

## Reconciling Section 230 and the First Amendment: Should Social Media Companies be Held Liable for the Consequences of Their Recommendation Algorithms?

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# RECONCILING SECTION 230 AND THE FIRST AMENDMENT: SHOULD SOCIAL MEDIA COMPANIES BE HELD LIABLE FOR THE CONSEQUENCES OF THEIR RECOMMENDATION ALGORITHMS?

HALEY BERNSTEIN\*

## INTRODUCTION

On New Year's Eve in 2017, an ISIS member attacked the Reina Nightclub in Istanbul, Turkey, a well-known spot for celebrities and Western tourists, murdering thirty-nine individuals and wounding approximately seventy.<sup>1</sup> Nawras Alassaf was among the thirty-nine killed during the terrorist attack, and his family brought suit against global social media platform Twitter,<sup>2</sup> now known as X.<sup>3</sup> Alassaf's family filed suit under 18 U.S.C. §2333, an antiterrorism act which allows U.S. nationals who have been injured by international terrorism acts to file civil suits for damages.<sup>4</sup> The lawsuit alleged that Twitter knowingly allowed ISIS to use its recommendation algorithms to recruit members and spread terrorist propaganda, ultimately leading to the death of Alassaf.<sup>5</sup>

It is undisputed that Twitter, as well as multiple other social media companies, use algorithms that match users with other user accounts,

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1. Ahmet S. Yayla, *The Reina Nightclub Attack and the Islamic State Threat to Turkey*, 10 CTC SENTENTIAL 1, 9 (2017).

2. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 478–79 (2023).

3. Elon Musk rebranded Twitter in July, 2023, and the platform is now referred to as “X.” Jordan Valinsky, *Elon Musk Rebrands Twitter as X*, CNN BUSINESS (July 24, 2023, 5:44 AM), <https://www.cnn.com/2023/07/24/tech/twitter-rebrands-x-elon-musk-hnk-intl/index.html>.

4. *Taamneh*, 598 U.S. at 477–78.

5. *Id.* at 481–82.

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videos, and online posts based on the content users tend to view.<sup>6</sup> Social media companies also profit from such content being uploaded to their platforms through advertisements.<sup>7</sup> However, despite the fact that Twitter knowingly allowed, as well as profited from, ISIS members and their supporters using the platform's algorithm to recruit, fundraise, and spread propaganda, the Supreme Court of the United States ruled in *Twitter Inc. v. Taamnah*, that Alassaf's family failed to demonstrate that Twitter actively and substantially aided and abetted ISIS's terrorist acts.<sup>8</sup>

In writing the *Taamnah* opinion, Justice Thomas recognized that "bad actors," such as ISIS may be able to use social media platforms for illegal ends.<sup>9</sup> Justice Thomas found social media companies comparable to cell phone providers, arguing that both merely offer passive services to the public at large, and thus, cannot be held liable for affirmative actions taken by their users.<sup>10</sup> Section 230 of the Communications Decency Act ("CDA"), enacted in 1996, similarly shares the concept that social media platforms should be seen as passive services and specifically shields companies from liability with respect to content uploaded by third parties.<sup>11</sup> However, as social media has evolved in recent decades and algorithms have played a more active role in the distribution of content across platforms, this view should be reevaluated.

Although in *Taamnah*, the Court found the role of the social media platform in this specific terrorist attack to be too attenuated to constitute aiding and abetting,<sup>12</sup> this case does not preclude future claims from arising in which social media companies can and should be held liable for the consequences of their recommendation algorithms.<sup>13</sup> Due to evolving

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6. *Id.* at 480–81.

7. *Id.* at 480.

8. *Id.* at 502–03.

9. *Id.* at 499.

10. *Id.* ("[W]e generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large. Nor do we think that such providers would normally be described as aiding and abetting, for example, illegal drug deals brokered over cell phones—even if the provider's conference-call or video-call features made the sale easier.")

11. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 1-3 (2021).

12. *See Taamneh*, 598 U.S. at 506 (finding that the "nexus" between Twitter's algorithm services and the ISIS terrorist attack is too far removed to constitute aiding and abetting).

13. *See id.* at 502 ("[W]e cannot rule out the possibility that some set of allegations involving aid to a known terrorist group would justify holding a secondary defendant liable for all [or some] of the group's actions . . . . [I]f a platform consciously and selectively chose to promote content provided by a particular terrorist group, perhaps it could be said to have culpably assisted the

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social media algorithms and emerging artificial intelligence (“AI”) technology, platforms have taken a significantly more active role in how content is shared and to whom it is distributed.<sup>14</sup> Thus, internet service providers may be held liable for their advanced algorithms designed to curate recommendations that match users with other user accounts and content based on similar demographic data and interests, specifically when those connections lead to illegal activity.<sup>15</sup>

This article first discusses the history of Section 230 of the CDA and explains why social media algorithms should not receive full statutory immunity under this law.<sup>16</sup> It then evaluates whether the government may regulate social media algorithms under the First Amendment.<sup>17</sup> Finally, this article concludes that algorithms may be regulated as commercial speech.<sup>18</sup>

## I. SOCIAL MEDIA ALGORITHMS SHOULD NOT RECEIVE FULL SECTION 230 PROTECTION

### A. Creation and History of Section 230

According to Section 230(c)(1) of the CDA, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>19</sup> This provision effectively distinguishes social media companies from content creators and shields them from liability for third-party posts.<sup>20</sup>

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terrorist group); *id.* at 507 (Jackson, J., concurring) (“[T]oday’s decisions are narrow in important respects . . . . Other cases presenting different allegations and different records may lead to different conclusions.”).

14. *The Impact of Social Media Algorithm Changes on Content Distribution*, AICONTENTFY (Nov. 6, 2023), <https://aicontentfy.com/en/blog/impact-of-social-media-algorithm-changes-on-content-distribution> (“[T]he landscape of social media is constantly evolving, and one of the most significant changes that have taken place over the years is the algorithms that govern how content is distributed.”).

15. *Force v. Facebook*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzman, J., concurring in part and dissenting in part) (“When a plaintiff brings a claim that is based not on the content of the information shown but rather on the connections Facebook’s algorithms make between individuals, the CDA does not and should not bar relief.”).

16. *See infra* Section II.

17. *See infra* Section III(A).

18. *See infra* Section III(B).

19. 47 U.S.C. § 230(c)(1).

20. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 627 (2020).

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Historically, laws have treated content publishers differently from content distributors.<sup>21</sup> For example, newsstands could not be held legally responsible for illegal content contained in the newspapers they sold, but the publisher of the newspaper could be held liable for the content published.<sup>22</sup> While at one point the difference between a publisher and a distributor appeared to be black and white, the rise of online services, including blogs, search engines, and social media, has blurred the lines between publishers and distributors.<sup>23</sup>

Section 230 was initially enacted after cases in the 1990s demonstrated how “existing U.S. law was ill-equipped to handle intermediary liability issues that arose with the rise of the Internet.”<sup>24</sup> In *Cubby, Inc. v. CompuServe, Inc.*, the court found that an online service acted as a distributor when it had no control over the content published in its newsletters nor the opportunity to review that content prior to its publication.<sup>25</sup> Thus, the court found CompuServe could not be held legally responsible for defamatory statements published on its site.<sup>26</sup> Comparatively, in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, the court found that an online site was considered a publisher because it had a software program that filtered offensive language and enforced content guidelines, and therefore it could be held liable for defamatory statements posted on its bulletin board.<sup>27</sup>

Then-representatives, Chris Cox (R-CA) and Ron Wyden (D-OR), found these decisions counter-intuitive and wanted to encourage online services to filter harmful content, as opposed to taking a hands-off approach for the purpose of evading liability.<sup>28</sup> Additionally, Cox and Wyden wanted to protect budding internet services and allow them to engage in content moderation without the fear of constant lawsuits.<sup>29</sup> They were concerned

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21. Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 143 (S.D.N.Y. 1991).

