AMPLIFIED SPEECH

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This Article introduces the concept of amplification into First Amendment law. Amplification, or the size of the audience reached by speech, lies at the heart of many contemporary free speech struggles. Yet the concept is surprisingly absent as a category of analysis from constitutional doctrine and virtually undiscussed in legal scholarship. Amplification deserves its own set of legal rules and doctrines, because the right to amplify one's speech serves the two core types of First Amendment interests—those of audiences and those of speakers—differently than the right to choose the content of one's speech. The higher the degree of amplification, the greater the disparity. When it comes to audience interests, amplification via mass media platforms has unique potential to distort the marketplace of ideas that informs voting audiences. When it comes to speaker interests, greater amplification has only diminishing marginal returns for the speaker's primary interest in autonomy, understood as the capacity for living one's own life, because speakers need very large audiences neither to (a) form their own life plans nor (b) have the motivation to act on them. Thus, the right to amplify speech to very large audiences is justified by its benefits for audience interests rather than speaker interests, and so may be constitutionally regulated to preserve the integrity of democratic discourse for audiences. A central practical upshot is that certain carefully drafted legal rules on amplification, including campaign finance laws and social media regulations, should survive constitutional scrutiny.

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INTRODUCTION

A man walks into a courthouse wearing a jacket embroidered with the words "F*** Big Oil," in order to protest a federal permit recently granted to a multinational corporation for building an oil pipeline. Later that day, the corporation's CEO pays her media consultant $100,000 to place local advertisements on billboards, television, radio, and YouTube about the jobs that the pipeline will generate.

Under current First Amendment law, these two speech acts have identical constitutional status. Both express views in public on matters of public concern. Both are robustly protected against government meddling. It is commonly thought, even, that a central strength of the First Amendment is its blindness to other details about the acts. This Article, however, argues that the First Amendment should not remain blind to one difference between these acts: their *amplification*, or the size of their audience. The ad payor, unlike the jacket wearer, is using a media platform to amplify her speech to be heard by a potentially massive audience.

The history of free speech is, in many ways, a history of the struggle for control over the means of amplification, from printing presses[1] to megaphones[2] to electromagnetic waves.[3] The struggle continues even in this era of YouTube and Facebook, because, while over four billion humans have instant access to tools of self-publication,[4] the new means of amplification are algorithms that draw attention toward some users' content but not others'.[5] As the system of amplification and its inequalities become more transparent, inquiring minds outside of law have begun to wonder whether the freedom of speech includes a "freedom of reach."[6]

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1 *See* JOHN MILTON, AREOPAGITICA (John W. Hales ed., Clarendon Press 1898) (1644).

2 *Cf.* Kovacs v. Cooper, 336 U.S. 77, 78–79 (1949) (plurality opinion) (amplification via sound truck); Ward v. Rock Against Racism, 491 U.S. 781, 784–90 (1989) (amplification via high-volume event speakers in a park).

3 *Cf.* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369–77 (1969).

4 *See* William H. Dutton & Mark Graham, *Introduction* to SOCIETY AND THE INTERNET: HOW NETWORKS OF INFORMATION AND COMMUNICATION ARE CHANGING OUR LIVES 1, 5 (Mark Graham & William H. Dutton eds., 2d ed. 2019).

5 *See* Jack M. Balkin, Essay, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1153–54 (2018); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–03, 1636–37 (2018).

6 *See, e.g.*, Sacha Baron Cohen, Keynote Address at the Anti-Defamation League's 2019 Never Is Now Summit on Anti-Semitism and Hate (Nov. 21, 2019) ("Freedom of speech is not freedom of reach."); Renee DiResta, *Free Speech Is Not the Same As Free Reach*, WIRED (Aug. 30, 2018, 4:00 PM), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach [https://perma.cc/CYH8-KDRN].

Yet First Amendment law remains oddly silent about amplification. The doctrine contains categories, and separate lines of analysis, for other speech properties, such as time, place, and manner, or content. But amplification is only mentioned in passing and is not treated consistently across cases. Constitutional scholars have not written about the theory of amplification in any detail, either.[7]

Surely there must be a right to speak *to* other people, or else free speech rights would have little value. The law could not restrict the man in our example to wear his jacket only at home. But to how many people does one have a right to speak? This Article starts the process of thinking through this question.

Some might argue that, in principle, speakers are entitled to as large a willing audience as they can buy or otherwise acquire through their private resources. Arguably the Supreme Court adopts this view of amplification rights in some cases. The view—call it the *libertarian view*—seems facially plausible because of the venerable tradition of the First Amendment as guardian of individual liberty. Speech rights, like all rights, preserve for individuals control over some zone of our lives, despite the necessary compromises of communal living. The libertarian view of amplification implies that having control over not only what we say, but exactly *how* we say it and *to whom* we say it, is part of the bargain.

This Article argues, to the contrary, that the right to amplify speech is—even in principle—restricted: at the highest levels of amplification, the right obtains *only insofar as it is consistent with the basic foundations of democratic discourse*.

