THE NEW EDITORS: REFINING FIRST AMENDMENT PROTECTIONS FOR INTERNET PLATFORMS

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This Article envisions what it would look like to tailor the First Amendment editorial privilege to the multifaceted nature of the internet, just as courts have done with media in the offline world. It reviews the law of editorial judgment offline, where protections for editorial judgment are strong but not absolute, and its nascent application online. It then analyzes whether the diversity of internet platforms and their functions alter how the Constitution should be applied in this new setting.

First Amendment editorial privilege, as applied to internet platforms, is often treated by courts and platforms themselves as monolithic and equally applicable to all content moderation decisions. The privilege is asserted by all types of platforms, whether search engine or social media, and for all kinds of choices. But Section 230's broad protections for internet platforms have largely precluded the development of a robust body of First Amendment law specific to internet platforms. With Section 230 reform a clear priority for Congress, internet platforms will likely turn to First Amendment defenses to a greater extent in coming years, prompting the need to examine how the law of editorial privilege applies online.

I offer six concrete conclusions about how online platforms do or do not challenge how courts currently apply the law of editorial judgment. The features and functions of online platforms do not change the need to differentiate when a platform is occupying a speaker or non-speaker role, the application of longstanding First Amendment exceptions for low value speech to platforms, and the judiciary's hesitancy to include market competitiveness in First Amendment analyses. These same features and functions require insisting that no distinction between wholesale and retail-level editorial judgments emerges in the online space and that useful distinctions between editing and advertising remain. Finally, they suggest that user decisions should

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be given greater weight in determining speech-related damages in claims brought against platforms.

INTRODUCTION

The question of when and how the First Amendment editorial privilege applies to internet platforms deserves greater scrutiny. Section 230, the statute that grants immunity to online platforms from liability for content posted by other parties on their sites, has largely precluded sophisticated debate in court about platform First Amendment rights. If courts even reach this issue–and they usually do not, since judges tend to prefer to resolve disputes on statutory grounds–they address it in passing or in a conclusory manner, without much nuance.[1] With Section 230 reform a top legislative priority, Congress seems likely to amend the statute. In response to these changes, platforms are likely to turn to First Amendment defenses even more than they have in the past.[2] With this change on the horizon, this Article directs scholarly attention to questions courts must likely soon address directly: whether the editorial privilege should remain the same for online platforms as print news, and whether all online platforms and their decisions should be seen equally as editors or editing.

This Article's overall argument is simple: the basic qualification for editorial protection does not need to change in an online context. The editorial privilege protects the exercise of selection over the speech of others–curating speech. When platforms exercise selection over speech, they are protected as editors. This Article makes six further specific points about editorial privilege in the online context. First, the role that a platform is playing in any given moment should determine whether editorial protections operate–a simple, but so far underappreciated, point. The fact that an internet platform exercises selection over speech at one moment or on one part of its site does not mean it does so in all instances. Second, no *constitutional* reason exists to exempt online platforms from the carve-outs for low-value speech from editorial privilege protections. Section 230, of course, does offer *statutory* immunity to platforms for hosting or republishing low-value speech when the information is provided by another "information content provider."[3] This difference remains one of the most compelling arguments for retaining Section 230. Third, the wholesale (algorithmic) or retail nature of editorial decision-making should not matter to an editorial judgment analysis online; the method of selection should not change the

[1] *See infra* Part IV.

[2] Indeed, since this paper's original drafting, internet organizations have filed a challenge against a law in Florida that purports to prevent internet platforms from blocking political candidates from their sites. The challenge argues that the law impermissibly constrains editorial privilege. *See* Netchoice and Computer Comm'n Industry Assoc. v. Ashley Brooke Moody et al., No. 4:21-cv-00220 (N.D. Fla. 2021).

[3] 47 U.S.C. §230.

constitutional protection available. Fourth, the targeted nature of much of online advertising should *not* merit online advertising greater First Amendment protection, despite potential arguments to the contrary. Fifth, under current law, competition considerations do not affect whether editorial privilege applies, an important consideration for ongoing debates about applying antitrust law to platforms. Sixth, when platforms cede control to users over particular content decisions, users should have a duty to mitigate damages before bringing suit over low-value speech.

This general argument and six specific observations are what emerge from current doctrine. The extent to which any of these constitutional outcomes is troubling should motivate statutory fixes. Indeed, where constitutional protections are lacking (rather than explicitly limited) is exactly where legislators have leeway to add statutory protections. That said, conversations about the gap between constitutional and statutory protections for platforms are increasingly difficult to have within the internet community, and with members of the public, as Section 230 becomes more politicized.[4] Scholars and advocates tend to fall into two camps. The first argues that Section 230 protections are superior to the protections of the First Amendment and that we should direct our efforts at preserving Section 230.[5] The second camp views editorial protections as inapplicable to platform decision making: platforms are more conduits of speech than constitutional speakers in their own right.[6] This Article creates a space in between these two poles and builds out an analytical structure for thinking about platform editorial privilege that is not all-or-nothing. This Article is not a referendum on whether Section 230 is better than the First Amendment–indeed, the author is overall fond of Section 230. Rather, it is an attempt to bring an analytical framework to a topic that will likely be before the courts sooner rather than later and may very well inform further debates about the role of statutory protections for internet platforms.[7]

This Article fills a gap in existing academic literature, which has not yet robustly discussed the contours of the editorial privilege as applied to internet platforms.[8] Several scholars have made elegant cases for

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[4] Jeff Kosseff, *What's in a Name? Quite a Bit, If You're Talking About Section 230*, LAWFARE (Dec. 19, 2019, 1:28 PM), https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230; Danielle Keats Citron & Mary Anne Franks, *The Internet as Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHIC. L. F. 45, 46 (2020) (describing Section 230 as essentially an "article of faith.").

[5] *See, e.g.*, Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019); Bruce D. Brown & Alan B. Davidson, *Is Google Like Gas or Steel?* N.Y. TIMES (Jan. 4, 2013), https://www.nytimes.com/2013/01/05/opinion/is-google-like-gas-or-like-steel.html.

[6] *See* James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 879 (2014) (helpful overview of conduit theory).

[7] *See, e.g.*, *supra* note 2.

[8] The primary exception is Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, *EMERGING THREATS ESSAY SERIES*, KNIGHT FIRST AMENDMENT INST. AT COLUM. U. (2018) (arguing against the editorial analogy). This paper is not a law

extending First Amendment rights, writ broadly, to search engines.[9] Other pieces argue against the application of the First Amendment to platforms, viewing platforms instead as neutral conduits of information that should receive lesser First Amendment protections.[10] Other relevant scholarship focuses more on the First Amendment-versus-Section-230 debate or is anchored primarily in internal debates about Section 230 itself.[11] Yet, these articles do not discuss at length what a constitutional *editorial privilege* built for the internet might look like.[12] Furthermore, editorial privilege as a concept has not received extensive scholarly attention since Robert Bezanson's expansive 1999 article, work which this Article updates.[13] In particular, this Article brings contemporary attention to this body of law by placing it in the context of online platform diversity.

The First Amendment offers a range of protections. Given this range, why focus on editorial judgment as the way to describe internet platform First Amendment rights, especially when other literature has looked at the question more broadly? Editorial judgment is the most precise way to speak about one particular kind of decision internet platforms make: the "choice of material" that they surface to their

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review article, and I disagree strongly with Whitney's interpretation of caselaw in several instances, including the relevance of *Pruneyard* and *Packingham*; her piece also critiques the analogy more than the underlying doctrine. Eric Goldman responds with representative critiques in Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, *EMERGING THREATS ESSAY SERIES*, KNIGHT FIRST AMENDMENT INST. AT COLUM. U. (2018). *See also* Genevieve Lakier, The Problem Isn't the Use of Analogies but the Analogies Courts Use, *EMERGING THREATS ESSAY SERIES*, KNIGHT FIRST AMENDMENT INST. AT COLUM. U. (2018); Frank Pasquale, Preventing a Posthuman Law of Freedom of Expression, *EMERGING THREATS ESSAY SERIES*, KNIGHT FIRST AMENDMENT INST. AT COLUM. U. (2018).

[9] *Id.* (providing what is arguably the most comprehensive treatment); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. & POL'Y 883 (2012); Grimmelmann, *supra* note 6; Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188 (2006).

[10] Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006).

[11] *See, e.g.*, Goldman, *supra* note 5; Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Citron & Franks, *supra* note 4; Kendra Albert, et al., *FOSTA in the Legal Context*, HACKING//HUSTLING (Jul. 30, 2020), https://hackinghustling.org/fosta-in-a-legal-context/; Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L. J. 1353 (2018).

[12] John Blevins' work comes closest: he argues for distinguishing First Amendment protections for network versus application layer platforms, but he focuses on media access regulations rather than on editorial judgment. *See* John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353 (2012). None of these articles explicitly address, for example, how social media platforms might differ from search engines from an editorial judgment standpoint. Kate Klonick's work touches on the unique features of social media content moderation, but she focuses on the actual mechanisms platforms employ as editors rather than on First Amendment doctrine. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

[13] Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754 (1999).

users.[14] Editorial judgment speaks most precisely to an actor making decisions about content authored by third parties. Internet platforms, to use the language of the Supreme Court in *Hurley*, do "not forfeit constitutional protection simply by combining multifarious voices . . . [nor] does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication."[15] In addition, most courts to have addressed the issue of First Amendment platform rights so far have treated platform speech rights as primarily a species of editorial judgment, so this treatment is consistent with emerging case law.[16] It is this elevation (or de-elevation) and ordering of third party content that makes up much of what internet platforms do, hence this Article's focus.

But not all internet platform decisions are an exercise of editorial judgment. Some platform actions very well might instead constitute commercial speech–or, might not constitute speech at all. Part of this Article's project is to build out criteria by which we might be able to isolate platform editorial judgment from other kinds of platform speech and non-speech. This endeavor need not mean that other forms of platform speech are unprotected by the First Amendment. Rather, by isolating when platforms are truly editorializing, we can afford such speech appropriately heightened First Amendment protections, while being able to adjust the level of scrutiny we apply to other categories of platform speech and non-speech.

As a starting point, a few notes on scope: this Article only investigates platforms at the application layer of the internet. Scholars have made compelling arguments for treating the application and network layers of the internet differently with respect to First Amendment protections.[17] For the purposes of brevity, this Article accepts this distinction and only focuses on application-layer platforms. Second, this Article treats platforms as editors rather than conduits. I have advanced a few reasons I think editorial judgment is the right approach to some internet platform decisions. But, more importantly, the nascent doctrine on this matter uniformly treats internet platforms as editors, and impending legislative changes to Section 230 all but guarantee courts will be seeing more First Amendment defenses raised by platforms. The fact that early case law has gone this way supports a lengthier investigation of this view. Last–I do not argue that internet

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[14] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 575 (1995).

[15] *Id.* at 569-70.

[16] Some courts refer to platform First Amendment rights in other constitutional terms. For instance, in *Search King v. Google*, the court uses language about opinion without reference to editorial judgment. Search King, Inc. v. Google Tech., Inc., 2003 WL 21464658, at *2-4 (W.D. Okla. May 27, 2003).

[17] *See, e.g.*, Blevins, *supra* note 12; *see also* Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193 (2018) (providing an excellent history of layer-based internet regulation); Lawrence Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, U. SAN DIEGO SCHOOL OF L. PUB. L. & LEGAL THEORY RESEARCH PAPER 55 (2003).

platforms are exactly like newspapers. Rather, I argue that courts have recognized protections for editorial functions *as such*. Looking at whether platforms perform editorial functions, as defined in caselaw, not whether they are like newspapers, is the correct analytical approach to assessing editorial protections for online platforms. For all of these reasons, this Article makes a starting assumption that platforms are generally not conduits but do (sometimes) engage in editing.

I. HOW PLATFORMS DIFFER

Google search is not Amazon search, nor is it Google ads. But the application of First Amendment protections to platforms has so far been lamentably blunt, treating "tech" monolithically. To Silicon Valley, the differences between Google, Facebook, and Amazon are highly salient and important; they are not the same kind of platform. The difference between Facebook's newsfeed, its ability to host a personally curatable profile, and its online marketplaces are likewise different–that is, not only are platforms different from each other, but they engage in starkly different kinds of activity within their own ecosystems. Furthermore, content moderation decisions can involve deciding to take down, leave up, amplify, and order content. A mature First Amendment analysis requires recognizing this functional diversity, both between and within platforms.[18] Some of these features map neatly onto existing legal distinctions, others introduce new considerations, and some should not affect a constitutional analysis. Acknowledging the ways platforms and platform actions differ–even if only to conclude they should not matter–is more rigorous than glossing over them and, as such, constitutes an important first analytical step.

In this Part, I will draw attention to the crucial *functional* distinctions that separate various technology platforms and their many different activities from one another. After Part III and Part IV explore the offline and online landscape of editorial judgment, the last Part of the Article will return to these distinctions and explore how that doctrine interacts with these features–and which distinctions should explicitly matter for First Amendment purposes. This Article proposes the following functional criteria for assessing differences between platforms and platform activities: separating core functions from advertising and other commercial actions, assessing whether decisions are made at the wholesale or retail level, the platform's role in the overall ecosystem, the amount of user control a platform offers, and the effect that a moderation decision has on a piece of content.

[18] Eugene Volokh takes a similar functions-based approach in *Social Media Platforms as Common Carriers* (forthcoming) (draft manuscript June 7, 2021). For an earlier example of an argument for tailoring legal analyses to the specific functions of online platforms, *see* Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87 (1993).

The threshold question to ask with respect to all of these functional differences is whether platforms are engaged in speech with respect to a particular activity. As Danielle Citron and Mary Ann Franks write, "[i]ntermediaries invoking Section 230's protections implicitly characterize the acts or omissions at issue as speech, and courts frequently allow them to do so without challenge."[19] In offline settings, courts often engage in a determination of whether the action at issue is speech or conduct before turning to questions about what kind of First Amendment protection follows.[20] In the handful of existing cases where courts have found editorial judgment applicable to online platforms, courts do not always engage in this conduct-versus-speech step.[21] Despite the importance of the conduct versus speech question, this question is one of the thorniest issues of contemporary First Amendment law, offline and online.[22] Asking it will not always bring an easy answer–but asking it is still better than assuming every platform action is speech.

The first major functional way to distinguish platform activities is to separate the core function of a platform from advertising or other commercial actions. In the offline world, advertising is sometimes, but not always, considered outside of the reach of editorial judgment.[23] Online platform advertising has a key feature that most offline advertising does not: it is usually behavioral in nature. Platforms collect data about a user's online speech and behavior and use that information to select which ad to display to that user, usually via algorithm. That same data, about a user's speech and preferences, may, at the same time, be used to better tailor the core service (e.g., ranking search results by relevance for a particular user). In this way, the same data is used to inform both the core function of the platform and advertising. This intertwining of the core function with advertising poses potential problems for the distinction courts have usually made between editorial speech and advertising, which Parts IV and V discuss. Specifically, platforms could argue that the individualized serving of ads reflects editorial judgment more than, say, the filling of a page of ads in a newspaper might. A platform might also perform commercial actions beyond advertising.

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[19] Citron & Franks, *supra* note 4, at 59.