26. *Id.*

27. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*2, \*5–7 (N.Y. Sup. Ct. May 24, 1995).

28. Johnson & Castro, *supra* note 21.

29. *Id.* (“Cox and Wyden wanted to address this discrepancy and create legislation that would encourage free speech online and allow online services to engage in content moderation without fear of liability.”).

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that without such liability it would kill “the little guy, the startup.”<sup>30</sup> Thus, Section 230 was introduced as an amendment to the Communications Decency Act.<sup>31</sup>

*B. The Evolving Nature of Social Media Algorithms*

When Section 230 was enacted in 1996, social media companies generally were “passive conduits” for users’ communications, similar to telephone companies.<sup>32</sup> Prior to sophisticated algorithms tailored to each individual user, social media feeds displayed posts from their followers in reverse chronological order.<sup>33</sup> Essentially, social media consumers would only view posts from accounts that they actively followed and the newest content posted from those accounts would show up on their news feeds ahead of earlier posts.<sup>34</sup> Overall, social media companies had less control over what individuals viewed because consumers themselves chose who they followed and when they posted content.

This system mirrors how telephone companies provide passive communication services to their users. Specifically, telephone companies have no power over who users may communicate with, when they choose to communicate, or what users may communicate about. However, what if telephone company providers began listening to the content of all of its calls for the purpose of collecting data on each of its individual callers?<sup>35</sup>

*What if instead of ringing its customers as soon as someone called, the phone company decided to deliver calls in an order that it determined? What if the phone rang all the time, not with calls from people known to those who answered, but from people the phone company predicted those customers might like to hear from? And that the topics those people talked about were carefully chosen by the phone company as ones that would cause emotional reactions, to drive up telephone use?<sup>36</sup>*

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30. Weintraub & Moore, *supra* note 20, at 626.

31. Johnson & Castro, *supra* note 21.

32. Weintraub & Moore, *supra* note 20, at 629.

33. Marcia Sekhose, *How to Get Instagram’s Chronological Order Feed*, BUS. INSIDER INDIA (Feb. 6, 2023), <https://www.businessinsider.in/tech/apps/news/how-to-get-instagrams-chronological-feed/articleshow/88727383.cms>.

34. *Id.*

35. Weintraub & Moore, *supra* note 20, at 629.

36. *Id.*

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Ultimately, social media companies no longer play a passive role in presenting content to their users.<sup>37</sup> In 2009, Facebook abandoned its chronological news feed model and began using algorithmic technology to deliver content to its users.<sup>38</sup> Since then, platforms such as Twitter, YouTube and Instagram have also followed suit.<sup>39</sup> So what really is a social media algorithm and how has it shaped the way users consume their content over time?

An algorithm at its core is a “mathematical or logical process consisting of a series of steps, designed to solve a specific type of problem.”<sup>40</sup> Social media algorithms use these mathematical and logical processes to curate personalized news feeds and account recommendations<sup>41</sup> for every individual user based on predictions about each of the user’s “preferences and tendencies.”<sup>42</sup> Algorithms work with the personal data of the user “in order to ‘know’ how to display the content on the social media platform.”<sup>43</sup> For instance, algorithms will use sensitive data gathered from the social media user, such as their geographical location, their friends, certain users they interact with most on the platform, and pages they often search to direct users to content and other accounts that are most likely to resonate with the user.<sup>44</sup> Social media algorithms also often collect data on users through recommendation systems, which in turn suggest “friends” and other accounts that users should follow, through collecting data on users, extracting features, and using models to predict missing links between users.<sup>45</sup> Essentially, when a user shows interest in a specific topic

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37. *Id.* (“Intermediaries today do much more than passively distribute user content or facilitate user interactions. Many of them elicit and then algorithmically sort and repurpose the user content and data they collect.”).

38. Will Oremus et al., *How Facebook Shapes Your Feed*, THE WASH. POST (Oct. 26, 2021, 7:00 AM), <https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/>.

39. Dorcas Adisa, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOCIAL (Oct. 30, 2023), <https://sproutsocial.com/insights/social-media-algorithms/>.

40. *Algorithm*, BLACK’S LAW DICTIONARY (11th ed. 2019).

41. Ruksar Parveen & N. Sandeep Varma, *Friend’s recommendation on social media using different algorithms of mach. learning*, GLOB. TRANSITIONS PROC. 273, 273 (2021).

42. Oremus et al., *supra* note 38.

43. Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & THE JUST SOC’Y (Apr. 24, 2021), <https://www.internetjustsociety.org/algorithms-in-social-media-platforms>.

44. *Id.*

45. Parveen & Varma, *supra* note 41 (“Machine learning is used to find the links between the users and helps in recommending friends by the methods of link prediction”).

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or category online, the algorithm will consistently show the user other items within that same category.<sup>46</sup>

Initially, Facebook used a relatively simple ranking algorithm that organized posts for each user, prioritizing information most likely to interest them to appear at the top of their feeds.<sup>47</sup> While this concept has remained, the news feed algorithm has otherwise dramatically evolved over the past decade.<sup>48</sup> Social media algorithms have now grown far more sophisticated, capable of using thousands of different signals to predict user's likelihood of engagement with content and other users.<sup>49</sup> AI has also played a significant role in advancing social media algorithms and reshaping how users interact with content online. Innovative AI tools affect social media activities in various ways including "text and visual content creation, social media monitoring, ad management, influencer research, [and] brand awareness campaigns."<sup>50</sup> Social media algorithms no longer merely default to a chronological timeline of users' posts, but actively "select and shuffle" content to facilitate user engagement and interaction.<sup>51</sup> In fact, in early 2021, Facebook trained its algorithms to classify posts as "good for the world" and "bad for the world."<sup>52</sup> After finding that posts with higher engagement were more likely to be "bad for the world," Facebook aimed to algorithmically demote those posts, demonstrating how Facebook and other social media platforms have immense power over what users view and who they interact with on their platforms.<sup>53</sup>

### C. Legal History of Section 230 and Social Media Algorithms

#### 1. Material Contribution Standard

In *Zeran v. America Online, Inc.*, the U.S. Court of Appeals for the Fourth Circuit interpreted the CDA broadly, establishing that Section 230

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46. Golino, *supra* note 43.

47. Oremus et al., *supra* note 38.

48. *Id.*

49. *Id.* ("[T]oday it can take in more than 10,000 different signals to make its predictions about a user's likelihood of engaging with a single post").

50. Reb Darbinyan, *How AI Transforms Social Media*, FORBES (Mar. 16, 2023, 8:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/03/16/how-ai-transforms-social-media/?sh=4052ac611f30>.