Understanding why takes a closer philosophical look at the relationship between amplification and the core values that undergird the First Amendment. The Free Speech Clause has a split purpose: serving both the (a) individual speaker and (b) overarching system of democratic discourse.[8] In most cases, this split goes unnoticed because,

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7 I have, to the best of my ability, found only one discussion longer than a few sentences. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 677–78 (1990) (mentioning audience size among factors courts consider in assessing whether speech is part of public discourse). Some First Amendment scholars have also begun to address the practical dimensions of regulating amplification. *See, e.g.*, Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227 (2021); Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 292–301 (2021).

8 Explicit scholarly recognition of this split goes back at least to the 1980s. *See, e.g.*, Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1132–33 (1993) [hereinafter *Meiklejohn's Mistake*] (comparing an autonomy theory with a collectivist theory); David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 198–202 (comparing a speakers' rights approach with a structural

ordinarily, both individual and structural values are served simultaneously: while the speaker expresses herself, democratic discourse gains a new idea or perspective. But the decision to amplify speech works differently. As speech reaches larger and larger audiences, it has a *smaller* impact on the speaker's own interests, properly understood, and has a *greater* impact on democratic discourse. Past some threshold audience size, the right to amplify speech is justified almost entirely because of its benefits to democratic discourse rather than speakers.

I do not mean that mass-amplified speech promotes none of a speaker's interests. The argument rests on a distinction between speakers' interests that lie at the core of the constitutional guarantee and those that do not. The core speakers' interests are autonomy and political participation. It is these core interests—which ultimately account for the protection of a very broad range of speech—that matter for the purposes of constitutional interpretation. But large-scale amplification is necessary for neither.

Begin with autonomy. Autonomy is the capacity for living one's life according to one's own reasons. Constitutional doctrine emphasizes two components of autonomy: (a) the ability to freely form one's own mind, including one's beliefs and identity; and (b) the opportunity for one's beliefs and identity to be recognized and affirmed by others. Generally, speaking freely to an audience is crucial for both aspects of autonomy. However, this Article makes the case that the best audiences for these purposes have at least some of the characteristics of diversity, responsiveness, familiarity, and supportiveness. But past some threshold audience size, just *adding* listeners does little to enhance these characteristics, and can actually undermine them. So amplification past that threshold has only diminishing marginal benefits for autonomy.

Political participation is the interest in taking part in democratic self-governance. For this interest to be meaningfully fulfilled, we must be able not only to talk to our family and coworkers, but to protest, post on social media, and otherwise join en masse with other speakers. But it is not so clear why a right justified by this interest would be unlimited. If the right is to *take part* in a democratic process, then it is unclear how the justification could support anything more than a claim to equal amplification for each citizen—and we cannot *all* be heard by millions. Political participation justifies my shouting on the street corner but not my shouting everyone else down, too.

This leaves only structural values to justify large-scale amplification rights. Democracy is the chief such value found in the

approach); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785–86 (1987) (comparing an autonomy approach with a public debate approach).

doctrine.[9] Speech rights can foster a vibrant marketplace of ideas that serves two functions in the democratic process: (a) informing voters and (b) legitimizing political decisions. But a long tradition of scholarship suggests that not just *any* marketplace of ideas will effectively produce these benefits.[10] Even the Supreme Court seems to recognize that the marketplace, to function adequately, needs three crucial features: *diversity*, meaning that a wide range of views are heard by most citizens; *mobility*, meaning that views have some realistic chance of being heard and—depending on their inherent appeal—moving upward in public discourse; and at least occasional *antagonism*, meaning that views are presented in passionate and responsive exchanges. I call these the preconditions of *epistemic competition*, because they make it likelier that truth rises to the top of public discourse.

Mass-amplified speech is uniquely positioned to disrupt these preconditions. To be amplified to a large audience, speech needs the right platform. Yet mass media platforms are scarce, and access to them is enormously (and not randomly) unequal. Those who speak on them can crowd out other speakers and have little need to respond to lesser-amplified opponents. So, if every speaker is entitled to the largest audience money can buy or connections can broker, then democracy may significantly suffer. If amplification rights are grounded primarily in democratic values, then it would be a "topsy-turvy" world in which those rights are interpreted to destabilize the very conditions that enable effective democratic discourse.[11]

In other words, the right to amplify speech to very large audiences should be subject to a democratic qualification. The First Amendment should protect the oil CEO's ability to amplify her speech to, say, hundreds of thousands of listeners only if her and others doing so facilitates rather than undermines epistemic competition—e.g., diversity, mobility, and antagonism—in the marketplace of ideas. If this analysis is correct, then regulations on mass-amplified speech that, narrowly and carefully, seek to ensure a functioning marketplace of ideas may well survive constitutional scrutiny.

This conclusion ripples across First Amendment law. Many free speech cases turn out to be mass-amplification cases upon closer examination. For instance, campaign finance laws regulate campaign spending, which largely goes toward amplifying political

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9 Another commonly cited structural First Amendment value is truth. For an explanation of why I treat it and democracy together, see *infra* note 115.

10 *See infra* note 145.

