SOCIAL MEDIA PLATFORMS ARE NOT SPEAKERS. WHY ARE FACEBOOK AND TWITTER DEVOID OF FIRST AMENDMENT RIGHTS?

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Many authors have assumed that social media platforms make use of their own First Amendment rights when they moderate content and amplify messages written by others on their platforms. This vision relies on the fact that platforms should be seen as 'speaking' through their ranking decisions and their removal decisions. This is because companies – through their written software, built by their engineers – are said to communicate their editorial choices and predictions for users. This article argues, to the contrary, that social media platforms are not speakers -- and more precisely that their recommendation and content moderation system is not speech for the purpose of the First Amendment.

Building on a sociological theory of First Amendment coverage and taking into account the social context that surrounds interactions

between social media platforms and users, this article seeks to debunk the ideas on which authors rely in claiming that social media platforms have First Amendment rights when they host and amplify content. It argues that such a claim is based on a misconception of what social media platforms do when they curate the content produced by their users, and a misconception of the role of algorithms in that process. It first shows that in most cases, social media platforms are not comparable to editorial mediums such as magazines or parades. It then shows that in most cases, social media platforms cannot be seen as speaking through the algorithmic recommendation system. Finally, it offers a view of social media platforms as a technical medium that is integral to the forms of interaction that happen between users. If social media platforms are not speakers, they are still responsible for the space they put at the disposal of their users. As such, the service they provide can be regulated through contract law and consumer law, as long as the State does not target the interactions between users that are covered by the First Amendment.

The internet has revolutionized the way we search for information, the way we talk to our friends, the way we talk to strangers, the way we talk about politics, and even the way we talk about our hobbies.[1] We can keep in touch and speak with our friends (and with strangers) all day through Facebook and Twitter – but are Facebook and Twitter *talking* to *us*? Content aggregation and social networking produce an intermediated experience for users, in which private actors have an infinite power.[2] But is this power a form of speech for the purpose of the First Amendment? This question is not only metaphysical, but practical. While Section 230 of the Communications Decency Act ("CDA") comes under a lot of criticism, it is essential to determine whether social media platforms have First Amendment rights in order to determine what form regulation could take regarding compatibility with the First Amendment. It has been argued by some authors that search engines such as Google make use of their First Amendment rights when they rank the results related to a particular search. In an influential white paper,[3] Eugene Volokh and Donald Falk argue that when they reference webpages as the most relevant to the searcher's entry, search engines make use of their First Amendment rights because they report about what others say, and they express their opinion on what they think will be the most helpful and useful information for the users.[4] This reporting and ranking is made through the use of algorithms; algorithms that inherently incorporate "search company

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[1] Jack M Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 31 (2006) (identifying a transformation in structures of communication that made possible the advent of a new public sphere: the networked public sphere).

[2] TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 5 (2018); Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2021 (2018); Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 938 (2012); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 697-98 (2009); Frank Pasquale, *Platform neutrality: enhancing freedom of expression in spheres of private power*, 17 THEORETICAL INQUIRIES IN LAW 488, 512 (2016).

[3] Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 886 (2011).

[4] *Id.* at 883.

engineers' judgment" about what materials users are most likely to find responsive to their queries.[5] From this, other authors have concluded that social media platforms make use of their own First Amendment rights when they moderate content and amplify messages written by others on their platforms.[6] This vision relies on the fact that platforms should be seen as 'speaking' through their ranking decisions and their removal decisions. This is because companies – through their written software, built by their engineers – are said to communicate their editorial choices[7] and predictions for users. In the authors' view, the message that they communicate through their algorithms is: "I predict you'll like this."[8] The authors also build their reasoning on several recent trends in First Amendment jurisprudence, including the recognition that computer code can be covered as speech by the First Amendment and the erasure of the distinction between corporate and non-corporate speakers in the well-known *Citizens United v. Federal Elections Commission* case.[9] They are also comforted in this way by the recognition that any kind of dissemination of information – including data – is covered by the First Amendment,[10] along with the recent systematic use of the First Amendment to constrain economic

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[5] *Id.* at 888.

[6] Daphne Keller, *Amplification and Its Discontents*, KNIGHT FIRST AMENDMENT INSTITUTE, https://knightcolumbia.org/content/amplification-and-its-discontents [https://perma.cc/LEN7-F8KG]; Jeff Kosseff, *First Amendment Protection for Online Platforms*, 35 COMPUT. L. & SEC. REV. 15 (2019); Volokh & Falk, *supra* note 3, at 886; Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. OF FREE SPEECH L. 97 (2021).

[7] Bhagwat, *supra* note 6, at 97.

[8] Keller, *supra* note 6.

[9] Citizens United v. FEC, 558 U.S. 310 (2010) (holding that there is no constitutional basis for the distinction that it had precedingly drawn between corporate and non-corporate speakers in the context of political advertisement); *see also* Burwell v. Hobby Lobby Stores, Inc, 573 US 682 (2014) (holding that closely held corporations could not be required to provide coverage for forms of contraceptives under the Patient Protection and Affordable Care Act of 2010 if these forms of contraceptives violated the owners' religious beliefs); on that question, *see generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS, 364-65 (First ed. 2018).

[10] Sorrell v. IMS Health Inc, 564 U.S. 552 (2011).

regulation. Using "First Amendment opportunism,"[11] "where litigants use novel free speech claims that may involve the repackaging of other types of legal arguments,"[12] numerous companies have, over the last two decades, strategically made use of First Amendment claims during litigation to contest the constitutionality of economic regulation weighing on them. This phenomenon, that many scholars have called "First Amendment Lochnerism"[13] has not spared litigation regarding tech companies. The question of whether some forms of expression are categorized as speech under the First Amendment is a question of coverage, and not of protection.[14] The inquiry of coverage asks if the constitutional validity of a law should be subject to First Amendment doctrine and analysis.[15] It is a necessary question, because the constitutional definition of the word 'speech' does not match the

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[11] Frederick Schauer, *First Amendment Opportunism*, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium*, 56 WM. & MARY L. REV. 1613, 1616 (2014); Leslie Kendrick, *First Amendment Expansionism The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium*, 56 WM. & MARY L. REV. 1199, 1200 (2014) (this first Amendment 'opportunism' can also be explained by cultural and political trends that place freedom of speech as a part of American national identity); *see* Robert C. Post, *Community and the First Amendment Symposium: Free Speech and Community*, 29 ARIZ. ST. L.J. 473, 480 (1997).

[12] Kendrick, *supra* note 11, at 1200.

[13] *Id.* at 1207; Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 136 (2016); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, COLUM. L. REV. F. (2018); *see also* Morgan N Weiland, *Expanding the periphery and threatening the Core: The ascendant libertarian speech tradition*, 69 STAN. L. REV. 1389, 1392-93 (2017); J. M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 389 (1990).

[14] On the distinction between coverage and protection, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 260–261 (Paperback ed. 2013) (distinguishing between "force" and "range").

[15] Robert Post, *Encryption Source Code and the First Amendment Symposium - The Constitutionalization of Technology Law*, 15 BERK. TECH. L.J. 713, 714 (2000); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981).

everyday meaning of the word.[16] Communicative clothing,[17] oil painting, financial contributions to political campaigns,[18] and photography are some acts, among others,[19] that are not classed as speech in the everyday sense, but are speech in a constitutional sense.[20] Because of First Amendment opportunism and First Amendment expansionism,[21] First Amendment coverage has become, over the last two decades, a central issue of First Amendment law.[22] As explained by Schauer, numerous new claims have now made their way into litigation; claims which would not have otherwise advanced at all.[23] Litigants have

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[16] Schauer, *supra* note 15, at 273; Robert Post, *Recuperating First Amendment Doctrine Essay*, 47 STAN. L. REV. 1249, 1251 (1994); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence Symposium of the Law in the Twentieth Century*, 88 CALIF. L. REV. 2353, 2363 (2000); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018) (using the term 'colloquially' to refer to the 'ordinary meaning'); Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech - An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1075 (2016).

[17] Schactht v. United States, 398 U.S. 58 (1970).

[18] Buckley v. Valeo, 424 U.S. 1 (1976); J. Skelly Wright, *Politics and the Constitution: Is Money Speech*, 85 YALE. L.J. 1001, 1004 (1975).

[19] *See* Stromberg v. California, 283 U.S. 359 (1931) (red flag display); *see also* United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969) (armbands); Spence v. Washington, 418 U.S. 405 (upside down U.S. flag display); In re Primus, 436 U.S. 412 (1978) (public interest litigation); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycotting); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557 (St. Patrick's Day parade).

[20] Schauer, *supra* note 15, at 269; Shanor, *supra* note 16, at 318.

[21] Kendrick, *supra* note 11, at 1210 (distinguishing between First Amendment opportunism (the fact that litigants make new claims based on the First Amendment) and First Amendment expansionism (the fact that Courts make decision to grant them), recalling that naked opportunism often fails)).

[22] However, an under-theorized one, argues Shanor, *supra* note 16, at 322: "despite this dynamism and the importance of whether the First Amendment applies in a given case to its ultimate outcome and the distribution of powers, it is well recognized that neither courts nor scholars have articulated a coherent theory of the First Amendment's boundaries"; *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785-86 (2003) ("Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory. . . [I]f there exists a single theory that can explain the First Amendment's coverage, it has not yet been found.").

[23] Schauer, *supra* note 11, at 175; *see also* Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium*, 56 WM. & MARY L. REV. 1501, 1507 (2014); J. M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 181 (2011) ("How people characterize positions along the spectrum of plausibility is always potentially in flux. By making and supporting constitutional arguments repeatedly, people can disturb

argued that compelling disclosure of conflicts of interest in the pharmaceutical industry was compelled speech[24], and that the First Amendment protects erroneous bond and credit ratings. From all these claims, the idea that social media platforms speak when they amplify and moderate the content produced by their users is intuitively the least absurd. After all, contrary to pharmaceutical companies, social media platforms are literally in the business of 'public discourse' – that is the core of what the First Amendment is supposed to protect.[25] Social media platforms are a technical medium through which some form of communication happens, and have become the central medium for people to talk about politics, art, entertainment, and even research.[26] They are central for the formation of public opinion and of cultural democracy.[27] The fact that social media platforms mostly amplify and moderate content through algorithms is not an issue, since code has already been recognized to be covered by the First Amendment in some cases.[28] Through algorithms that have been created by their engineers, social media platforms are said to decide whether to publish, withdraw, postpone, or alter content and that would suffice to make them part of the press for the purposes of the First Amendment.[29] This article, however, argues that social media platforms are not speakers, and more precisely that their recommendation and content moderation system is

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settled understandings and create new ones. Through political activism and legal advocacy, determined parties can push positions from off-the-wall to on-the-wall.").

[24] Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 308-10, 316 (1st Cir. 2005).

[25] *See* Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. OF FREE SPEECH L. 337, 340 (2021) (highlighting that technology companies' business model involves in some way facilitating communications, which makes the First Amendment argument more intuitive, and thus more compelling).

[26] *See* Packingham v. North Carolina, 137 US 1730, 1735 (2017) (holding that social media platforms have become the most important place for the exchange of views).

[27] Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. UNIV. L. REV. 1052, 1076 (2016).

[28] Bernstein v. U.S. Dept. of State, 974 F. Supp. 1288, 1303 (N.D. Cal. 1997); Universal Stud. v. Corley, 273 F. 3d 429, 455 (2d Cir. 2001).

[29] *See* Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, KNIGHT FIRST AMENDMENT INSTITUTE, (Feb. 26, 2018), https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question [https://perma.cc/UU8L-R72T] (but arguing in other papers that contrary to publishers, social media platforms should not be held responsible for what they publish); *see* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. 33 (2019).

not speech for the purpose of the First Amendment. Because Twitter and Facebook are media in the technical sense of the term – they deliver information, like broadcasting, newspapers, books and so on – the authors assume that they must place themselves in the same position regarding the First Amendment. This is misguided, because there is not a match between a technical medium and the medium for First Amendment purposes; or an editorial medium, telecommunications being the most obvious example. It is not the use of a technical medium that determines First Amendment coverage, nor the use of speech-like language, but the social context and social conventions in which these words and media are "enveloped"[30] that give them social significance. The social norms and social context within which the communicative act intervenes is what matters to determine if an action is covered by the First Amendment.[31] Building on a descriptive and sociological theory of First Amendment coverage,[32] this article seeks to debunk the ideas on which authors rely in claiming that social media platforms have First Amendment rights when they host and amplify content. It argues that such a claim is based on a misconception of what social media platforms do when they curate the content produced by their users and a misconception of the role of algorithms in that process. It first shows that in most cases, social media platforms are not comparable to editorial mediums such as magazines or parades. It then shows that in most cases, social media platforms cannot speak through the algorithmic recommendation system. Part I describes social media platforms that will be discussed in this article, their function, and their algorithms. Part II and Part III analyze the social context through which social media platforms are said to disseminate ideas. Part II asks if social media platforms can be seen as editorializing when they host or amplify some content to the detriment of others. It first compares social media

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[30] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1994).

