *See* Weintraub, *supra* note 34.

209 *See infra* notes 242–44 and accompanying discussion.

210 Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

211 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government.").

regardless of the government's motive, content-neutral justifications, or feelings toward the speech in question.[212]

This also applies in the context of commercial speech. In *Sorrell v. IMS Health Inc.*, a statute prohibited pharmacies and other regulated entities from selling and disseminating prescriber-identifying information for marketing purposes.[213] The statute barred pharmaceutical manufactures from using such information for marketing purposes.[214] The Court found this statute to be content-based because it specifically barred the use of specific information for marketing purposes.[215] Further, the law singled out pharmaceutical companies, disfavoring a specific speaker.[216] Even though marketing is in the realm of commercial speech, the Court ignored this inquiry and analyzed the statute under a content-based, strict scrutiny analysis.[217]

Moreover, algorithms employed by social media platforms are commercial speech by nature since their primary purpose is to monetize promoted advertisements[218]—which is likely irrelevant to a First Amendment analysis. Commercial speech doctrine treats content-based restrictions as such and does not seem to decrease protection based on any financial purpose associated with the speech.[219] For example, the Supreme Court found a statute prohibiting all robocalls to cell phones—except for those related to government debt—content-based.[220] The Court emphasized that there was no reasonable differentiation between government-debt collection speech and other categories of robocall speech, including

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212 *Reed*, 576 U.S. at 165.

213 Sorrell v. IMS Health, Inc., 564 U.S. 552, 562–63 (2011).

214 *Id.*

215 *Id.* at 564.

216 *Id.*

217 The Court does not conduct a commercial speech analysis. *See id.* at 565.

218 Facebook's business model is centered on selling advertisements to be viewed by users, earning the company $86 billion in revenue last year. Anna Edgerton et al., *How Facebook Algorithms Can Fight Over Your Feed*, BLOOMBERG (Oct. 25, 2021, 10:56 AM), https://www.bloomberg.com/news/articles/2021-10-25/how-facebook-algorithms-can-fight-over-your-feed-quicktake [https://perma.cc/6ZLL-4JUF].

219 Barr v. Am. Ass'n of Pol. Consultants Inc., 140 S. Ct. 2335, 2348 (2020).

220 *Id.*

commercial speech.[221] Although robocalls are commercial in nature, the Court treated the statute as content-based and applied strict scrutiny.[222]

The strict scrutiny inquiry asks if a statute is sufficiently narrowly tailored to promote a compelling governmental interest, and if it is the least restrictive option to serve that interest.[223] In terms of strict scrutiny, compelling governmental interests include protecting the right to vote freely and conduct elections with integrity and reliability.[224] To promote a compelling interest, the government must show a direct causal link between the statute's restriction and the harm it purports to prevent, supported by actual evidence.[225] Further, when deciding if a statute is narrowly tailored, the Court asks whether the curtailment of free speech is necessary to solve the problem.[226] Finally, the law cannot be underinclusive or overinclusive.[227]

1. Political Speech

Restricting political advertisement microtargeting would likely be considered content-based on its face. The bill singles out political advertisements over other subject matters and targets specific

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221 *Id.*

222 *See id*. at 2347.

223 United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

224 Burson v. Freeman, 504 U.S. 191, 198–99 (1992); *see also supra* note 196.

225 *See* United States v. Alvarez, 567 U.S. 709, 725–26 (2012) (reasoning that the government's assertion that it is common sense that false representations have the tendency to dilute the meaning of military awards is insufficient to overcome strict scrutiny); *see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 800 (2011) (rejecting evidence that violent video games are harmful to children since the research was based on correlation evidence, not causation, and most studies had flaws in their methodology).

226 *See Brown*, 564 U.S. at 799.

227 *See Burson*, 504 U.S. at 206–07 (concluding that a law prohibiting the solicitation of votes within 100 feet of the entrance to a polling place is not overinclusive because forbidding solicitation protects all intimidation, not just blatant and specific attempts). *But see Brown*, 564 U.S. at 802, 805 (ruling that the act was underinclusive because children can use video games with parental consent and overinclusive because it presupposes that parents want to prevent their children from buying violent video games).

speakers—namely, online platforms.[228] Therefore, the BMPAA would warrant a strict scrutiny analysis and likely fail.[229]

Notably, the Court recognized an important and substantial governmental interest in ensuring balanced coverage of public issues.[230] However, this was in relation to broadcasting during times when the number of broadcasting frequencies available were scarce.[231] The same is generally inapplicable to print media since there is no issue of spectrum scarcity.[232] Accordingly, in the print media context, the government must not infringe upon the public's free discussion of governmental affairs.[233]