51. Weintraub & Moore, *supra* note 20, at 630.

52. ARVIND NARAYAN, UNDERSTANDING SOCIAL MEDIA RECOMMENDATION ALGORITHMS, KNIGHT FIRST AMENDMENT INSTITUTE 34–35 (2023).

53. *Id.*



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provides immunity to internet service providers against actions arising out of third party content.<sup>54</sup> However, Section 230 was not intended to create “a lawless no-man’s land on the internet.”<sup>55</sup> Accordingly, internet service providers seeking immunity under Section 230 must demonstrate that: (1) they “provide an interactive computer service;” (2) the asserted claims treat the provider as a “‘publisher’ or ‘speaker’ of the information at issue;” and (3) the “challenged communication is information provided by another ‘information content provider.’”<sup>56</sup>

To determine whether a provider qualifies as a “publisher” or “speaker,” and thus may receive immunity under Section 230, courts have generally adopted the material contribution standard articulated in *Fair Housing Council v. Roommates.com*, which bars immunity under Section 230 if the provider contributes materially to the creation or development of the challenged content.<sup>57</sup> Essentially, an internet service provider will be considered a “developer” as opposed to merely a “publisher” of the challenged content if the provider “contributes materially to the alleged illegality of the conduct.”<sup>58</sup> The material contribution test ultimately makes a distinction between internet service providers taking steps to display actionable content and providers actually maintaining “responsibility for what makes the displayed content [itself] illegal or actionable.”<sup>59</sup>

#### *2. Force v. Facebook: Flawed Majority Reasoning*

In *Force v. Facebook*, victims of terrorist attacks in Israel filed suit against Facebook, alleging that terrorist organization, Hamas, used Facebook to post content that encouraged members of Hamas to engage in

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54. Nathalie Dalzell, *Telecommunications Law - Facebook Immunized from Civil Liability under Communications Decency Act Despite Using Algorithms to Recommend Content—Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020) (mem.), 54 SUFFOLK U. L. REV. 599, 603 (2021) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997)).

55. *Id.* at 604.

56. *Id.*

57. *Id.* at 605 (citing *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008)).

58. See *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008); *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (“[C]onsistent with broadly construing ‘publisher’ under Section 230(c)(1), we have recognized that a defendant will not be considered to have developed third-party content unless the defendant directly and ‘materially’ contributed to what made the content itself ‘unlawful.’”).

59. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (quoting *Jones v. Dirty World Entertainment Recordings*, 755 F.3d 398, 414 (6th Cir. 2014)).

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attacks against them.<sup>60</sup> Specifically, the plaintiffs argued that Facebook’s policies and algorithms affirmatively directed harmful content to the personalized newsfeeds of those who carried out the victims’ attacks, and thus Facebook may be held liable for materially contributing to the unlawful activity.<sup>61</sup> The court ultimately concluded that arranging and displaying third party content to users of Facebook through recommendation algorithms was not sufficient to hold Facebook liable as a “developer” of that content.<sup>62</sup>

However, the court in *Force* overlooks the sophistication of algorithm technology and disregards the distinction between users seeking out information themselves and users being presented with information they did not express affirmative interest in seeking.<sup>63</sup> While the court effectively detailed the material contribution test, it relied too heavily on D.C. Circuit case, *Marshall’s Locksmith Service v. Google*.<sup>64</sup> The court’s reliance on *Marshall’s Locksmith Service* “led it to incorrectly analogize” Facebook’s newsfeed and friend suggestion recommendation algorithms to Google’s mapping services.<sup>65</sup> In *Marshall’s Locksmith*, Google was translating false third party information into pinpoints on maps displayed to the website’s users that were already seeking out information regarding locating locksmith services.<sup>66</sup> Whereas in *Force*, Facebook algorithms engage in advanced practices to display targeted, personalized content on users’ newsfeeds, as well as provide users with recommended “friends” to

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60. *Force v. Facebook*, 934 F.3d 53, 59 (2d Cir. 2019) (“The encouraging content ranged in specificity; for example, Fraenkel, although not a soldier, was kidnapped and murdered after Hamas members posted messages on Facebook that advocated the kidnapping of Israeli soldiers. The attack that killed the Braun baby at the light rail station in Jerusalem came after Hamas posts encouraged car-ramming attacks at light rail stations.”).

61. *Id.* (“[P]laintiffs claim[] Facebook enables Hamas ‘to disseminate its messages directly to its intended audiences,’ . . . and to ‘carry out the essential communication components of [its] terror attacks’”).

62. *Id.* at 71.

63. Dalzell, *supra* note 54, at 609–10.

64. *Id.* at 609; *see also* *Marshall’s Locksmith Serv. v. Google*, 925 F.3d 1263, 1270–71 (holding that website’s translation of third-party mapping services with false locations into textual and pictorial pinpoints on maps did not constitute developing or creating that information).

65. Dalzell, *supra* note 54, at 609; *see also Force*, 934 F.3d at 58 (“The newsfeed algorithms . . . analyze Facebook users’ prior behavior on the Facebook website to predict and display the content that is most likely to interest and engage those particular users. Facebook’s algorithms also provide ‘friend suggestions,’ which, if accepted by the user, result in those users seeing each other’s shared content.”); *id.* at 69 (citing *Marshall’s Locksmith Serv.*, 925 F.3d at 1269) (“The internet mapping services of Google, Microsoft, and Yahoo! translated this information into textual and pictorial ‘pinpoints’ on maps that were displayed to the services’ users.”).

66. *Marshall’s Locksmith Serv.*, 925 F.3d at 1265.

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follow, displaying information that users are *not* actively seeking out.<sup>67</sup> This distinction demonstrates how Facebook algorithms are engaging in affirmative actions to influence Facebook's users to follow certain accounts and view specific content that they would not have otherwise necessarily sought out, which is ultimately leading to engagement in illegal conduct.<sup>68</sup>

Judge Katzmann's dissenting opinion in *Force* highlights that while social media platforms are not quite content originators, they are no longer passive conduits of information and thus have occupied an "ill-defined middle ground" within the law.<sup>69</sup> The judge specifically discusses how Facebook's recommendation algorithms go beyond merely presenting users with information, but actively create content (i.e. "friend suggestions") for users that cannot be considered within the scope of Section 230.<sup>70</sup>

#### *D. Recommendation Algorithms Fall Outside the Scope of Section 230 Protection*

According to the material contribution standard, an internet service provider receives no protection under the CDA when its activity "materially contributes" to illegal activity, or the provider plays a large role in developing, as opposed to merely publishing, content that leads to illegal activity.<sup>71</sup> Thus, the application of this standard to recommendation algorithms suggests that platforms should not receive protection under the CDA because social media newsfeed and friend suggestion

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67. Dalzell, *supra* note 54, at 609–10; *see also Force*, 934 F.3d at 65 ("Facebook's 'newsfeed' uses algorithms that predict and show the third-party content that is most likely to interest and engage users. Facebook's algorithms also provide 'friend suggestions,' based on analysis of users' existing social connections on Facebook and other behavioral and demographic data. And, Facebook's advertising algorithms and 'remarketing' technology allow advertisers to target ads to its users who are likely most interested in those ads.").

68. Dalzell, *supra* note 54, at 609–10 ("The court overlooked how Facebook may have affirmatively used its algorithms to influence its users to engage in illegal activity, which does not render it a 'publisher.'").

69. Weintraub & Moore, *supra* note 20, at 632 ("Judge Katzmann's opinion recognizes that the platforms have come to occupy an ill-defined middle ground in terms of their responsibility for the parameters of online debate—more than passive conduits but less than content originators.").

70. *Force*, 934 F.3d at 76–77 (Katzman, J., concurring in part and dissenting in part) (explaining that in targeting and recommending information to users, Facebook is forging connections and social networks among people, deeming it more than a mere publisher of information).

71. *See supra* notes 57–58 and accompanying text.

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recommendation algorithms make platforms' activity more comparable to creation and development, rather than passive publication.<sup>72</sup>

As Judge Katzmann asserts in his dissent in *Force*, Section 230 does not grant publishers immunity “for the full range of activities in which they might engage.”<sup>73</sup> Rather, the CDA only bars lawsuits seeking to hold internet service providers accountable for exercising their “traditional editorial functions,” such as publishing, withdrawing, postponing, or altering content.<sup>74</sup> Thus, while internet service providers may be considered publishers in general, and inarguably engage in publisher-like activities such as posting and censoring third-party content, the CDA may not apply to the activities that social media algorithms engage in, such as crafting newsfeeds and creating friend recommendations.<sup>75</sup> These activities are more reminiscent of developing content, as opposed to publishing content.