[31] Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 366 (2018); Post, *supra* note 15, at 722; Post, *supra* note 30, at 1252; Xiangnong Wang, *De-coding Free Speech: A First Amendment Theory for the Digital Age*, WIS. L. REV. 1373, 1378 (2020); Shanor, *supra* note 16, at 323.

[32] Shanor, *supra* note 16, at 325; Post, *supra* note 30, at 1254.

platforms to newspapers, then to parades, and then to bookshops. Part III examines the relationship between platforms and users through algorithms. It first shows that this relationship does not meet the condition of the Spence Test, and focuses afterwards on Post's theory of coverage to show that the social conventions surrounding this relationship do not place platforms and users in a dialogic and independent relationship. Part IV offers the view of social media platforms as a technical medium that is integral to the forms of interaction that happen between users. These interactions are undoubtedly protected by the First Amendment because they further democratic governance, cultural democracy and democratic legitimacy. If social media platforms are not speakers, they are still proprietary of the space they put at the disposal of their users, and in that capacity, they have the possibility to govern this space through Terms and Services and Community Standards.

I.   Social media platforms' functions and algorithms

Each social media platform carries out different functions.[33] This section distinguishes between the different functions of the different platforms and highlights the algorithms' function on each.

Algorithms, in the broadest sense, are encoded procedures for transforming input data into a desired output, based on specified calculations.[34] It is a sequence of steps to follow in order to automate decisions.[35] Algorithms help discover useful patterns in datasets and then help automate the decisions that rely on these discoveries.[36]

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[33] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. OF FREE SPEECH L. 377, 408 (2021) (distinguishing between hosting, messaging, and recommending).
[34] Tarleton Gillespie, *The Relevance of Algorithms*, MEDIA TECHNOLOGIES. ESSAYS ON COMMUNICATION, MATERIALITY AND SOCIETY 167 (2014).
[35] *See* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact Essay*, 104 CALIF. L. REV. 671, 674 (2016).
[36] Barocas & Selbst, *supra* note 35, at 674.

Algorithms are also used for classifications:[37] they choose what to show or not to show to an individualized user.

Each Social media platform has its own algorithms that are distinct from search engines' algorithms. Algorithms effectuate two types of action: they curate the content posted by their users based on their Terms of Services and Community Standards, and they suggest content to their users. In this section, I will describe the algorithms of different social media platforms and explain how they impact the product they commercialize. It is important to take into account that social media platforms' product can evolve extremely rapidly in order to compete between themselves.[38] The section thus describes the main function of each platform and the goal of their algorithms at the time of the writing.

A.   Facebook's algorithms

Facebook is a platform that allows users to post and see content that is shared with any other users who have agreed to be their 'friend.' Meta provides a hosting function: it hosts the content (text, pictures, and videos) that each user posts in the direction of their friends and archives it. It also allows 'friends' to communicate together thanks to the Messenger app.

Meta's algorithms are based on the ranking of the content that is provided by a user's friends list on the platform.[39] This is what composes the 'Newsfeed' that was created in 2006.[40] The Newsfeed was originally chronological, but began being managed by algorithms

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[37] GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 33 (1. paperback ed., 8. print ed. 2008).

[38] *See* Elizabeth Lopato, *Adam Mosseri confirms it: Instagram is over*, THE VERGE (Jul. 26, 2022), https://www.theverge.com/2022/7/26/23279815/instagram-feed-kardashians-criticism-fuck-it-im-out_[https://perma.cc/5SBK-72KZ] (explaining that it is not possible to see pictures of kitten on Instagram anymore, while it was its primary function in the past).

[39] Will Oremus et al., *How Facebook shapes your feed*, WASHINGTON POST (Oct. 26, 2021), https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/ [https://perma.cc/B6ED-T99S].
[40] *Id.*

in 2009.[41] In 13 years, the algorithms that manage this feed have changed a lot, but the spirit of its initial purpose has remained: Meta's algorithms are supposed to put the most appealing news at the top.[42] This news is determined by the algorithms based on the users' previous behavior on the platform.[43] Facebook employees decide what data sources the software should draw on to realize its 'prediction' to create the feed, and the criteria that should be privileged by the algorithms.[44] For example, initially, Facebook's algorithm used to prioritize metrics such as 'Likes', clicks and comments to determine which posts to boost.[45] In 2014 and 2015, Facebook decided to focus on new signals such as the amount of time a user spent reading a story, and to amplify video shared directly to Facebook.[46] Since 2016, Facebook shifted its metrics toward something it called 'meaningful social interactions':[47] algorithms designed to show people more posts from friends and family, especially posts that create a lot of comments. Officially thought to foster 'interactions' between people, especially between friends and family, the new metrics in reality, sparked feelings of anger and polarization because such content attracted the most comments.[48] This tendency was reinforced by the creation of the emoji, to which Facebook assigned five times the weighting of a simple 'Like'.[49] To sum up, Facebook's algorithms provide highly individualized feedback, based on the individual behavior the user has previously displayed and on the content posted by the users' friends.

B.   Twitter's algorithms

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Facebook, *What the shift to Video means for Creators*, (Jan. 7, 2015), https://www.facebook.com/formedia/blog/what-the-shift-to-video-means-for-creators [https://perma.cc/GW9D-ZPK8].

[47] Adam Mosseri, *Bringing people closer together*, FACEBOOK (Jan. 11, 2018), https://about.fb.com/news/2018/01/news-feed-fyi-bringing-people-closer-together/ [https://perma.cc/B7MW-QVW7].

[48] J.B. Merill & W. Oremus, *Five points for anger, one for a "like": How Facebook's formula fostered rage and misinformation*, WASHINGTON POST (Oct. 26, 2021), https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/ [https://perma.cc/Z9XH-NU83].

[49] *Id.*

Twitter is a social media platform where users who do not necessarily know each other can follow each other based on what they like to discuss. It thus provides a basic hosting function (each user has a Twitter page where all their Tweets and Retweets appear). It provides a messaging function: users who follow each other can communicate between themselves. It also has (probably its most important function) a recommending function. Twitter describes its own algorithm as displaying 'A stream of Tweets from accounts you have chosen to follow on Twitter, as well as recommendations of other content we think you might be interested in based on accounts you interact with frequently, Tweets you engage with, and more.'[50] You can also follow topics --[51] in which case, related Tweets, events and ads will also appear on your timeline. Another important algorithm is Twitter's trending topic algorithm. According to Twitter, the trends show "what everyone is talking about right now."[52] The Twitter trending topic varies geographically (users are able to change the location), and may also vary according to the topics users like.

C.   Instagram's algorithms

Instagram is a social media platform that allows users to share pictures and videos. Like Facebook and Twitter, there is a basic hosting function: each user has an Instagram page where they can post and archive pictures and videos. There is also a messaging function: Instagram users can communicate between each other. The recommending function is divided into four parts. The algorithms work to personalize the user's experience, but different algorithms are used for different parts of the app – Feed, Stories, Explore, and Reels. The Feed page of the app is mainly dedicated to people or topics the user follows. Users can follow others whose accounts are public, or

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[50] Luca Belli, *Examining algorithmic amplification of political content on Twitter*, TWITTER (Oct. 21, 2021), https://blog.twitter.com/en_us/topics/company/2021/rml-politicalcontent [https://perma.cc/8UT6-JKS5].

[51] Josiah Hughes, *How the Twitter Algorithm Works [2023 GUIDE]*, HOOTSUITE (Dec. 14, 2022), https://blog.hootsuite.com/twitter-algorithm/ [https://perma.cc/V2NK-3QRE].

[52] Liz Lee & Frank Oppong, *Adding more context to trends*, TWITTER (Sept. 1, 2020), https://blog.twitter.com/en_us/topics/product/2020/adding-more-context-to-trends [https://perma.cc/BK6M-XN3K].

users who have admitted them to be friends. Users can also follow topics based on the so-called hashtags. Until 2016, when it became managed by algorithms, the order presentation was chronological.[53] The algorithms now rank the posts using different signals: information about the post (how popular a post is), information about the person who posted (if people have interacted with that person a lot), the activity of the user (what types of post they have liked), the history of the user interacting with that person.[54]

In 2020, Instagram introduced a new function which adds recommended posts   into   the   users'   feed.[55] The Story page allows users to post many pictures that will disappear from their profile after 24 hours.[56] It ranks the stories from profiles the user follows according to the same signals.[57]

The Explore page is very different. It is designed to help the user "discover new things."[58] The algorithms make recommendations based on posts the user has liked, commented on and saved.[59] For example, if a user has liked posts from a figure skater called Nathan Chen, and commented on his post, the algorithm is very likely to offer them other figure skating videos using the same signals as in the feed section to rank between them: (How popular is a post? Have people interacted with the person who posted before? What is the activity of the user? What is the history of the user interacting with the person who posted?). As Instagram itself says, the algorithm can also offer posts about related topics (for example, roller skating and not ice-skating), without them understanding what each post is about.[60]

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[53] Adam Mosseri, *Shedding more light on how Instagram works*, INSTAGRAM (Jun. 8, 2021), https://about.instagram.com/blog/announcements/shedding-more-light-on-how-instagram-works [https://perma.cc/H3YK-APBR].
[54] *Id.*
[55] Instagram, *How Instagram determines which posts appear as suggested posts*, https://help.instagram.com/381638392275939 [https://perma.cc/DT85-97CV].
[56] Instagram, *STORIES Share your everyday moments*, https://about.instagram.com/features/stories [https://perma.cc/7JSP-497Z].
[57] Mosseri, *supra* note 53.
[58] *Id.*
[59] *Id.*
[60] *Id.*

Finally, Reels are short videos that users create for the app, and come with a written comment. It is designed specifically to entertain the usersand to "ake it easier for [users] to discover short, fun videos from creators all over the world and people just like you."[61] As in Explore, the Reels are chosen among people the users do not know, on signals such as 'the activity of the user', 'Reel information' (popularity and audio tracks), and 'information about the poster'. This part was created after TikTok's success and is described by the New York Times as a "TikTok clone."[62]

D.   TikTok's algorithms

TikTok is a social media platform that allows users to share short videos with the entire world. Contrary to Instagram and Facebook, the app was not initially designed for friends to communicate with each other or necessarily for users in the same geographical region; rather, for anybody to broadcast themselves around the world.[63] In the main feed, called 'For You,' the algorithms recommend videos based on the activity the user has on the app – what the user likes, interacts with, shares or searches. The algorithms include signals such as 'which accounts you follow,' 'comments you've posted,' 'videos you've shared on the app,' and 'longer videos you've watched all the way to the end.'[64] The difference between TikTok and the other apps is that while you can follow and be followed, this is not the signal the algorithms take into account the most.[65] TikTok is an infinite pool that never runs out of content, and the algorithms play an even more important role than in

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[61] *Id.*

[62] Brian X. Chen & Taylor Lorenz, *We Tested Instagram Reels, the TikTok clone. What a Dud*, THE NEW YORK TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/technology/personaltech/tested-facebook-reels-tiktok-clone-dud.html [https://perma.cc/6XQ8-ZYW2].

[63] John Herman, *How TikTok is Rewriting the World*, THE NEW YORK TIMES (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html [https://perma.cc/8CLU-HVK4].

[64] Christina Newberry, *How the TikTok Algorithm Works (and How to Work With It in 2023)*, HOOTSUITE (Feb. 11, 2023), https://blog.hootsuite.com/tiktok-algorithm/ [https://perma.cc/XF9E-X7RL].

[65] Herman, *supra* note 63.

other platforms because the feed is based almost exclusively on algorithmic observation and inference.[66] While on Facebook, Twitter and Instagram the choices of the user (which person to follow or befriend) are almost as important as your interaction on the platforms to determine the content you will see, it is not the case for TikTok. Indeed, when one creates a TikTok account, they have direct access to the pool of videos without necessarily adding friends or following people.

II.   Are platforms an editorial medium?

In their important article, Eugene Volokh and Donald M. Falk argue that search engines such as Google or Yahoo! are speakers because they communicate to their users a selection and sorting of results that represent the company's opinion of what is the most useful and relevant information regarding a particular request.[67] By doing so, they exercise, conclude Volokh and Falk, their editorial judgment -- much like newspapers and guidebooks. The fact that they use computerized algorithms to do so is not an issue, since these algorithms incorporate the search engine company engineers' judgment and this constitutes an editorial opinion. Other authors use this argument to say that social media platforms such as Facebook or Instagram express their editorial judgments through their ranking and removal choices.[68] They all rely on lower court cases; *Langdon v. Google Inc.*,[69] being the most . paradigmatic of them. In *Langdon*, the Court, quoting *Miami Herald Publishing Co. v. Tornillo*[70] and *Hurley v. Irish-American Gay, Lesbian,*

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[66] *Id.* ("The most obvious clue is right there when you open the app: the first thing you see isn't a feed of your friends, but a page called "For You." It's an algorithmic feed based on videos you've interacted with, or even just watched. It never runs out of material. It is not, unless you train it to be, full of people you know, or things you've explicitly told it you want to see. It's full of things that you seem to have demonstrated you want to watch, no matter what you actually say you want to watch.").   `

[67] Volokh & Falk, *supra* note 3, at 884.