Online platforms that employ algorithms are more similar to newsprint publications than traditional broadcasting, as there is virtually unlimited space to publish online and people now consume news online as a replacement to traditional print publications.[234] Digital platforms are also unlike cable news and radio, both of which are regulated to some degree in terms of indecent materials.[235] Thus, a governmental interest in allowing users to receive balanced

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228 *See, e.g.*, Sorrell v. IMS Health, Inc., 564 U.S. 552, 564 (2011) (explaining that the law as issue was content based, since it disfavored a specific speaker).

229 Laws regulating content are subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

230 FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984).

231 *See id.*

232 *Id.*

233 *See* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 257–58 (1974) (concluding that a "right of reply" statute, requiring newspapers to print replies from candidates who were assailed by the newspaper, was unconstitutional).

234 Social media sites surpassed print newspapers as a news source. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/ [https://perma.cc/KQY4-WJX4]. One in five U.S. adults say they get news via social media, slightly higher than those who get their news from print newspapers (sixteen percent). *Id.* When looking at online news use combined with the percentage of Americans who get news from *either* news websites or social media, the web is coming close to television as a source for news (forty-three percent of U.S. adults get news from news websites or social media, compared with forty-nine percent for television). *Id.*

235 For example, the FCC may restrict indecent materials when there is a reasonable risk that children may be in the audience. FCC, THE FCC AND FREEDOM OF SPEECH 1 (2019), https://www.fcc.gov/sites/default/files/the_fcc_and_freedom_of_speech.pdf [https://perma.cc/HW32-UV4X].

viewpoints through prohibiting microtargeting would likely be rejected by the Court, just like the print media context.[236]

Another substantial governmental interest related to microtargeting is protecting election integrity.[237] However, it is unlikely the BMPAA sufficiently promotes this interest. Though there are studies about the negative effects of microtargeting on democracy, these studies only indicate correlation, not causation.[238] It is difficult to assess with certainty what exactly causes specific voting patterns and ideologies.[239] It may be that social media generally encourages political extremism to obtain likes and followers, rather than specific targeting of that information.[240]

However, the Court has stated that laws aimed at protecting the right to vote have "such a compelling interest," that the government is not required to demonstrate strong evidence of political stability for the law to pass strict scrutiny.[241] Accordingly, if less emphasis is placed on the type of evidence required to show the promotion of a governmental interest, there is a possibility that the Court may find the BMPAA serves an interest in protecting democracy.

Nonetheless, the BMPAA is not narrowly tailored. Political speech is the cornerstone of protected speech, requiring the highest degree of scrutiny.[242] The BMPAA is overinclusive because it regulates political advertising for all covered online platforms;

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[236] *See supra* notes 230–33 and accompanying discussion.

[237] *See supra* note 196 and accompanying text.

[238] Evidence shows that political microtargeting can increase polarization and fragmentation; however, it can also enhance democracy by increasing the level of political literacy throughout society. Judit Bayer, *Double Harm to Voters: Data-Driven Micro-Targeting and Democratic Public Discours*e, INTERNET POL'Y REV., Aug. 11, 2020, at 1, 9, https://policyreview.info/articles/analysis/double-harm-voters-data-driven-micro-targeting-and-democratic-public-discourse [https://perma.cc/BLF5-895T].

[239] *See generally* Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized [https://perma.cc/F2VR-F3G8].

[240] *Id.*

[241] *See* Burson v. Freeman, 504 U.S. 191, 208 (1992). The Court does not require strong evidence of empirically drawn, objective effects on political stability when laws are aimed at protecting the right to vote. *Id.*

[242] *See* Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989))).

however, findings indicate that social media platforms feature the greatest quantity of false information of all platforms.[243] Hence, regulating search engines and certain websites[244] would target more speech than necessary.

Additionally, the BMPAA only regulates political advertisements, not political news stories, despite misinformation's derivation from both sources.[245] If the statute also applied to political stories, it would require the same strict scrutiny analysis, but would be even less likely to survive constitutional muster since "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."[246] Consequently, the BMPAA would likely be struck down as unconstitutional.