[20] *Id.* (discussing the following cases as instances where courts ask whether acts are speech before engaging in constitutional analysis); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft cards); Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503 (1969) (black armbands); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (political contributions).

[21] *See, eg.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (applying First Amendment protections without addressing the conduct v. speech issue); Search King, 2003 WL 21464658 at *9 (moving directly to the question of whether search rankings were opinions or facts, without addressing conduct v. speech issue). *But see* Zhang v. Baidu.com Inc., 10 F.Supp.3d 433, 441 (S.D.N.Y 2014) (where the court does address the conduct v. speech question).

[22] *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

[23] *See infra* Part III.

Shopping platforms are a good example of this: a platform might list goods of others for sale, rank those listings of products according to relevance or other criteria, and sell its own products. We might wish to pull out the platform-as-seller from the platform's other roles; a seller has additional duties that an editor does not.

A second way to differentiate platform actions is to consider whether platforms make moderation decisions at the wholesale, i.e., categorical level, or at the retail, i.e., content-specific, level.[24] Platforms make wholesale decisions when they set content moderation policies and design moderation algorithms. Platforms make retail-level decisions when they make decisions about particular pieces of content. Given the volume of online interactions, most platforms make most decisions at the wholesale level. Consider Twitter's early content moderation policy, which was only 538 words long and listed broad categorical buckets of off-limits speech ("violence and threats" or "pornography").[25] That said, as platform refine their moderation categories, more retail judgment might be involved, at least with respect to certain categories. Consider Facebook's current content-moderation policies, where categories are drawn much more finely. For instance, on Facebook, nipples are not allowed unless they fall under a series of exceptions, including if their posting constitutes "an act of protest," a categorization that almost demand subsequent retail-level (not to mention, human) judgment.[26]

Algorithmic moderation introduces an additional wrinkle into this categorical versus retail-level distinction. Platforms must decide whether to alter algorithms that are producing suboptimal results or supplement algorithms with human review. Google, for instance, developed "scalable, automated approaches" to downrank Holocaust denialist sites when it emerged that their search algorithm was previously giving primacy of place to (highly trafficked) denialist websites.[27] In another instance, Google manually downranked J.C. Penney's links in response to its attempt to manipulate its ranking in search.[28] Some critics argue that

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[24] Wholesale and retail are terms Robert Bezanson uses. I use them here, interchanging them with the terms categorical (wholesale) and content-specific (retail) at times. *See* Bezanson, *supra* note 13, at 811.

[25] *See* Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 773, *citing* Sarah Jeong, *The History of Twitter's Rules*, VICE (Jan. 14, 2016); *The Twitter Rules*, INTERNET ARCHIVE WAYBACK MACHINE (Jan. 2009), https://web.archive.org/web/20090118211301/http://twitter.zendesk.com/forums/26257/entries/18311.

[26] *See* Douek, *supra* note 25, at 783.

[27] Danny Sullivan, Official: *Google Makes Change, Results Are No Longer in Denial Over 'Did the Holocaust Happen?'*, SEARCH ENGINE LAND (Dec. 20, 2016, 2:00 PM), https://searchengineland.com/googles-results-no-longer-in-denial-over-holocaust-265832 (quoting Google executive as saying: "When non-authoritative information ranks too high in our search results, we develop scalable, automated approaches to fix the problems, rather than manually removing these one-by-one.").

[28] *See* Grimmelmann, *supra* note 6, citing David Segal, *The Dirty Little Secrets of Search*, N.Y. TIMES, (Feb. 12, 2011), http://www.nytimes.com/2011/02/13/business/13search.html (discussing Google's

the mode of content moderation–algorithmic or human–should matter in the level of constitutional or statutory protection given.[29]

A third point to consider involves a platform's role in the overall ecosystem. Some platforms might be the only available option for certain online activities; consider Snapchat's period of dominance for disappearing content before other platforms implemented similar features. Other platforms might be overwhelmingly market-dominant, such as Google search over Bing search. Some critics suggest that market-dominant platforms should be more restricted in the content moderation decisions they may make exactly in virtue of their dominance.[30]

Another difference to consider involves how much user choice a platform allows. Users have very little control over how content appears in search results, (SEO optimization notwithstanding), nor can they control what other users post about them on social media. Sometimes, though, users can remove their own speech or speech others have posted on a page they "control" on a platform. This issue of user control is a new consideration, compared to offline media–a newspaper reader cannot remove an unflattering Letter to the Editor from all copies in circulation–and is most relevant when users contest companies should take down content that users themselves could remove.[31] This issue is worth considering as part of a First Amendment analysis because, potentially, we can conceive of multiple *editors* (the user and platform) operating on the same speech, a unique feature of online platforms compared to offline media.

Last, a platform can take a number of different actions with respect to a piece of content it decides to moderate. It can take down, leave up, amplify, or differently rank a piece of content. These distinctions have some parallels in the offline world–a requirement to leave content up evokes the right-to-reply line of cases, the fairness doctrine, and issues around compelled speech.[32] A requirement to take content down evokes cases about regulating low-value speech and, more controversially, hate speech.[33] Amplification and ranking decisions raise issues of endorsement and opinion versus fact determinations.[34] Some

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manual downranking of J.C. Penney as a result of J.C. Penny's attempts to game its search ranking.).

[29] *See infra* notes 231-237 and accompanying text.

[30] *See, e.g.,* Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021) (qualified private right of action only against a platform that is "dominant in its market").

[31] See infra Parts IV and V.

[32] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating right-of-reply statute); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (upholding fairness doctrine); National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (invalidating California statute requiring certain disclosures of unlicensed family planning clinics as compelled speech).

[33] Brandenburg v. Ohio (imminent lawless action test); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down hate speech regulation).

[34] *See, eg.*, Milkovich v. Lorain Journal, 497 U.S. 1 (1990) (rejecting independent opinion privilege against libel).

courts and scholars have suggested that the particulars of content moderation should make a difference to the protection it receives.[35]

Internet platform activities differ–both between and within a given platform. The aspects discussed above are not an exhaustive list of all of the ways internet platforms differ, but they provide a helpful starting point for considering how First Amendment editorial judgment protections might or might not differ with respect to each type of activity. Not all of these distinctions will, or should, matter to a First Amendment analysis, but the ways that they do and do not are often messy and complex. To see precisely how these differences might matter, we must first turn to the law of editorial judgment offline and its nascent application to online platforms. Section V then returns to these distinctions as they intersect with the doctrine.

II. SECTION 230 AND THE FIRST AMENDMENT

Understanding why First Amendment law as applied to platforms is underdeveloped requires understanding the scope and protections of Section 230.[36] This 1996 law provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[37] This law emerged from a pair of decisions–*Cubby, Inc. v. CompuServe, Inc*. and *Stratton Oakmont, Inc. v. Prodigy Services Co*.–that rested on common law and First Amendment grounds and were widely viewed as existential threats to the internet.[38] These decisions together established that internet platforms would be subject to tort liability if they moderated their content (*Stratton Oakmont*) but excused them from liability if they put no moderation policies in place (*CompuServe*). If platforms exercised content moderation, they acted as editors, and were subject to republication liability. The tort of republication liability holds that "one who repeats or otherwise republishes defamatory matter is subject to liability as if [s]he had originally published it."[39] Congress enacted Section 230 to remove this disincentive to moderate content.

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[35] Volokh, *supra* note 18 (arguing that content recommendation functions may warrant more protection that removal functions); Cubby, Inc. v. Compuserve, Inc, 776 F. Supp. 135 (S.D.N.Y 1991) (no liability for defamation if platform decided to leave all content up); Stratton Oakmont, Inc. v. Prodigy Servs., Co., 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Nassau Cnty. 1995) (liability for defamation if platform took some posts down but not others);

[36] For a more detailed exploration, I direct the reader to Kate Klonick's excellent summary of Section 230 history. *See* Kate Klonick, *The New Governors, supra* note 12.

[37] 47 U.S.C. § 230(c)(1).

[38] Cubby, Inc. v. Compuserve, 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 31063/94 1995 WL 323710 (N.Y. Sup. Ct. Nassau Cnty. 1995).

[39] Restat. 2d Torts §578; see also *Republication in the Internet Age*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (undated), https://www.rcfp.org/journals/news-media-and-law-summer-2014/republication-internet-age/ (last accessed Mar. 9, 2021),

The Fourth Circuit upheld a wide view of Section 230 in the landmark *Zeran v. America Online, Inc.*[40] This decision, which drew heavily on legislative history, "concluded that Section 230 immunizes online platforms from virtually all suits arising from third-party content."[41] Specifically, platforms retained their Section 230 liability even after they received notice of potentially defamatory content.[42] Importantly, as Jeff Kosseff recounts, the court's "interpretation of Section 230 was so broad that it exceeded the standard First Amendment protections afforded to publishers. *Zeran* turned Section 230 into a nearly impenetrable super-First Amendment for online companies."[43] It is these greater protections, the risks that early case law surfaced, and the extreme volume of content online platforms process that motivate arguments that Section 230 is better than First Amendment protections.

The *Zeran* ruling was profoundly influential in shaping the internet landscape in the following decades.[44] This choice to adopt a broad interpretation of Section 230 has meant that courts resolve most content-related claims against internet platforms on these grounds, rather than engaging in First Amendment analysis. This approach has held true even when courts are addressing claims other than defamation, the primary subject of pre-section 230 debate about platform liability. Courts have applied Section 230 to block liability for internet platforms with respect to negligence claims, discrimination claims, and a variety of statutory causes of action.[45]

Momentum to tighten interpretation of Section 230 has picked up in recent years. Congress implemented the first major change to Section 230 in its 2017 "Allow States and Victims to Fight Online Sex Trafficking Act" (FOSTA).[46] FOSTA removes immunity for online platforms facing civil claims brought under the federal anti-trafficking statute, the Trafficking Victim's Protection Act (TVPA).[47] It also makes changes to criminal liability, removing immunity for state-level claims that would violate the criminal provisions of TVPA and claims under FOSTA's newly created prohibitions on online "promotion or facilitation" of "prostitution."[48] And, for the first time, a member of the Supreme Court,

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[40] Zeran v. Am. Online, Inc. 129 F.3d 327 (4th Cir. 1997).

[41] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 94-95 (2019).

[42] *Zeran*, 129 F.3d at 333 ("Liability upon notice would defeat the dual purposes advanced by §230")

[43] KOSSEFF, *supra* note 41 at 95.

[44] *Id.* at 94 ("It is difficult to overstate the significance" of *Zeran*.)

[45] *See, e.g.,* Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008) (negligence); Chi. Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008), as amended (May 2, 2008) (discrimination); Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016) (anti-trafficking statutes); Force v. Facebook, 934 F.3d 53 (2d Cir. 2019) (affirming dismissal of civil anti-terror claims against Facebook).

[46] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (amending the Communications Act of 1934, 47 U.S.C.§ 230(e) (2018)).

[47] For an excellent and in-depth look at FOSTA, *see* Albert et al., *supra* note 11 at 4.

[48] *Id.*

Justice Thomas, indicated interest in narrowing Section 230's interpretation in a dissenting opinion.[49]

Section 230 has also entered the political mainstage. Critics from the right have honed in on Section 230 as protecting online "censorship" of certain political views on internet platforms, and critics from the left have pointed to Section 230 as enabling internet platforms to escape responsibility for harmful content online. From June 2020 to March 2021, members of Congress introduced at least 21 different bills to limit or change Section 230. Of these, three bills would repeal Section 230.[50] Most of the bills attempt to restrict what content moderation decisions platforms can make.[51] The bills active from the current (117th) session of Congress largely take the following approach: limiting immunity for companies that "make[] content moderation decisions . . . that are not reasonably consistent with the First Amendment."[52]

Two bills from the 116th session of Congress went further and would have dictated that companies could not use algorithms to display content in any way other than randomly, chronologically, alphabetically, or based on an average user rating, or based on user preferences.[53] Some bills target particular types of content. A bill introduced after the Capitol insurrection would introduce liability for platforms if their algorithms amplify or recommend "content directly relevant to a case involving interference with civil rights."[54] A 2021 state law in Florida purports to prevent platforms from de-platforming political candidates.[55] It is these kinds of bills that, if implemented, would likely prompt internet platforms to raise editorial judgment defenses with more specificity; indeed, a lawsuit is already underway challenging the Florida law on the

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[49] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., dissenting).

[50] Abandoning Online Censorship Act, H.R. 874, 117th Cong. (2021); A bill to amend the Internal Revenue Code of 1986 to increase the additional 2020 recovery rebates, to repeal section 230 of the Communications Act of 1934, and for other purposes, S. 5085, 116th Cong. (2020); A bill to repeal section 230 of the Communications Act of 1934, S. 5020, 116th Cong. (2020).

[51] Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021); Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. (2021); Stop Suppressing Speech Act of 2020, S. 4828, 116th Cong. (2020); Protect Speech Act, H.R. 8517, 116th Cong. (2020); Online Content Policy Modernization Act, S. 4632, 116th Cong. (2020); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020).

[52] H.R. 285, *supra* note 51.

[53] Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020).

[54] Protecting Americans from Dangerous Algorithms Act, introduced by Reps. Anna Eshoo (D-CA) and Tom Malinowski (D-NJ), citing language from 42 U.S.C. 1985. It was reintroduced on March 18, 2021. *See Reps Eshoo and Milanowski Reintroduce Bill to Hold Tech Platforms Accountable for Algorithmic Promotion of Extremism*, U.S. HOUSE OF REPS. (Mar. 23, 2021), https://malinowski.house.gov/media/press-releases/reps-malinowski-and-eshoo-reintroduce-bill-hold-tech-platforms-accountable (hereinafter Press Release.).

[55] Florida SB 7072 (2021).

basis.[56] With respect to the examples given above, internet platforms could argue that the bills impinge their constitutional right to editorial judgment.

III. THE CONSTITUTIONAL LAW OF EDITORIAL JUDGMENT

This Part brings into view the existing legal categories and analyses that courts apply when assessing whether to extend protection to speech as editorial judgment in the offline context. Briefly, editorial judgment is granted protection but subject to some limits. Editorial decisions are not exempt from the general carveouts from First Amendment protection for low-value speech, including fraud and libel, and are generally distinct from the commercial speech of the editing institutions themselves.

Justice Burger gave perhaps the most concise definition of editorial judgment: "editing is selection and choice of material."[57] Supreme Court doctrine does not lend itself well to concision, however. The law of editorial judgment as employed by courts can border on "a meaningless, almost vacuous, standard," according to Randall Bezanson, the author of one of the primary scholarly works on editorial judgment.[58] This Part works to synthesize this unwieldy body of law, drawing both on judicial decisions and Bezanson's own framework. As the doctrine currently stands, actors engage in editorial judgment when they exercise some form of selection over speech. An actor need not author the relevant content, the selection itself need not communicate a coherent message, and inviting speech of others does not automatically erase a private actor's editorial rights over that sphere. Speech qualifying for protection as editorial judgment must not run afoul of traditional exceptions from First Amendment protection and must be motivated by more than bare commercial self-interest.