[68] Keller, *supra* note 6; Daphne Keller, *Who do you sue? State and Platform hybrid power over online speech,* HOOVER INSTITUTION ESSAY 14; Bhagwat, *supra* note 6, at 111.

[69] Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007).

[70] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that the "right of reply" that was introduced by a Statute to compel newspapers to insert responses to certain contents is unconstitutional because free speech necessarily includes the right to choose what to say and what not to say); Pacifica Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.,

and Bisexual Group of Boston, Inc.,[71] analogized Google directly to a newspaper and Google's search engines to a newspaper's editorial line.

The fact that social media platforms do not create content themselves is not an issue because the First Amendment protects the decisions to include or exclude others' content as much as it protects the authoring of the content in the first place.[72] As explained by Bracha, this construct distinguishes the speech and the speech interest.[73] The speech is that of social media platforms' users, but the protected speech would be that of the social media platforms in their editorial capacity.[74] Tornillo made clear that the compelled speech doctrine should apply not only to speech that the speaker generated themselves but also to the speech generated by others.[75] Are social media platforms editorial mediums? Can they be compared to a magazine or a parade, or a guidebook?

A.   Are social media platforms similar to magazines?

1.   Do social media platforms aggregate content the same way a magazine does?

Can social media platforms, as some authors advance,[76] be compared to a newspaper or a magazine? Like the *New York Times*, social media

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475 U.S. 1, 11 (1986); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("[The First Amendment] includes both the right to speak freely and the right to refrain from speaking at all.").

[71] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

[72] Volokh & Falk, *supra* note 3, at 891.

[73] Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1646 (2013).

[74] *Id.* (talking about search engines, but I believe the reasoning applies to social media platforms the same way).

[75] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. at 258 (holding that the presentation of an edited compilation of speech generated by other persons falls squarely within the core of the First Amendment.); *see also* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. at 570.

[76] *See* Keller, *supra* note 6, at 17 (holding that the Court has set a low bar in defining First Amendment rights of entities that aggregate third-party speech and that platforms should be seen as aggregating users' speech the same way that the editor of an anthology aggregates essays); *see also* Volokh & Falk, *supra* note 3, at 891. *But see* Volokh, *supra* note 33, at 405 (holding that the hosting function of social media platforms is not comparable to newspapers because readers do not count on social media platforms to fight information overload using their hosting decisions).

platforms aggregate the speech of others. When users open Facebook or Twitter, they know that the media is an aggregation of content users have dedicated to the platforms: like an author of an op-ed in the *New York Times*, they have used the platform as a host to express what they want to say. Meta, Twitter, Instagram, and to a lesser extent, TikTok, also exercise a right to include or exclude through their content moderation policy, which could be analogous to the *New York Times*'s choice to discuss a topic and to publish an op-ed. By ranking the content that they show to their users, their action would be comparable to the newspapers choosing to police the size of an article's title to highlight certain content above others.[77] This comparison, however, is overly simplistic. There are no Facebook editors deciding what to include or exclude from the platform because of the relevance of the content. The *New York Times'* editor in chief's function is to read as much content as possible and to select only the most relevant to publish in its newspaper.[78] That is the function readers value and is why they buy the *New York Times*: because they understand the articles have been selected carefully for their relevance and quality by trusted professionals. There is no such thing on Facebook or Twitter. Everyone can express themselves under the Community Standards. Social media platforms likely distribute 99 percent of all the content that is submitted to their services.[79] While *the New York Times* knows – and values – all the content it publishes, Facebook, Twitter, Instagram and TikTok cannot possibly know all the content that is distributed across their platforms; neither can they know (let alone endorse) the content they amplify. Yet, the Court has made clear, in its decision in *Rumsfeld v. Forum for Academic and Institutional Rights*[80] that the endorsement of the message compiled is a condition to be considered as speaking for the purpose of the First Amendment. In that case, a law school had

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[77] *See* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . whether fair or unfair - constitute the exercise of editorial control and judgment."); *see also* Bracha, *supra* note 73, at 1646; *see also* Volokh & Falk, *supra* note 3, at 891.

[78] Volokh, *supra* note 33, at 404 (noting that to be useful to the public, newspapers need to publish 1 percent of what is available to them, or less).

[79] *Id.* at 404-05.

[80] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 59 (2006).

organized a recruitment forum, but had excluded military recruiters from it, because they did not want to be associated with the military's "don't ask, don't tell" policy.[81] The Court found it was very unlikely that the law school would be associated with the speech of the recruiters present at that event.[82] To be considered as speaking when hosting content, one is likely to be attributed to the speech in question. This is not the case of social media platforms when they are hosting and recommending users' content. The social conventions that surround the interactions between social media platforms and their users indicate that both users and social media platforms do not associate the platform with the speech they host or amplify, at least as speakers. Take Facebook and Twitter. First, nobody opens Facebook or Twitter to know Meta or Twitter's opinion on a particular topic – it would be impossible to guess with certainty, given the number of different viewpoints distributed by the service.[83] A Facebook or Twitter user does not have Meta or Twitters' opinion in mind regarding the public debate but the opinion of their friends or persons they follow. One is conscious that when Twitter or Facebook present the post of another user, they are not endorsing the viewpoint, nor the quality of the content presented by this user. This is in fact stated explicitly in the Terms of Services of social media platforms. Twitter's Terms of Service state for example that Twitter "does not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any content or communications posted via the services or endorse any opinions

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[81] *Id.* at 47.

[82] *Id.* at 65 (holding that the compelled speech rule does not apply where there is little likelihood that "the views of those engaging in the expressive activities would be identified" with the owner who remained free to disassociate themselves from those views); *see also* Janus v. AFSCME, 138 S. Ct. 2448, 2468 (2018); Expressions Hair Design v. Schneiderman, 581 U.S. 37, 47 (2017); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980); Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) (holding that school students can appreciate the difference between speech a school sponsors and speech the school permits because it is legally required to do so, pursuant to an equal access policy).

[83] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1091-92 (N.D. Fla. 2021) (noting that social media providers likely distribute 99 percent of the viewpoints submitted to their services).

expressed via the services."[84] In the same way, Facebook's Terms of Services provide that "We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct... or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content)."[85] This is reinforced by the fact that social media platforms' financial interests are to host the most diverse content on their platform in order to expose the greatest number of users to advertising.[86] The fact that users can at any time block someone, unfollow someone, or hide the content that one has posted suggests that it is their experience and not the potential editorial opinion of social media platforms which is favored in the relationship between the users and said platforms.[87] The users know that their social media feed has nothing to do with the platforms' opinion, but much more to do with themselves.[88] Therefore, it is very unlikely that users assume any endorsement (regarding the viewpoint, the quality or the general relevance) of the content that is presented to them by the platform,[89] contrary to a newspaper or a magazine. Finally, while the *New York Times* and the *New Yorker* do employ people to produce most of the content they publish, this is not the case for any of the platforms being described: they do not produce content. Different social media platforms work differently, however, and they provide a different service to their users. One must therefore ask if some functions provided

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[84]   *Terms of Service,* TWITTER (Jun. 10, 2022), https://twitter.com/en/tos [https://perma.cc/YU7H-F8WB].

[85] *Terms of Service,* FACEBOOK (Jul. 16, 2022), https://www.facebook.com/legal/terms [https://perma.cc/4KCN-MWSM].

[86] Chinmayi Arun, *Facebook's Faces,* 135 HARV. L. REV. F. 236 (Mar. 15, 2022) (highlighting that Facebook must answer to different kind of pressures to legitimize itself).

[87] Volokh, *supra* note 33, at 408 (noting that the hosting function of platforms is centered around the choices of the users).

[88] James Grimmelmann, *Speech Engines,* 98 MINN. L. REV. 868–952 (2014) (discussing search engines) ("The entire point of consulting a search engine is that the user specifies her own interests – not someone else's – in the search query and receives results relating to those interests."). In social media platforms' case, and because of their business model based on surveillance, I argue that following people, or accepting friendship, liking a tweet or even opening up content is a way to specify our own interest).

[89] *See also* Bracha, *supra* note 73, at 1647-48 (noting that while we are very likely to associate a New York Times's op-ed with the newspaper, we are very unlikely to associate the Yellow Pages directory with the speech offered by the entities listed in them).

by some platforms are more comparable to the editorial function of a newspaper or magazine.

2.   *Are some social media platforms more like newspapers than other mediums?*

As Part I explains, the recommending function of each platform works differently. While Meta platforms amplify popular posts from friends on the user's feed, Twitter introduces posts that come from friends of friends, or on topics that interest the user. They also offer content on topics that other users are talking about at a given time, some insight on the news, or popular discussions (this is the trending section). Instagram, in addition to ranking the content of the users' friends, offers many types of recommendations based on the topic the user has liked, shared, or commented on. These recommendations can only come from accounts whose creator decided to make it public. This is also the case for TikTok, whose primary function (the 'For You' section of the platform) is to offer some 'New Content' to the users, that is content from people they do not know. It means that TikTok's algorithms pick the most attractive video from the universe of all the videos,[90] contrary to Meta's algorithm that mainly ranks (or amplifies) the content produced by friends. Is this second function – of recommending content from across the whole platform – an editorial action? Is the argument different for TikTok or Instagram, who provide, in their 'For you' and 'Explore' feed the most attractive videos of the entire internet?

I argue that is not the case, for several reasons. When the *New York Times* or the *New Yorker* publish an article, they know the content of the article they publish, and they are seen as endorsing the content, not always for its viewpoint,[91] but at least for its quality and relevance. This

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[90] I thank Robert Post for suggesting this point.
[91] The *New York Times* does not have to always present the same viewpoint. It can decide to adopt a certain degree of viewpoint pluralism, but it surely endorses the quality and relevance of the article.

is not true for TikTok or Instagram, because the choice is made by algorithms rather than endorsements.[92]

The reason why the *New York Times* is seen as endorsing certain content links to the fact that the *New York Times* has a limited amount of space. Readers count on them to reduce the information overload. But it is also linked to the fact that most of the articles written by the *New York Times* are by journalists working for the newspaper, and it thus produces its own content.

Yet, the functions of recommendation that Instagram and TikTok have developed lead them to put forward some influential accounts for strategic commercial purposes. That is, Instagram and TikTok need their influencers to make money, and reciprocally, the influencers' success (and money) would not exist without Instagram or TikTok.[93] On TikTok, the deal seems even more straightforward. TikTok-ers can indeed receive money from live feed broadcasts through the live gift function on the app.[94] Influential TikTokers can apply to the TikTok Creator Fund to receive money in exchange for 'creating incredible TikTok videos.'[95] In such a case, the link between enterprise and TikToker appears to create an endorsement for the content, comparable

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[92] It has been endorsed in the sense that it has been judged as respecting the Community Standards.

[93] *See* Taylor Lorenz, *Christina Najjar Speaks to Rich Moms*, N.Y. TIMES (Jun. 2, 2021) https://www.nytimes.com/2021/06/02/style/tinx-tiktok.html [https://perma.cc/WFJ9-CXSM]; Taylor Lorenz, *Queen of the Internet*, N.Y. TIMES (Oct. 11, 2021) https://www.nytimes.com/2021/10/11/style/brooklyn-queen.html [https://perma.cc/HH3X-8XLE].

[94] *Video Gifts*, TIKTOK, *https*://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/video-gifts/ [https://perma.cc/3TGR-CFR5] (last visited Mar. 4, 2023).

[95] *See Creator Fund*, TIKTOK, https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creator-fund/ [https://perma.cc/GMU8-HJP3] (last visited Mar. 4, 2023) (to participate in the TikTok Creator Fund, you must meet certain eligibility requirements. For example, users must be 18 years or older, be a legal resident of one of the 50 States, District of Columbia, or the territories and possessions, of the United States, meet a minimum following threshold of 10K authentic followers, have accrued at least 100K authentic video views in the last 30 days, and post original videos in line with our Community Guidelines. Seeking to promote content creator through the platform is also the basic product that offers Twitch and in a lesser extent, YouTube).

to the *New York Times* with its journalists or its op-editorialists.[96] Other than this particular case, the comparison with a newspaper or a magazine seems not only counter-intuitive, but misleading, and should not be used.