11 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 763 (2011) (Kagan, J., dissenting).

advertisements over mass media. The Supreme Court has struck down an array of such laws—from caps on campaign donations[12] to bans on corporate campaign advertising,[13] most notably in *Citizens United v. FEC*, to specialized public financing schemes[14]—under the strictest form of constitutional scrutiny. But if these regulations are understood as narrowly seeking to promote epistemic competition, then these cases may have been wrongly decided. In addition, how we think about mass amplification matters for a range of cases involving regulations on mass media platforms, including net neutrality rules recently before federal courts and proposed social media regulations.[15]

A defense of such regulations that focuses on the degree of amplification regulated offers theoretical and doctrinal advantages over the two other central democratic lines of defense in recent literature.[16] The first such line is egalitarian-democratic, interpreting the First Amendment to encapsulate principles of equality among speakers as democratic citizens.[17] Doctrinally, these defenses face an uphill battle, because the Court has already firmly rebuffed such egalitarian principles as antithetical to the First Amendment.[18] I join a second, and older, scholarly line that is epistemic-democratic, interpreting the First Amendment to require a marketplace of ideas that *actually* (rather than theoretically) informs voters. My focus is on diversity among ideas and views, rather than equality among speakers. However, proponents of epistemic-democratic views have traditionally sidelined the First

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12 McCutcheon v. FEC, 572 U.S. 185, 191–93 (2014); *see also* Randall v. Sorrell, 548 U.S. 230, 236–37 (2006).

13 Citizens United v. FEC, 558 U.S. 310, 318–19 (2010).

14 *Bennett*, 564 U.S. at 727–28; *see also* Davis v. FEC, 554 U.S. 724, 736–44 (2008).

15 *See, e.g.*, Mozilla Corp. v. FCC, 940 F.3d 1, 17–18 (D.C. Cir. 2019) (per curiam) (upholding the Trump Administration's effective repeal of net neutrality); *see also* Wash. Post v. McManus, 944 F.3d 506, 510–13 (4th Cir. 2019) (striking down state disclosure laws imposed on social media advertising).

16 *See generally* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018) (giving an overview of different styles of democratic arguments).

17 *See, e.g.*, Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 965–90 (2020); Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach [https://perma.cc/BKP6-CQDQ]; Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, *in* THE FREE SPEECH CENTURY 140, 140–42 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019); Genevieve Lakier, Essay, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118–20 (2018); Jedediah Purdy, Essay, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2174–77 (2018).

18 *Citizens United*, 558 U.S. at 363 (declaring that Congress may not justify campaign finance regulations based on an equality rationale).

Amendment speaker interests that the Court holds dear.[19] An amplification-based view takes these claims seriously. It offers a justification for embracing epistemic-democratic principles, with an explanation for why those principles triumph over individual liberty in some contexts (those of mass amplification) but not others (those of minimal amplification).

The Article proceeds in four Parts. In the first, I introduce the concept of amplification and explain constitutional doctrine's implicit but inconsistent treatment of it. In the second, I explain how massively amplified speech can serve the democratic process but can—though the Court has so far missed it—also *undermine* the epistemic reliability and legitimacy of that process. In the third Part, I canvass the speaker interests with constitutional status—autonomy and political participation—and conclude that amplification offers only marginal benefits for the former and only slightly greater benefits for the latter. In the final Part, I explore how my analysis of amplified speech offers a justification for the constitutionality of certain campaign finance and media regulations.

I. AN INTRODUCTION TO AMPLIFICATION

When you think of a speech act,[20] you might think first of its content, or the message conveyed in its words or symbols. Content is the core of speech's power, because it is what most reliably changes listeners' minds and even conduct. Perhaps because of content's power, it is also the feature of speech most often suppressed by governments trying to preserve the political or cultural status quo.

First Amendment law now fiercely protects content, more than any other feature of speech, against government suppression.[21] Laws singling out specific content for restriction are—with few exceptions[22]—subjected to the highest bar of constitutional review,

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19 *See, e.g.*, Fiss, *supra* note 8, at 784–86; ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26–27 (Greenwood Press 1979) (1960).

20 A note for philosophers: I use the term "speech act" to mean *any* act of speech and not—as is more common in philosophy—just illocutionary acts (e.g., apologies, promises, enactments). *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 5 (J. O. Urmson & Marina Sbisà eds., 2d ed. 1975).

21 *See* Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972).

22 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (listing "well-defined and narrowly limited" unprotected classes of speech, including obscenity, libel, and fighting words).

strict scrutiny.[23] This demanding test requires that a law must "further[] a compelling interest" and be "narrowly tailored to achieve that interest."[24] The test applies even when the content is indisputably false.[25] And it applies not just to one's general message but to one's specific choice of words.[26]

But a speech act is also more than its content. It is an event, rooted in a concrete context. It is uttered by a speaker, in a certain time, place, and manner. The Gettysburg Address, to take a well-known example, was delivered by Abraham Lincoln in the midst of the U.S. Civil War, on August 28, 1863, at the dedication of a new military cemetery in Gettysburg, Pennsylvania, the site of one of the bloodiest battles of the war. This context matters for understanding the act.[27] The 271 words of the Gettysburg Address would take on different meanings if spoken by Lincoln on the same battlefield in 1865, by a protestor in Hong Kong in 2019, or by a Black Lives Matter activist in 2021.