A. Editing as Selection Over Speech

The classic judicial enumeration of editorial judgment comes from the 1974 right-of-reply case *Miami Herald v. Tornillo*: "The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials–whether fair or unfair–constitute the exercise of editorial control and judgment."[59] This language in *Tornillo* highlighted an key feature the Court would look for in deciding whether editorial judgment applied: some kind of choice or selection over speech. Beyond this aspect, though, the *Tornillo* opinion and other early editorial

[56] *See supra* note 2.

[57] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

[58] Bezanson, *supra* note 13, at 829.

[59] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258. (1974).

judgment cases were light on detail. As the Court cryptically defined editing the year before *Tornillo*, in *CBS v. Democratic National Committee*, "editing is what editors are for."[60] True to that sentiment, it would be a few decades before the Court elaborated on its *Tornillo* decision.

In the mid-1990s, the Supreme Court issued two decisions that made clear it was willing to construe editorial judgment broadly. In its 1994 decision *Turner Broadcasting v. FCC*, the Court reviewed regulations that required cable operators to carry local broadcast signals.[61] It found "cable programmers and cable operators engage in and transmit speech" even though they authored no part of the underlying content they transmitted, because they "exercis[ed] editorial discretion over which stations or programs to include in its repertoire."[62] The Court developed this view of editorial judgment as "discretion over others' speech" the next year in its 1995 decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, writing that, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech, or by failing to generate, as an original matter, each item featured in the communication."[63] Selection over speech is enough: the coherency of that selection is not at issue.

The Court's most recent editorial judgment case, the 2019 *Manhattan Community Access Corporation v. Halleck*, reaffirmed protections for the editorial judgments of private actors supporting public functions in an opinion widely regarded as hinting at the Court's instincts about internet platform speech.[64] In *Halleck*, a private nonprofit organization that operated a public access channel suspended television producers from both the channel's broadcasts and facilities on the basis of content they had submitted for consideration.[65] The television producers argued that the public access channel was a government forum subject to First Amendment constraints and could not engage in viewpoint discrimination.[66] The Court disagreed. Despite the public role this channel played, the nonprofit was still a private actor whose editorial judgments deserved First Amendment protection. In language that hewed closely to the contours of debates about internet platforms, the Court wrote that "merely hosting speech by others . . . does not alone

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[60] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

[61] Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994).

[62] *Id.* at 636 (*quoting* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986)); *see also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (finding that a state-owned public access television station had editorial discretion and excluding a political candidate from its televised debate was a proper exercise of that editorial judgment.).

[63] Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp., 515 U.S. 557, 558 (1995).

[64] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

[65] *Id.* at 1924

[66] *Id.* at 1930.

transform private entities into state actors," meaning, as private entities, they were entitled to "exercise editorial discretion over the speech and speakers in the forum."[67] The Supreme Court sought to protect private editorial judgments, lest private actors "face the unappetizing choice of allowing all comers or closing the platform altogether."[68] With *Halleck*, the Court made clear that even private entities that play an important public role and invite third-party speech do not cede editorial control.

Critics of platform editorial judgment often point to *Pruneyard* and *Rumsfeld v. FAIR* as instances of limits on editorial selection. *Pruneyard*, as heard in the U.S. Supreme Court, involved an appeal of a judgment from the Supreme Court of California, which held that a private shopping mall's blanket policy prohibiting any public expressive activity not related to commercial purposes violated the state constitution's free expression provision.[69] The Supreme Court affirmed on the basis that the state constitutional provision did not infringe the shopping mall's First Amendment rights. Crucially, the Supreme Court did not hold that the First Amendment *required* that such public spaces open themselves to all speakers, only that states were allowed to pass their own such regulations or constitutional provisions.[70] Few states have since done so, and California state courts have narrowed the application of *Pruneyard*, perhaps indicating the doctrine has fallen out of judicial favor.[71] *Rumsfeld v. FAIR* involved a challenge to a federal law that required institutions of higher learning receiving certain federal funding to allow military recruiters on campus.[72] The Supreme Court held that this requirement did not violate the First Amendment rights of the institutions.[73] Crucially, the Court held that the activity at issue was not speech "the schools are not speaking when they host interviews and recruiting receptions."[74] Choosing recruiters, the court held, "lack[s] the expressive quality of a parade, newsletter, or the editorial page of a newsletter."[75] The Supreme Court's determination that this activity did not constitute speech can certainly be contested; but its limit, here, on institutional ability to exercise selection over recruiters stemmed from the basis that conduct, not speech, was at issue. The Court did not, instead, find a new limiting principle applicable to editorial privilege. Editorial discretion emerges

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[67] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

[68] *Id.* at 1931.

[69] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Pruneyard Shopping Ctr. V. Robins, 23 Cal. 3d 899 (Cal. Supreme Court 1979).

[70] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) ("We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by . . . state-protected rights of expression and petition.")

[71] *See* Volokh, *supra* note 18, draft manuscript at 27 (discussing Massachusetts, New Jersey, and Pennsylvania); Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 26 Cal. 4th 1013 (2001); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003), Ralphs Grocery v. United Food, 55 Cal. 4th 1083 (2012).

[72] Rumsfeld v. FAIR, 547 U.S. 47 (2006).

[73] *Id.* at 70.

[74] *Id.* at 64.

[75] *Id.*

from these cases circumscribed only in very particular circumstances, in my view.

B. Editorial Protections are Subject to Traditional Limits on Low-Value Speech

Edited speech, like other speech, is subject to the traditional exceptions from First Amendment protection for low-value speech, including the common law speech torts.[76] Defamation actions are particularly central to debates about editorial protections. The landmark Supreme Court case *New York Times v. Sullivan* established the constitutional contours of libel with respect to public figures, holding that a plaintiff who is a public figure had to prove that a defamatory statement was made with actual malice.[77] Defamation actions are central to debates about edited speech because of the republication doctrine, which holds that one who republishes libelous speech–say, a newspaper–is subject to the same liability as the original speaker.[78] Libel actions are also particularly relevant to the online context. As Part II describes, exempting online platforms from republication liability was one of the major motivations of Section 230. An important point to note, with respect to libel actions, is that although falsity is a key element of defamation, "falsity alone does not take speech outside of the realm of First Amendment."[79] No broad-based exemption to constitutional protections exists for false speech.[80]

Although editors are subject to the traditional First Amendment carve-outs for low-value speech, *Smith v. California,* a case dealing with liability for a bookstore that stocked an obscene publication, provides at least minimal constitutional protection for low-value speech in limited circumstances.[81] The Court in *Smith v. California* held that, at least for distributors, liability is limited only to cases where the distributor knew she was distributing low-value speech.[82] There, the court held unconstitutional a statute that punished a bookseller for having, in his store, obscene material, without including language about whether the distributor knew the material was obscene. Thus, a small swath of low-

[76] Bezanson explores privacy torts and examines newsworthiness doctrine; as the Court has broadened who and what receives editorial protection, such as parade organizers, this tort has become less relevant. *See* Bezanson, *supra* note 13, at 777-790.

[77] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In general, with respect to a private person, a defamatory statement must be a false statement purporting to be fact, but must also be published or communicated, be made with at least negligence, and do harm to a person.

[78] RESTATEMENT (SECOND) OF TORTS §578 (AM. L. INST. 1977).

[79] United States v. Alvarez, 567 U.S. 709 (2012).

[80] *See infra* notes 86-95; 163-197 and accompanying text (discussing false advertising claims).

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

[82] *Id.* at 154.

value speech distributed by those who can exercise editorial judgment does receive constitutional protection under this decision.

The relevance of *Smith v. California* to any individual speaker, however, turns on whether that speaker is considered a publisher or distributor. The law traditionally distinguishes between publishers–think newspapers–and distributors, which might include booksellers, newsstands, and the like. The holding of *Smith* only applies to distributors. But the distinction between publishers and distributors online is not settled: early case law held that an internet platform was a publisher if it engaged in content moderation (editing) but a distributor if it did not moderate content.[83] These cases motivated the passage of Section 230. This Article will not attempt to resolve the debate about whether internet platforms are publishers or distributors; its claim is that platforms engage in certain actions that count as editing for First Amendment purposes. Without resolving the distributor/publisher question, it is hard to state with certainty *Smith's* applicability to online platforms–but the decision at least shows the Court's solicitude towards red-flag laws that punish speech only after the speaker is notified of its content, a key tool in the online context.[84]

C. The Problem of Fraudulent Speech

Fraudulent speech–at least of the commercial variety–is actionable under the Supreme Court's decision in *Virginia State Board of Pharmacy*.[85] There, the Court held that a state could "insur[e] that the stream of commercial information flow[s] cleanly as well as freely."[86] That said, fraud is a contested category of low-value speech. As Justice Rehnquist noted in his dissent in *Central Hudson*, "in the world of political advocacy and its marketplace of ideas, there is no such thing as a 'fraudulent' idea."[87] Indeed, he castigated the Court for "unlock[ing] a Pandora's Box" with its ruling in *Virginia State Board of Pharmacy*.[88] The Court has, indeed, continued to grapple with whether and how the First Amendment should protect fraudulent speech, both commercial and otherwise. Several key cases dealing with this problem–including determining what statements made by internet platforms count as commercial speech subject to claims of fraud–have emerged in the online

[83] Cubby, Inc. v. Compuserve, Inc, 776 F. Supp. 135, 140 (S.D.N.Y 1991); Stratton Oakmont, Inc. v. Prodigy Servs., Co., 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Nassau Cnty. 1995).

[84] *See, e.g.*, Mark MacCarthy, *Back to the Future for Section 230 Reform*, LAWFARE (Mar. 2, 2021 11:54 AM), https://www.lawfareblog.com/back-future-section-230-reform (proposing notice-and-takedown alternative).

[85] Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748 (1976).

[86] *Id.* at 772.

[87] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting).

[88] *Id.*

context; those cases will be addressed in Part IV, and this section will address a few key offline cases that deal with this question.

Fraudulent speech cases have complicated taxonomies: this area can encompass 1) an editor endorsing, implicitly or explicitly, another's fraudulent speech, 2) an editor or institution's fraudulent statements about editing practices themselves, and 3) speech that furthers fraudulent conduct. To give an example of the first category, this might involve a newspaper publishing a story in which a reporter has embellished quotes for her own reputational gain. The Court addressed this question squarely in *Masson v. New Yorker Magazine*, discussed below. The second might involve a situation where a newspaper says to its readers, "we fact-check all of our articles," but, in fact, it does not. This category of potential fraud has arisen frequently in the online context and is discussed in Part IV. This category is highly contested; indeed, some would collapse this second category with the third. The third category encompasses the realm of fraudulent advertising, the realm of, for example, quack doctor claims. This is the realm of false advertising law. The Supreme Court has been clear that business practices–even of businesses engaged in the business of speech–can be regulated.[89] This third category is addressed in more depth in the next subsection.

The Supreme Court has only addressed fraudulent speech explicitly in the context of editorial judgment in one case, *Masson v. New Yorker Magazine*.[90] This case, like many, occurred in the context of a defamation action, which limits the holding's broader applicability. Here, the plaintiff brought a defamation action against a journalist who placed quotation marks around speech that was not actually spoken by the interviewee, and against the publication itself, whose editorial process endorsed, either knowingly or recklessly, the fraudulent quotations.[91] The Court issued a restrained holding, finding that a deliberate alteration of an interviewee's words is "not dispositive in every case."[92] Only if "alterations of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character" might the fraudulent misuse of quotations be actionable in libel.[93] In essence: fraud–here defined as the deliberate alteration of quoted material and representation of that the altered material as accurate–is not enough alone to exempt that speech from First Amendment protections, editorial or otherwise.[94] Only if the fraudulent speech "results in a material change in the meaning conveyed" by the words in a way that harms the interviewee in accordance with defamation law is that fraudulent speech

[89] *See* Associated Press v. United States, 326 U.S. 1, 6 (1945).
[90] Masson v. New Yorker Mag., 501 U.S. 496 (1991).
[91] Masson v. New Yorker Mag., 895 F.2d 1535, 1568 (1989).
[92] *Masson*, 501 U.S. at 517.
[93] *Id.* at 518.
[94] *Id.* at 512–513 ("one need not determine whether" content of statement is true "in order to determine that it might have injured his reputation to be reported as having so proclaimed," given that the magazine had "a reputation for scrupulous factual accuracy.")

unprotected.[95] This holding echoes, to some extent, the Court's falsity jurisprudence: fraud, like falsity, in and of itself, is not enough to take speech outside the First Amendment. That said, this form of speech fraud is not the only kind; false advertising laws provide a major line of speech fraud cases, whose reasoning has been picked up to a degree in early online editorial judgment cases. The next section examines the offline caselaw of false advertising.

D. Commercial Advertisements

Advertisements are a potential site of combustion in speech law, at the intersection between editorial judgment and commercial speech. The caselaw is murky, and commercial speech doctrine has also evolved since early cases about editorial judgment and advertising cases, placing their holdings in potential further doubt. The key case here is the Supreme Court's decision in *Pittsburgh Press*, decided when commercial speech was essentially unprotected, before *Virginia State Board of Pharmacy*.[96] In *Pittsburgh Press*, the Court held that an ordinance forbidding newspapers from carrying sex-designated advertising for jobs did not violate the newspaper's First Amendment rights. The Court found that this practice did not "implicate the newspaper's freedom of expression or its financial viability" and was instead "purely commercial advertising"–that is, commercial speech–that, moreover, involved illegal discrimination.[97] Such speech *could* be regulated without violating the protection afforded editorial judgments under the First Amendment.[98]

The Court then decided *Virginia State Board of Pharmacy* in 1976, which extended constitutional protection to lawful, accurate commercial speech.[99] This case cited *Pittsburgh Press* as good law.[100] When the Court elaborated its test for determining what protection commercial speech gets in the subsequent *Central Hudson* case, it also cited *Pittsburgh Press* as good law.[101] The Second Circuit also followed the *Pittsburgh* line of reasoning in its 1991 opinion in *Ragin v. New York Times*, where it upheld regulations of racially preferential real estate advertisements.[102] There, it quoted *Central Hudson's* language that: "Commercial messages that do not accurately inform the public about lawful activity" are unprotected

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[95] Masson v. New Yorker Mag., 501 U.S. 496, 517 (1991).

[96] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 376 (1973).

[97] *Id.* at 376 (The Court points to New York Times Co. v. Sullivan, 376 U.S. 254 (1964) as its model for its decision.)

[98] *Id.*

[99] Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748 (1976) ("What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity. . . the answer . . .is in the negative.").

[100] *Id.* at 759-60.

[101] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980).