B.   Are social media platforms similar to a parade?

An actor need not be a newspaper or magazine to be considered editorializing, let alone speaking. Another important comparison made by the authors is the parade. In *Hurley*,[97] the Court held that a parade's organizer had the right to exclude someone and to do so even though the parade was otherwise highly unselective. This example is a strong argument in favor of supporting social media platforms' First Amendment rights. Contrary to the newspaper or the magazine, the parade's organizer does not control nor know all the messages that are transmitted during the parade. They can, therefore, aggregate some speech, without knowing all of the participants, while maintaining their editorial rights. This appears to place the organizer in a similar position to social media platforms.

In concluding that social media platforms hold the same position as a parade's organizer,[98] the authors seem to have a point.[99] Like parade organizers, social media platforms aggregate content without knowing all the content involved. Like parade organizers, social media platforms admit far more participants than they reject.

Yet, this aggregation argument – that social media platforms are comparable to parades – is not in line with doctrinal nor theoretical reality.

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[96] Seeking to promote content creators through the platform is also the basic product that Twitch offers and to a lesser extent, YouTube.

[97] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("[I]n spite of excluding some applicants, the [parade organizer was] rather lenient in admitting participants.").

[99] Bracha, *supra* note 73, at 1647 (recognizing that search engines constitute an editorial product in a very limited sense).

The Supreme Court has refused to recognize that any kind of aggregation of others' speech would put the aggregator in an editorial position.[100] To be seen as editorializing for the purpose of the First Amendment, there must indeed be some other action beyond aggregation itself: action linked to social conventions that the aggregator undertakes to place themselves (or not place themselves) in a certain situation where they aggregate the content of others. The Court made clear that when a medium employs a coherent faculty of speech, such as at a parade, interfering with that faculty would violate the First Amendment in altering the content of the speech.[101] On the contrary, in *Turner Broadcasting System Inc. v. F.C.C.*, the Court held that the programming offered on various channels by a cable network consists of individual unrelated segments that happen to be transmitted together by individual selection by members of the audience.[102] This is why it is not unconstitutional to compel a cable operator to carry a broadcaster "who might otherwise be silenced and consequently destroyed."[103] When deciding to participate in a parade or being a spectator of it, one knows at least one or two ideas that are conveyed by the parade itself and is likely to be shared by all of the participants. The participants of Gay Pride know that the message shared by the parade regards LGBTQ rights.[104] They are aware that they might disagree on other topics except on LGBTQ rights, but they have the right to exclude some participants

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[100] *See* Volokh, *supra* note 33, at 425.

[101] Rumsfeld v. F. for Acad. & Institutional Rts. Inc., 547 U.S. 47, 63-64 (2006) ("[B]ecause 'every participating unit affects the message conveyed by the parade's private organizers,' a law dictating that a particular group must be included in the parade 'alters the expressive content of the parade'. As a result, we held [in Hurley] that the State's public accommodation law, as applied to private parade, 'violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'"); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 98-99 (1980) (Powell, J., concurring) ("For example, a law requiring that a newspaper permit others to use its columns imposes an unacceptable burden upon the newspaper's First Amendment right to select material for publication. Such a right of access burdens the newspaper's 'fundamental right to decide what to print or omit.' . . . The selection of material for publication is not generally a concern of shopping centers.'"); *see also* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988).

[102] Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 652 (1994).
[103] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. at 577.
[104] *Id.* at 576 ("Although each parade unit generally identifies itself, each is understood to contribute something to a common theme.").

whose specific unit of speech could change the overall meaning of the whole.[105] When users subscribe to Facebook or Twitter, they do not expect the platforms to provide a coherent message. To quote Eugene Volokh, "Major platforms are not in the business of providing 'coherent and consistent messaging."[106] Contrary to parades, large social media platforms lack a 'sufficient common theme.' Users of Facebook or Twitter do not expect to see the aggregate of all pages they host, nor do they assume or expect to share at least one common view with all Facebook or Twitter users that would constitute an overall message underlying each unit of speech.[107] Users may curate a list of friends and pages to follow in order to encounter posts they agree with regarding a certain topic, but this is the users doing, not the platform's.[108] Twitter or Facebook host posts regarding all topics, and one can find on both platforms viewpoints from extreme sides of the spectrum, consisting of "individual unrelated segments that happen to be transmitted together by individual selection by members of the audience."[109]

Another related argument that pushes the distinction between a parade and social media platforms is the absence of association between social media platforms and the speech of their users, contrary to the likelihood of association between a parade and the messages that compose it.

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[105] *Id.* at 572-73, 576-77 ("[T]he parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. . . . [T]he parade's overall message is distilled from the individual presentation along the way, and each unit's expression is perceived by spectators as a part of the whole. . . . Since every participating unit affects the message conveyed by private organizers, the state courts' application of the statute produced an order essentially requiring to alter the expressive content of their parade.").

[106] Volokh, *supra* note 33, at 405.

[107] *Id.*

[108] *See id.* at 411. *Contra* Bhagwat, *supra* note 6, at 113 (noting that the reasons we grant editorial rights to media such as newspapers is because we think public discourse is enhanced when publishers are able to present coherent consistent products with consistent messages. Social media platforms do have editorial rights because we need them to create ideologically coherent packages of content). While the prescriptive part of this argument is appealing and should be discussed in more detail, we can reject the descriptive part by arguing that presenting the same coherent consistent product to all of their users is simply not what most platforms do in reality. Most of the platforms host both ends of the political spectrum and do not present a coherent consistent product to the public taken as a whole.

[109] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. at 576.

Parler finds itself in a very different situation regarding this argument: Parler's service and business model corresponds more to the model described by Bhagwat according to which social media platforms should be able to present coherent, consistent products, with consistent messages.[110] Indeed, Parler has been created and is known to be linked to the Republican Party and Donald Trump, whose far-right ideology (including antisemitism and conspiracy theories) tend to be suppressed by other platforms. Liberals' speech and accounts have sometimes been suspended by the platform.[111] It seems that one can distinguish a common theme in the app comparable to what happens in a parade. But the platforms described in Part I of the article cannot and should not be compared to parades.

C.   Are social media platforms like bookstores, and do bookstores editorialize?

In most cases, social media platforms cannot be compared to newspapers, magazines nor to parades because social media platforms do not make choices as to which content they host as comparable to an editor. There is in most cases no common theme that is shared by all the users of the platform, and there is no endorsement by the social media platforms of the message they transmit -- nor is there a knowledge of the message. This is one of the main characteristics of bookstores, that are considered by the courts as distributors – as opposed to editors, and who are not seen as endorsing the content they provide in their shop.[112] The comparison between bookstores and social media platforms is not new.[113] Some courts have declared that social media platforms are distributors of content like bookstores or libraries. In *Cubby, Inc. v. CompuServe Inc*,[114] the district court indeed applied the liability model

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[110] Bhagwat, *supra* note 6, at 113.

[111] James Wellemeyer, *Conservatives Are Flocking to a New 'Free Speech' Social Media App That Has Started Banning Liberal Users*, NBC NEWS (Jul. 3, 2020, 1:13 AM), https://www.nbcnews.com/tech/tech-news/conservatives-flock-free-speech-social-media-app-which-has-started-n1232844 [https://perma.cc/D8U4-GSZS].

[112] RESTATEMENT (SECOND) OF TORTS § 581 (AM. L. INST. 1977); Janklow v. Viking Press, 378 N.W.2d 875, 881-82 (S.D. 1985).

[113] MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 92 (The MIT Press rev. and updated ed. 2003) (1998).

[114] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

of bookstores to a website. The court considered that since CompuServe Inc. did not actively review all the content posted on its site, it was acting more as a distributor of content like a bookstore rather than a publisher.[115] For this reason, it could not be held liable for a defamation it did not know about.[116] The court derived its reasoning from the well-known *Smith v. California* case,[117] in which Justice Brennan, writing for the majority, stated that it was contrary to the First Amendment to hold bookstores responsible for the content of every book in the store.[118] Indeed, bookstores, libraries and newsstands are *places* of important First Amendment protected activities, and forcing them to be responsible for all the content they sell -- even when they are unaware of it -- creates self-censorship that would be detrimental to the dissemination of ideas and to the public taken as a whole.[119] By making the comparison between bookstores and social media platforms, the district court thus implied that like bookstores, social media platforms could exercise some form of broad control over the content they choose to carrywithout being held responsible for the content they did not or should have known about.[120]

Indeed, bookstores, like libraries or newsstands, make choices about what to acquire, or not to acquire, all the time. A law that would prohibit, or by contrast, force a bookstore to acquire a certain book would surely trigger strict First Amendment scrutiny.[121] A law that

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[115] *Id.* at 139-40.

[116] RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977) (providing that distributors of content are not held liable for the content they distribute unless they know or should have known of the defamation).

[117] Smith v. California., 361 U.S. 147 (1959).

[118] *Id.* at 153.

[119] *Id.* ("And the bookseller's burden would become the public's burden, for, by restricting him, the public's access to reading matter would be restricted.").

[120] GODWIN, *supra* note 113, at 93.

[121] Some bookstores are dedicated to a theme. If a bookstore is specialized in guidebooks, it makes no sense to force them to acquire *To Kill a Mockingbird*. Some bookstores decide to spend a period of time focusing on a special topic, say Christmas. They will acquire all the Christmas books existing but will choose not to acquire books on Thanksgiving. It makes no sense to force them to acquire these books.

would prohibit a bookstore from selling or a library from sending a certain book to its consumers would do the same.

But are Facebook or Twitter, in their hosting function, to be specific, exactly like a bookstore or even a library? I argue that they are, in reality, slightly different: before entering a library or a bookshop, there is no contract to sign that will specify what kind of books the library or the bookshop acquires and sells. In looking for a title that a bookshop does not carry, customers would not ask why the book is absent, nor do store managers have to explain themselves. This is because we assume that the library or the bookshop have a certain degree of discretionary choice when they choose to carry or not to carry a book, even if there is no endorsement of the content they choose to stock. On the contrary, when users enter a social media platform, they know in advance that a certain kind of content will not be permitted and, as Facebook and Twitter have already communicated in their content in the services policies, they are expected to respect that. The creation of the Facebook Oversight Board[122] to adjudicate this type of conflict between users and Facebook shows that the content moderation policy is closer to a juridical policy than to the choice of the bookstore to acquire or not to acquire a book. In that sense, a post on Facebook holds a kind of (juridical) endorsement because Facebook's algorithms have concluded it consistent with the Community Standards previously enacted. As I explain in Part IV, a law that would prohibit or force Facebook or Twitter to carry a certain viewpoint would trigger the First Amendment, but a law or a state action that would require Facebook and Twitter to execute its contract would not.

III.   Social interactions between platforms and users, algorithms and the First Amendment

One does not need to be editorializing to be a speaker. In reality, the argument used by the authors regarding ranking and moderating could very well circumvent the editorial argument -- and would be well advised to do so. Social media platforms could indeed argue that the

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[122] Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. J. 2418, 2499 (2020).

feed they present to their users represents "implied observations of relevance" regarding what they would like or be interested to see.[123] This would come down to separate layers of expression, as in the editorial argument, but would not rely on the distinction between the whole and each unit of speech inside the whole. The new layers of expression would be constituted by the distinction between the "immediate meaning" -- that is, the messages posted by other users on a platform, and an "underlying layer of meaning" on which social media platforms would claim protection.[124] Bracha describes these new layers of expression by distinguishing between the meaning of denotation (speech that is effectively communicated to users through visual interactions) and the meaning of connotation (meaning deriving from the communication of others' speech by way of ranking and moderating).[125] The authors rely on the doctrine known as "code is speech" developed at the end of the last century when courts were asked for the first time to determine whether code possessed sufficient speech-like qualities to be covered by the First Amendment, and answered affirmatively.[126] In *Sorrell v. IMS Health Inc,*[127] the Supreme Court also recognized that any creation and dissemination of information is speech protected by the First Amendment. Of course, this last assertion is not in line with the common sense of what judges do in reality,[128] but it is the basis of the argument, combined with the argument that code is speech. Many authors use this argumet to conclude that search

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[123] Bracha, *supra* note 73, at 1651; *see* Keller, *supra* note 6, at 16 ("Platforms that use algorithms to rank user content effectively set editorial policy and 'speak' through ranking decisions. The message conveyed can be pretty boring: Platforms say things like 'I predict that you'll like this' or 'I think this is what you're looking for.' That's enough that lower courts have recognized First Amendment protection for platforms' ranking choices.").

[124] Bracha, *supra* note 73, at 1652 (distinguishing between the meaning of denotation (the speech that is effectively communicated to users through visuals interactions) and connotation (the meaning deriving from the ranking)).

[125] *Id.*

[126] Wang, *supra* note 31, at 1373.