Another aspect of a speech act's context is its audience. While technically we can speak to ourselves, in a diary or voice memo, ordinarily we speak in order to communicate to others. Indeed, we often intend to speak to *specific* others. Just as the speaker or the time, place, or manner of a speech act can change its perceived message, so, too, can the audience to whom it is uttered. If Lincoln had been speaking to the members of Congress, gathered before him, rather than 15,000 citizens of the Union, his words would have been understood differently.

Some of these non-content aspects of speech are protected by the First Amendment.[28] Speech may not be regulated based on the identity of its speaker (or even based on the fact that the speaker is a corporation or union).[29] Nor may it, without adequate justification, be restricted in its time, place, or manner.[30]

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23 *Cf.* Burson v. Freeman, 504 U.S. 191, 211 (1992) ("[I]t is the rare case in which we have held that a law survives strict scrutiny."); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

24 Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007) (plurality opinion)).

25 *See* United States v. Alvarez, 567 U.S. 709, 718 (2012).

26 *See* Cohen v. California, 403 U.S. 15, 25–26 (1971).

27 *See* City of Ladue v. Gilleo, 512 U.S. 43, 56–57 (1994) ("An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.").

28 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 573 (2011) (describing a statute as singling out "a narrow class of disfavored speakers").

29 *Citizens United*, 558 U.S. at 392–93 (Roberts, C.J., concurring).

30 However, this protection of the time, place, and manner of speech is not always zealously guarded by the Court. *See infra* Section I.B.1.

The First Amendment also, arguably, guarantees a right to an audience. However, that does not mean a right to be heard by exactly the audience one hopes for; audiences have their own rights not to listen. They can typically do so by averting their eyes or covering their ears.[31] And when they cannot do so with relative ease, such as when speech is mailed or broadcast directly into their homes, they are protected as "captive" audiences.[32] Nonetheless, constitutional doctrine implies that speech rights are meaningless without the opportunity to reach *an* audience.[33] As the Supreme Court expresses it, "[t]he right to free speech, of course, includes the right to attempt to persuade others to change their views."[34]

This Article zeroes in on one characteristic of speech's audience: its size. *Amplification* is the term I use for the size of the audience of a speech act. To increase the audience size of a speech act is to "amplify" it.

How does and should the Constitution protect amplification? Those are the overarching questions of this Article. This Section tackles the description question. To begin, it introduces readers to the tools speakers use to amplify their speech to the largest audiences—often with great difficulty and cost—in the contemporary media environment. Then it explains how those tools of amplification are currently protected under constitutional doctrine. In short, the Constitution contains an implicit right to speak to the largest willing audience that one can acquire through private means.

A. *Amplification Mechanics*

Most speakers will attempt to amplify their speech at some point. They will post messages on Twitter, rather than just talking to family and close friends. They will seek to publish their book or article, rather than just circulating it within their network. They will advertise their couch for sale on Craigslist, instead of just by word of mouth. Increased amplification brings the increased potential to change the beliefs and conduct of others, to find persons with a mutual interest, and to raise one's own profile.

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31 *Cohen*, 403 U.S. at 21.

32 *See, e.g.*, Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 736–38 (1970).

33 Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (plurality opinion).

34 Hill v. Colorado, 530 U.S. 703, 716 (2000).

So how do we do it? Increasing amplification involves drawing attention to speech.[35] I will name five methods here; these can be employed alone or in combination. *First*, attention can be drawn by changing the *content* of speech to be more intriguing or shocking, like a newspaper changing its headlines into clickbait. This method is easiest for speakers to control, but, on its own, has minimal amplification potential; it works best only in certain contexts or to augment an already large audience. A comment posted to a Twitter account with three followers will almost certainly not achieve much amplification, no matter how incendiary it is. *Second*, the speaker can change the *manner* of speech to be eye- or ear-catching. For instance, speakers on a street attract attention using a bullhorn or flashing lights. *Third*, mass attention can in rare cases be drawn by the *speaker's identity*—e.g., if they are a celebrity, or occupy a temporary position of importance. *Fourth*, attention can be drawn by *popularity cascades*. An orator surrounded by a small crowd may draw a still larger one; or a YouTube video initially liked by thousands may eventually "go viral" and be seen by millions. But while popularity cascades can potentially draw heaps of attention, they are unpredictable. *Fifth*, the speaker can place the speech in a venue at which attention already pools, such as a newspaper or television channel. Call these venues amplifying *platforms*. The degree of amplification that results depends on the size of the platform's existing audience.

Notice that amplification is almost always a function of other properties of speech, such as its content, speaker identity, or "time, place, or manner." All of these properties are inextricably linked. Why should anyone bother treating amplification as a distinct property? One reason is that different degrees of amplification (whatever the associated content and context) share distinctive qualities. For instance, the larger amplification is, the more it tends to be motivated by a desire to influence—whether to sell products, achieve fame, or change hearts and minds—and to in fact bring about that influence. In these respects, a speech in a printed copy of the *New York Times* has more in common with a speech uttered on CNN than with a speech printed in the physical pages of the United Teachers of Wichita monthly newsletter.