[102] Ragin v. New York Times, 923 F.2d 995 (2d Cir. 1991).

and concluded that regulating racially biased real estate advertisements did not infringe protections afforded editorial judgment.[103]

But other Circuit court decisions dealing with lawful speech upheld editorial protections for decisions about advertisements. In the 1971 case *Associates & Aldrich Co. v. Times Mirror Co.*, the Ninth Circuit found no legal authority "that allows us to compel a private newspaper to publish advertisements without editorial control of their content merely because such advertisements are not legally obscene or unlawful."[104] This decision indicated support for editorial control over advertisements when they dealt with legal content.[105] In the 1976 case *Mississippi Gay Alliance v. Goudelock*, the Fifth Circuit upheld a paper's decision not to accept advertisements from a gay community center.[106] The court found that because the advertisement did not contain any low-value speech, the decision to accept or reject the advertisement was just as protected by the First Amendment as the decision to accept or reject an editorial in *Tornillo*.[107] The Eighth Circuit reached a similar conclusion in the 1987 case *Sinn v. The Daily Nebraskan*, upholding a newspaper's decision to reject roommate ads in which the seekers stated their gay or lesbian sexual orientation.[108] There, the Eighth Circuit did not engage at all with questions of commercial versus non-commercial speech; it simply concluded that, because the state school newspaper was editorially independent of the school, the decision to reject the ads was not state action and was thus protected editorial judgment.[109]

Bezanson offers an interpretation of these decisions: where newspapers "transform[] the expression into its own communicative judgment" editorial protections apply.[110] In his view, advertisements sometimes fall into this communicative category, and sometimes outside of it. *Pittsburgh Press* included language that supports this view; the Court wrote that none of the advertisements in question "express[] a position" and as such, do not receive protection.[111] We see echoes of this communicative message determination in the non-advertising cases *Pruneyard* and *Rumsfeld*, where the court concluded, in both cases, that

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[103] Ragin v. New York Times, 923 F.2d 995, 1002 (2d Cir. 1991) (*quoting* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980)).

[104] Assocs. Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 136 (9th Cir. 1971).

[105] *See also* Micah Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L. J. 497 (2015) (arguing that Supreme Court's skepticism towards commercial speech regulation only applies to commercial speech that is non-misleading, informational advertising).

[106] Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (1976).

[107] *Id.* at. 1078-79.

[108] Sinn v. Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987) (The "Daily Nebraskan had reasonably determined that the plaintiffs' advertisements, in effect, discriminated against readers based on sexual orientation" and thus did not want to publish them.)

[109] *Id.* at 665-66.

[110] Bezanson, *supra* note 13, at 822.

[111] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973).

the institution's decision to allow certain speakers would not constitute the institutions' own communicative message.[112]

So what do we make of all this? *Central Hudson's* language is still a good guide: regulations of "commercial messages that do not accurately inform the public about lawful activity" do not run afoul of First Amendment protections for editorial judgements.[113] Inaccurate advertising about lawful activity, or advertising about unlawful activity, may be regulated. But courts have increasingly widened the definition of lawful speech–speech is only related to illegal activity if it explicitly proposes breaking the law.[114] The Supreme Court's focus on commercial speaker rights in *Sorrell v. IMS Health* also indicated a tightening of what constitutes acceptable regulations of commercial speech.[115] And commercial speakers also have increasing access to the compelled speech doctrine; they may have the right to refuse to carry certain kinds of commercial speech, including advertisements.[116] Together, these developments have shrunk the sphere of acceptable regulations of advertisements–and bolstered greater editorial control over advertisements by commercial speakers hosting ads–both online and offline.

E. Monopoly and Editorial Privilege

The Supreme Court, in *Tornillo*, flatly dismissed concerns about monopolies as a criterion relevant to determining limits on editorial privilege. The Court described the media landscape, recognizing concerns about limited competition, "Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."[117] Despite acknowledging the "homogeneity of editorial opinion, commentary and interpretive analysis" and "abuses of bias and manipulative reportage," the Court concluded that "[h]owever much validity may be found in these

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[112] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980); Rumsfeld v. FAIR, 547 U.S. 47, 65 (2006) (finding "little likelihood that the views of those engaging in the expressive activities would be identified with the owner.").

[113] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980).

[114] *See* Doni Bloomfield, *Speech, Drugs, and Patent Infringement* (draft manuscript at 43 n. 150) (describing a range of recent cases, including Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 113-14 (2d Cir. 2017) ("[T]he First Amendment offers no protection to speech that proposes a commercial transaction if consummation of that transaction would *necessarily* constitute an illegal act.") (emphasis in original), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744403#maincontent.

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

[116] These examples do not address the legality of regulating commercial advertising related to illegal activities, or compelled advertisements re illegal activities. The analysis may come out differently.

[117] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 249 (1974)

arguments . . . [a government mandate of a right-to-reply] brings about a confrontation with the express provisions of the First Amendment."[118] Even these legitimate concerns about monopoly could not overcome the fact that "the choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment."[119]

The Court has carved out one place monopoly power can be relevant to editorial rights in *Turner*, as then-Judge Kavanaugh highlighted in his dissent in the case upholding net neutrality regulations: "content-neutral restrictions on a communication service provider's speech and editorial rights may be justified if the service provider possesses 'bottleneck monopoly power' in the relevant geographic market."[120] But that monopoly power depended on the fact that the "physical connection between the television set and the cable networks gives cable operators. . . gatekeeper[ ] control over most programing."[121] Cable companies are not equivalent to newspapers; *Turner* did not overturn *Tornillo's* language about competition and editorial privilege. This fact of physical gatekeeper control determines whether monopoly considerations enter the analysis. That said, even regulations of gatekeepers are subject to intermediate scrutiny, preserving some degree of First Amendment protections for their editorial decisions.

F. Categorical Selection

Wholesale editorial judgments certainly receive First Amendment protection. Consider special-interest magazines: the fact that Knitting Magazine does not publish articles about bicycle repair is fully protected by the First Amendment.[122] But, with the rise of algorithmic decision making in the online context, regulators and critics have started to consider curbing protections for algorithmically served web content, which is, in essence, regulating wholesale decision making. For instance, a recently proposed bill would remove Section 230 protections for algorithmic amplification, where the platform uses "an algorithm, model, or other computational process to rank, order, promote, recommend, amplify, or similarly alter the delivery or display of any information"[123] that is "directly relevant to a case involving interference

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[118] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 254 (1974)

[119] *Id.* at 258.

[120] United States Telecom Ass'n v. FCC, 855 F.3d 381, 431 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *quoting* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 661 (1994). I thank Daphne Keller for the suggestion to address this point.

[121] *Turner Broad.*, 512 U.S. at 656.

[122] I thank Eric Goldman for the suggestion of framing the point in this way.

[123] *See, e.g.*, Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020), introduced by Reps. Anna Eshoo (D-CA) and Tom Malinowski (D-NJ). The bill does provide exceptions for chronological, user rating, alphabetical, and random ordering. It was reintroduced on March 18, 2021. *See Reps. Eshoo and Malinowski Reintroduce Bill to Hold Tech Platforms Accountable for Algorithmic Promotion of Extremism*, U.S. HOUSE OF REPRESENTATIVES (Mar. 24, 2021),

with civil rights" or terrorism.[124] Setting aside severe content-neutrality problems, this bill only attempts to punish *algorithmic* promotion, leaving retail-level decisions by the same platforms protected. Parts IV and V will explore why the wholesale-retail distinction in the online context is suspect, but let's first examine offline doctrine–if any–on whether different protections can be applied to wholesale versus retail editorial judgments.

Turning first to Bezanson's analysis, Bezanson argued that courts do treat wholesale and retail judgments differently, although this distinction is weak and implicit in the judgments he cites in support of his argument. If only slightly, he argued that courts are more disposed to grant protection to retail-level decisions, because retail-level decisions are more likely to carry a communicative message. He bases his analysis primarily on the Court's opinion in *Turner Broadcasting*, the challenge to the rule that required cable operators to set aside channel space to carry local broadcast signals.[125] The standard interpretation of the Court's decision to uphold the must-carry rule in that case is that it hinged on the content-neutrality of the regulations: the regulation did not turn on the content of the local broadcast channels, and so passed constitutional muster under intermediate scrutiny.[126] Bezanson's gloss on the Courts' opinion differs: the wholesale judgments at issue here "lack[ed] the hallmarks of independent choice geared toward audience need that the free press guarantee demands of editorial judgments. Indeed, they lack an essential quality of conveying a message *from the publisher* to the audience."[127] It is on this basis, that these particular wholesale judgments lacked a communicative message, that the Court found the regulations were content-neutral and as such constitutional, in Bezanson's view. In this account, courts would be willing to grant protection to wholesale judgments that carry a communicative message. This proposal obviously raises questions about how a judge determines whether a particular decision carries a communicative message, an issue raised again in Rumsfeld.[128]

Bezanson's view does not age well: the court disfavored the wholesale-retail distinction, at least in the context of a government actor making speech selections, in the 2003 plurality opinion in *United States v. American Library Association*.[129] The Court's ultimate determination here turned very much on whether the resource in question constituted a government forum and what conditions on federal funding are

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https://malinowski.house.gov/media/press-releases/reps-malinowski-and-eshoo-reintroduce-bill-hold-tech-platforms-accountable (hereinafter Press Release.)

[124] *See* Press Release, *supra* note 123. The full text of the bill quotes the relevant U.S. Titles rather than stating "interference with civil rights," 42 U.S.C. §1985; 42 U.S.C. §1986;18 U.S.C. §2333.

[125] Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 623 (1994).

[126] *Id.* at 662.

[127] Bezanson, supra note 13 at 826.

[128] Rumsfeld v. FAIR, 547 U.S. 47, 65 (2006).

[129] 539 U.S. 194 (2003).

appropriate–rather than on the wholesale-retail question. But this case is one of the few that discusses the issue at all and is worth reviewing on that basis.

The case involved a challenge to the Children's Internet Protection Act, which required libraries to use internet filters as a condition of accepting certain federal grants.[130] The Court concluded that the regulation was valid, as it did not induce public libraries to violate patrons' First Amendment rights.[131] Put another way, internet filters are protected instances of editorial judgment by government actors. As a background principle, both the district court and Supreme Court agreed that libraries engage in what is essentially a curatorial function with respect to books; libraries aim "to give the public, not everything it wants, but the best that it will read or use."[132] But, the district court found libraries did not actually exercise protected editorial judgment with respect to the internet: "whereas a library reviews and affirmatively chooses to acquire every book in its collection, it does not review every Web site that it makes available…[as such] a public library enjoys less discretion in deciding which Internet materials to make available than in making book selections."[133] In other words, the wholesale nature of the library's decision making about internet websites afforded their decisions less protection as editorial judgments and granted the public's First Amendment listeners interests in accessing those sites more weight.

The Supreme Court, however, reversed the district court: "We do not find this distinction constitutionally relevant. A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make."[134] Recognizing the "vast quantity of material on the Internet . . . libraries cannot possibly" engage in the same kind of selection as with print materials.[135] As such, "it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgment."[136] Those categorical decisions about websites receive the same level of constitutional protection as more specific decisions about books. Because website editorial decisions received the same kind of editorial protection as book selection, the imposition of internet filters as a condition of federal funding did not infringe on patrons' First Amendment rights. The Court's reasoning, in addition to rejecting a distinction between wholesale- and retail-level judgments, does not use the language of communicative messages, either

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[130] 47 CFR § 54.520.

[131] United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 214 (2003).

[132] *Id.* at 204. (internal quotes omitted) (the Court pointed to its similar decision in Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (public forum principles do not apply to public television station's editorial judgments about what to present to viewers)).

[133] *Am. Libr. Ass'n*, 539 U.S. at 207–08.

[134] *Id.* at 207.

[135] *Id.* at 208.

[136] *Id.*

(Bezanson's interpretation of the case law). In sum–at least in the context of state action–no difference exists between wholesale and categorical editorial decision making, on a "communicative" or other basis.

In sum, this Part demonstrates that courts have recognized editorial judgment when actors exercise selection over speech. The selection need not convey a coherent message and the actor need not have authored the selected speech. Furthermore, existing doctrine does not support a wholesale-retail distinction in editorial selection. Finally, looking to the speech itself, courts will extend editorial judgment protections as long as speech does not fall into one of the traditional categories of low-value speech, and as long as that speech is motivated by more than bare commercial self-interest.

IV. EDITORIAL JUDGMENT ONLINE: THE PROTO-DOCTRINE

The offline editorial judgment cases acknowledge some nuance between different kinds of speech-selection decisions. In contrast, cases dealing with internet platform editorial judgment have generally treated editorial judgment monolithically. Early cases at most engage with the "discretion over others' speech" basis for finding editorial judgment, as discussed in Part III. If a court determines a platform is engaged in speech selection, the court will usually grant protection to that speech as editorial judgment without further analysis. Later cases start to introduce, tentatively, considerations about fraud in content moderation decision-making. But these analyses do not seriously engage with the question of whether the speech at issue is commercial or truly curated speech. Moreover, distinctions between kinds of platforms have not played an important part of analyses, in part because most cases deal with search engines, rather than other kinds of platforms.

The conclusions we draw from these cases should be treated tentatively, however. My claim in this Part is that judicial treatment of editorial privilege online remains in its infancy in three respects. First, because of Section 230's broad immunity provisions, not many courts have even reached First Amendment issues. When they do reach them, the First Amendment analyses are often an underdeveloped afterthought. Second, only lower federal courts and a few appeals courts have reached these issues, largely at the motion to dismiss or summary judgment stages. That higher courts have generally not weighed in means these approaches are far from settled law. Third, the existing judicial analyses lack the kind of fine-grained sophistication necessary to take on the challenges of applying the First Amendment to online platforms. This Part traces the development of this proto-doctrine, examining cases about search engines, social media platforms, shopping platforms, and commercial advertising; in the following Part, I will argue for refinements to this approach.

A. The "Original" Search Cases: Broad Protections

One of the first cases to address First Amendment protections for platforms came from the Western District of Oklahoma. This 2003 case is an anomaly in that it resolved the issue entirely with reference to the First Amendment, rather than also looking to Section 230, and it read editorial protections quite broadly. In *Search King v. Google*, the plaintiff claimed that Google "maliciously decreased" plaintiff's website ranking and claimed tortious interference with contractual relations.[137] The court granted Google's motion to dismiss, finding "no conceivable way to prove that the relative significance assigned to a given website is false" and, as such, rankings "constitutionally protected opinions."[138] Under Oklahoma law, protected speech cannot give rise to a claim for tortious interference with contractual relations because it cannot be considered "wrongful."[139] The court here used the language of fact and opinion to arrive at its decision about the content's First Amendment status, as some offline courts have, rather than explicitly invoking the language of editorial judgment.[140] Still, the court was fairly black-and-white about the application of the First Amendment: the protections applied. The court did not ask questions about conduct versus speech, although it did carefully consider the distinction between search and advertising.[141]

In the 2007 case *Langdon v. Google*, the court considered editorial judgment in similarly broad strokes.[142] The plaintiff challenged Google's alleged decisions not to run advertisements at all on his website, not run one of his advertisements elsewhere, and to de-list his website from certain search results.[143] He argued that Google gave either fraudulent or no reasons for its decisions, and he brought fraud, breach of contract, and deceptive business practices claims.[144] The District Court for the District of Delaware found that Section 230 foreclosed the plaintiff's claims, but it also briefly addressed the platform's First Amendment rights.[145] The court noted that First Amendment rights encompass "the decision of both what to say and what not to say," and that "the injunctive relief sought by

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[137] Search King, Inc. v. Google Tech., Inc., 2003 WL 21464658, at *2-4 (W.D. Okla. May 27, 2003).

[138] *Id.* at *4; Kinderstart.com LLC v. Google, Inc., 2007 WL 831806 (N.D. Cal. Mar. 16, 2007) (finding similarly that Google rankings are not provably false) ("As discussed above, PageRank is a creature of Google's invention and does not constitute an independently-discoverable value. In fact, Google might choose to assign PageRanks randomly, whether as whole numbers or with many decimal places, but this would not create 'incorrect' PageRanks.")