[127] Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

[128] *See* Post (1994), *supra* note 16.

engines,[129] and by extension social media platforms, are speakers.[130] In Part A, I show that even though code has sometimes been recognized as speech covered by the First Amendment, code is not *always* speech. In Part B and C, I argue that whatever theory of coverage we recognize as true, social media platforms cannot be recognized as speaking when they use algorithms to rank the content created by their users.

A.   Code is not always speech

The doctrine of 'code is speech' developed at the end of the last century when courts were asked for the first time to determine whether code possessed sufficient speech-like qualities to be covered by the First Amendment.[131]

In *Bernstein v. U.S. Dep't of State*, Bernstein (at the time a PhD student in mathematics at University of California, Berkeley) wanted to publish a paper including the source code of an encryption algorithm that he developed.[132] He submitted a request to the U.S. Department of State to determine whether he needed a license to publish this source code. The U.S. Department of State answered that the source code was a "munition" for the purpose of the "International Traffic in Arms Regulation."[133] As a result, Bernstein needed a license to "export" it through the publication.[134] Bernstein sued, alleging that this regulation imposed a prior restraint on his speech and thus violated the First Amendment.[135]

In front of the district court,[136] the government claimed that source code was unprotected conduct rather than speech because it was not

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[129] Stuart Minor Benjamin, *Algorithms and Speech Debate*, 161 U. PA. L. REV. 1445, 1449 (2012).
[130] *See* Volokh & Falk, *supra* note 3, at 884.

[131] Wang, *supra* note 31, at 1373.

[132] Bernstein v. U.S. Dep't of Just., 176 F.3d 1132, 1135-36 (9th Cir.), *withdrawn,* 192 F.3d 1308 (9th Cir. 1999).

[133] *Id.* at 1136.

[134] *Id.*
[135] *Id.*

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

"sufficiently imbued with elements of communication" to fall within the protections of the First Amendment as expressive conduct.[137] The district court rejected that argument, declaring that code was not even an expressive symbolic conduct, such as nude dancing or flag burning, but speech comparable to speaking language.[138] Because code is a complex system of understood meanings within specific communities, the court found no meaningful difference between computer language, particularly high-level languages as defined above, and German or French. [139] As a result, the court refused to apply *Spence v. Washington* or the O'Brien test.

The Ninth Circuit affirmed on appeal,[140] without directly addressing the question of whether source code should be considered a language such as German or French. It rather compared the way cryptographers use source code to the way economists use graphs and mathematicians' equations: "to facilitate the precise and rigorous expression of complex scientific ideas."[141] Accordingly, the court concluded that encryption software in their 'source code' form was expressive for the purpose of the First Amendment and that requiring a license before publication was a form of prior restraint incompatible with the First Amendment.[142] In *Universal Studies v. Corley*,[143] the Second Circuit adopted a vision slightly different from the Ninth Circuit. The case involved a First Amendment challenge to the Digital Millennium Copyright Act (DMCA). The act was adopted by Congress in 1998 to strengthen digital protection against piracy.[144] The law not only targeted pirates who would circumvent digital walls (such as encryption codes or passwords) but also those who manufactured and distributed the circumvention technologies.[145] DeCSS was a computer program that was designed to

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[137] *Id.*
[138] *Id.*

[139] *Id.* at 1435 (quoting Yniguez v. Arizonans for Off. Eng., 69 F.3d 920 (9th Cir. 1995)).
[140] Bernstein v. U.S. Dep't of Just., 176 F.3d 1132, 1135 (9th Cir. 1999).

[141] *Id.* at 1141.

[142] *Id.* at 1135.
[143] Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).
[144] 17 U.S.C. §1201(a)(1)-(2), (b)(1) (2012).

[145] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001).

circumvent CSS. CSS is the encryption technology used by motion picture studios to protect their motion pictures from unauthorized copying and viewing.[146] Eric Corley ran a magazine and a website dedicated to the "hacker community."[147] In November 1999, he wrote an article about DeCSS and posted the source and object code of DeCSS at the end of the article.[148] The studios filed suit.[149] Similarly to the Ninth Circuit Court in *Bernstein*, the Second Circuit recognized that code was speech covered by the First Amendment, comparing it to a mathematical formula and musical scores.[150] But rejecting the appellant's claim that code was "pure speech," the circuit court accepted the O'Brien Test. The court distinguished between speech elements of code and non-speech elements of code and insisted especially on the effects of the functional (non-speech) component.[151] The court retained the government's argument that the DMCA's provisions targeted the code for its capacity to illegally bypass the copyright protections of DVD. In other words, it targeted the secondary effects of speech.[152]

Dormant for fifteen years, this doctrine has regained visibility with technology companies relying on "code is speech" to dispute any kind of regulation that would hamper their economic power.[153] It is

[146] *Id.*

[147] *Id.*

[148] *Id.* at 439.

[149] *Id.*

[150] *Id.* at 446.

[151] *Id.* at 452. ("The characterization of functionality as a proxy for the consequences of use is accurate. But the assumption that the chain of causation is too attenuated to justify the use of functionality to determine the level of scrutiny, at least in this context, is not. . . just as the realities of what any computer code can accomplish must inform the scope of its unconstitutional protection, so the capacity of a decryption program like DeCSS to accomplish unauthorized – indeed, unlawful – access to materials in which the plaintiffs have intellectual property rights must inform and limit the scope of its First Amendment Protection.").

[152] *See* City of Renton v. Playtime Theatres, Inc., 465 U.S. 41 (1986) (holding that a content-based ordonnance in its face targeting adult theatres was content-neutral because it targeted only the secondary effects of the theaters – the adverse economic, social and aesthetic impact of the businesses on the surrounding community).

[153] For example, to oppose a court order directing Apple to unlock an iPhone belonging to a mass-shooter, the company claimed that the order would force them to write a software, which came down to "compelled speech." *See* Apple Inc.'s Mot. to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Gov't's Mot. to

supported by some authors. In *Search Kind, Inc. v. Google Tech., Inc.,*[154] a district court recognized that search engines effectively communicate their opinion on the relevance of the results offered through their algorithm's outputs --[155] which appears to apply the expansive interpretation of the First Amendment. Search Kind was a company that acted as a middleman to ensure websites' visibility on Google. On its website, it hosted companies of interest through advertising and providing them with visibility, thanks to its page rank.[156] Between 2001 and 2003, Search Kind and its fileable PRAN page rank had decreased significantly, which impacted the business of Search Kind. Search Kind sued and alleged that Google modified its algorithms after learning that PRAN was competing with Google on the market of advertising.

The court agreed with Google's claims that Google's page rank results were constitutionally protected opinions because they were fundamentally subjective in nature. As each algorithm used by each search engine is different, Google page ranks are Google's opinion of the significance of particular websites as they correspond to search queries.[157] To be clear, Google's defense in that case was even broader than the "code is speech" argument. Indeed, it protected not only the code itself, but the results of the application of the code by Google. The functional aspect of the code was considered speech as much as writing

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Compel Assistance at 32, In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 3KGD203, No. 16-CM-00010-SP, 2016 WL 2771267 (Cal. 2016) [hereinafter Apple's Mot.]; on the description of the case, *see* Wang, *supra* note 31 at 1392–93. (explaining that Apple recruited Theodore Olson, the lawyer who argued Citizens United v. FEC before the Supreme Court to mount its legal defense); *see* Taylor Goldenstein, *High-Profile Attorney Ted Olson Joins Apple's Fight Against FBI Terror Probe*, L.A. TIMES (Feb. 18, 2016), https://www.latimes.com/local/lanow/la-me-ln-ted-olson-joins-apple-fight-against-fbi-20160218-story.html [https://perma.cc/K9R3-JVWF] (Apple's rivals including Amazon, Google and Microsoft, actually filed a joint amicus brief in support of Apple, arguing that the FBI's action was classic compelled speech because "writing computer code... is a form of protected speech under the First Amendment).

[154] Search King, Inc. v. Google Tech., Inc., 2003 WL 21464568 (2003).

[155] *Id.*

[156] *Id.* at 1-2.

[157] *Id.* at 6 (highlighted by Wang, *supra* note 31, at 1394).

the algorithm itself. Contrary to what some authors advance, these cases taken together do not resolve the issue of how to see code for the purpose of the First Amendment, nor could they.[158] Indeed, as George Wang has shown, code as any language is used for many different purposes, some of which implicate the First Amendment while others do not.[159] The Ninth Circuit was right in *Bernstein* to conclude that writing in code should not prevent First Amendment coverage because code is a form of language like a mathematical formula.[160] However, not all interactions in which language is used are covered by the First Amendment.[161] This is because social interactions largely happen through language, and the First Amendment does not cover all types of social interactions.[162] Contract law is implemented without First Amendment analysis.[163] A defendant accused of tagging a city's bus shelter could not use the First Amendment as a defense,[164] and antitrust violations cannot be expelled because the defendant used words.[165] As a result, although code is sometimes speech compared to German or French, it is not always speech protected by the First Amendment.[166] As

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[158] *Id.* at 406 ("The trouble with the doctrine that "code is speech" is not just that it leads to bad outcomes; it also makes no sense as a First Amendment rule.").

[159] *Id.* (highlighting that code can be used in ways that have a profound impact on public discourse but can also be used to calculate your taxes and vacuum your floor).

[160] Post, *supra* note 15, at 718.

[161] Post, *supra* note 15; Post (1994), *supra* note 16; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765–1809 (2003); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. [i]–366 (2018) (quoting commercial fraud, perjury, conspiracy, workplace harassment, compelled speech of tax returns as examples of speech that are not speech within the meaning of the First Amendment); Ashutosh Bhagwat, *When Speech Is Not Speech Symposium: The Expanding First Amendment*, 78 OHIO ST. L.J. 839 - 886 (2017); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

[162] Post (1994), *supra* note 16, at 1252.

[163] Shanor, *supra* note 16; Schauer, *supra* note 22.

[164] Post (1994), *supra* note 16, at 1252 (the Supreme Court has long recognized that the First Amendment does not protect speech that is integral to a criminal activity); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); See GREENAWALT, *supra* note 162 (listing conspiracy, bribery, perjury amongst those crimes that involve writing or oral communications and that are not covered by the First Amendment).

[165] Tushnet, *supra* note 16, at 1074 (quoting perjury as an example).

[166] *See* Wang, *supra* note 31, at 1389 (distinguishing between three case-scenarios for code).

explained by Wang, code – like language – is now omnipresent in our day-to-day life and mediates our interactions with many objects.[167] If code were considered as speech under the First Amendment in all the situations that involve any code, some serious legal issues would follow, including regarding the domain of consumer protection. It would be very difficult for the state to regulate objects involving codes, such as microwaves and lawnmowers.[168] In *Bernstein*, code was used in a well-known social practice common to the 'sub-community' of the scientific world.[169] The code, to be written in an article and discussed by other researchers, was part of Bernstein's participation in scientific discourse.[170] In other words, it was a medium protected by the First Amendment as an important part of public opinion formation.[171] However, code being covered by the First Amendment in *Bernstein* does not tell us whether Twitter and Facebook's use of algorithms to moderate and amplify user posts is speech covered by the First Amendment. When code is entered into the software directly by a developer, the content of the source code is not the object of discussion because the user of the code does not require knowledge of it.[172] The code, however, commands the computer to act in a certain way. It could therefore be considered that the actions of the computer are the direct result of the engineer's speech. To assess that, one must look closer at the social context in which social media algorithms evolve.

B.   Social media platforms' algorithms and the Spence Test

In *Spence v. Washington*,[173] the court articulated a test to know when conduct constitutes symbolic speech and thus triggers First Amendment

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[167] Wang, *supra* note 31, at 1389.

[168] Wang, *supra* note 31, at 1389.

[169] Lee Tien, *Publishing Software as a Speech Act Symposium - The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 629 (2000).

[170] Wang, *supra* note 31, at 1415.

[171] *See* Miller v. California, 413 U.S. 15, 34 (1973).

[172] Wang, *supra* note 31; Post, *supra* note 15.

[173] Spence v. Washington, 418 U.S. 405, 410-12 (1974).

scrutiny.[174] It stated that First Amendment scrutiny would be triggered whenever "an intent to convey a particular message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it."[175] In the words of *Post*, this test "makes reference to a speaker's intent, a specific message, and an audience's potential reception of that message."[176] It is rather doubtful that engineers express through their algorithms a message that is sufficiently precise to meet the conditions of the *Spence* test. When recommending content, social media platforms algorithmically select material based on a determination of relevance, interest, importance, and popularity.[177] Here, we can distinguish between open recommending and curated recommending. In one case, the recommendation is made from a pool of content that is primarily user-generated, while in the other case, the system selects from a pool of content that is curated, approved, or otherwise chosen by the, platforms.[178] Social media platforms such as Twitter, YouTube, Facebook, Instagram or TikTok place themselves in the first situation. While they have control over the algorithms they apply on their platforms, they do not control the speech that will be created by their users, and this is what determines the content that will be received by the audience. When Facebook or Twitter write their algorithms, they cannot know the messages that will be conveyed using their processes because the algorithms are written before the users' posts are even created. The engineer writing the algorithms on behalf of Facebook or Twitter has little idea how the algorithms will be utilized because the possibilities of interactions are close to infinite. Furthermore, even if social media platforms attempted to contemplate the results in advance, the process has become so complicated and dependent on so many

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[174] *Id.* at 416.
[175] *Id.* at 411.