C. Content-Neutral Speech Regulations

The regulatory option most likely to survive constitutional muster is to regulate microtargeting in a content-neutral manner, with the substantial governmental interest being unrelated to democratic effects of microtargeting. Content-neutral regulations serve purposes unrelated to the expression's content, despite occasional, incidental effects on some messages.[247] Such regulations come in the form of time, place, and manner restrictions, as well as laws of general applicability.[248]

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243 *See* Brown, *supra* note 1.

244 The BMPAA does "not include a website, application, or network . . . that, during the [twelve]-month period ending on the date of the dissemination of the political advertisement involved, collected or processed personal information relating to fewer than 50,000,000 individuals." Banning Microtargeted Political Ads Act of 2021, H.R. 4955, 117th Cong. § 325(d)(3) (2021).

245 *See* Haidt & Rose Stockwell, *supra* note 36 (discussing misinformation in news stories); *see also* Mike Isaac, *Facebook Ends Ban on Political Advertising*, N.Y. TIMES (Mar. 3, 2021), https://www.nytimes.com/2021/03/03/technology/facebook-ends-ban-on-political-advertising.html (last visited Mar. 31, 2022) (discussing false information in political advertisements).

246 N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

247 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

248 *See id.* at 792; *see also* United States v. O'Brien, 391 U.S. 367, 370, 377 (1968) (holding that a statute prohibiting the intentional destruction of a draft card passed constitutional scrutiny because the government interest was unrelated to the suppression of free speech).

1. Time, Place, and Manner Restrictions

The government may enact regulations restricting the time, place, and manner of protected speech, so long as the restrictions are justified without reference to the content of speech, are narrowly tailored to serve a significant governmental interest, and leave ample alterative channels open for communicating the information.[249] In deciding whether there is content-neutrality, the Court should look to whether the governmental motivation to regulate is based upon disagreement with a specific message or viewpoint.[250] This inquiry is another form of the intermediate scrutiny test.

In *Hill v. Colorado*, the state declared it unlawful to knowingly approach another person to disseminate leaflets outside a health care facility without that recipient's consent.[251] The government's interest was to protect the health and safety of citizens.[252] The Court upheld the statute as a content-neutral time, place, and manner regulation since it did not regulate speech, and, instead, only regulated the place where certain expressions could occur.[253] Further, the law was not adopted to suppress a certain type of speech.[254] In reaching its conclusion, the Court emphasized that the statute's legislative history did not indicate disagreement with any particular message, nor did the text of law refer to any specific speech content.[255]

It is possible to frame a statute like the BMPAA as a time, place, and manner restriction because it seeks to regulate the means of advertising, not the advertisement's substance.[256] The BMPAA would ban covered online platforms from targeting advertisements to users, not the content of the advertisements, essentially creating regulation on marketing.

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249 *Ward*, 491 U.S. at 791.

250 *Id.* The sound-amplification guideline was enacted so the city could control noise levels at events and maintain the character of the town. It had nothing to do with content. *Id.* at 792.

251 Hill v. Colorado, 530 U.S. 703, 707 (2000).

252 *Id.* at 715.

253 *Id.* at 719.

254 *Id.*

255 *Id.*

256 *See* Banning Microtargeted Political Ads Act of 2021, H.R. 4955, 117th Cong. § 325(a)(1) (2021).

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the ordinance in question required businesses to obtain licenses if selling items designed or marketed for use with illegal drugs.[257] The ordinance did not prohibit the act of advertising, just the *means* of marketing certain items.[258] The ordinance did not implicate commercial speech interests because restricting the manner of marketing did not appreciably limit the communication of information.[259] However, in other circumstances, the legislative history of a similar statute could suggest that the real interest was in limiting the types of political information users can obtain—a clear content-based motivation.

Moreover, the Court could find the BMPAA to be content-based on its face, as it did in *Sorrel*.[260] Just as a regulation prohibiting pharmacies from using prescriber-identifying information for marketing purposes was content-based (since it disfavored specific speakers), prohibiting online platforms from using information for marketing purposes is also content-based because it specifically disfavors online platforms.[261] Thus, the BMPAA will likely be subject to strict scrutiny and rejected on that basis.

2. Laws of General Applicability

In *United States v. O'Brien*, the Court reasoned that when speech and nonspeech elements are combined, an important governmental interest in regulating the nonspeech element can justify the incidental burdens on the speech element.[262] This inquiry involves an intermediate scrutiny analysis, requiring a regulation: (1) be within the constitutional powers of the government; (2) further an important or substantial governmental interest; (3) be unrelated to the suppression of free expression; and (4) ensure that any incidental restriction on First Amendment freedoms is no greater than essential to further that interest.[263]

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257 Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 491 (1982).
258 *Id.* at 496.
259 *Id.*
260 Sorrell v. IMS Health, Inc., 564 U.S. 552, 563–64 (2011).
261 *See id.*
262 United States v. O'Brien, 391 U.S. 367, 376 (1968).
263 *Id.* at 377.