[139] *Search King*, 2003 WL 21464658 at *4.

[140] Bezanson, *supra* note 13 at 791.

[141] *Search King*, 2003 WL 21464658 at *3-4.

[142] Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); *see also* KinderStart.com LLC v. Google, Inc., No. 2007 U.S. Dist. LEXIS 22637 (N.D. Cal. 2007).

[143] *Langdon*, 474 F.Supp. 2d. at 626-67.

[144] *Id.* at 625-27 (Court found that the plaintiff failed to state his public calling claim. Plaintiff also alleged that Google violated his First and Fourteenth Amendment rights under the federal and state constitutions. The case involved mainly Google, but plaintiff listed other platforms as defendants, too.).

[145] *Id.* at 631.

Plaintiff contravenes" Google's right.[146] The court engaged in little analysis beyond this statement, simply citing *Tornillo* and Eighth and Ninth Circuit cases discussed above upholding editorial judgment as applied to offline advertising.[147] As in *Search King*, the court did not engage in content versus speech analysis, and also did not consider whether Google-as-search-ranker and Google-as-ad-network meant anything different for the plaintiff's different claims.

The 2014 case *Zhang v. Baidu* is the most thorough opinion on search engine First Amendment rights, and specifically on protections for editorial judgment.[148] The District Court for the Southern District of New York found that the First Amendment protected search results because "search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information."[149] Compared to *Langdon* and *Search King*, the court laid out a more complete First Amendment analysis of internet platform rights, drawing on *Tornillo*, *Turner*, and *Hurley*.[150] Here, the plaintiffs, activists pushing for greater democratic rule in China, brought suit against the Chinese search engine Baidu for blocking certain pro-democracy results in its U.S. product, bringing a bevy of state and federal civil rights claims.[151] The court granted the defendant's motion for judgment on the pleadings: "allowing Plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment."[152]

The court walked through *Tornillo*, *Turner*, and *Hurley*, commenting that "First Amendment jurisprudence all but compels the conclusion that the Plaintiffs' suit must be dismissed."[153] These cases together represented four principles the *Zhang* court found instructive: (1) that the government cannot interfere "with the editorial judgments of private speakers on issues of public concern," (2) that this right extends beyond the press, (3) that the editorial message need not be coherent nor have been authored by the editor, and (4) that the government's intentions are irrelevant with respect to the validity of the regulation.[154] The court also dismissed arguments that platform First Amendment rights should be reduced because search results deal with factual information (citing *Sorrell v. IMS Health*.)[155] The court was also careful to show how

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[146] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[147] *Id.*, citing Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974); Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987) (upholding newspaper's decision to reject roommate ads in which advertisers stated their gay or lesbian orientation); Assocs. & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) (finding that court cannot compel publisher to publish advertisements in as-submitted form; publisher is allowed to exercise editorial judgment over ad content).

[148] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433 (S.D.N.Y 2014).

[149] *Id.* at 438.

[150] *Id.* At 434-36.

[151] *Id.* at 434-36.

[152] *Id.* at 435.

[153] *Id.* at 436.

[154] *Id.* at 437-38.

[155] *Id.* at 438 (citing Sorrell v. IMS Health, Inc., 564 U.S. 552, 570 (2011)).

Turner's rationale for applying intermediate scrutiny to cable editorial choices was not applicable in the search result context.[156] The court wrote that "Turner's three principles for applying a lower level of scrutiny . . . that cable companies were mere conduits for the speech of others, that they had the physical ability to silence other speakers, and that the regulations at issue were content-neutral–are inapplicable here."[157]

Most interestingly for our purposes, the court engaged with two prongs of analysis that echo debates about editorial judgment in the offline world, the wholesale versus retail question and the issue of commercial self-interest. The court dismissed as irrelevant the fact that the editorial decisions were (largely) conducted algorithmically.[158] As discussed above, algorithmic judgments can be construed as more wholesale in nature than retail in nature. The court found that such a distinction did not matter with respect to the level of First Amendment protection afforded search results: "algorithms themselves were written by human beings, and they 'inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries.'"[159] Other courts have expressed similar views on the equality of human versus algorithmically selected speech in Section 230 cases, reflecting potentially broader support for this proposition among judges who have not yet explicitly ruled on internet platform First Amendment cases.[160] In a nod to the bare commercial self-interest line of cases that limited editorial judgment in the offline world, the plaintiffs tried to argue that the search results should be given lesser protection because search results are "both Baidu's product and advertisement."[161] Although the court recognized that "advertisements displayed by a search engine" and maybe even "search results shown to purposefully advance an internal commercial interest of the search provider" might qualify as commercial speech, the pro-democracy results at issue did not fall under these categories and remained protected editorial judgment.[162]

B. Fraud Claims Against Platforms

A few recent cases suggest possible judicial solicitude towards claims that platform representations about how they moderate content are fraudulent. In the terminology used earlier in this Article, the court

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[156] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 439 (S.D.N.Y 2014).
[157] *Id.* at 440.
[158] *Id.* at 438.
[159] *Id.* (quoting Volokh & Falk, *supra* note 11, at 884).
[160] *See* Force v. Facebook, Inc. 2019 WL 3432818 (2d Cir. July 2019); *see also* Eric Goldman, *Second Circuit Issues Powerful Section 230 Win to Facebook in 'Material Support for Terrorists' Case*–Force v. Facebook, TECH. & MKTG. L. BLOG (July 31, 2019), https://blog.ericgoldman.org/archives/2019/07/second-circuit-issues-powerful-section-230-win-to-facebook-in-material-support-for-terrorists-case-force-v-facebook.htm.
[161] *Baidu,* 10 F. Supp. 3d. at 443.
[162] *Id.* (internal quotations omitted).

has shown willingness to allow actions challenging the second category of fraudulent speech–fraudulent representations about editing–at least at the motion to dismiss stage. They key takeaway from these cases is that the courts, at this early procedural stage, raised the possibility that certain instances of fraud could take protected speech outside the parameters of editorial judgment. Notably, in the relevant cases so far, the same claims failed at the summary judgment stage.

In *E-Ventures*, a 2016-17 case in the District Court for the Middle District of Florida, the plaintiffs were a firm that offered search engine optimization services to help client websites rank more highly in search results.[163] In 2014, Google notified the company that a couple hundred websites owned by the company "were being manually removed by Google from all of Google's search results because they had been identified as 'pure spam.'"[164] The company alleged that Google's content moderation policies do not make this particular spam policy, and its consequences, clear.[165] More importantly, the company alleged that Google's spam reasoning was fraudulent; the real reason for de-listing was anticompetitive bias.[166] The plaintiffs brought a federal unfair competition claim under the Lanham Act, as well as a claim under state consumer protection law, a claim for defamation, and a claim for tortious interference with business relations.[167] The district court denied Google's initial motion to dismiss on all counts except the defamation claim, allowing the others to go forward (hereinafter *E-Ventures I*).[168] Google subsequently moved for summary judgment, and the case was assigned to a different judge, who ruled for Google (hereinafter *E-Ventures II*).[169]

In *E-Ventures* I, the court claimed "little quarrel with the cases cited by Google for the proposition that search engine output results are protected by the First Amendment."[170] Nonetheless, the court identified a key feature which took the case out of the realm of protected speech: allegedly, "Google falsely stated that e-ventures' websites failed to comply with Google's policies," and, as such, "this case does not involve protected pure opinion speech."[171] Further, the court found that the plaintiff alleged that Google banned its websites for anticompetitive reasons, citing to *Pittsburgh Press* and *Ragin*, concluding that "a fact published maliciously with knowledge of its falsity or serious doubts as to its truth is sufficient to overcome the editorial judgment protection afforded by the Constitution."[172] Specifically with respect to editorial

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[163] E-Ventures Worldwide v. Google, 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) (E-Ventures I).

[164] *Id.* at 1269.

[165] *Id.* at 1270.

[166] *Id.* at 1277.

[167] *Id.* at 1271.

[168] *Id.* at 1279.

[169] E-Ventures Worldwide v. Google, 2017 WL 2210029 (M.D. Fla. 2017) (E-Ventures II).

[170] *E-Ventures I*, 188 F. Supp. 3d at 1274.

[171] *Id.*

[172] *Id.* at 1275.

judgment, the court found that the plaintiff had sufficiently alleged, at this stage, "that it did not violate any of Google's policies and that the representations made by Google that e-ventures' pages violate Google's policies are false."[173] To the court's credit, it did note that "whether or not plaintiff can support these assertions and carry its burden at a later stage of the proceedings is for a different day."[174]

In *E-Ventures II*, the opinion written by a different judge effectively walked back the first judge's reasoning.[175] In fact, in a highly unusual move, the judge found that the plaintiffs had pled sufficient evidence of bad faith to overcome Section 230 protections, but that the First Amendment nonetheless barred the claims.[176] The court elaborated, invoking editorial privilege:

> Google's actions in formulating rankings . . . and in determining whether certain websites are contrary to Google's guidelines . . are the same as decisions by a newspaper editor regarding which content to publish, which article belongs on the front page, and which article is unworthy of publication. The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism.[177]

The court concluded that "editorial judgments, *no matter the motive*, are protected expression."[178] The judge moved the needle back to the "early" days of internet platform litigation: the First Amendment protected the platform's search rankings, full stop. The court's holding about Section 230 has been questioned by subsequent courts, but Google nonetheless continues to cite the First Amendment portion in litigation documents.[179]

Dreamstime v. Google, a 2019-2020 case in the District Court for the Northern District of California, presented a similar scenario.[180] Dreamstime, a stock image supplier, experienced a significant drop in its search rankings.[181] Dreamstime alleged that Google "manipulated Dreamstime's organic search ranking unfairly and illegally to force Dreamstime to spend an unreasonable amount of money on additional AdWords campaigns that would not otherwise have been necessary."[182]

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[173] E-Ventures Worldwide v. Google, 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) (E-Ventures I).

[174] *Id.*

[175] E-Ventures Worldwide v. Google, 2017 WL 2210029 (M.D. Fla. 2017) (E-Ventures II).

[176] *Id.* at *10.

[177] *Id.* at *11.

[178] *Id.* (emphasis added).

[179] *See, e.g.*, Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 633 (2020); Murphy v. Twitter, 60 Cal. App. 5th 12 (2021); Motion to Dismiss at 3, 18, Dreamstime v. Google, 3:18-cv-019010, 2019 WL 2372280 (N.D. Cal 2019) (citing E-Ventures II).

[180] Dreamstime.com, LLC v. Google, 2019 WL 2372280 (N.D. Cal 2019) (Dreamstime I); Dreamstime.com, LLC v. Google, 470 F.Supp.3d 1082 (N.D. Cal 2020) (Dreamstime II).

[181] *Dreamstime I*, 2019 WL 2372280 at *5-*6.

[182] *Id.* at *2 (internal quotations omitted).

The plaintiff brought antitrust claims against Google, which were dismissed,[183] as well a breach of covenant of good faith and fair dealing claim and a claim under California consumer protection law.[184] In *Dreamstime I*, the court denied Google's motion to dismiss on First Amendment grounds, but, similar to *E-Ventures*, subsequently granted Google's motion for summary judgment in *Dreamstime II*.

In *Dreamstime I*, the court, citing to *Tornillo* and all of the platform cases discussed so far in this Article, wrote: "even assuming the First Amendment generally protects search engines," an "issue of material fact exists as to the reason Dreamstime had formerly been highly ranked on Google . . . Perhaps the reason is that Google torpedoed Dreamstime's organic search ranking to boost advertising revenue. Perhaps it is not. Discovery will tease out what occurred here."[185] Putting the court's words into the terms used in this Article, the court is essentially identifying a potential low-value speech exception in an area otherwise covered by editorial judgment.

The same judge, however, subsequently granted Google's motion for summary judgment.[186] Following a careful parsing of the facts that took up more than half of the opinion, the judge concluded that Google had committed no fraud under California consumer protection law with regards to Dreamstime's rankings.[187] The judge, however, does not make any reference to the First Amendment in his opinion on the motion for summary judgment–even when carefully assessing whether fraud could have occurred. This absence leaves us to wonder if his prior references to the First Amendment and exceptions for fraud are still relevant. However, the judge also did not engage with Section 230 in granting summary judgment, appearing to stick with consumer protection statutory grounds. Once again, the impact of an editorial judgment platform case going forward is unclear to limited.

A second kind of fraud case involves claims that platform statements about its own moderation policies constitute false advertising. The Ninth Circuit, which heard the key case so far, flatly rejected these kinds of fraud claims. Prager University ("PragerU"), a right-wing group that posts videos on YouTube, sued Google for a number of claims, including claims for false advertising under the Lanham Act.[188] PragerU asserted that YouTube's policies and guidelines, as well as its general statements about the platform's neutrality, constituted such false

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[183] Dreamstime.com, LLC v. Google, 2019 WL 2372280 at *1 (N.D. Cal 2019) (Dreamstime I).

[184] *Id.* at *10.

[185] *Id.*

[186] Dreamstime.com, LLC v. Google, 470 F.Supp.3d 1082, 1096 (N.D. Cal 2020) (Dreamstime II).

[187] *Id.* at 1094 ("Dreamstime's fraud claim fails for one simple reason. Nobody at Google, either on the advertising or the organic side, ever believed that Dreamstime's ranking dropped as a result of the update to Google's salient terms algorithm . . . an omission theory [under California consumer protection law] does require that the defendant possess actual knowledge of the concealed fact.").

[188] Prager Univ. v. Google, 2018 U.S. Dist. LEXIS 51000 at *8 (N.D. Cal. 2019).

advertising.[189] The lower court dismissed both of these claims: the court found that the platform's policies and guidelines were "more akin to instruction manuals" rather than "part of an organized campaign to penetrate the relevant market."[190] With respect to the platform's general statements about being, for example "a community where everyone's voice can be heard," the court found that "all of these statements constitute mere 'puffery' and are therefore not actionable under the Lanham Act," meaning the statements were "extremely unlikely to induce consumer reliance or so vague that it is not capable of being proved false."[191] The Ninth Circuit affirmed: "YouTube's braggadocio about its commitment to free speech constitutes opinions that are not subject to the Lanham Act."[192] The statements the platform made, such as "people should be able to speak freely" are "classic, non-actionable opinions or puffery."[193] Similarly, the platform's statements that its service would help one "discover what works best" was non-quantifiable and also puffery.[194]

It is worth noting that momentum for such claims is not limited to the political right. A similar case, filed by left-leaning advocates, is pending in D.C. Superior Court.[195] The alleges false advertising under D.C. consumer protection law on the basis that Facebook states, but does not, remove hate speech.[196]

In sum, the platforms emerged victorious in all of these cases. In the end, it is hard to make much of these opinions from a First Amendment standpoint other than judges are beginning to show signs of at least entertaining the argument that fraud claims can, as in the offline world, trump editorial protections online with respect to platform business practices. What constitutes a platform business practice as opposed to speech is, of course, subject to contested debate. It is also worth noting that courts have not showed an openness to claims that platforms should be liable for the fraudulent or false speech of third-party users.