Occasionally speakers seek, sometimes in combination with others, to amplify speech on a very large scale, in order to influence public opinion as a whole and thereby bring about social or political change. To do so, they need enough amplification to at least affect the subjects and arguments heard by a significant portion of the targeted public. I will call this degree of amplification *mass amplification*. I do

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35 *See* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 264 (2016).

not want to tie mass amplification to an exact number of listeners, because that number is more of a range and will vary by population size and other circumstances. Just to provide a concrete anchor for thinking, I will very roughly estimate that, if the target population is the United States, mass amplification means at least a few million people.[36] Mass amplifying platforms include well-known media sources like, inter alia, the *New York Times*, the *Wall Street Journal*, Fox News, CNN, and certain YouTube channels.[37]

Mass amplification does not come easily. Of the five methods mentioned above, the only one that can reliably draw mass attention for the noncelebrity speaker is the use of amplifying platforms—and only then the highest-traffic platforms. Yet these platforms are scarce, relative to the number of potential speakers. Few media sources can attain truly mass reach;[38] those that do often achieve quasi-monopoly status.[39] Attention tends to pool on a subset of platforms due to two primary phenomena: network effects and cognitive scarcity. Network effects occur when platforms acquire high status in a community, drawing in new users and retaining others who do not want to miss out.[40] Cognitive scarcity—limited time and attention span—ensures that few audience members seek out additional media sources.[41]

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36 Bear in mind that this number assumes that most Americans do not actively follow national discourse on a given topic, so fewer absolute numbers will be needed to reach a critical mass.

37 *Cf.* SHANTO IYENGAR, MEDIA POLITICS: A CITIZEN'S GUIDE 56 (4th ed. 2019) (listing *New York Times* daily circulation as 3.3 million and *Wall Street Journal* as 2.5 million); Aaron Rupar, *Fox News's Post-Trump Slump, Explained*, VOX (Feb. 2, 2021), https://www.vox.com/2021/1/27/22250976/fox-news-ratings-drop-explained-post-trump [https://perma.cc/9V7A-JWBX] (describing both CNN and Fox News as regularly reaching a couple of million viewers); Paige Leskin & Palmer Haasch, *These Are the 30 Most Popular YouTube Stars in the World, from PewDiePie to Ryan Kaji*, INSIDER (Jan. 26, 2021, 3:21 PM), https://www.businessinsider.com/most-popular-youtubers-with-most-subscribers-2018-2 [https://perma.cc/B4WN-FV8U] (listing the highest YouTube subscribers (for an independent, international channel) at 108 million).

38 Data available in the United States suggests that American media attention is highly concentrated, flowing largely to few media companies. *See* Patrick J. Kennedy & Andrea Prat, *Where Do People Get Their News?*, 34 ECON. POL'Y 5, 29–30 (2019) ("On average, the top five media organizations in a country control about a third of the total attention share.").

39 *See, e.g.*, Balkin, *supra* note 5, at 1153 ("[T]he largest owners of private [Internet] infrastructure are so powerful that we might even regard them as special-purpose sovereigns."); ELI M. NOAM & THE INT'L MEDIA CONCENTRATION COLLABORATION, WHO OWNS THE WORLD'S MEDIA?: MEDIA CONCENTRATION AND OWNERSHIP AROUND THE WORLD 3 (2016).

40 *See* Sinan Aral, *Breaking Up Facebook Won't Fix Social Media*, HARV. BUS. REV. (Sept. 30, 2020), https://hbr.org/2020/09/breaking-up-facebook-wont-fix-social-media [https://perma.cc/D5XP-EZA3].

41 *See* Thomas Christiano, *Money in Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 241, 248–49 (David Estlund ed., 2012) (describing "socially induced cognitive scarcity").

Mass-amplifying platforms are not only scarce; access to them is unequal. Most mass media organizations are privately held corporations. While these corporations possess a variety of motivations, they primarily seek to raise advertising revenue. They do this by expanding their audience and increasing existing audiences' engagement with and time consuming their content—all of which present additional advertising opportunities. To borrow Tim Wu's phrase, media corporations are "attention merchants."[42] This often means choosing to amplify speakers who will either attract audience attention or pay directly. Those who attract attention tend to be public figures or celebrities, or say incendiary things. Fox News, in particular, is famous for its media model that maximizes emotionally inflammatory content.[43]

For the non-famous citizen, payment is the most reliable route through these platforms' gates. But prices for advertising over mass platforms are well beyond the means of the average citizen; and the larger the audience reached, the more exorbitant the price. Just to offer a quick survey, it costs about a dollar per click to advertise on Facebook, over $400,000 for a thirty-second ad during a popular television show, and about $1,000 per column inch to advertise in the *New York Times*.[44] These expenses start to add up once one realizes that effective amplification requires repetition.[45] To reach most of the viewers of one platform, one must pay for multiple spots. Moreover, to maximize one's amplification, one needs to pay for multiple spots on multiple platforms.

One might think that in the Internet era these scarcity problems would wane. Free and equal access to social media makes everyone, in

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42 WU, *supra* note 35.

43 *See* Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house [https://perma.cc/7JRA-ALQD]; *Cf.* YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 159 (2018).