Algorithms that create individualized newsfeeds and friend suggestions engage in activity that goes beyond passively presenting information to users.<sup>76</sup> Social media companies are actively controlling what individuals view, when they view it, and who they connect with on the platform.<sup>77</sup> In the cases of both newsfeed and friend suggestion algorithms, social media platforms are contributing to the creation of content. Social media newsfeeds use algorithms to determine what content users view based on their social connections and engagement on the site.<sup>78</sup> While newsfeed recommendation algorithms might seem more akin to the analogy of a newsstand neutrally distributing newspapers,<sup>79</sup> as opposed to creating actual content, it may be argued that these advanced AI algorithms do more than just arrange completed content posted by third

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72. *Force*, 934 F.3d at 76–77 (Katzman, J., concurring in part and dissenting in part).

73. *Id.* at 81.

74. *Id.*

75. *Id.* at 82 (“[T]he CDA does not protect Facebook’s friend- and content- suggestion algorithms . . . First, Facebook uses the algorithms to create and communicate its own message: that it thinks you, the reader—you, specifically—will like this content. And second, Facebook’s suggestions contribute to the creation of real-world social networks.”).

76. Weintraub & Moore, *supra* note 20, at 629 (“Every ‘like,’ every share, every click of every user is tracked and analyzed by online companies. Armed with this data, online companies deliver and present their information in an entirely different way.”).

77. *Id.*

78. Akos Lada & Tak Yan, *How Does News Feed Predict What You Want to See?*, META (Jan. 26, 2021), <https://about.fb.com/news/2021/01/how-does-news-feed-predict-what-you-want-to-see/>.

79. Johnson & Castro, *supra* note 21.

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parties.<sup>80</sup> Sophisticated social media algorithms are more analogous to “researcher[s] who poke[] through your trashcan to uncover secret habits and patterns about your life—patterns you have not knowingly revealed and may not have yourself recognized.”<sup>81</sup> These researchers then analyzed the data they found to curate an entirely individualized newsfeed, personally designed to keep the user consistently engaged. The ultimate outcome is not necessarily a newsfeed that is merely an altered or edited version of one’s interests but it becomes a “synthesized product—new information which the researcher, not [the user], created.”<sup>82</sup> While platforms’ algorithms themselves may not be making the content that is being distributed, they are actively developing personalized newsfeeds that control the content users consume.

Moreover, platforms such as Facebook often utilize algorithms to generate friend suggestions for users to network and connect with other users who may share similar interests.<sup>83</sup> Social media algorithms use many factors to create these suggestions, including one’s social connections, browser history, activity on the site—such as joining groups and sharing content—current location, and profile information.<sup>84</sup> Thus, social media platforms act similarly to developers in utilizing collected data about users to actively produce new content: user friend suggestions.<sup>85</sup> Put simply, these friend suggestions are not only controlled by social media companies, but specifically *created* by the platforms’ own algorithms. Additionally, according to the material contribution standard, not only is the social media platform taking on more of a developer role, as opposed to a publisher role, in curating individualized friend recommendations for users, but the challenged communication is not provided by another

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80. Ellen Smith Yost, *Social Support for Terrorists: Facebook’s “Friend Suggestion” Algorithm, Section 230 Immunity, Material Support for Terrorists, and the First Amendment*, 37 SANTA CLARA HIGH TECH. L.J. 301, 323 (2020).

81. *Id.*

82. *Id.*

83. *How Does Facebook Use My Information to Show Suggestions in People You May Know?*, FACEBOOK, <https://www.facebook.com/help/1059270337766380> (last visited Feb. 18, 2023) (“People You May Know suggestions can be friends of friends, people in your network or people you may have something in common with.”).

84. *Id.*; see also Arkopravo Pradhan, *How Facebook Suggests a Friend?*, LINKEDIN: LINKEDIN PULSE (May 15, 2022), <https://www.linkedin.com/pulse/how-facebook-suggests-friend-arkopravo-pradhan/> (“The friendship suggestion is based on the Facebook algorithm, which considers a variety of issues, including previous connections, previous activities, and profile information. The basis of the Facebook algorithm is based on three key factors of interest, time, and connection . . .”).

85. Yost, *supra* note 82 (explaining that algorithms do not merely present friend requests, but they operate in a way that *creates* friend requests.”).

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“information content provider” because social media algorithms use extracted data and predicative links to actively create friend recommendations for users.<sup>86</sup> As a result, friend suggestion recommendation algorithms should not fall within the scope of Section 230 protection.<sup>87</sup>

Finally, there is also little evidence of congressional intent indicating that Section 230 was enacted for the purpose of protecting advanced social media algorithms.<sup>88</sup> As previously stated, Section 230 was passed primarily to encourage internet service providers to engage in content moderation of obscenity, as well as to protect small, start-up companies from excessive litigation threats.<sup>89</sup> When Section 230 was created in 1996, Google and Facebook had not even been founded, let alone grown into colossal internet service providers amassing billions of dollars in revenue.<sup>90</sup> In his dissent, Judge Katzmann stated:

*It would be one thing if congressional intent compelled us to adopt the majority’s reading. It does not. Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result.*<sup>91</sup>

Ultimately, in enacting Section 230, Congress could not have anticipated how algorithms would operate to curate content for social media

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86. *Id.* at 322

87. *Force*, 934 F.3d at 77 (Katzman, J., concurring in part and dissenting in part) (“When a plaintiff brings a claim that is based not on the content of the information shown but rather on the connections Facebook’s algorithms make between individuals, the CDA does not and should not bar relief.”).

88. *See* BRANNON & HOLMES, *supra* note 11, at 1–2 (“According to the conference report, the CDA as a whole was intended to ‘modernize the existing protections against obscene, lewd, indecent or harassing uses of a telephone.’”); *Force*, 934 F.3d at 77–78 (Katzman, J., concurring in part and dissenting in part) (“Congress devoted much committee attention to traditional telephone and broadcast media; by contrast, the Internet was an afterthought, addressed only through floor amendments or in conference.”).

89. *Yost*, *supra* note 82, at 313 (“Cox and Wyden’s amendment had two purposes. It aimed to ‘promote the continued development of the internet’ by safeguarding the industry from burdensome state and federal regulation. It also aimed to maximize users’ control over what information they—and their children—received via the internet.”).

90. *Weintraub & Moore*, *supra* note 20, at 626 (“Google, founded in 1998, two years after Section 230 became law, had third-quarter 2019 revenue of \$40.3 billion. Facebook, founded in 2004, had \$17.65 billion in third-quarter 2019 revenue.”).

91. *Force*, 934 F.3d at 77 (Katzman, J., concurring in part and dissenting in part).

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companies, nor could Congress have anticipated the success of companies like Facebook and Google that have generated billions of dollars and are no longer “the little guy, the startup,” in need of protection.<sup>92</sup>

According to the Department of Justice’s (“DOJ”) Review of Section 230, “[t]he internet has changed dramatically in the . . . years since Section 230’s enactment in ways that no one, including the drafters of Section 230, could have predicted.”<sup>93</sup> The Review emphasizes that online services today “bear little resemblance” to the online platforms that existed in 1996 as “[p]latforms no longer function as simple forums for posting third-party content, but instead use sophisticated algorithms to promote content and connect users.”<sup>94</sup> The DOJ found that in interpreting Section 230 so broadly, courts have ultimately diverged from the provision’s “original purpose.”<sup>95</sup> Overall, technology, as well as the internet service provider industry, have evolved significantly since the time Section 230 was enacted, and it is important to look not only at what was intended, but also at what type of liability for social media companies should exist now, given these advanced changes.