[176] Post (1994), *supra* note 16, at 1254; in the same sense, *see* Benjamin, *supra* note 128, at 1461 ("Communication thus seems to require at a minimum, a speaker who seeks to transmit some substantive message or messages, to a listener who can recognize that message.").
[177] Jennifer Cobbe & Jatinder Singh, *Regulating Recommending: Motivations, Considerations, and Principles*, 10 EUROPEAN J. OF L. AND TECH. (2019).

[178] *Id.*

signals[179] that it would be extremely difficult for an engineer to know what would emerge.[180] This is not the case for other mediums that are code-based and protected by the First Amendment. Taking video games as the example, the number of possible interactions in a game – at least the kind the Supreme Court covers under the First Amendment --[181] are finite because they take place within some form of virtual reality. This means the engineer and authors know what will happen if the gamer interacts in a certain way with the algorithms, and, in turn, the gamer knows that the author has thought about their likely behavior. This mutual understanding is what characterizes the link between the speaker and the audience.If social media platforms are speakers -- the link between them, a specific message, and the audience's reception is absent because the speaker does not know the message he transmits. This suggests that the message transmitted by social media platforms is not distinct enough to deserve First Amendment protection. There is a problem with the Spence test. As put by *Post*, "What is curious is that the doctrine is transparently and manifestly false. The test cannot plausibly be said to express a sufficient condition to bring the First Amendment into play."[182] Indeed, a crime motivated by racist (and political) bias satisfies the Spence test, but it is not covered by the First Amendment. By contrast, art that does not convey a particular message – such as Marcel Duschamp's urinal, entitled *The Fountain* – is protected by the First Amendment but does not satisfy the Spence test.[183] This suggests that the Spence test does not articulate a sufficient condition, nor does it articulate a necessary condition to bring the First Amendment into play.[184] For the Spence test, the link between a speaker, a message, and the potential audience is considered in the

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[179] James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 877 (2013) (advancing that argument for search engines).

[180] *See id., infra* Part III B.

[181] Brown v. Ent. Merch. Ass'n, 564 U.S 786 (2011).

[182] Post, *supra* note 16, at 1252.

[183] Post, at 1252; *see also* Shanor, *supra* note 16, at 341. On the question of art coverage, *see* Mark Tushnet, *Art and the First Amendment,* 35 COLUM. J.L. & ARTS 169 (2011).

[184] Post, *supra* note 16, at 1252-53.

abstract without considering the social context in which it is happening.[185] But the court, in reality, gives a lot of importance to the social context in which conduct is happening to know if the First Amendment values apply.If a particular exchange occurs that resembles the conventions and practices of a medium furthering First Amendment values, this exchange would be covered by the Amendment, even if it lacked a clear message.

The Supreme Court recognized in *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*,[186] that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[187] As a result, while being part of a parade (a medium protected by the First Amendment), the expression that is protected is not limited to its banners and songs but to all sorts of speech acts.[188] However, explains *Post*, to further First Amendment values, the social conventions that are taken into account by the judge – and that constitute the medium as a category – must do more than facilitate the communication of messages.[189] These social conventions are seen as furthering First Amendment values when they embody a certain kind of relationship between the speaker and audience. The relationship must be dialogic and independent. This means that the speaker assumes their audience will "autonomously query the meaning of their message and their authority."[190] The audience must be able to discuss the meaning of

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[185] *Id.* at 1254-55.
[186] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573-74 (1995).
[187] *Id.* at 569.
[188] *See also* Morse v. Frederick, 551 U.S. 393, 401 (2007) (holding that a banner stating "BONG HITS 4 JESUS" is speech for the purpose of the First Amendment although "the message on [the] banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.").
[189] Post (1994), *supra* note 16, at 1274 (taking the example of a navigation chart for airplanes that clearly communicate a particular message, and yet are not covered by the First Amendment. According to Post, this is because we interpret them as speaking monologically to their audience: we expect the audience to keep in a dependent place regarding the speaker).
[190] *Id.* at 1254.

the message, and the message must be produced quite autonomously. The dialogic relationship does not have to be immediate. Numerous sociologists have documented how television viewers discuss and reconstruct the meaning of their favorite show based on their own experience and through discussion with their friends.[191] However, the meaning of connotation that is transmitted by platforms to users through their algorithms' outputs hardly complies with these two criteria.

C.   Social media platforms' algorithms in their social and technical context

1.   *A message lacking autonomy and dialogic dynamics*

In this section, I explain that the relationship between social media platforms and their users is not the relationship that matters for the purpose of the First Amendment. The relationship between speaker and audience that happens through algorithms lacks autonomy and dialogical dynamics. First, users do not seek Twitter's opinion of what should be of interest for them or which tweet should be presented first or second. Users open Twitter to see what their followers think at a particular time and to debate with other people, but not to see what Twitter is thinking about a particular topic.[192] This is illustrated by the fact that in everyday language, Twitter is often referred to as a set of Tweets (that are probably highlighted by Twitter according to the people one follows), rather than Twitter as an independent entity. "Black Twitter," for example, has not been created by Twitter. Instead, that conversation is independent of Twitter's opinion, and the users know that perfectly. This is probably the reason why users valorize what

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[191] DELLA COULING & IEN ANG, WATCHING DALLAS: SOAP OPERA AND THE MELODRAMATIC IMAGINATION ([Nachdr.]; Engl. transl. (with revisions) first publ. 1985 by Methuen, transferred to digital print ed. 2005) (highlighting the double process of identification and detachment from the characters that helps foster the viewers' personality); MARY ELLEN BROWN, SOAP OPERA AND WOMEN'S TALK: THE PLEASURE OF RESISTANCE (1994) (highlighting the discussions around a TV-show – including the alternance between mockery, irony and adhesion – help create the meaning of it).

[192] Bracha, *supra* note 73 (making this argument for Google, but I believe the argument is even stronger for platforms).

is being said *through* the platform.[193] Users do not consider Twitter to be talking to them because, I argue, the automatic content moderation and ranking system is not an object of discussion or debate -- but rather a tool[194] that speaks directly to the computer and *partially* determines its action. At this stage, I must refer back to the processes used by firms to moderate and rank user content to determine what they are actually commanding computers to do.

2.   *Algorithms' opacity and human agency*

The algorithms that run platforms[195] are characterized by their opacity because the person who is reading the "classification decision" – the social media platforms' user in the present case – usually has little concrete sense of how and why the classification arrived.[196] This opacity can arise from an intentional corporate self-protection,[197] in which case the opacity is dissymmetric between the firm and its users. Opacity can also arise from the simple fact of writing and reading code,[198] especially code that takes into account large criteria. Finally, it can result from a mismatch between the mathematical optimization of machine learning based on high dimensionality, and the human scale

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[193] Marc Lamont Hill, *"Thank You, Black Twitter": State Violence, Digital Counterpublics, and Pedagogies of Resistance*, 53 URBAN EDUC. 286 (2018).

[194] Lauren Willis, *Deception by Design*, 34 HARV. J. OF L. & TECH. (HARV. JOLT) 116, 132 (2020) (noting that as with all tools, the interfaces are quite unseen by users, while they are using the interface: users do not reflect systematically on how the interface shapes their interaction with other users); *see also* Daniel Susser, Beate Roessler & Helen Nissenbaum, *Technology, autonomy, and manipulation*, 8 INTERNET POL'Y REV. (2019) [https://perma.cc/Z3T7-WX5X].

[195] Christian Sandvig, *Seeing the Sort: The Aesthetic and Industrial Defense of "The Algorithm,"* J. OF THE NEW MEDIA CAUCUS (2014) [https://perma.cc/BX55-LXXC] (talk of 'Facebook's algorithm' typically refers to high-level assemblies of many sub-algorithms, all eventually implemented and running as computer programs).

[196] Jenna Burrell, *How the machine 'thinks': Understanding opacity in machine learning algorithms*, 3 BIG DATA & SOC'Y (2016) (last visited Jun. 2, 2022) https://doi.org/10.1177/2053951715622512 [https://perma.cc/2RDF-6D48]; FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (1st Harv. Univ. Press ed. 2016).

[197] Burrell, *supra* note 197; Pasquale, *supra* note 197.

[198] Burrell, *supra* note 197.

reasoning[199] that characterizes our social media platform's discussion. In the latter case, the dissymmetry of knowledge between the firm and its users is reduced because what the machine exactly does is opaque even for the engineers who created the algorithms and fed them with data.[200]

Social media platforms usually use machine learning algorithms to run their software and, more specifically, to rank and moderate content. Machine learning algorithms are a particular kind of algorithm that programs computers to use data to teach themselves to perform particular tasks.[201] They present certain distinctive challenges of scale and complexity that can reinforce the fact that programmers who are insiders to the algorithm must contend with the opacity as well.[202] This is because machine learning algorithms result from two components – the code and the298atasetts on which it is trained – whose interaction with each other is extremely complex[203] and partially out of the engineer's control[204] for different reasons. First, the accuracy of the algorithms' prediction is never 100 percent. There is always a margin of error. Model assessments are realized through the split between a training set and a test set. The algorithm's performance (or accuracy) is evaluated through the application of the training set on the test set.

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[199] *Id.*; Willis, *supra* note *195*, at 127 (highlighting the difference between offline human-directed and online real-time machine-controlled experimentation is profound).

[200] Manfred Broy, *Software Engineering — From Auxiliary to Key Technology*, in *Software Pioneers: Contributions to Software Engineering*, ed. Manfred Broy and Ernst Denert (Berlin: Springer, 2002), 11; *see also*, Wendy Hui Kyong Chun, *Programmed Visions: Software and Memory* (Cambridge, MA: MIT Press, 2011); Ian Bogost, *Alien Phenomenology, or What It's Like to Be a Thing* (Minneapolis: Univ. of Minn. Press 2012).

[201] Willis, *supra* note 195; Atif M., *Artificial Intelligence vs Machine Learning vs Data Science*, TOWARDS DATA SCIENCE (Sept. 11, 2020), https://towardsdatascience.com/artificial-intelligence-vs-machine-learning-vs-data-science-2d5b57cb025b [https://perma.cc/7SEJ-9ZVV].

[202] Nick Seaver, *Knowing Algorithms* in DIGITALSTS: A FIELD GUIDE FOR SCIENCE & TECHNOLOGY STUDIES, (Princ. Univ. Press, 2019).

[203] Burrell, *supra* note 197.

[204] Willis, *supra* note 195, at 127 (noting that these systems operate quickly, autonomously, accurately and opaquely).

When choosing the algorithm, engineers often have to privilege one criterion (accuracy,[205] precision,[206] or sensitivity[207]). Second, the engineers do not know all the features that matter to the classification outcome. This can lead to the valorization of unintended features in the classification outputs made by the algorithms.[208] An algorithm's biases are sometimes created by what Commissioner Slaughter calls "faulty inputs,"[209] when the dataset that trained the machine learning algorithm is not adequately representative. These data biases are sometimes unintentional, but not always -- especially when they reinforce racism, sexism, or homophobia.[210] They can also be the result of faulty outputs,

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[205] Salma Ghoneim, *Accuracy, Recall, Precision, F-Score & Specificity, which to optimize on?* TOWARDS DATA SCIENCE (2019), https://towardsdatascience.com/accuracy-recall-precision-f-score-specificity-which-to-optimize-on-867d3f11124 [https://perma.cc/CP47-4E9J] (If the algorithm's goal is to distinguish huskies from wolves, accuracy answers the following questions: 'How many animals did we correctly label out of all the animals presented in the test set?').

[206] If the algorithm's goal is precisely to recognize huskies, precision answers the following question: 'How many of the animals we labelled as huskies are actually huskies?'
[207] If the algorithm's goal is to recognize huskies, sensitivity answers the following question: 'How many of those who are huskies did we correctly label as huskies?'
[208] Cameron Boozarjomehri, *Is This a Wolf? Recognizing Bias in Machine Learning,* MITRE PARTNERSHIP NETWORK (Oct. 2, 2018), https://kde.mitre.org/blog/2018/10/28/is-this-a-wolf-understanding-bias-in-machine-learning/?fbclid=IwAR00X47QCjycxsZj_2nYpGReNNCnIFni0318cJbO3VAUxgN466_10dhxVWw [https://perma.cc/8WZ4-NXTT] (a well-known example is an algorithm that was able to distinguish wolves from huskies and obtain results around 90 percent accuracy, that was considered an excellent result by the engineers. It appeared later that the model was basing its primary decision on the background: wolf images had a snowy background, while husky images rarely did).