44 *See* Akvile DeFazio, *How Much Do Facebook Ads Cost in 2021? (+ 3 Ways to Save)*, WORDSTREAM (July 20, 2021), https://www.wordstream.com/blog/ws/2021/07/12/facebook-ads-cost [https://perma.cc/N36B-TDQA]; Julia Stoll, *Cost of a 30-Second TV Spot During This Is Us in the United States from 2016/17 to 2020/21 TV Season (in U.S. Dollars)*, STATISTA (Jan. 13, 2021), https://www.statista.com/statistics/756867/this-is-us-ad-price-usa [https://perma.cc/3YZQ-33P9]; *2021 Newspaper Rates*, N.Y. TIMES, https://nytmediakit.com/newspaper-guidelines [https://perma.cc/Q6PM-97G4] (click "Category Rate Cards" and choose "Newspaper Rates" from dropdown menu).

45 *See, e.g.*, Susanne Schmidt & Martin Eisend, *Advertising Repetition: A Meta-Analysis on Effective Frequency in Advertising*, 44 J. ADVERT. 415 (2015); Margaret C. Campbell & Kevin Lane Keller, *Brand Familiarity and Advertising Repetition Effects*, 30 J. CONSUMER RSCH. 292 (2003); Chris Janiszewski & Tom Meyvis, *Effects of Brand Logo Complexity, Repetition, and Spacing on Processing Fluency and Judgment*, 28 J. CONSUMER RSCH. 18 (2001).

a sense, their own self-publisher or self-producer. But technology cannot remove the cognitive and sociological drivers of *mass* media scarcity, and so, while more speech is formally published today than in the past, proportionately less of what is published is actually heard. Mass-amplification scarcity is thus not a passing contingency but a deep and enduring feature of human life as we know it.

What has changed with the Internet are the loci of mass attention. On the Internet, one does not gain mass attention simply by posting speech on Facebook or Twitter, as one does by having one's speech simply appear on a popular television channel. One's speech also needs to be selected by the algorithms that "promote," or draw attention to, some over other speech on the same platform.[46] Algorithms promote content in two main ways. One is by placing content in high-visibility locations, such as in the margins or banner of a webpage. (Money, of course, can also often be used to buy these spots.) The second is by raising the "rank" of content so that it appears at the front or top of the primary information flow seen by each user, whether a Facebook news feed, a Google search result list, or a YouTube recommended videos list. While such rankings cannot always be directly bought, sophisticated speakers, such as political campaigns, are pouring money into "beating" algorithms.[47]

What this means is that a speaker can rarely achieve a significant amount of amplification on her own. To do so, she needs access to one of a few selective, privately controlled platforms or algorithms. In later Sections, I will use this fact about mass amplification to argue that constitutional law should protect the use of mass amplifiers differently from the use of other amplifiers. But first I explain how amplification is currently protected.

B. *Amplification in First Amendment Doctrine*

Constitutional doctrine's official approach to amplification might be described as "amplification blindness." The Supreme Court, at least, almost never directly discusses audience size. As Justice Douglas put it

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46 *See* Louis Michael Seidman, Essay, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2235–36 (2018). *See generally* Klonick, *supra* note 5.

47 *See, e.g.*, Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy [https://perma.cc/P8FQ-7M8Y]; Tarleton Gillespie, *Algorithmically Recognizable: Santorum's Google Problem, and Google's Santorum Problem*, 20 INFO. COMMC'N & SOC'Y 63 (2017); Kelley Cotter, *Playing the Visibility Game: How Digital Influencers and Algorithms Negotiate Influence on Instagram*, 21 NEW MEDIA & SOC'Y 895 (2019); WU, *supra* note 35, at 318–20.

in a rare opinion that explicitly mentions the issue, "the size of the audience has heretofore been deemed wholly *irrelevant* to First Amendment issues. One has a right to freedom of speech whether he talks to one person or to one thousand."[48] The explanation for this blindness is fairly simple: the speaker's claim in litigation is never to directly reach an audience of size *n*. Instead, the claim is to use a particular means to assist in amplification, which only indirectly and imprecisely corresponds to an estimated audience size. If the First Amendment protects access to an amplifier, then it will in effect protect access to *whatever* size of audience the amplifier happens to reach. (Of course, this is only protection against *government* intervention in amplification, not a guarantee of amplification; the speaker must acquire her "soapbox" or "television frequency" on her own, through private means.) In other words, amplification blindness—like so-called color blindness—usually most benefits the most privileged.

But amplification blindness is only the Court's approach in principle. In practice, not all degrees of amplification are treated the same for First Amendment purposes. But the wrinkle is certainly not to the advantage of the lesser-privileged: it is the *higher* levels of amplification that receive the greater solicitude. The Court never expressly states this. Instead, how much protection use of an amplifier receives depends on whether it is employed in a publicly or privately owned space—which in turn often correlates with the level of amplification it provides. The speaker's choice to use the widest-reaching amplifying platforms, like newspapers or television, is treated as a core part of the freedom of speech. Regulations on use of these platforms are subject to the highest constitutional standard, strict scrutiny, and rarely survive. By contrast, the speaker's choice to use low-level amplifiers in public forums, like sound trucks and signage, is viewed as peripheral to the speaker's free speech interests. Regulations on them are subject only to the lower intermediate scrutiny and usually stand.