Assuming the first prong is satisfied, the substantial governmental interest must not demonstrate a "motive" to restrict the content of communication.[264] In *O'Brien*, the Court upheld a statute[265] that promoted the government's substantial interest by assuring the availability of issued Selective Service certificates and was not aimed at suppressing communications.[266] The Court declined to strike down the statute on the basis of an illicit legislative motive to suppress freedom of speech.[267] Further, the Court emphasized that inquiries into congressional motive and purpose should be performed with caution.[268] Looking to statements by legislators, for instance, is inadequate because what motivates one legislator to enact a statute is not necessarily what motivates another.[269]

To successfully regulate microtargeting, the governmental interest likely cannot seek to protect the right to vote freely and conduct elections with integrity and reliability; such motivation would regulate speech. This regulates speech on its face because the motivation is to stop individuals from seeing certain news stories or political advertisements.[270] This certainly qualifies as speech-related.

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[264] Wu, *supra* note 75, at 1514–16 ("Burning down someone's house can be communicative—it suggests, at a minimum, disapproval of the resident or perhaps his tastes. Nonetheless, a defense that states the arsonist is protected by the First Amendment because he was expressing his hatred for his rival would usually be thrown out without much consideration. In contrast, in a prosecution for burning a flag at a protest . . . the First Amendment analysis will be triggered as a matter of course.").

[265] The statute prohibited "the knowing destruction or mutilation" of Selective Service registration certificates. *O'Brien*, 391 U.S. at 370.

[266] *See id.* at 382.

[267] *Id.* at 382–83 ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." (quoting McCray v. United States, 195 U.S. 27, 56 (1904))).

[268] *Id.* at 384 ("We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991) ("It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose.").

[269] *O'Brien*, 391 U.S. at 383–84.

[270] The BMPAA is aimed at stopping the practice of "convey[ing] conflicting and contradictory messages to different people." Press Release, Eshoo, *supra* note 70.

However, if a stated interest is unrelated to the democratic process, such as promoting privacy, the Court may accept it as substantially[271] unmotivated by a desire to suppress speech.[272] Though privacy rarely trumps the First Amendment,[273] the Court has accepted this interest as sufficiently substantial beyond the First Amendment context.[274]

Therefore, a law restricting the types of targeted information utilized by algorithms[275] may pass constitutional muster in the privacy context since it would be unrelated to suppressing speech, but instead, protect the privacy of users' information.[276] In *O'Brien*-type laws, the Court declines to extensively inquire into whether a purported governmental interest is legitimate.[277] Thus, a content-neutral law regulating microtargeting would likely be most successful to prioritize privacy interests over democratic interests. Further, the Court would likely reject claiming a privacy interest in the context of commercial speech regulations, content-based regulations, or

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[271] *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (concluding that protection of potential client's privacy was a substantial state interest).

[272] *See* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (holding that a law prohibiting the intentional disclosure of contents of an electronic communication—when one knows that the information was obtained through an illegal interception—was a content-neutral law of general applicability because the purpose of protecting the privacy of wire and oral communications was without reference to the content of the regulated speech).

[273] A privacy interest was insufficient to justify a law prohibiting publication of truthful information about a matter of public significance. *Id.* at 527–28.

[274] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (allowing government access to cell-site records goes against an individual's reasonable expectation of privacy in his physical location and provides an intimate window into a person's life, revealing not only his particular movements, but also his familial, political, professional, religious, and sexual associations).

[275] This can encompass personal information demographic information as well as previous media interactions. *See* text accompanying *supra* notes 24–25.

[276] Caitriona Fitzgerald, Deputy Director of the Electronic Privacy Information Center, praised the BMPAA for protecting privacy. She stated that it would prohibit targeting users based on data they do not even know has been collected about them, since it would essentially ban online platforms from targeting individuals based on their personal information. *See* Press Release, Eshoo, *supra* note 70. This is an important step in protecting privacy and democracy.