**III. SOCIAL MEDIA ALGORITHMS SHOULD BE  
CONSIDERED COMMERCIAL SPEECH, AND THUS,  
SHOULD RECEIVE LESS FIRST AMENDMENT  
PROTECTION UNDER THE FIRST AMENDMENT**

Even if courts were to hold that social media platforms’ recommendation algorithms fall outside of the scope of Section 230, companies like Facebook would still argue that it evades any liability for third-party illegal activity because its algorithms are constitutionally protected speech under the First Amendment.<sup>96</sup> Accordingly, the question becomes whether these recommendation algorithms are considered speech, and whether they may receive significant First Amendment protection.

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92. Weintraub & Moore, *supra* note 20, at 626.

93. U.S. DEP’T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 2 (2020), <https://www.justice.gov/ag/file/1072971/dl?inline=>.

94. *Id.*

95. *Id.*

96. Yost, *supra* note 82, at 325 (“Facebook will argue that its algorithm is constitutionally protected speech that the government seeks to impermissibly regulate.”).

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*A. Should Social Media Algorithms be Considered “Speech” for the Purposes of First Amendment Protection?*

The First Amendment of the Bill of Rights states: “Congress shall make no law . . . abridging the freedom of speech.”<sup>97</sup> Freedom of speech is essentially the right to “speak,” “write,” and “share” ideas without government intrusion.<sup>98</sup> Accordingly, the “creation and dissemination” of content or information is classified as speech within the meaning of the First Amendment.<sup>99</sup> However, the Framers of the Constitution could not anticipate technologically advanced machines, as opposed to humans, creating and disseminating information, thus sparking debate over whether algorithms constitute speech under the First Amendment.<sup>100</sup>

Social media platforms typically utilize two types of AI systems—one assisting in content moderation and one controlling the recommendation algorithm.<sup>101</sup> The content moderation system determines which third-party user content should be accepted on the platform and which content should be rejected.<sup>102</sup> This mechanism essentially utilizes a filtering function to remove harmful content that may violate the platform’s policies and guidelines.<sup>103</sup> Moderating functions, including blocking content, fact-checking, labeling content, and demonetizing pages, have been found to receive full protection under the First Amendment.<sup>104</sup> Given that content moderation provides a “gateway to public discourse” through empowering user expression and removing harmful obscene material,<sup>105</sup> the content

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97. U.S. CONST. amend. I, cl. 3.

98. *Freedom of Speech*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/freedom\\_of\\_speech](https://www.law.cornell.edu/wex/freedom_of_speech) (June 2021).

99. Yost, *supra* note 82, at 326.

100. *Id.*

101. Jeffery Atiik & Karl Manheim, *Social Media Algorithms Are Not Protected Speech*, THE HILL: CONGRESS BLOG (June 7, 2023, 9:00 AM), <https://thehill.com/opinion/congress-blog/technology/4035644-social-media-algorithms-are-not-protected-speech/>.

102. *Id.*

103. *Id.*; *see also* Jonathan Walter, *Content Moderation Is Not Synonymous With Censorship*, PUB. KNOWLEDGE (Nov. 16, 2020), <https://publicknowledge.org/content-moderation-is-not-synonymous-with-censorship/> (“Content moderation . . . empowers private actors to establish community guidelines for their sites and demand that users seeking to express their viewpoints are consistent with that particular community’s expectations of discourse, yielding tangible benefits such as flagging harmful misinformation, eliminating obscenity, curbing hate speech, and protecting public safety.”).

104. *See* Walter, *supra* note 103 (“Companies like Facebook and Twitter are moderating their platforms, a process which includes setting their own community standards, blocking content, fact-checking, labelling content, and demonetizing pages, which has been found by courts to be fully protected First Amendment expression.”).

105. Atiik & Manheim, *supra* note 103.



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moderation AI mechanism conforms to the principles of the First Amendment and should receive protection accordingly.<sup>106</sup>

It is less clear whether the AI recommendation mechanism constitutes speech under the First Amendment.<sup>107</sup> The recommendation function is completely generated by autonomous machines and serves little purpose under the First Amendment.<sup>108</sup> Unlike the AI content moderation function, which involves human input in determining community guidelines that the AI technology must follow while checking and removing content,<sup>109</sup> “there is no human discretion, judgment or editorial input into the ‘decisions’ made by the AI,” with regard to the recommendation mechanism.<sup>110</sup> While platform operators give the AI system a “goal,” typically a task to maximize the time users spend on the platform, the AI technology must learn on its own how to actually structure and deliver recommendations to fulfill that objective.<sup>111</sup> Additionally, unlike the content moderation AI system, the fundamental purposes underlying the First Amendment are not served by the AI recommendation mechanism.<sup>112</sup> AI codes do not communicate in “human-understandable” terms, they are merely mathematical computer codes that perform functions.<sup>113</sup> In terms of recommendation algorithms, “output of the AI’s calculations [or its recommendations] is similarly functional and not expressive: mainly to keep users ‘engaged.’”<sup>114</sup>

If regulated activity is not considered “speech,” then the activity does not receive First Amendment protection and no further constitutional analysis is required.<sup>115</sup> Thus, if courts were to consider recommendation algorithms a form of non-expressive conduct, as opposed to speech, social media algorithms would not receive immunity from liability claims under Section 230 of the First Amendment. However, as discussed in the next

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106. Walter, *supra* note 105.

107. Atiik & Manheim, *supra* note 103.

108. *Id.*

109. Walter, *supra* note 105.

110. Atiik & Manheim, *supra* note 103.

111. *Id.*

112. *Id.* (“[T]he second AI mechanism, the one that drives a recommendation algorithm, does not serve any of the purposes that underlie the First Amendment.”).

113. *Id.*

114. *Id.*

115. Doug Linder, *What is “Speech” Within the Meaning of the First Amendment?*, EXPLORING CONST. L., <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/whatisspeech.html> (last visited Apr. 6, 2024) (“If the regulated activity is not ‘speech,’ then it is not protected by the First Amendment and there is no need to extend the constitutional analysis further.”).

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section, even if algorithms are considered speech, they still may be constitutionally regulated under the First Amendment.

According to some First Amendment scholars, recommendation algorithms are likely considered speech because algorithms ultimately seek to convey messages, regardless of whether or not a clear viewpoint is expressed.<sup>116</sup> Stuart Minor Benjamin, an academic scholar of First Amendment law, has posited that “algorithmic selection and promotion of specific content tailored to specific users” may be considered speech under the First Amendment.<sup>117</sup> Additionally, Benjamin argues that algorithms fall within the scope of the Supreme Court’s two-part test for analyzing digital speech under the First Amendment as articulated in the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*.<sup>118</sup> According to the test, to qualify as speech under the First Amendment: (1) the communications platform’s operators must “either create programming or choose what to air” and (2) in choosing what to air, the operators or programmers must “seek to communicate messages on a variety of topics.”<sup>119</sup>

Recommendation algorithms likely satisfy both prongs of the *Turner* test.<sup>120</sup> First, companies such as Facebook often control the programming of AI recommendation algorithms and can determine tasks and objectives the algorithms must fulfill to achieve specific outcomes.<sup>121</sup> Second, while it is less clear whether algorithms communicate specific messages to platform users, the Supreme Court has interpreted this “message” prong broadly and has stated that “a narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>122</sup> Although it may be argued

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116. Yost, *supra* note 82, at 327; *see also* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013) (“[T]he First Amendment encompasses a great swath of algorithm-based decisions—specifically, algorithm-based outputs that entail a substantive communication.”).