The result, painting with broad strokes, is that the right to amplify is most robust when one is trying and able to reach the largest numbers. This Part illustrates the Court's formal amplification blindness approach and implicit preferential treatment of higher levels of amplification. In Parts II and III, I will explain why the Court should take greater explicit notice of the degrees of amplification offered by different amplifiers. The Court gets its implicit normative analysis exactly backwards: the biggest amplifiers are the ones that should be most easily regulable.

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48 United States v. UAW, 352 U.S. 567, 595 (1957) (Douglas, J., dissenting) (emphasis added).

1. Amplification in Public Forums

The one constitutionally guaranteed opportunity for amplification—the sort that anyone, irrespective of their resources, must be granted—resides within public forum doctrine. The State must hold open to all access to public forums, or spaces historically reserved for "assembly, communicating thoughts between citizens, and discussing public questions."[49] Public forums are usually (though not necessarily) publicly owned spaces, such as roads, sidewalks, parks, and squares in which pedestrian or vehicular traffic is common.[50] No speech may—with rare exceptions—be outright banned in them.

Public forum access is not granted just so that friends can talk in the fresh air. The Court describes public forums as places to engage in persuasion and influence within the broader community—i.e., to take at least some small part in the formation of public opinion. For that, one needs to speak to those with whom one disagrees.[51] In addition, while audience size is not often mentioned, it is implied: to take part in the formation of public opinion, you want not just to successfully change minds but to change *many* minds. And public forums often provide access to crowds.

Yet the right to access public forums usually provides only limited amplification. Audiences there consist primarily of passersby. On an average day, the number that can be expected to pass by is not large—especially compared to the number of minds one must change to bring about major social change.[52] It is therefore no surprise that public forums are primarily used for amplification by relatively small and poor grassroots movements—which may not be able to afford other amplification strategies.

But even the small *potential* audience within a public forum can rarely be reached in its entirety by one speaker. The portion of that audience reached depends on how much attention the speaker can draw to her speech, and for how long. In other words, it depends on her use of additional amplifiers. A person shouting from a soapbox, as

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49 Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

50 *Id.* at 515–16. *But see* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234–37 (2d Cir. 2019) (holding that Donald Trump's Twitter feed constitutes a public forum), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

51 *See* McCullen v. Coakley, 573 U.S. 464, 476 (2014) (observing that public streets and sidewalks "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir"); *cf.* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) ("Government property often provides the only space suitable for large gatherings, and it often attracts audiences that are otherwise difficult to reach.").

52 *See* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 33.

nineteenth-century orators did, may catch a few extra ears during the hours her voice lasts. Someone with a megaphone or someone who can post durable signs will probably do better.

Yet the use of these intra-public forum amplifiers is not itself constitutionally guaranteed. Doctrine ordinarily classifies these amplifiers as the time, place, or manner (TPM) of speech. This classification makes analytical sense. As described in the last Section, nearly all amplifiers operate by affecting time, place, or manner; in a public forum, this usually means raising volume or visibility. But with this classification comes a demotion in constitutional status: limitations on TPMs, unlike content, are constitutionally permissible. So a city's ordinance forbidding the posting of signs in certain public areas may well be upheld. The speaker's choice of her speech's TPM is thought to be much less important than her choice of its content.[53] TPM rules are still subject to constitutional constraints: they must pass the intermediate level of constitutional scrutiny and, as such, must "restrict[] no more speech than necessary" to achieve a legitimate government interest, and leave open "ample alternative channels for communication."[54] But they ordinarily do pass, so long as the government offers an adequate justification.[55] The prevention of social disruption—in the form of noise or aesthetic blight—is a commonly cited justification, and it is usually deemed adequate.[56]

Amplification might still be safeguarded even from TPM restrictions if, in the last prong of the constitutional test, "ample" alternatives had to offer similar levels of amplification to the time, place, or manner restricted. But they do not. Courts seldom deem an alternative channel inadequate just because it reduces potential audience size. For instance, in *Ward v. Rock Against Racism*, a New York City rule required performers using the Central Park bandshell to use sound-amplification equipment and a sound technician provided by the city—partly in order to keep sound levels down.[57] Rock Against

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53 *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." (first citing Adderley v. Florida, 385 U.S. 39, 47–48 (1966); then citing Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); and then citing Cox v. Louisiana, 379 U.S. 536, 554 (1965))).

54 *See McCullen*, 573 U.S. at 477, 492.

55 *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (plurality opinion) (upholding sound truck restrictions); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 807–08 (1984) (upholding signage restrictions); Hill v. Colorado, 530 U.S. 703, 734–35 (2000) (upholding protest distancing rules).

56 *See, e.g.*, *Kovacs*, 336 U.S. at 81–83 (plurality opinion) (noise nuisance); *Vincent*, 466 U.S. at 810 ("visual blight").

57 Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989).