The procedural downsides of openness to claims of fraud about moderation practices are worth noting. The unfounded nature of the fraud claims in the examined cases ended up costing the litigants and the courts substantial resources. Additionally, the judge's initial solicitousness towards the plaintiff's claims raise the question of whether the plaintiffs were trying to settle, opening a slippery slope for platform

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[189] Prager Univ. v. Google, 2018 U.S. Dist. LEXIS 51000 at *29 (N.D. Cal. 2019).
[190] *Id.* at *33 (internal quotation omitted).
[191] *Id.* at *36 (internal quotations omitted).
[192] Prager Univ. v. Google, 951 F.3d 991, 1000 (9th Cir. 2020).
[193] *Id.*
[194] *Id.*
[195] *See* Complaint, Muslim Advocs v. Zuckerberg (D.C. Sup. Ct. 2021), available at https://muslimadvocates.org/wp-content/uploads/2021/04/GW_MuslimAdvocates_Facebook_Complaint_FILED_4_8_21-with-addresses-REDACTED.pdf.
[196] *Id.*

payouts to claimants alleging fraud. These cases drive home the procedural value of Section 230, which provides a statutory short-stop for these kinds of claims, reducing the procedural costs for the involved parties.[197]

C. Social Platform Cases

Few cases have touched on platform First Amendment rights in the context of social media.[198] The cases that have done so resemble the inchoate reasoning of the original search cases–*Search King* and *Langdon*–and the broad protections they afford. In a 2017 case, *La'Tiejira v. Facebook*,[199] in the Southern District of Texas, the plaintiff, an adult entertainment actress, sued Facebook for failing to remove an allegedly defamatory post another user had posted to the plaintiff's Facebook page.[200] The plaintiff brought defamation, breach of implied contract, and intentional infliction of emotional distress claims, and also sought to hold Section 230 unconstitutional as applied.[201] Facebook brought a motion to dismiss under Section 230 and under the Texas anti-SLAPP law, the Texas Citizens Participation Act, and, interestingly, *requested* that the court address the speech issue first.[202] This request is unusual because Section 230's broad protections usually suffice for platform litigants; Google's anti-SLAPP defense failed in a 2007 case, so perhaps this was an attempt to revive state anti-SLAPP statutes as an additional defense for platforms.[203]

The court ruled for Facebook on both grounds.[204] The court found the state anti-SLAPP law protected Facebook because the plaintiff's "claims arise directly and exclusively from Facebook's First Amendment right to decide what to publish and what not to publish on its platform," citing *Tornillo* and *Baidu*.[205] One might feel like the First Amendment analysis is incomplete because court did not engage with questions of low-value speech and republication liability, and the case was, after all, about defamation. But the court did not need to reach those issues for either

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[197] For this argument at length, *see* Goldman, *supra* note 5.

[198] Many cases have addressed questions of liability for content moderation on social media, but most are resolved on Section 230 grounds. *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014); Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); Sikhs for Just. "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088 (N.D. Cal. 2015), *aff'd sub nom.* Sikhs for Just., Inc. v. Facebook, Inc., 697 F. App'x 526 (9th Cir. 2017); Gaston v. Facebook, Inc., No. 3:12-CV-0063-ST, 2012 WL 629868 (D. Or. Feb. 2, 2012), report and recommendation adopted, No. 3:12-CV-00063-ST, 2012 WL 610005 (D. Or. Feb. 24, 2012).

[199] 272 F. Supp. 3d 981, 987 (S.D. Tex. 2017).

[200] *Id.* at 984.

[201] *Id.* at 983.

[202] *La'Tiejira*, 272 F.Supp.3d at 984.

[203] *See* Kinderstart.com LLC v. Google, Inc., No. C06-2057JFRS, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007).

[204] *La'Tiejira*, 272 F.Supp.3d at 981.

[205] *Id.* at 991.

anti-SLAPP or Section 230 purposes.[206] Certainly missing from the speech inquiry, though, was what, if any, role the user's own ability to delete the speech at hand should play in a First Amendment analysis.

Although overturned by the Fifth Circuit, a second case, *Robinson v. Hunt County*, from the Northern District of Texas, grappled with the intersection of platform First Amendment rights and government First Amendment obligations.[207] In this case, the plaintiff sued the county and the sheriff's office for deleting comments critical of the sheriff's work.[208] Quoting *La'Tiejira*, the lower court found that "Facebook has a right to exercise control over the contents of its platform" and that "removal of Plaintiff's posts would most likely be construed as compliance with Facebook's policies, which must be followed in order for Defendants to utilize Facebook."[209] In essence, the district court found that a private actor's editorial policies trumped a government actor's First Amendment obligations. This view was soundly rejected on appeal in the Fifth Circuit, where the court applied an analysis more similar to the Second Circuit's conclusions in *Knight First Amendment Institute v. Trump*, finding that the sheriff's Facebook page was a forum subject to First Amendment scrutiny and that its operators had engaged in unconstitutional viewpoint discrimination.[210] In sum, social platform cases so far show an extension of the law of editorial privilege as applied to search platforms, with little discussion of the dual-layer (user and platform) feature of social media platforms.

D. Shopping Platform Cases

In its withdrawn opinion in *Oberdorf v. Amazon*, the Third Circuit considered the application of the editorial privilege to Amazon in a case involving claims seeking to hold Amazon strictly liable for injuries caused by defective goods purchased on the company's website.[211] The holding is tricky: the court's reasoning moved from finding that Amazon exercised editorial functions to immunity under Section 230, rather than the First Amendment, but the decision still relied on the concept of an editor. Furthermore, the judgment was vacated pending rehearing *en banc*,

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[206] *La'Tiejira v. Facebook*, 272 F. Supp. 3d 981, 981 (S.D. Tex. 2017). The court spent some time assessing whether the speech at hand was speech concerning a public issue–a requirement for the anti-SLAPP statute to apply. The court concluded that the plaintiff, as an adult entertainer who made a living from public appearances, qualified as a public figure for purposes of the statute. This analysis touched on elements of a defamation analysis–whether the falsity or actual malice standard should apply based on the private or public nature of the speech–but did not actually complete that analysis.

[207] Robinson v. Hunt Cty., 2017 WL 7669237 (N.D. Tex. 2017).

[208] *Id.* at *3-4.

[209] *Id.*

[210] Robinson v. Hunt Cnty., TX, 921 F.3d 440, 447-48 (2019) (the Robinson court applied similar reasoning to the Second Circuit in Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019)).

[211] Oberdorf v. Amazon.com Inc., 930 F.3d 136 (3rd Cir. 2019) (vacated).

which then certified a question of state law to the Pennsylvania Supreme Court.[212] As such, this opinion should be treated as suggestive only, rather than precedential.

The court's analysis–as it should–distinguished between Amazon's roles. The court "recogniz[ed] that Amazon exercises online editorial functions" but did not "agree that all of Oberdof's claims" seek to treat Amazon as a publisher or speaker.[213] Amazon's "involvement in transactions extends beyond a mere editorial function; it plays a larger role in the actual sales process. This includes receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting the fees it charges."[214] The court concluded that to extent that plaintiff's claims relied "on Amazon's role as an actor in the sales process" her claims were not barred by Section 230.[215] However, to the extent that she "is alleging that Amazon failed to provide or edit adequate warnings regarding the use of the dog collar, we conclude that that activity falls within the publisher's editorial function."[216]

Other courts–as the Pennsylvania Supreme Court might–have decided differently, but not on First Amendment grounds. The Fourth Circuit, in *Erie v. Amazon*, found that Amazon was merely an "entrustee" of a good sold by a third party.[217] In a similar vein, in *Vesley v. Armslist*, the Seventh Circuit found Armslist not liable for a gun sale: "simply enabling consumers to use a legal service is far removed from encouraging them to commit an illegal act . . . [Armslist permitted placing] an advertisement on its website and nothing more."[218]

Suits that have sought to hold online marketplaces liable for failure-to-warn causes of action or for false advertising of third-party sellers on their platforms have so far failed. The Ninth Circuit has held that Section 230 does not bar failure-to-warn claims, but the relevant cases have so far failed on their merits, with plaintiffs lacking the necessary relationship to the defendant to inculcate a duty to warn.[219] The Southern District of New York seemingly held that Section 230 protected Amazon against liability for a manufacturer's ad copy.[220] Again, these cases dealt only with Section 230, not explicitly with the First Amendment, but these cases may hint at

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[212] Oberdorf v. Amazon.com Inc., 818 Fed. Appx. 138, 143 (3d Cir. 2020) ("Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?")

[213] *Oberdorf*, 930 F.3d at 153.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] Erie Insurance Co. v. Amazon.com, Inc. 925 F.3d 135 (4th Cir. May 22, 2019).

[218] Vesely v. Armslist LLC, 762 F.3d 661 (7th Cir. 2014).

[219] Doe v. Internet Brands, 824 F.3d 846 (9th Cir. 2016); Order Granting Defendant Internet Brands Motion to Dismiss, Doe v. Internet Brands, No. 12-3626-JFW (C.D. Cal. Nov. 14, 2016); Beckman v. Match.com, 668 Fed. Appx. 759 (9th Cir. 2016).

[220] Brodie v. Green Spot Foods LLC, 2020 WL 70275494 (S.D.N.Y. Nov. 30, 2020).

how courts are assessing the seller-speaker definition for shopping platforms, which will be relevant to any First Amendment challenges.

It is hard to know what to make of this emerging caselaw about shopping platforms. At the very least, when considering claims against shopping platforms, courts show signs of at least recognizing the different roles that individual platforms can play within their own ecosystems, a positive development in terms of analytical precision.

E. Online Commercial Advertising

The following cases deal with platforms hosting advertisements, not with advertisements for platforms themselves. Online commercial advertising cases fall into two broad categories: cases raising issues akin to those that arise in the commercial advertising context in the offline world, and those raising issues novel to the online context. As an initial point, not all courts analyze core functions separately from advertising in online platform cases. For example, in the "early" search platform case *Langdon v. Google*, the court broadly assessed the claims about ads alongside the claims about search ranking, providing no analytical guidance about whether and when such claims should be considered separately.[221]

With respect to applying offline caselaw online, courts have continued to hold that online ads for illegal activity receive no First Amendment protection. Backpage.com's challenge to the Stop Advertising Victims of Exploitation (SAVE) Act of 2015 exemplifies this approach.[222] There, the court held that Backpage did not have standing to challenge SAVE because it did not intend to host prohibited advertisements related to sex trafficking of minors, and even if it did, it could not claim a constitutional interest in that speech, as "such speech is not protected by the First Amendment."[223] So far, so consistent.

In a case combining a well-worn fact pattern with the new practice of behavioral advertising, the ACLU and several partners filed charges with the Equal Employment Opportunity Commission against Facebook and ten other companies that target ads for certain jobs in male-dominated fields to users on the basis of gender and age.[224] The coalition claimed that these targeted job advertising practices violated federal laws pertaining to sex and age discrimination. The case settled, requiring substantial changes to Facebook's advertising procedures, echoing the

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[221] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007)

[222] For full coverage, *see* Eric Goldman, *Backpage Can't Challenge the SAVE Act-Backpage v. Lynch*, TECH. & MKTG. L. BLOG (2016), https://blog.ericgoldman.org/archives/2016/11/backpage-cant-challenge-the-save-act-backpage-v-lynch.htm.

[223] Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 104 (D.D.C. 2016).

[224] Galen Sherwin, *How Facebook is Giving Sex Discrimination in Employment Ads a New Life*, ACLU (Sept. 18, 2018, 10:00 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/how-facebook-giving-sex-discrimination-employment-ads-new.

outcome of *Pittsburgh Press*.[225] A few other similar lawsuits about discriminatory advertising have been filed but either settled or were dismissed for lack of standing for lack of injury in fact and under Section 230.[226] The decision in *Fair Housing Council v. Roommates.com* also followed this logic, although it was a Section 230 case; online platforms cannot design input for classified advertisements in ways that further discrimination.[227] Given the dismissals, settlements, and dominance of Section 230 in these cases, few specifics can be gleaned about the First Amendment's application to targeted online advertising, other than it was not a lynchpin issue in these cases.

Other claims about unique features of online advertising are embedded in cases that are better known for other controversies. *Prager University v. Google*, for instance, primarily revolved around rejected claims that Google was a state actor for purposes of the First Amendment. The state law claims in this case, which were separated from the federal claims and heard in state court, were based in part on the fact that the plaintiff's access to "YouTube's advertising service has been restricted," a process known as demonetization, where platforms restrict the ability of ads to appear on certain content on its platform.[228] The lower court flatly dismissed the argument that the advertising service could constitute a public forum. In so holding, the court invoked the language of editorial judgment, writing that, "even more than the core YouTube service, these platforms [the ad services] necessarily reflect the exercise of editorial discretion rather than serving as an open 'town square.'"[229] The court also found Section 230 protected the advertising decisions.[230] This language is striking: the state court here goes out of its way to describe the platform's control over ad service as editorial judgment.

The behavioral nature of online advertising is another feature that could support a position that editorial protections should be applied more broadly to platform decisions about advertising than in the offline context. As the view goes, targeted advertising involves individual decisions about pieces of content, a clear instance of selection over speech. So far, courts have not expressed much support for this position. In *Baidu*, as discussed above, the court addressed a related issue, rejecting

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[225] Galen Sherwin & Esha Bhandari, *Facebook Settles Civil Rights Cases by Making Sweeping Changes to Its Online Ad Platform*, ACLU (Mar. 19, 2019, 2:00 PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/facebook-settles-civil-rights-cases-making-sweeping.

[226] *See, e.g.,* Mobley et al. v. Facebook, 5:16-cv-06440 (N.D. Cal. 2016) (settled); National Fair Housing Alliance et al. v. Facebook, 1:18-cv-02689 (S.D.N.Y 2018) (settled); Riddick v. Facebook, 3:18-cv-04529 (N.D. Cal. 2016) (settled); Vargas v. Facebook, Inc., No. 19-CV-05081-WHO, 2021 WL 214206 (N.D. Cal. Jan. 21, 2021) (dismissed on Section 230 and lack of injury in fact grounds); Opiotennione v. Facebook, Inc., No. 19-CV-07185-JSC, 2020 WL 5877667 (N.D. Cal. Oct. 2, 2020) (dismissed on lack of injury in fact).

[227] Fair Housing Council v. Roommates.com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008).

[228] Prager Univ. v. Google LLC, 2019 Cal. Super. LEXIS 2034 at *16 (2019).

[229] *Id.* at *17.