117. Yost, *supra* note 82, at 327.

118. *Id.* (“Benjamin identifies ‘two—and only two—elements for First Amendment coverage’ of digital speech.”); *see also* *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636–37 (1994).

119. Benjamin, *supra* note 109, at 1460.

120. *See* Yost, *supra* note 82, at 327 (“While the precise nature of Facebook’s algorithms is a closely guarded trade secret, public information shows some of the company’s algorithms likely satisfy both elements of Benjamin’s algorithmic speech test.”).

121. *Id.* (“[I]n early 2018, Facebook CEO Mark Zuckerberg announced a change to Facebook’s algorithms. Zuckerberg said he was ‘changing the goal I give our product teams from focusing on helping you find relevant content to helping you have more meaningful social interactions.’”).

122. *Id.*; *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (“[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.”).

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that algorithms are merely utilized to facilitate user engagement, algorithms may also be used to promote more meaningful interactions between users on social media platforms by connecting users with content and other accounts that may resonate with them.<sup>123</sup> Sparking “back-and-forth” discussion is not only a fundamental value of the First Amendment, but an algorithm’s prioritization of creating more meaningful interactions online demonstrates a “pro-community and social engagement” message to its users that satisfies the second prong.<sup>124</sup> So long as the recommendation algorithms are suggesting friends and newsfeed content based on shared interests and other factors used to promote social interaction, recommendation algorithms will likely be classified as speech under the First Amendment.<sup>125</sup>

#### *B. Social Media Algorithms as Commercial Speech*

Even assuming social media algorithms are considered speech, they likely do not receive heightened protection under the First Amendment. Social media algorithms should be considered commercial speech, which is a categorically less scrutinized classification of speech.<sup>126</sup>

##### *1. First Amendment Background and Classifications of Speech*

Although the Framers of the Constitution promised American citizens broad protection against government intrusion with regard to the freedom of speech, courts have made it clear that this First Amendment right to free speech is *not* absolute.<sup>127</sup> The Supreme Court has historically categorized types of speech and has often permitted or prohibited the government’s ability to regulate speech based on the speech’s status as highly “unprotected” or “protected” respectfully.<sup>128</sup>

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123. Yost, *supra* note 82, at 327 (“Facebook . . . program[s] its algorithms to “prioritize posts that spark conversations and meaningful interactions between people,” and “show these posts higher in [the user’s] feed.”).

124. *Id.* at 328.

125. *Id.* at 328-29.

126. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1 (2019).

127. Yost, *supra* note 82, at 326.

128. KILLION, *supra* note 128, at 1 (“The Supreme Court has long interpreted the Clause to protect against government regulation of certain core areas of ‘protected’ speech . . . while giving the government greater leeway to regulate other types of speech, including a handful of limited categories that the Court has deemed largely ‘unprotected.’”).

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While the Court's approach to First Amendment analysis is not entirely categorical, identifying the category of speech at issue helps determine what level of judicial scrutiny a court will apply when conducting its analysis.<sup>129</sup> This categorization often has a major impact on the outcome of a case.<sup>130</sup> Regulations of highly "protected" speech generally receive strict scrutiny, which means that the government must show that its regulation has (1) a compelling governmental interest and (2) is narrowly tailored or is the least restrictive means to the government.<sup>131</sup> Strict scrutiny sets a high bar for the government to meet, and when it is applied to a speech regulation, the regulation is often struck down.<sup>132</sup> Lower levels of review for speech include intermediate scrutiny and rational basis review, and these standards apply to less protected categories of speech.<sup>133</sup> To satisfy intermediate scrutiny, the government must demonstrate (1) a substantial governmental interest (2) in a way that "does not substantially burden speech more than necessary."<sup>134</sup> Finally, to pass rational basis review, which is the most deferential standard of review for the government, the regulation must have (1) a legitimate state interest and (2) a rational relation between its means and ends that is non-arbitrary or capricious.<sup>135</sup>

Whether the Court will apply strict scrutiny, or a form of lower-level scrutiny largely depends on "the character and context of the speech."<sup>136</sup> For instance, content-based and viewpoint-based regulations typically receive higher First Amendment protection, particularly when they involve restricting political or ideological speech. Political speech has historically been considered at the heart of the First Amendment, including speech

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129. *Id.* ("[J]ust because a law implicates protected speech does not mean that the law automatically violates the Free Speech Clause. . . . Nevertheless, the category of speech at issue can help determine what First Amendment standards, including what level of judicial scrutiny, a court might apply in a constitutional challenge to the law.")

130. *Id.* ("[F]or laws that regulate speech or bills that propose to do so, the category of speech involved may be an important factor in evaluating whether a particular measure is likely to survive a First Amendment challenge.")

131. *Id.*; David L. Hudson Jr., *Strict Scrutiny*, FREE SPEECH CTR. (Feb. 18, 2024), <https://firstamendment.mtsu.edu/article/strict-scrutiny/>

132. Hudson Jr., *supra* note 133 (explaining that strict scrutiny has been often called "strict in theory, fatal in fact," because with few exceptions, when it is applied, the government has historically lost).

133. David L. Hudson Jr., *Substantial Government Interest*, FREE SPEECH CTR. (Feb. 18, 2024), <https://firstamendment.mtsu.edu/article/substantial-government-interest/>.

134. *Id.*

135. *Id.*

136. KILLION, *supra* note 128.

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regarding “politics, nationalism, religion, or other matters of opinion.”<sup>137</sup> However, the Court has also recognized certain limited categories of “un-protected” speech that the government permissively may regulate, even when the speech is content-based.<sup>138</sup> Types of speech that receive the lowest standard of review or no constitutional protection include categories such as obscenity, defamation, incitement, and fighting words.<sup>139</sup>

#### *2. Social Media Algorithms Should be Considered Commercial Speech*

Commercial speech is protected speech, though regulation of it is not subject to strict scrutiny, and thus courts will apply less heightened standards of review.<sup>140</sup> Commercial speech is defined as speech that “merely proposes a commercial transaction or relates solely to the speaker’s and the audience’s economic interests.”<sup>141</sup> The Supreme Court has specifically found that commercial speech is “somewhat intuitive-namely, speech that does no more than propose a commercial transaction.”<sup>142</sup> For example, a sign that advertises goods for a discounted price would constitute commercial speech.<sup>143</sup> However, the Supreme Court has not limited commercial speech to merely traditional advertisements.<sup>144</sup> Speech may also be considered commercial when it includes political or informational

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137. *Id.*

138. *Id.* at 1–2.

139. *Id.* at 2; *see* *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscene material or sexual activity depicted in a patently offensive way, devoid of any serious literary, scientific, artistic, or political value, is not protected under the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266–67 (1964) (ruling that false statements of fact about an individual are not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that the First Amendment does not protect advocacy that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (finding that the First Amendment provides no protection for “fighting words,” or those “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”).

140. KILLION, *supra* note 128 (explaining that commercial speech “has historically received less First Amendment protection” than other categories of speech, such as political speech).

141. *Id.*

142. Kerri A. Thompson, *Commercial Clicks: Advertising Algorithms as Commercial Speech*, 21 *VAND. J. ENT. & TECH. L.* 1019, 1034 (2019).

143. *Id.*

144. *See* *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–75 (1989) (holding that Tupperware parties constituted commercial speech); *Hunt v. City of L.A.*, 638 F.3d 703, 716 (9th Cir. 2011) (ruling that an oral sales pitch to sell shea butter and incense on a boardwalk constituted commercial speech).