[277] United States v. O'Brien, 391 U.S. 367, 383–84 (1968).

time, place, and manner laws since the Court typically makes a more substantial inquiry into such regulations.[278]

The regulation should also be no broader than necessary to further a privacy interest if it allows users to opt-in to having their information used for targeting purposes. In this way, the plain text of the statute would indicate privacy as the main concern, not democracy. However, there is a possibility that the Court would not consider privacy a sufficiently substantial interest to overcome the incidental burden on speech.[279] Under these circumstances, regulating microtargeting would be extremely difficult absent a significant change to First Amendment doctrine.

D. Regulating Outside the BMPAA

Under current Supreme Court doctrine, there is little leeway to regulate microtargeting. Yet the harms associated with the practice are substantial.[280] Since platforms themselves are unable to adequately moderate content,[281] government action is necessary to ensure a stable and thriving democratic society. This should not be in the form of a categorical exception for algorithmic-based decisions[282] since doing so would burden speech in meaningful ways.[283] Instead, efforts should focus on regulating social media platforms where false information is most widely and rapidly spread.[284]

This can be accomplished through enforcement actions by the Federal Trade Commission ("FTC"). The FTC is typically

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[278] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 762, 771–72 (1993) (explaining that commercial speech regulations must alleviate the purported harm, supported by evidence including studies or anecdotal evidence); United States v. Alvarez, 567 U.S. 709, 725–26 (2012) (requiring content-based regulations to show a direct causal link between the restriction and the harm to be prevented, supported by actual evidence); Hill v. Colorado, 530 U.S. 703, 719 (2000) (showing that in the context of time, place, and manner statues, the Court emphasizes the statute's legislative history). *But see O'Brien*, 391 U.S. at 384 (declining to inquire into congressional motive for content-neutral statutes).

[279] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 555–56 (2001) (holding that a privacy interest was not substantial enough to prohibit the disclosure of truthful information in the matter of public interest).

[280] *See supra* notes 36–41 and accompanying discussion.

[281] *See* text accompanying *supra* notes 60–64.

[282] *See* Benjamin, *supra* note 77, at 1457 (discussing this solution).

[283] *See supra* Part III.B.

[284] Brown, *supra* note 1.

responsible for charging companies with privacy violations under Section 5 of the FTC Act, barring "unfair or deceptive acts or practices."[285] Though the FTC rarely chooses to do so, only undertaking 101 privacy-related actions from 2008 to 2018,[286] under a new presidential administration, they may be compelled to take greater action.

Since the FTC would be acting in relation to platforms' exploitation of users' personal information, the First Amendment would unlikely be implicated. Moreover, with increased FTC oversight, platforms would likely become more accountable for posted content, forcing the platforms to improve content-moderation techniques, or at least be transparent in the way their algorithms operate.[287]

Absent government action, it is up to social media platforms to adequately moderate content and limit the use of microtargeting when possible. Platforms have yet to satisfactorily do so.[288] However, with enough pressure from users, increased media attention, and government criticism, platforms may begin to self-regulate in an effective way. Until then, users must be diligent in factchecking news stories and advertisements and make a conscious effort to engage with views other than their own.

CONCLUSION

This Comment considers whether the government can constitutionally regulate microtargeted political advertisements and news stories to combat rapidly spreading false information about elections and political candidates. Targeted algorithmic outputs are likely

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[285] FTC, PRIVACY AND SECURITY ENFORCEMENT, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement [https://perma.cc/V5UM-96TV]; *see also* Federal Trade Commission Act, 15 U.S.C § 45(a)(1).

[286] *See Rethinking Privacy for the AI Era*, FORBES (Mar. 27, 2019, 1:16 PM), https://www.forbes.com/sites/insights-intelai/2019/03/27/rethinking-privacy-for-the-ai-era/?sh=627e15207f0a [https://perma.cc/6GS7-MDW5].

[287] *See* Yaël Eisenstat, *How to Hold Social Media Accountable for Undermining Democracy*, HARV. BUS. REV. (Jan. 11, 2021), https://hbr.org/2021/01/how-to-hold-social-media-accountable-for-undermining-democracy [https://perma.cc/64M9-VZAG].

[288] *See* ELECTION INTEGRITY P'SHIP, *supra* note 7, at 220.

protected speech under current First Amendment doctrine because platforms purposely sort and transmit substantive information. Thus, it is doubtful that microtargeting can be regulated in the context of political advertisements and news, since doing so would be a content-based restriction and would likely fail constitutional muster. Until the government or online platforms can find ways to adequately moderate content to field misinformation and disinformation, users must diligently factcheck news and advertisements and make conscious efforts only to spread truthful information. Doing so will enable our democracy to not only survive, but thrive.