[209] Rebecca Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission,* 23 YALE J. L. & TECH. (SPECIAL ISSUE) 1 (2021); *See also* David Lehr & Paul Ohm, *Playing With the Data: What Legal Scholars Should Learn About Machine Learning,* 51 U.C. DAVIS L. REV. 653, 656 (2020) (talking of "garbage in, garbage out").
[210] SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018) (showing how marginalized communities are systematically redlined by algorithms, and making a direct link between systemic racism, conscious or unconscious racism of some of the engineers who have created the algorithms, and algorithms bias); *see also* KATE CRAWFORD, ATLAS OF AI: POWER, POLITICS, AND THE PLANETARY COSTS OF ARTIFICIAL INTELLIGENCE (2021) (arguing that far from being disembodied and objective as they are often presented, AI is endowed with our own ideologies, stereotypes and biases); Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to Be Dismantled,* MIT TECH. REV. (2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-

when the algorithms generate conclusions that are inaccurate or misleading.[211] In short, biases can come from almost anywhere,[212] and remind us that correlation does not imply causation.[213] Third, the internal decisive logic of the algorithm (that has been programmed by the engineer) is altered as it learns from training data: the outputs at week 2 will likely be different than at week 1, without any human intervention.[214] Heavy testing of algorithms can – not without difficulty --[215] help explain how and why a classification decision has been made by the subset of algorithms. However, one must recognize that in the production of algorithms' outputs, human and non-human actors' actions are always intertwined:[216] thus, human agency is not sufficient to explain the outputs of the algorithms.[217] If it is true that humans are expressing themselves through the creation of algorithms by choosing the criteria with which the algorithms should take a decision,[218] it is false to state (as Stuart Minor Benjamin has) that the human is doing all the talking in that process[219] or that "individuals are sending a substantive message in such a way that others can receive it."[220] Indeed, what results from the above description is that algorithms' outputs (at least, the algorithms used by social media platforms) are partially

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racist-dismantled-machine-learning-bias-criminal-justice/   [https://perma.cc/WNS9-NDEB].

[211] Slaughter, *supra* note 210, at 7.
[212] *Id.;* Lehr & Ohm, *supra* note 210, at 656 (highlighting that the "garbage is a static, unavoidable feature of the data").
[213] Lehr & Ohm, *supra* note 210, at 656.
[214] This is called 'model drift' in computer science language.

[215] Pedro Domingos, *A Few Useful Things to Know About Machine Learning*, 55 COMMC'NS. ACM 78 (2012) (noting that the human brain is not equipped to reason in higher dimensions, making the improvement or debugging of the algorithms by humans extremely difficult when an important number of qualities and characteristics are provided as inputs).
[216] Francis Lee & Lotta B. Larsen, *How Should We Theorize Algorithms? Five Ideal Types in Analyzing Algorithmic Normativities*, 6 BIG DATA & SOCIETY (ISSUE) 2 (2019).

[217] *Id.*
[218] Gillespie, *supra* note 34.
[219] Benjamin, *supra* note 130, at 1479.
[220] *Id.*

unpredictable and that humans must adapt[221] to them as much as algorithms adapt to humans' agency.[222] The fact that, in a very anthropocentric way, human agents usually receive entire attributions for these outputs[223] (because they perform intentions and use languages[224]) does not mean that it is right to do so,[225] or that humans are the only ones to be able to produce signification.[226] In other words, if Facebook's programmers send a specific message to their server through codes, the message received by the public is different from the message that has been sent, because the message received results from the combination of both human and non-human actions. If it was not so, there would be no use to label Facebook or Twitter's algorithms as trade-secrets, since the message contained in algorithms could be reconstructed by the public who receive that supposedly same message.

Furthermore, one must remember that contrary to a video game, where the engineer knows in which (virtual) reality the user will evolve, social media algorithms are trained on past datasets to act on information that is not known at the time of the training. Because of the infinite number of possibilities that characterize the speech of social media users, engineers cannot know in advance what type of content their algorithm will deploy in.

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[221] *See* Lee & Larsen, *supra* note 216 (social scientists talk about interactions, negotiation, and relationality, to describe that relationship); Burrell, *supra* note 196; Michel Callon & John Law, *Agency and the Hybrid Collectif*, 94 S. ATL. Q. 481 (1995).

[222] Callon & Law, *supra* note 222.

[223] Elizabeth Reddy et al., *Beyond Mystery: Putting Algorithmic Accountability in Context*, 6 BIG DATA & SOCIETY (ISSUE) 1 (2019) (highlighting that algorithms can do much of the work and yet accountability is still organized, normatively and legally, around human authorship and human agency).
[224] Callon & Law, *supra* note 222; Reddy, *supra* note 224.

[225] Callon & Law, *supra* note 222 ("This paper has suggested that the agents we tend to recognize are those which perform intentions. And those which use a language. Strategic speakers: those are the hybrid 'collectifs' which usually come endowed with agency. Which don't have to put up an argument in order to achieve citizenship in the world of social theory. But we've also argued that it doesn't have to be so. That, indeed, it is not so."); Reddy, *supra* note 224.
[226] Callon & Law, *supra* note 222.

To sum, the message of connotation[227] that is received and understood by Facebook's users results from the combination of what Facebook said to its servers, what the users said to the server, and the action of the computer. The use of automation, resting on an opacity of criteria, that are difficult to put forward by a normal user is one of the social conventions we share about the use of social media platforms. We also know that the agency is difficult to attribute with certainty to a human. While social media platforms clearly facilitate the communication of messages of public discourse – clear, autonomous, and systematic messaging produced by humans working for the platforms is absent. The relationship that is created between social media platforms and users is neither autonomous nor dialogic -- that is, the relationship of dependency between the content produced and the users. Social conventions embody, for the purpose of the First Amendment, a dialogic and independent relationship between users -- not between the social media platform and user.

One could also argue that the message sent by social media platforms to their server is the real message, even though it is not understood by the users as such. This argument would be based on the Supreme Court's cases such as *Hurley* or *Morse v. Frederick*, according to which a message does not have to be crystal-clear to be protected by the First Amendment: it can also be cryptic. This would be, however, a misunderstanding of the doctrine as it is applied. Indeed, if some cryptic works of art are protected by the First Amendment, it is because they resemble the social conventions of a medium recognized by the Court as furthering First Amendment values:[228] a relationship between speaker and audience that is autonomous and dialogic. A medium that

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[227] See Bracha, *supra* note 73, at 1652 (for a discussion of the "underlying layer of meaning").

[228] Post (1994), *supra* note 16, at 1253 (holding that in the Hurley case, the Court highlighted parades were themselves mediums of expression and concluded that *for this reason* parades need not to communicate specific messages in order to qualify for First Amendment protection; concluding that the ideas prized by First Amendment jurisprudence are often as much a product of First Amendment media as they are independent entities transparently conveyed by such medias).

always presents cryptic or even subliminal messages[229] is very unlikely to be considered to further First Amendment values.

IV.   What do platforms do if they are not speakers?

Part III has shown that social media platforms cannot be seen as speaking for the purpose of the First Amendment, because the relationship between them and their users through algorithms is neither autonomous nor dialogic. Social media platforms are yet undoubtedly integral and necessary to other forms of interactions protected by the First Amendment – the interactions between users.[230] The fact that social media platforms do not have First Amendment rights when they recommend and moderate content does not mean they have no other type of rights that the legislator should identify.

A.   Social media platforms' algorithms are integral to the interactions between users that are protected by the First Amendment

The interaction between individual users is the core of what the First Amendment intends to protect, whatever theory of the First Amendment we choose to retain. The purpose of social media platforms is to allow a dialogic relationship between autonomous individuals on matters of their choosing. This dialogic relationship furthers the competition of ideas[231] and the autonomy of the users. But it also allows each individual to participate in the formation of public opinion, or in other words, to

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[229] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) ("It cannot be said that a social media platform, to whom most content is invisible to a substantial extent, is indistinguishable for First Amendment purposes from a newspaper or other traditional medium.").

[230] Rozenshtein, *supra* note 25, at 340 (highlighting that companies should use First Amendment claims only to defend First Amendment rights of their users against government infringement).

[231] Eugene Volokh, *Cheap Speech and What it Will Do Symposium: Emerging Media Technology and the First Amendment*, 104 YALE L.J. 1805, 1807 (1994) (highlighting that cheap speech created by new technologies would help implement a better competition of ideas in the marketplace because more speakers, rich and poor, would be able to make their work available or speak their mind to all).

take part in public discourse. Public discourse is, according to Post, those spaces of communication that help support and maintain the democratic legitimacy of the State.[232] For a political regime to be democratically legitimate, it is not enough to elect public officials every 4 years. Citizens need to know that while they govern, public officials are responsive to their wishes; those subject to the law must believe that they have an influence on the law adopted by the government, or believe that they are also potential authors of the law.[233] Of course, as one vote does not determine by itself the color of the government, one wish expressed by one citizen is not enough to influence public officials – this would be unmanageable.

Just as the addition of a vote makes up a whole that constitutes the result of the elections, the addition or interaction of the expression of the citizens on matters of policy and politics constitutes a whole that Post calls "public opinion."[234] Public opinion describes the whole that – in a democracy – is supposed to have an effect on government and push them to act in a certain way. Public discourse, in Post's sociological account of the First Amendment,[235] constitutes those circulating ideas and opinions in the public sphere that contribute to the formation of public opinion.[236] As an obstruction to the vote of one person constitutes a threat to democracy, the obstruction of the expression of one person on matters of public discourse constitutes a threat to democracy as well.

It is essential that citizens have unrestricted access to certain means of communication and certain forms of communicative action if they want

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[232] Robert C. Post, *Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L. REV. 601, 639 (1989); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse,* 64 UNIV. COLO. L. REV. 1109, 1115 (1993).

[233] Robert Post, *Participatory Democracy and Free Speech,* 97 VA. L. REV. 477, 482 (2011).

[234] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 2015 ed.).

[235] Balkin, *supra* note 27, at 1053 (highlighting that much of Post's work 'tries to map legal concept and doctrines onto a sociological account of how people speak, use information and produce knowledge in a democracy).

[236] *Id.*

to believe that public officials are at least likely to be responsive to these wishes.[237] It is not difficult to understand why social media platforms, as a vehicle for the interaction between users from everywhere in the country or even in the world, deepen the democratic formation of public opinion.[238] It allows everyone – not only those who have been chosen by broadcasters or by the New York Times – to speak and potentially be heard by an unlimited number of people.[239] Thus, it should also help deepen the democratic legitimation of the government, since everyone may express themselves on social media.[240]

One must note the clear distinction between Post's democratic theory of the First Amendment and Meiklejohn's. In Post's view, what is essential is not that everything worth saying shall be said --[241] but that everyone has the opportunity to speak on matters of public discourse,[242] to take part in the formation of public opinion and subsequently feel the authorship of the law that has been adopted with others.[243] In a digital world that allows mass participation, Meiklejohn's view seems rather outdated: while everyone has the possibility to express themselves on social media platforms,[244] his theory does not explain who should be able to express themselves, who should not, and on which topic. His theory is also problematic because it lacks an explanation of what is

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[237] Post *supra* note , at 663, 683; Robert Post, *The Constitutional Status of Commercial Speech Melville B. Nimmer Memorial Lecture*, 48 UCLA L. REV. 1, 7 (2000); *see also* Balkin, *supra* note 27, at 1058.

[238] Balkin, *supra* note 27, at 1058; Balkin, *supra* note 1, at 953.

[239] Volokh, *supra* note 232, at 1807.

[240] *Id.* (highlighting that the distinction between rich and poor in their relation to public speech will be reduced by new technologies); *see* Jen Schradie, *The Great Equalizer Reproduces Inequality: How the Digital Divide Is a Class Power Divide*, 37 RETHINKING CLASS AND SOCIAL DIFFERENCE 81 (2020) (this vision has to be tempered -- sociological studies show that the active participation of some users and not others in social media platforms can be explained by their social class).

[241] Post, *supra* note 238, at 7 (quoting Alexander Meiklejohn).

[242] Balkin, *supra* note 27, at 1053 (this turnaround between Post and Meiklejohn's theory is used by Balkin).

[243] *See* Post, *supra* note 238, at 12 (Post uses other words. He says that 'the possibility of participating in the formation of public opinion authorizes citizens to imagine themselves as included within the process of self-determination.').