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messaging as well, so long as there is some economic purpose behind the speech.<sup>145</sup>

Social media algorithms would likely constitute commercial speech because the data-driven AI mechanisms have transformed platforms into “pay-to-play enterprises.”<sup>146</sup> Through using algorithms to produce high engagement and activity by promoting “clickbait,”<sup>147</sup> or content whose main purpose is to attract attention and generate “clicks,” companies like Facebook and Google have made millions of dollars in advertising profits.<sup>148</sup> Social media algorithms unassailably create public discourse and even political debate.<sup>149</sup> However, while algorithms may not have a solely monetary purpose, “speech that mixes pure commercial elements like price advertising with non-commercial elements like education or editorial material may also be commercial speech.”<sup>150</sup> The Supreme Court must ultimately consider the totality of the speech as a whole, including the function and motivation of the speech.<sup>151</sup> Thus, while social media algorithms may convey educational and political messages, they are ultimately “designed for engagement, not information sharing,” and can therefore be considered commercial speech.<sup>152</sup> For instance, while Facebook may have advertised that the purpose of its recommendation algorithms is to “spark conversations and meaningful interactions between people,” the underlying motive behind sparking more meaningful

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145. Kevin Goldberg, *Commercial Speech and Truth in Advertising: Everything to Know*, FREEDOM F. <https://www.freedomforum.org/commercial-speech/> (last visited Mar. 17, 2024) (“Commercial speech is content that primarily exists for an economic purpose, even if it may have political or informational messaging as well.”); *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (finding that economically motivated contraceptive advertisements were considered commercial speech, notwithstanding that the advertisements contained discussions of public issues such as family planning and sexually transmitted diseases).

146. Weintraub & Moore, *supra* note 20, at 631.

147. *Clickbait*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/clickbait> (last visited Dec. 20, 2023) (“[S]omething (such as a headline) designed to make readers want to click on a hyperlink especially when the link leads to content of dubious value or interest.”).

148. Weintraub & Moore, *supra* note 20, at 631.

149. Perumal Kajitha, *The Role of Social Media In Shaping Political Discourse And Public Opinion In The Digital Age*, LINKEDIN: LINKEDIN PULSE (Apr. 30, 2023), <https://www.linkedin.com/pulse/role-social-media-shaping-political-discourse-public-opinion-kajitha/>.

150. Yost, *supra* note 82, at 330.

151. *Id.*

152. *The Science Behind Why Social Media Algorithms Warp Our View of the World*, THE CONVERSATION (Aug. 25, 2023), <https://www.fastcompany.com/90943919/the-science-behind-why-social-media-algorithms-warp-our-view-of-the-world>.

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engagement is to increase engagement in general on the platform, generally, and thus generating more money for the company.<sup>153</sup>

Algorithms also propose commercial transactions by “matching users’ interests to advertisers,” or using collected data to recommend personalized content to users that they will likely be interested in purchasing based on the users’ data history.<sup>154</sup> The concept is that the message or “speech” of the algorithm is “to match user information to the advertiser, targeting users who are more likely to accept the advertiser’s message and engage in a commercial transaction by clicking on the advertisement.”<sup>155</sup> Overall, social media companies like Facebook are far more than simply sites for “building social connections and communicating freely with friends and family.”<sup>156</sup> Rather, they are private companies that use algorithms to sell personalized data collected from their sites to advertisers, and accordingly, algorithms are inextricably linked to commercial activity.<sup>157</sup>

#### *3. Algorithms Should not Receive Full First Amendment Protection and may be Permissibly Regulated as Commercial Speech*

Assuming social media algorithms constitute commercial speech, there remains the question of whether the government can permissibly regulate them.<sup>158</sup> While commercial speech may fall into a category of “protected” speech,<sup>159</sup> commercial speech generally receives far less protection than other forms of speech, such as political speech.<sup>160</sup> Commercial speech receives less protection than political speech because commercial

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153. Yost, *supra* note 82, at 327, 330-31 (“Facebook’s friend suggestions do arguably propose a commercial transaction central to the social media business model— that one user ‘friend’ another, on a platform where increased connection and engagement means more time spent scrolling and increased ad revenue. Facebook’s motivation for urging these connections is certainly economic at base.”).

154. Thompson, *supra* note 145, at 1034-35.

155. *Id.* at 1035.

156. *Id.* at 1036.

157. *Id.*

158. *Id.*

159. KILLION, *supra* note 128 (“Commercial speech . . . has historically received less First Amendment protection than political speech.”).

160. *Id.*; *see also* Yost, *supra* note 82, at 330 (explaining that commercial speech essentially receives “second class First Amendment protection,” as courts typically use intermediate scrutiny, rather than strict scrutiny, when evaluating regulations restricting commercial speech); *Bd. of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989) (finding that regulations on commercial speech need not be the least restrictive means to achieve the government’s substantial objective).

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advertising is considered more “objective” and is thus subject to “determination of its truth content.”<sup>161</sup> Courts are very concerned with the “chilling effect” of speech regulations, particularly when it comes to political speech and unpopular viewpoints.<sup>162</sup> Generally, courts do not want government regulations to significantly inhibit the marketplace of ideas or public discourse.<sup>163</sup> However, courts are not as concerned that regulations on commercial speech will have a “chilling” effect on public discourse because this type of speech does not involve ideas and unpopular opinions like those found in political speech.<sup>164</sup> Ultimately, if the speech is largely economically driven “then that speech may be less easily chilled and may therefore need less First Amendment protection.”<sup>165</sup>

In *Central Hudson Gas v. Public Service Commission*, the Supreme Court created a four-pronged test to specifically determine whether a regulation on commercial speech is constitutional.<sup>166</sup> According to the test, which has since been modified by *Milavetz v. United States* and *Board of Trustees v. Fox*,<sup>167</sup> the government must prove (1) the expression is not protected under the First Amendment (likely that the speech is misleading or involves illegal activity), (2) the government has a “substantial interest” in regulating the speech, (3) the regulation reasonably relates to the asserted government interest, and (4) the regulation is a “reasonable fit” toward achieving the government’s objective.<sup>168</sup>

While evaluating a hypothetical government regulation is beyond the scope of this Article, in general, social media algorithms likely could be regulated under this standard because they may lead to illegal activity, and the government has a substantial interest in protecting the health and safety of the public. First, social media recommendation algorithms may contribute to activity that violates the Antiterrorism and Effective

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161. David Schultz, *Commercial Speech*, FREE SPEECH CTR. (Feb. 18, 2024) <https://firstamendment.mtsu.edu/article/commercial-speech/>.

162. Frank Askin, *Chilling Effect*, FREE SPEECH CTR. (Feb. 18, 2024) <https://firstamendment.mtsu.edu/article/chilling-effect/> (The chilling effect is the concept of “detering free speech and association rights protected by the First Amendment as a result of government laws or actions that appear to target expression,” especially when it involves unpopular views and political speech).

163. David Schultz, *Marketplace of Ideas*, FREE SPEECH CTR. (Feb. 18, 2024) <https://firstamendment.mtsu.edu/article/marketplace-of-ideas/>.

164. Yost, *supra* note 82, at 330.

165. *Id.*

166. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

167. Thompson, *supra* note 145, at 1037 (“The Court subsequently relaxed two of the *Central Hudson* criteria in *Milavetz v. United States* and *Board of Trustees v. Fox*.”).

168. *Id.*; *see also* Cent. Hudson, 447 U.S. at 566.