[230] *Id.* at *27.

plaintiff arguments that search rankings served the same purpose as advertisements. Because the search results were "both Baidu's product and advertisement," the plaintiffs argued that the rankings were commercial speech and subject to lower First Amendment protection.[231] The court rejected this view, stating that "advertisements displayed by a search engine" and, possibly, "search results shown to purposefully advance an internal commercial interest of the search provider" might qualify as commercial speech, but the search results at issue did not.[232]

In *Gonzales v. Google*, a case which sought to hold Google accountable for a death in a terrorist attack under the federal Anti-Terrorism Act, the plaintiffs tried to argue that the behavioral nature of advertising transformed ads on YouTube into platform speech for the purposes of Section 230. They alleged "that Google creates 'new unique content' for viewers 'by choosing which advertisements to combine with the posted video with knowledge about the viewer.'"[233] The court rejected their argument that this "unique content" meant Section 230 did not apply.[234] Plaintiffs similarly argued, in *Force v. Facebook*, that "Facebook's use of algorithms is outside the scope of publishing because the algorithms automated Facebook's editorial decision-making."[235] Neither court directly addressed First Amendment equities directly, but the *Gonzales* court noted that Section 230 was enacted to further First Amendment interests.[236] Other cases have similarly found that Section 230 grants protection of automated editorial acts.[237]

Overall, courts have applied certain elements of offline advertising law squarely in the online context, especially with regards to advertisements about illegal conduct. Weak evidence exists that courts have been hesitant to treat algorithmic or behavioral advertising any differently than human-reviewed, retail-level decisions about advertising. Even when these analyses rest on Section 230, these cases provide some indication of how courts would carry out a First Amendment analysis, given the close relationship between the two bodies of law.

Taken together, the emerging law of editorial judgment online suggests a strong, but relatively unnuanced, application of First Amendment editorial protection to online platforms. Some, but not all, judges differentiate between platform roles; doing so is more typical in shopping platform cases. Judges have shown some openness to allowing fraud claims when the fraudulent speech in question is the platform's own. Few cases exist with respect to social media platform privilege, but the cases that do pay little attention to the interaction between user

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[231] Zhang v. Baidu.com Inc., 10 F.Supp.3d 433, 443 (S.D.N.Y 2014)
[232] *Id.* (internal quotations omitted).
[233] Gonzales v. Google, 282 F. Supp. 3d 1150 at 1168 (N.D. Cal. 2017).
[234] *Id.*
[235] Force v. Facebook, Inc., 934 F.3d 53, 67 (2d Cir. 2019).
[236] *Gonzales*, 282 F. Supp. 3d at 1163.
[237] O'Kroley v. Fastcase, Inc., 831 F.3d 352, 355(6th Cir. 2016); Marshall's Locksmith Serv. V. Google, LLC, 925 F.3d 1263, 1271 (D.C. App. 2019); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

control and platform editorial control. Finally, courts have extended offline laws about advertising and editorial control to the online context largely unchanged, and some have shown an initial willingness to prioritize protections for online advertising as editorial judgment.[238]

V. TOWARDS A REFINED EDITORIAL PRIVILEGE FOR PLATFORMS

The old rules of editorial judgment do not always map easily onto the contours of online platforms. This is one reason courts may have avoided applying the law of editorial judgment to internet platforms in a fine-grained manner. But, seeing platforms and platform actions as the same is not constitutionally rigorous. Platforms differ in ways that might affect how the law of editorial judgment is applied to them: they host content and they curate it; they perform a core function and serve ads; they make algorithmic wholesale and traditional retail curatorial decisions; they offer varying degrees of control to users over speech; and they occupy more or less dominant positions in the market. In this Part, I analyze how the doctrine of editorial judgment, both as developed offline and as developing online, applies in the presence of these distinctions.

The basic qualification for editorial judgment does not need to change in an online context. When platforms exercise selection over the speech of others–when they are exercising a curatorial function–they are protected as editors. *Tornillo*, *Turner* and *Hurley* create a strong foundation for extension of editorial judgment, defined as exercising selection over speech, to private actors, including internet platforms. In particular, the extension of editorial protection to curating that does not "isolate a specific message" means that selecting speech for relevance, one of the most common bases for selection of speech for many online platforms, easily qualifies for editorial protection.[239]

But selection should be just the threshold of a First Amendment analysis, not the conclusion. More factors should be considered. First, the role that a platform is playing in any given moment should matter to the analysis of whether speech protections extend to it–a simple, but so far underappreciated, point. Just as in the offline world, First Amendment analysis should be sensitive to the role that a platform is playing with respect to a particular decision. Second, no *constitutional* reason exists to exempt online platforms from exceptions to editorial privilege for low-value speech–a deeply troubling result, I argue. (Section 230, of course, does offer *statutory* immunity for some of this speech.)

Third, as in the offline context, we should continue to reject a wholesale-retail distinction in the online space, despite pressure to weaken protections for algorithmic content moderation. Algorithmic

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[238] *See* Prager Univ. v. Google, 2018 U.S. Dist. LEXIS 51000 (N.D. Cal. 2019).

[239] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 558 (1995).

decision-making is, in terms of volume, the place where platform editorial judgments are at their highest expression. That said, the technological mode through which editorial decisions are made should not matter: platforms should be equally free to make case-by-case decisions. Affording editorial protection on the basis of what can be an arbitrary technical choice does not serve the underlying purposes of such First Amendment protections.

Fourth, the behavioral nature of much of online advertising should *not* merit online advertising greater First Amendment protection, despite platforms' (possible) arguments that such activities are intimately linked with their editorial functions. Fifth, as a matter of doctrine, the market position of an online platform should be irrelevant to editorial privilege analysis, as long as platforms are not considered public forums. Sixth, when platforms cede control to users over particular content decisions, users should have a duty to mitigate damages before bringing suit. Again, to the extent that any of these outcomes are troubling, it is exactly there, where constitutional protections are absent but not expressly limited, that legislators enjoy the greatest scope to craft additional statutory protections.

A. Platform Roles and Moderation Effects

As Part I discussed, platforms play different roles. Early case law suggests that courts are starting to differentiate between core services and advertising services in assessing editorial privilege online. Courts are also starting to distinguish between the different roles one platform plays within its own ecosystem: not every action a shopping platform takes counts as protected speech (e.g., *Oberdorf*). Making this kind of determination demands that courts conduct rigorous factual inquiries, of which *Dreamstime II* is a good example.[240] Courts must also establish precise boundaries where protected speech stops and conduct begins; no clear definition exists, at the moment, of when a platform acts as a seller versus an editor, for instance. Pending litigation could shed some light on this distinction.[241] Courts should be wary that these cases risk drawing the lines of either speech or conduct too broadly; the broader speech versus conduct debate should be at the forefront of judges' minds, not just the acts of the one online marketplace before them.

Courts have generally afforded the same level of editorial protection to decisions to take down, leave up, amplify, or rank content. I agree that this is the correct approach. All of these decisions are

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[240] Dreamstime.com, LLC v. Google, 470 F.Supp.3d 1082, 1084-1093 (N.D. Cal 2020) (Dreamstime II) (intense factual record).

[241] *See, e.g.,* Oberdorf v. Amazon.com Inc., 818 Fed. Appx. 138, 143 (3d Cir. 2020) (certifying to the Pennsylvania Supreme Court whether "Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?").

legitimate forms of editing with offline precedent. The Supreme Court's decisions in *Hurley* and *Halleck* underscore the protection given to private entities who invite speech to refuse to host certain speech, giving a right-not-to-host the same protection as decisions about affirmatively hosting content. Eugene Volokh argues in a forthcoming paper that the case for editorial protection is the strongest for platform recommendation functions–amplification or ranking, in this Article's terms–on the basis that this is the closest to what traditional offline entities who edit do (newspapers, broadcasters, booksellers).[242] I do not think the caselaw supports this kind of distinction, especially considering *Hurley* and *Halleck*. Online-specific caselaw similarly does not support such a distinction between protections afforded to takedowns versus leave-ups, including upranking or downranking. *Search King* found protections for ranking and *Prager* found protections for not recommending certain content to certain users–the kind Volokh suggests are the pinnacle of editing. But *Langdon* and *Baidu* sustained the same editorial protections for decisions not to run content, and *La'Tiejira* found related protections for leaving content up. The one exception to giving each of these types of content moderation decisions equal First Amendment protection is in must-remove cases dealing with low-value speech, addressed next, but this exception applies equally to all relevant types of moderation decisions.[243]

B. Speech Selection, Conduct, and Low-Value Content

On a First Amendment basis, actions against illegal business practices, including fraudulent business practices, should be allowed. At this broad level, Judge Alsup's quip in *Dreamstime I* that "[j]ust as a fast-talking con-artist cannot hide behind the First Amendment, neither can Google," is right.[244] Determining the line between protected speech and fraudulent business practices is, however, difficult. As the Ninth Circuit has made clear, seeming discrepancies between content moderation decisions and broad statements about content moderation standards, where that discrepancy involves subjective judgments, do not constitute fraudulent business practices.[245] Similarly, evidence of changes in Google rankings, edited speech, should never alone be considered evidence of fraud.

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[242] Volokh, *supra* note 18, draft manuscript at 20.

[243] I thank Daphne Keller for the reminder to distinguish this type of removal decision from other types of removal decisions.

[244] Dreamstime.com, LLC v. Google, 2019 WL 2372280 at *5 (N.D. Cal 2019) (Dreamstime I)

[245] I thank Berin Szoka for helpful language emphasizing this point. *See also* Prager Univ. v. Google, 951 F.3d 991, 1000 (9th Cir. 2020); Levitt v. Yelp! Inc., 2011 U.S. Dist. LEXIS 124082 at *8 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) ("[T]raditional editorial functions often include subjective judgments informed by political and financial considerations. Determining what motives are permissible and what are not could prove problematic." (Citations omitted)).

Along these lines, *E-Ventures I* and *Dreamstime I,* at the motion to dismiss stage, failed to require enough of the plaintiffs. The courts failed to require the plaintiffs to plead actual facts establishing fraud, allowing the cases to proceed on what were essentially bare allegations.[246] I agree with Eric Goldman's criticisms of this case on this point: the judges gave plaintiffs "so much runway before shutting down the case"[247] and allowed the wasting of "lots of money on discovery to reach [a] seemingly inevitable outcome."[248] But this criticism is orthogonal to the issue of First Amendment protections; in general, courts are obligated not to allow claims of fraud to proceed to discovery without sufficient evidence to think there was fraud. In *E-Ventures* and *Dreamstime I*, the courts should also have more explicit about citing cases that excepted otherwise protected editorial judgments from protection on the basis of low value speech, instead of simply invoking the more general *Cohen v. Cowles* line about speakers having "no special immunity from the application of general laws."[249] All that said, they were right to try to parse whether unprotected business conduct existed alonside protected speech.

With respect to fraud actions for business practices, *Masson* might provide a useful limiting principle. There, the Supreme Court wrote of seeking to find a solution that did not "diminish to a great degree the trustworthiness of the printed word."[250] If an action a platform takes, as in *Masson*, "results in a material change in the meaning" of the content, that material change is defamatory, fraudulent, or otherwise actionable as low-value speech, and the action meets the relevant scienter requirements, that action could potentially be challenged. These requirements–material change to meaning that falls into a low-value speech category made with the requisite intent–would at least prove an administrable test.

This question of subjective judgment and low-value speech raises a point of particular concern with respect to hate speech. Given the state of hate speech jurisprudence after *R.A.V. v. St. Paul*, which cast doubt on goverment efforts to regulate hate speech, such speech on online platforms that does not constitute an immediate incitement to violence involves subjective judgment.[251] Decisions to remove or not remove most of what we discuss in common parlance as hate speech, then, probably

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[246] *Compare* Levitt v. Yelp! Inc., 2011 U.S. Dist. LEXIS 124082 at *15 (N.D. Cal 2011) (ample discussion of *Iqbal* pleading requirements where plaintiffs alleged Yelp fraudulently manipulated reviews to induce purchase of advertising).

[247] Eric Goldman, *First Amendment Protects Google's De-Indexing of "Pure Spam" Websites*–E-Ventures v. Google, TECH. & MKTG. L. BLOG. (Feb. 9, 2017), https://blog.ericgoldman.org/archives/2017/02/first-amendment-protects-googles-de-indexing-of-pure-spam-websites-e-ventures-v-google.htm.

[248] Eric Goldman, *Contract Claims Against Google Survive First Amendment Defense*–Dreamstime v. Google, TECH. & MKTG. L. BLOG (Jun. 6, 2019), https://blog.ericgoldman.org/archives/2019/06/contract-breach-claims-against-google-survive-first-amendment-defense-dreamstime-v-google.htm.

[249] Dreamstime.com, LLC v. Google, 2019 WL 2372280 at *2 (N.D. Cal 2019) (Dreamstime I).

[250] Masson v. New Yorker Mag., 501 U.S. 496, 520 (1991).

[251] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

falls under editorial protections. To legally require companies to remove hate speech, offline progress with respect to defining what hate speech counts as low-value, unprotected speech is required. Additionally, listener interests, as asserted in *Smith* and *Bantam Books*, could pose a hurdle to must-remove regulation of hate speech.[252]

Republication liability remains a troubling aspect of exempting low-value speech from editorial protection. Especially for social platforms, who invite speech of users, the risks for defamation action are astronomical, absent Section 230. Removing or amending Section 230 leaves this deeply troubling consequence on the landscape of a First-Amendment-only internet.

It is extremely unlikely that courts would follow the path I am about to outline, but I did want to raise one possibility. Courts could choose to affirmatively limit the doctrine of republication liability to the news media. One of the motivations for the doctrine is to incentivize media outlets to make sure their news–even the statements of witnesses–is accurate.[253] As the court observed in Cox Broadcasting: "[I]n a society in which each individual has but limited time and resources with which to observe at first hand . . . he relies necessarily upon the press to bring him in convenient form the facts of those operations."[254] Platforms arguably do not play this function; platforms have not *replaced* the reporting the media does (notwithstanding the changes platforms have wrought on the media landscape). This proposal has significant limitations beyond its practical unlikelihood, including the fact that certain platforms could be said to play the role of bringing "in convenient form the facts," potentially subjecting search engines to republication liability but not social media. It could also be challenged on the basis that the republication liability doctrine is unsuitable even for the news media. This is a fairly far-fetched proposal, and not much is likely to change with respect to republication liability doctrine. This outlook yet again underscores why Section 230's, with respect to republication liability, is so important.

C. Wholesale-Retail Distinction

A wholesale-retail distinction in protections for editorial privilege should not exist in the online context, just as it does not in the offline context. That said, some regulators and critics support, at least implicitly, more restrictions on online algorithmic content moderation than on retail-level decision-making. Concerns about political

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[252] I thank Daphne Keller for this point. Smith v. California, 361 U.S. 147 (1959); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

[253] Gertz v. Robert Welch, Inc. 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact" because they do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

[254] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

manipulation, economic inequality, and racial bias motivate some to urge deference to human decision-makers.[255] Part II discusses recent examples of bills that would constrain algorithmic decision-making, dictating that companies could not use algorithms to display content in any way other than randomly, chronologically, alphabetically, or based on an average user rating, or based on user preferences, or algorithmically amplify content that deals with civil rights violations.[256] Plaintiffs have tried to make this distinction, too.[257] Thus, the prospect of a wholesale-retail distinction in the online context is worth analyzing.