[244] Balkin, *supra* note 27, at 1053.

happening between the vote. Indeed, if people get to vote every four years for their president, and if the conditions for a rational debate (presenting all the arguments) were met before these elections – Meiklejohn's theory suggests that the democratic process is respected and that citizens do not have a democratic interest to intervene in between. Meiklejohn's view of democracy is therefore much narrower (and *surranée*) than Post's: it is limited to elections or 'direct democracy processes.'[245] Finally, the last problem in Meiklejohn's theory is his disregard for speech that is not related to the political process. In Balkin's words, Meiklejohn's theory is politico-centric.[246] In this view, cultural products are valuable as far as they are useful to the education of the public in matters of politics, and promote the discussion of serious public concerns.[247] As a result, the culture that helps to educate the public about public concerns is valuable, while the culture that does not or is not serious enough (especially popular culture) should not be protected by the First Amendment. This opposition is problematic: everything is political; even the most crass TV show can teach something to its viewers.[248]

Furthermore, a woman's freedom is not limited to her ability to understand serious issues of public concern. As Habermas has shown,[249] and as Balkin recalls,[250] the formation of the public sphere in eighteenth century Europe was characterized by discussions, in salons and cafes on matters of mutual interest – featuring art and gossip. The institutions and places initially made to discuss matters of mutual interest (in particular, novels and gossip) became the places where citizens could criticize the direction of political happenings while governments

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[245] *Id.* at 1068.
[246] J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1985–86 (1995).
[247] Balkin, *supra* note 1, at 946.

[248] *See* IEN ANG, WATCHING DALLAS: SOAP OPERA AND THE MELODRAMATIC IMAGINATION (Della Couling trans., 1st ed. 1985); *see also* MARY ELLEN BROWN, SOAP OPERA AND WOMEN'S TALK: THE PLEASURE OF RESISTANCE (1st ed. 1994).
[249] *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (10th print ed. 1999).

[250] *See generally* Balkin, *supra* note 1; Balkin, *supra* note 27, at 1074.

became, gradually or suddenly, accountable. In that sense, as recalled by Balkin, cultural democracy has preceded political democracy chronologically and ontologically, and cultural discussion has set the stage for political discussions to happen. However, it does not follow to say that cultural discussions have no a value in themselves. Art and culture, including popular culture, have an intrinsic value because they constitute the human personality and a human's *raison d'être*.[251] As explained by Balkin, social media platforms operate a shift in cultural democracy because they create the material possibility for everyone, not just cultural or economical elites, to participate in the process of meaning-making -- that is, the human's *raison d'être* --[252] through cultural participation, artistic expression and comment.[253] Social media platforms therefore help deepen cultural democracy, and cultural expression must be considered part of public discourse as much as political expression even when it is not directly linked to that expression.

The interactions between users on social media platforms are part of public discourse and therefore covered by the First Amendment. So, if platforms are not speaking for the purpose of the First Amendment, what do they do when they rank and moderate the speech of others?

Social media platforms constitute a medium for the communication of ideas, but the 'speech' interactions that further First Amendment values in this medium are not the interactions between the platforms and the users but between users themselves. However, as explained by Post, the medium as a genre encompasses far more than acts of speech. It includes those materials and organizations that are integral or necessary to the

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[251] Balkin, *supra* note 1, at 33-34 (noting that culture designates, in philosophy, everything that is acquired by human throughout their life, opposed to what is innate to their birth and is said to distinguish humans from animals).

[252] Balkin, *supra* note 1, at 8.

[253] *Id.* at 946-47 (describing, in particular, the phenomenon of "routing around" – i.e., reaching audiences directly without going through a gatekeeper – and "glomming on" – the nonexclusive appropriation of media content for the purpose of commentary, annotation, and innovation); *see also* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW AND CONTEMPORARY PROBLEMS 173, 181 (2003).

forms of interaction that comprise the medium. The licensing of projectors, explains Post, would have important effects on First Amendment values that lead us to protect motion pictures in the first place.[254] This article argues here that platforms, as conduits in the dissemination of information, are not speakers and that their regulation might contradict the First Amendment should this regulation target the forms of interaction that the First Amendment seeks to protect; that is, the interactions between users that are constitutive of public discourse.

The government cannot adopt a law that forces platforms to suppress all speech related to cats, because it would represent a content-based restriction to speech prohibited by the First Amendment, nor can it force platforms to suppress all speech that finds hats outdated in preference of chapeau, because this would represent a viewpoint discrimination of speech related to public discourse prohibited by the First Amendment. However, the government can compel social media platforms to reveal their algorithms to an institution that would be charged to review them and this would not represent compelled speech.

However, just because platforms are not speakers, does not mean they have no rights, including maybe other types of First Amendment rights.

> B.   Governing social media platforms' spaces through
> contracts and consumer protection

Social media platforms are not speakers, but they are certainly proprietary of the space they put at the disposal of their users. Platforms do not need to be speakers to govern the platform they have created through contracts and Terms of Services. In regulating their spaces, they have multiple occasions to abuse their authority, and the government might choose to intervene to protect consumers against abuse and deception.[255]

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[254] Post, *supra* note 15, at 717.
[255] Jack M. Balkin, *Law and Liberty in Virtual Worlds*, *in* THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 86, 88 (Jack M. Balkin & Beth Noveck eds., 2006).

1) Governing the space through Terms of Services and Community Standards

Platforms do not need to be speakers to have proprietary rights on the space they put at the disposition of their users.

As proprietor, they could decide to include in their Community Standards that nobody should talk about cats on their platform, or that no speech should be offensive against aliens. When users behave in ways that contradict the Community Standards or even the Terms of Service, platforms acting as proprietors of the space can enforce their Community Standards through content moderation and even kick out users that would have acted in ways that are dangerous for others. In that process, platforms are not speaking, they are making use of their proprietary rights and their contractual rights.

However, users are extremely dependent of the platform's power. Neither the free flow of ideas nor the formation of community can occur within a virtual world unless the designer permits it. Users are therefore dependent on platforms to express themselves, and to receive the information communicated to them by others. The fact that they have voluntarily agreed to the Terms of Service and to respect Community Standards does not mean that the State cannot intervene to protect consumers against abuses of the enforcement. Indeed, as users spend time, use the space put at their disposal, and build a community on the platforms -- telling them to exit if they disagree with Terms of Services and the way Community Standards are enforced cannot be an option, because exit might be extremely costly for users.[256]

The ability of platforms to see everything that is going on, their capacity to collect datasets on people and their capacity to design the way the platform works[257] give them an enormous power over their users. This

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[256] *Id.*

[257] *Id.; see also* M. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1006 (2013) (holding that asymmetries of information coupled to the universal power to design the legal and visual terms of the transaction could alter the consumer landscape).

power stems not only from the *enforcement* of Terms of Services and Community Standards, but also from these documents themselves.

Indeed, platforms cannot have it both ways;[258] they cannot provide a service and harvest users' data[259] and then claim to not be responsible for anything that happens on their platforms. As a business that provides a service in exchange for a kind of payment, they submit to the laws that prohibit unfair, abusive or deceptive practices.[260]

As numerous authors have explained, algorithmically designed businesses and platforms inevitably lead to user deception.[261] They also threaten to immunize deception of consumers from legal prohibitions on business practices,[262] because it is difficult to prove the intent in an algorithm --[263] and because of the micro-targeted content offered to each of the users.[264] Even if intent as a condition has been omitted from most

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[258] Balkin, *supra* note 255, 95.

[259] *See e.g., Terms of Service,* FACEBOOK, https://www.facebook.com/terms.php [https://perma.cc/8DZ8-FRLD] ("We don't charge you to use Facebook or the other products and services covered by these Terms. Instead, businesses and organizations pay us to show you ads for their products and services. By using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you.").

[260] F.T.C. Act § 5(a), 15 U.S.C. § 45(a) (prohibiting '[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce'); *see also* Lanham Act § 43(a)(1), 15 U.S.C. § 1125(a)(1) (prohibiting, in commercial advertising, labeling, or promotion, false representations and misleading omissions about a firm's own products or services or a competitor's products or services).

[261] Lauren Willis, *Deception by Design*, 34 HARV. J. L. & TECH. 116, 127 (2020) (holding that machine learning is a perfect tool to exploit human vulnerabilities and create deception because it can identify relationships and dynamics that are too complicated for humans to assess); Calo, *supra* note 258, at 1043; Susser, *supra* note 195, at 1.

[262] Willis, *supra* note 195, at 117.

[263] *See id. infra* Part III.B.2 (recalling that an algorithm's classification decision is the result of the interaction between a human's agency and the machine's one. Proving that the human alone was responsible and that additionally they intended to program this deception is a difficult business).

[264] Willis, *supra* note 195, at 118.

statutes prohibiting deceptive business practices,[265] the use of AI in business practices has been a barrier to enforcement.[266]

Some deceptions will be easier to prove than others. For example, if Facebook claims in its Community Standards that speech about cats is forbidden, but nevertheless allows this speech on the platform so that speech about cats is omnipresent, this constitutes a deceptive practice for its consumers. Conversely, if nothing in Facebook's Community Standards provides that speech about dogs is prohibited, but Facebook systematically removes speech about dogs, this also constitutes a deceptive practice for its users.

Other forms of deception might be less straightforward to conceptualize. It might be difficult to distinguish nudging or persuasion from abusive manipulation.[267] However, if a platform states that its space is designed to be safe and to reduce harmful content for users,[268] only then to amplify such harmful content in an effort to draw the users' attention,[269] it would constitute a deception that is prohibited by statute. The source of the deception is not the question here. It is possible that the platform's algorithm led to unfair and deceptive outcomes without a human programming that outcome, because a machine can choose a deceptive path to reach a goal.[270] If a platform enterprise should design its algorithms solely toward the success of its business metrics, it would very likely lead to consumer deception. Because intent is not a condition for consumer deception, and because it is likely that an enterprise whose

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[265] CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016).

[266] Willis, *supra* note 195, at 119.

[267] *Id.*

[268] *See e.g., Terms of Service,* FACEBOOK, https://www.facebook.com/terms.php [https://perma.cc/8DZ8-FRLD] ("We don't charge you to use Facebook or the other products and services covered by these Terms. Instead, businesses and organizations pay us to show you ads for their products and services. By using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you.").

[269] Karen Hao, *How Facebook Got Addicted to Spreading Misinformation,* MIT TECH. REV., (2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/ [https://perma.cc/3XTT-AS2D].

[270] Willis, *supra* note 195, at 150.

platform deceives people has been negligent with the monitoring of algorithms, Lauren Willis offers a presumption that the business which financially benefits has caused the deception. She also offers to recognize that a transaction based on false consumer beliefs is unfair, regardless of the source of those beliefs.[271]

2) *In which cases do platforms have association rights?*

Not all social media platforms are alike, and if they are not alike, they should not be treated alike.[272] Some platforms aim to be a virtual Hyde Park where users can navigate, while others are aimed at a specific section of the public. If anti-discrimination laws usually protect the right of consumers to be treated equally and without discrimination,[273] some platforms, whose aim is political or religious, might raise their right of expressive association to protect the way they run their space.[274] Such discrimination would have to be related to the values of the social media platform's creation and purpose. For example, in *Rotary Club of Duarte*,[275] the Supreme Court rejected the freedom of association claim of the rotary club against a sex anti-discrimination legal requirement on the basis that sex discrimination was peripherical to the purpose of networking -- which was the official purpose of the rotary. By contrast, in *Boy Scouts of America v. Dale*, the Supreme Court held that the Boy Scouts were not bound by a New Jersey public accommodation statute that prohibited discrimination against homosexuals.[276] Indeed, the Boy

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[271] *Id.* at 119.

[272] Balkin, *supra* note 256, at 103 (talking about games but I believe it applies to platforms as well).

[273] This means that a platform otherwise open to any member cannot provide that 'only' people who own a cat are excluded from the platforms.

[274] Balkin, *supra* note 256, at 105-06.

[275] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984) (holding that Jaycees cannot claim its expressive association right against a sex-antidiscrimination clause, because it is peripherical to the purpose of the association).

[276] 530 U.S. 640, 656 (2000).

Scouts argued that their religion, which entailed a moral objection to homosexuality, was the center of their association.

As a result, it is very likely that some platforms created with a political or a religious purpose will have more rights to exclude users than those platforms dedicated to the general public. This is not the case of the platforms we have described in Part I, but it might be the case of other platforms such as Parler.

V.   Conclusion

Based on a descriptive and sociological account of First Amendment coverage, this article has attempted to show that social media platforms such as Facebook, Twitter, Instagram and TikTok cannot in most cases be seen as speaking for the purpose of the First Amendment. They cannot be considered as editors of content for the purpose of the First Amendment, such as newspapers and magazines. They are also distinct from bookstores. Furthermore, they cannot be considered as speaking through their algorithms because the algorithms' opacity does not allow to transmit a message that is understandable by users. Platforms, however, play an integral role in the interactions between users that happen on the space they make available. As such, a regulation that would target platforms but have an effect on users' speech would target the First Amendment. And because platforms are proprietary of the space they make available, contract law and consumer law are essential to the regulation of the platforms.