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Death Penalty Act.<sup>169</sup> Pursuant to 18 U.S.C. § 2339B, it is unlawful for anyone subject to the jurisdiction of the United States to knowingly provide “material support or resources to a foreign terrorist organization.”<sup>170</sup> Social media algorithms generate recommendations that connect individuals with terrorist accounts based on the content they consume.<sup>171</sup> For instance, Facebook’s algorithm autogenerates business pages which allows other user accounts to “like” and follow these pages.<sup>172</sup> Extremist terrorist organizations such as al-Qaida and al-Shabab use these algorithmic-generated pages to recruit their followers.<sup>173</sup> Thus, it may be argued that Facebook provides online support and resources for terrorist organizations to connect with, organize, and recruit members. Moreover, the government has a substantial interest in regulating recommendation algorithms to protect citizens’ welfare and safety.<sup>174</sup> Terrorist groups are increasingly using social media to organize and carry out attacks.<sup>175</sup> A study conducted in 2021 using a dataset of 231 United States-based Daesh (Islamic State) terrorists found that over 80% of the terrorists in the dataset used social media platforms for at least some of their activities.<sup>176</sup> Accordingly, substantial harm may come from these algorithmically generated connections and the government has significant interests in regulating these algorithms to prevent terrorist attacks from occurring. Overall, the government has a significant interest in counteracting

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169. See Pub. L. 104-132, § 303, 110 Stat. 1214, 1250.

170. *Id.*

171. See *Force v. Facebook*, 934 F.3d 53, 85 (2nd Cir. 2019) (Katzman, J., concurring in part and dissenting in part) (“News reports indicate that the friend-suggestion feature has introduced thousands of IS sympathizers to one another.”).

172. Desmond Butler & Barbara Ortulay, *Facebook Auto-Generates Videos Celebrating Extremist Images*, ASSOC. PRESS (May 9, 2019, 2:04 PM), <http://ap-news.com/f97c24dab4f34bd0b48b36f2988952a4>.

173. *Id.*

174. Goldberg, *supra* note 147 (“The Supreme Court upheld Puerto Rico’s ban on casino advertisements in 1986 to protect the health, safety and welfare of Puerto Ricans.”).

175. Seamus Hughes & Alexander Meleagrou-Hitchens, *The Threat to the United States from the Islamic State’s Virtual Entrepreneurs*, 10 CTC SENTINEL 1 1 (2017) (“Out of a total of 38 Islamic State-inspired domestic plots and attacks in the United States between March 1, 2014, and March 1, 2017, at least eight (21 percent) have involved some form of digital communication with virtual entrepreneurs.”).

176. Jens F. Binder & Jonathan Kenyon, *Terrorism and The Internet: How Dangerous Is Online Radicalization?*, FRONTIERS IN PSYCHOLOGY 5 (2022).

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terrorism and courts often give deference to the government in matters of national security.<sup>177</sup>

Finally, the government should be permitted to regulate recommendation algorithms under the First Amendment because recommendation algorithms such as newsfeed algorithms arguably do not promote fundamental First Amendment values. Algorithms deliver to users content that is based on their own interests, ultimately restricting the amount, as well as the different types of, content that individuals consume to their own past behavior on the site.<sup>178</sup> This limits one's worldview, as opposed to broadening it—which is a large purpose of the First Amendment.<sup>179</sup> Algorithms decrease the amount of speech to which individuals are exposed, reinforcing preexisting views as opposed to presenting information that counters or challenges preexisting views.<sup>180</sup> Advertising algorithms ultimately offer the same types of speech over and over, “limiting the marketplace of ideas to one familiar store.”<sup>181</sup> While, this may increase social media companies' goal of engagement: “[t]his kind of personalized advertising ‘serve[s] up a kind of invisible autopropaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown.’”<sup>182</sup> Overall, algorithms offend First Amendment principles, and while they may receive some protection as commercial speech under the First Amendment, government regulation would likely be permissible because as commercial speech, algorithms receive a lower standard of review and the government has a substantial interest in protecting the public.

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177. Cf. *Korematsu v. U.S.*, 323 U.S. 214, 219-220 (1944) (upholding discriminatory exclusion order because while “[c]ompulsory exclusion of large groups of citizens from their homes . . . is inconsistent with our basic governmental institutions[,] . . . when under conditions of modern warfare [and] our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”); *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (finding national security interests justified upholding entry ban on foreign nationals).

178. Thompson, *supra* note 145, at 1026–28 (“Personalization of advertising, calculated by an algorithm based on past behavior, ensures that even if one ‘clicks around’ on different pages based on interest, the world of links presented to a reader is limited by past behavior.”).

179. David L. Hudson Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, HUMAN RIGHTS, Oct. 20, 2018, at 2 (“[T]he marketplace of ideas[] is a pervasive metaphor in First Amendment law that posits the government should not distort the market and engage in content control. It is better for people to appreciate for themselves different ideas and concepts.”).

180. Thompson, *supra* note 145, at 1026.

181. *Id.*

182. *Id.*

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## CONCLUSION

While in *Taamnah*, the court ruled in favor of Twitter, it is unlikely that *Taamnah* will be the last lawsuit against social media companies for materially contributing to the illegal actions of their platform's users.<sup>183</sup> The internet is dramatically different than it was when Section 230 was enacted.<sup>184</sup> While social media companies generally appear to act as publishers, platforms' algorithms engage in functions more comparable to that of developers.<sup>185</sup> Thus, the activity of recommendation algorithms should not fall within the scope of protection of Section 230 of the CDA.<sup>186</sup> Further, these algorithms may be regulated as commercial speech under the First Amendment because social media algorithms are economically motivated and therefore, regulations may survive using a lower standard of review.<sup>187</sup>

Social media platforms and the internet in general have had a positive impact on society by facilitating open communication, creating spaces for discourse among different groups of various backgrounds, and providing educational resources.<sup>188</sup> While these aspects of social media are commendable and should be preserved, the fatal consequences of social media algorithms cannot be ignored when they lead to terrorism and other illegal activity.<sup>189</sup> Although some may argue that it is necessary to include social media algorithms within the meaning of Section 230 in order to protect social media companies and prevent them from censoring speech to avoid liability, social media sites are no longer small start-ups that need to be shielded from lawsuits so that their companies may continue to grow.<sup>190</sup> Social media companies are now global technology giants that must be held legally accountable for contributing to the spread of serious hate and fatal harm through the use of their advanced algorithms. Platforms like Facebook are fully aware of the pervasive and blatant presence of groups such as ISIS, Hamas, and Hezbollah on their sites, yet without

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183. 598 U.S. 471, 506–507 (2023).

184. See *supra* text accompanying note 95.

185. See *supra* note 77 and accompanying text.

186. See *supra* Section II.

187. See *supra* Section III.

188. See *Force v. Facebook*, 934 F.3d 53, 88 (2d Cir. 2019) (Katzman, J., concurring in part and dissenting in part) (“It is undeniable that the Internet and social media have had many positive effects worth preserving and promoting, such as facilitating open communication, dialogue, and education.”).

189. *Id.* (“[S]ocial media can be manipulated by evildoers who pose real threats to our democratic society.”).

190. See *supra* text accompanying note 94.

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legal pressure to remove content and accounts that facilitate terrorism, efforts to eliminate this content have either been slow to occur or have been wholly underinclusive.<sup>191</sup> Ultimately, these algorithms connect individuals looking to engage in terrorism together with “pinpoint precision,”<sup>192</sup> and if internet service providers are not held liable for these algorithms, it will leave extremely dangerous and near-deadly activity unchecked.

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191. *Force*, 934 F.3d at 84–85 (Katzman, J., concurring in part and dissenting in part) (“Recent news reports suggest that many social media sites have been slow to remove the plethora of terrorist and extremist accounts populating their platforms, and that such efforts, when they occur, are often underinclusive. Twitter, for instance, banned the Ku Klux Klan in 2018 but allowed David Duke to maintain his account.”).

192. *Id.* at 85.

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