Let us first consider why some might intuitively support higher protections for retail-level decision-making–because such decisions seem to embody "editing" the most. When considering the ideal editor, we might conjure up an image of an old-timey, chain-smoking, pinstriped-wearing newspaper editor mulling over a particular reporter's story and deciding whether or not to include it (or how to edit it so that it can be included). More importantly, we might imagine that editor always makes individualized, reasoned, contextual, and accurate decisions about the content under review.[258]

That tableau disappears in the context of algorithmic decision-making. It is hard, and inaccurate, to picture that same kind of editor at work on Facebook's algorithm, for instance. Exactly because of its algorithmic nature, each piece of content does not receive considered human review.[259] Decisions about what to host are made *ex ante*, and most online posts are not reviewed individually before they are served to users.[260] For good reason: it is exactly these large-scale, expert judgments about relevancy that make Google search valuable or Instagram's newsfeed so enjoyable to its users. Moreover, as Evelyn Douek writes, given the volume demands of online content moderation, "probabilistic enforcement is the *only* possibility between two extremes of severely

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[255] *See, e.g.*, Aziz Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611 (describing examples of opposition to automated decision-making from a nurses' union, criminal defendants, and federal housing assistance applicants) (citing Daniel Kreiss & Shannon C. McGregor, *Technology Firms Shape Political Communication: The Work of Microsoft, Facebook, Twitter, and Google with Campaigns During the 2016 U.S. Presidential Cycle*, 35 POL. COMM. 155, 156–57).

[256] Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020). See, e.g., Protecting Americans from Dangerous Algorithms Act, introduced by Reps. Anna Eshoo (D-CA) and Tom Malinowski (D-NJ), would curb Section 230 protections and make companies liable if their algorithms amplify or recommend "content directly relevant to a case involving interference with civil rights "(42 U.S.C. 1985); neglect to prevent interference with civil rights (U.S.C. 1986); and in cases involving acts of international terrorism (18 U.S.C. 2333). *See* Press Release, *supra* note 123.

[257] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 438 (S.D.N.Y 2014).

[258] These ideas are drawn from the four possible reasons Aziz Huq puts forth for a right to a human decision, although he ultimately rejects them. *See* Huq, *supra* note 255.

[259] *Id.*

[260] *See, e.g.*, Douek, *supra* note 25, at 797 (discussing differences between algorithmic moderation and human moderation), *citing* Mike Ananny, *Probably Speech, Maybe Free: Toward a Probabilistic Understanding of Online Expression and Platform Governance*, KNIGHT FIRST AMEND. INST. FREE SPEECH FUTURE Series (Aug. 2019).

limiting speech or letting all the posts flow."[261] Arguably, it is in algorithmic decision-making that internet platforms most strongly express editorial judgments, at least by volume. As those who object to algorithmic content moderation admit, the decisions about these algorithms are powerful and wide-reaching. This is the reverse of our intuitions in the offline context, where that old-timey editor is the ultimate determinant of what gets printed.

This comparison was meant to demonstrate that there are not features *inherent* to retail or wholesale decision-making as categories that merit greater or lesser constitutional protection. It was meant to demonstrate that our intuitions about what should be protected stem from identifying the most powerful locus of editorial decision-making. Where, in the offline context, that locus arguably is at the retail level, that does not hold in the online context. And, as the Court held in *American Library Association*, the problem of volume does not erase constitutional protections: "exclud[ing] certain categories of content, without making individualized judgment[s]" does not mean actors are not editing.[262]

To be clear, I am not arguing that we should decrease offline protections for wholesale decisions and decrease online protections for retail decisions. As the *American Library Association* opinion states, exercising one type of editorial judgement does not invalidate the protections afforded to another type.[263] Tech platforms *also* exercise genuine judgement at the retail-level with respect to decisions about, say, downranking particular pieces of content.[264] Platforms shift between algorithmic and human review, sometimes for the same piece of content, and alter the categories that inform algorithms in response to human review.

Consider the following: a platform has a policy against hosting extremist threats of violence. Its existing algorithm is generally able to filter out most threats. But, a new extremist meme makes the rounds, calling for violence using coded language to communicate a threat so that the algorithm, as designed, does not detect it. The platform should be able to exclude that meme from its site before the algorithm is updated to catch it: it makes little sense to deny those content moderation decisions protection on the basis of what is essentially technological lag. Consider another example: Facebook's recent changes to its anti-nudity policy regarding breast cancer awareness.[265] Whether breast cancer awareness posts are allowed on the platform via algorithmic review or human review should not determine the level of protection that decision gets; indeed, the kind of review may simply depend on the sophistication of the

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[261] *See, e.g.*, Douek, *supra* note 25, at 798.

[262] United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 208 (2003).

[263] *Id.* at 207.

[264] *See, e.g.*, Douek, *supra* note 25, at 781–83 (2021) (describing a shift from "categorical" content moderation to more context-specific (and content-specific) moderation practices).

[265] *Id.* at 783.

algorithm, which does not provide a sound basis for determining constitutional coverage. Last, granting less deference to retail-level decisions would disincentivize careful scrutiny of content in the mold of Facebook's Oversight Board. If decisions that go through content-specific review, and are granted less protection by virtue of not being the "primary" site of moderation, platforms would have fewer incentives to employ such forms of governance.

One might object that wholesale content moderation policies designed by humans ("we will design our algorithms to exclude any Weird Al parodies") are different from machine-learning driven decisions ("we design our algorithm to learn what content people engage with the most and amplify that"). But–as others have argued–that distinction does not hold up.[266] First, a decision to design an algorithm to select for relevancy is a human-made choice about what content to prioritize–relevant content. Second, the human-versus-machine distinction should not matter, constitutionally: editorial decisions need not be coherent or communicable to the public.[267] As the Supreme Court wrote in Hurley, "a private speaker does not forfeit constitutional protection simply by . . . failing to edit their themes to isolate a specific message."[268] Explainability might be a wise attribute from a policy perspective, but the First Amendment does not demand it. Both retail and wholesale algorithmic decisions are expressions of genuine editorial judgment online–a distinction between the two has no place in online analyses.

D. Behavioral Commercial Advertising: Editing or Advertising?

Online caselaw regarding editorial privilege and advertising is fairly scattered, making it difficult to draw many cross-case conclusions about trends. Instead, I will highlight possible dangers and pitfalls in this area of which courts should be cognizant as the case law develops further.

Courts should be wary of lumping core functions and advertising together for First Amendment purposes. This could happen in two different ways. First, courts could apply the law of editorial judgment to core functions and advertising without teasing apart important differences between the two, as in *Langdon,* where the court did not consider whether an advertisement's status as commercial speech altered its analysis. This approach risks getting rid of important distinctions between core functions and advertising that have been established offline, including considerations about regulating false advertising and

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[266] For a thorough examination of this question, see, e.g., Stuart Minor Benjamin, *Debate: Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013).

[267] *Id.* at 1494; Volokh & Falk, *supra* note 9, at 884; Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 437-38 (S.D.N.Y 2014); *but see* Tim Wu, *Free Speech for Computers?*, N.Y. TIMES (June 20, 2012), https://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html.

[268] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

the ability to challenge advertising practices as discriminatory, as in *Pittsburgh Press.*

Alternatively, courts could make the mistake of actively lumping online advertising together with core functions because of online advertising's behavioral nature. The court in *Gonzales*, *Force v. Facebook,* and other cases rejected this argument on Section 230 grounds, but the issue is not definitively settled in the First Amendment context. To recap this practice, platforms collect data on user interactions with the products of platform editorial judgment–*e.g.* a user's interaction with search results. They then use this data both to refine their editorial judgments *and* to place targeted ads.[269] A user searching for home health care aides might start to see more relevant search results for queries on life insurance, and at the same time, start to see advertisements for the same. The same data is used to refine both the core (editorial) service and the advertising function, more closely intertwining the curatorial and commercial features of a platform's service. As the argument goes, each ad reflects a platform's choice to show a particular message to a particular user: a targeted communicative choice that should be protected. That view's natural conclusion is that online, behavioral advertising merits greater protections than offline advertising. This outcome would carry the same risks as above, including an inability to regulate false and discriminatory advertising online. Indeed, those who oppose First Amendment Lochnerism should be particularly wary and watchful of decisions in this area. The technological nature of these cases could obfuscate larger issues at stake, allowing for easy slippage down the *Lochner* path in this area.[270]

Indeed, the public debate about whether online platforms constitute public forums subject to First Amendment principles may exert pressure on courts to bolster editorial protections for platforms in the advertising realm while being less forceful in the core function context. The California state court's language in *Prager* exemplifies this risk, where the court wrote that advertising services, "even more than the core YouTube service" reflect the platform's editorial discretion.[271] This language is striking for two reasons, for elevating editorial judgment regarding advertising over editorial judgment regarding the core service, and for seemingly skipping over the question of commercial speech. In some ways, this court's statement exemplifies the risks of Bezanson's "communicative message" test for editorial judgment; the court is identifying a communicative message in YouTube's decision not to host ads on Prager content, but not in their decision to allow Prager to continue to have an account. Courts should be wary of collapsing

[269] SHOSHANA ZUBOFF, SURVEILLANCE CAPITALISM 78 (2019) ("Google would no longer mine behavioral data strictly to improve service for users but rather to read users' minds for the purposes of matching ads to their interests, as those interests are deduced from the collateral traces of online behavior.").

[270] *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016).

[271] Prager Univ. v. Google, 2018 U.S. Dist. LEXIS 51000 at *17 (N.D. Cal. 2019).

distinctions between core and commercial speech on the basis of looking for a communicative message or in response to other, broader policy debates about the public role of platforms. Doing so–as in *Prager*–risks bolstering commercial speech protections to the detriment of non-commercial speech protections. Indeed, courts should be wary of using advertising as a "holding pen" for platform editorial rights. Doing so would ignore many other clear instances of platform selection over speech and invert the motivations behind the editorial function, which was not originally developed to protect such commercial speech.

E. Broader Considerations: Market Competition and User Control

Two further features of the online platform landscape are worth considering: first, platform competition, and second, the degree of control afforded a user over her own and others' speech. Regarding the first, for instance, some Section 230 reform bills contemplate applying different rules based on a platform's market position.[272] Courts generally do not consider market competition with respect to editorial judgment in the offline world, with *Tornillo* forming the basis of that approach.[273] *Tornillo* dismissed the relevance of limited market competition in the news media to editorial judgment. That said, with respect to the internet, even a few national newspaper chains could arguably be considered more competitive than one national search or shopping platform, as some have argued Google and Amazon constitute.[274] Perhaps this difference in degree is a difference in kind, and the extreme uniqueness of these platforms in the market deserves to be taken into account when assessing their editorial privilege. That said, the *Tornillo* Court elsewhere wrote that: "The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion" but nonetheless dismissed the relevance of monopoly concerns to the application of editorial privilege.[275] From a results-oriented viewpoint, the concentration of power in individual platforms also achieves this result–and the Court decisively rejected that concentration as irrelevant to deciding the scope of editorial privilege.

The relevance of monopoly considerations largely turns, then, on whether you think internet platforms play a gate-keeping function;

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[272] Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021) (qualified private right of action only against a platform that is "dominant in its market").

[273] For a longer analysis of when antitrust claims might be viable with respect to online platforms–when not predicated on protected speech–see Berin Szóka & Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, 29 GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (2020).

[274] *See, e.g.,* United States v. Google, LLC, 1:20-cv-03010 (D.D.C. 2020); Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017).

[275] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 250 (1974)

whether they are common carriers or not. As indicated in the Introduction, this Article does not resolve this debate.[276] Addressed briefly, I think there is a good argument to be made that internet service providers do play a gatekeeping function, but platforms do not; after all, no one platform is the only pathway to the internet, like cable operators were at the time of *Turner*. Market considerations boil down to this: if an entity is a gatekeeper, monopoly considerations might be relevant to a First Amendment analysis, but if they are not a gatekeeper, editorial privilege remains undisturbed by competition concerns. Others disagree with this argument, though, and if the law moves definitively towards considering platforms gatekeepers, competition could become more relevant to First Amendment analysis.

The second broad consideration is that of user control on online platforms. Courts were not faced with the issue of user control in the offline world; I argue that integrating the common law doctrine of mitigating damages is the appropriate way to include this consideration in a First Amendment analysis online. With respect to user control, internet platforms introduce a feature not present in offline media: two layers of what might be considered editorial control. Platforms retain editorial control over content, and they also grant their users some degree of control over content. For instance, a user on Facebook can delete his or her own speech from the platform and can also delete the speech of others if it is posted to his or her "Wall." Similarly, users can generally block people from posting any content to their "spaces" of social media platforms. In other contexts, platforms offer users the ability to turn on child safety filters, etc. That said, the platform retains the final say about what content may or may not be hosted on its platform. This delegation of a degree of control to users does not have a good parallel in the offline world. Newspapers generally do not rent out a page of their classifieds section, for instance, to another actor to control for long periods of time.[277] An individual user could cease listing a particular classified ad, but not much else; and they cannot exercise minute-by-minute control over a listing–what has been accepted goes to print and stays there.

Courts have generally not grappled with the implications of this double-layer system in the online context. I suggest that they should with respect to one circumstance: the common law duty to mitigate damages.[278] Consider the *La'Tiejira* case above, which involved an

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[276] For an excellent full-length discussion of this question, see Volokh, *supra* note 18. For a recent discussion of Turner in light of recent Supreme Court developments, *see* Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021), https://www.lawfareblog.com/justice-thomass-misguided-concurrence-platform-regulation.

[277] Although, if they did, there is a strong argument that that actor would have editorial rights over the page. *See generally* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[278] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. L. INST. 1981).

allegedly defamatory post.[279] Facebook's content moderation policies would allow it to remove that content if it determined removal was warranted; indeed, if the post was false and defamatory, Facebook might be liable for not removing it under a First Amendment analysis, as discussed above (absent Section 230). Similarly, La'Tiejira herself could have removed that content posted to her own wall. Yet, she let the post remain up for months and chose to sue Facebook for failure to remove. I suggest that courts impose a duty to mitigate damages where users have a degree of editorial control over content–as courts have in the common law. An individual user may not bring action against Facebook for not removing a single defamatory post or exposing their kids to mature content where they are offered the option to address that content themselves.

The issue become more complex when one considers the volume of speech on online platforms. The *La'Tiejira* case only dealt with one post. But users are sometimes flooded with problematic messages online, where a wholesale or algorithmic approach to takedowns would be a more efficient mechanism. Even though users have retail-level control over such speech, the platforms alone retain wholesale control. Where users do not have effective control over low-value speech that affects them, they should not be expected to mitigate damages. One actionable legal test, here, would be to ask whether it was reasonable to expect the user to take steps to mitigate, or not.[280]

CONCLUSION

Newspapers and online platforms are not the same thing–nor is that the right question to ask. We should ask whether online platforms exercise editorial judgement as independently defined in caselaw. Just as the law differentiated between newspapers, broadcast, and cable, the law should be able to adapt itself to the online platform context. We should embrace a doctrine of online editing without the fear that any changes that come as a result of the features and functions of online platforms will alter or reduce protections for offline media. The new editors of our information landscape deserve a tailored take on old protections.

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[279] *See supra* notes 166-173 and accompanying text.

[280] *See, e.g.*, the use of the reasonableness test with respect to tortious injuries and religion-based refusals to seek medical care. *See* Anne C. Loomis, Note, *Thou Shalt Take Thy Victim as Thou Findest Him: Religious Conviction as a Pre-Existing State Not Subject to the Avoidable Consequences Doctrine*, 14 GEO. MASON L. REV. 473, 475-76 (2007).