Racism was hosting their annual, multihour concert, said to reach 50,000 residents, and wanted to use their own technician.[58] The Court upheld the city rule, on the ground that the city was "protecting its citizens from unwelcome noise."[59] According to the Court's opinion, "[t]hat the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."[60] All that mattered was that "the guideline continue[d] to permit expressive activity" and had "no effect on the quantity or content of that expression"—the more highly valued properties of speech.[61]

The Court also almost uniformly dismisses a stark reality of amplification in public forums: that the most effective methods of amplification within those forums also take more resources. For instance, in *Kovacs v. Cooper*, the City of Trenton, New Jersey, had passed an ordinance prohibiting the operation of sound amplifiers affixed to vehicles that emitted "loud and raucous noises."[62] The defendant in the case was charged under the statute for using a so-called "sound truck" to comment on an ongoing labor dispute.[63] The Court upheld the regulation as protecting against "distractions . . . dangerous to traffic at all hours" in business streets and promoting "quiet and tranquility" in residential areas.[64] In addressing the alternative channels of communication, the Court found them adequate because "[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers."[65] In doing so, it observed "[t]hat more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."[66]

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58 *See* Ned Rorem, Letter to the Editor, *Prisoner of Rock Wants It Turned Down*, N.Y. TIMES, Apr. 18, 1989, at A26; *Rock Against Racism Concert*, N.Y. TIMES, May 3, 1980, at 14.

59 *Ward*, 491 U.S. at 796 (quoting *Vincent*, 466 U.S. at 806).

60 *Id.* at 802 (first citing *Vincent*, 466 U.S. at 803 & n.23, 812 & n.30; and then citing *Kovacs*, 336 U.S. at 88–89 (plurality opinion)).

61 *Id.*

62 *Kovacs*, 336 U.S. at 78 (plurality opinion).

63 *Id.* at 79.

64 *Id.* at 87.

65 *Id.* at 89.

66 *Id.* at 88–89. *But see id.* at 103 (Black, J., dissenting) (expressing concern that "preference in the dissemination of ideas is given those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures").

In sum, the right to amplification within public forums is only weakly guarded in First Amendment doctrine. Unlike the content of speech, it is seen as a fairly peripheral property of a speech act that can be easily sacrificed to the right social objectives. Alternatives that reduce amplification significantly or are prohibitively expensive for the speakers in question are often accepted as adequate. This will prove a major contrast with the doctrine's treatment of amplification examined in the next Section.

2. Mass Amplification: Campaign Finance

When mass media is involved, amplification is protected more like content, as an indispensable aspect of a speaker's speech. Courts show more sympathy here than they do in the public forum context with the speaker's right to choose her degree of amplification—at least to the extent that she can afford it. The clearest example of this appears in cases challenging regulations of spending on campaign speech.

In 1972, Congress passed the Federal Election Campaign Act (FECA), the most comprehensive attempt in American history to regulate money spent on political campaigns.[67] Among other things, FECA placed strict dollar limits on expenditures for campaigning speech.[68] In the seminal case *Buckley v. Valeo*, the Court interpreted the First Amendment to forbid any such caps, unless the funded speech was coordinated with a political candidate.[69] Indeed, any limits on campaign expenditures would be required to clear the highest constitutional bar, strict scrutiny, which demands that a law must "further[] a compelling interest" and be "narrowly tailored to achieve that interest."[70] Since *Buckley*, regulations of expenditures have been struck down under this standard as unconstitutional, including caps on expenditures by a self-financing (wealthy) candidate,[71] corporate and union expenditures in favor of a candidate,[72] and payments to petition gatherers for ballot

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67 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–30126, 30141–30145).

68 *See* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (per curiam).

69 *Id.* at 18–19.

70 Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007) (plurality opinion)).

71 *Buckley*, 424 U.S. at 51–54 (per curiam); *see also* Davis v. FEC, 554 U.S. 724 (2008) (striking down the so-called Millionaire's Amendment in the Bipartisan Campaign Finance Act).

72 *Citizens United*, 558 U.S. at 372; *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

initiatives.[73] The Court has on similar grounds invalidated some schemes for publicly financing candidates, as explained below.[74]

The Court's primary concern about expenditure limits is that they "necessarily reduce[] the quantity of expression."[75] Quantity can mean the number of unique campaign ads produced.[76] But it can also mean—and the Court seems, the majority of the time, to take it to mean—the number of listeners—i.e., amplification—for any given ad. When the Court discusses expenditures, it ordinarily contemplates their application to amplification. As the Court said in *Buckley*:

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[77]

Similarly, the Court states in a later case that "allowing the presentation of views [in a national presidential campaign] while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."[78] This focus is consistent with a great deal of research confirming that most money spent on campaigning goes to fund airtime or the equivalent.[79]

The description of amplification as quantity—a classification that the Court expressly denies amplification in public forums[80]—suggests that more amplification is more *speech*. That is, the total number of speech acts funded by an expenditure depends on the number of listeners. One might, alternatively, think that a speech amplified

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73 Meyer v. Grant, 486 U.S. 414, 415–16 (1988).

74 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011).

75 *Buckley*, 424 U.S. at 19 (per curiam).

76 *See id.* (explaining that higher spending enables production of more and longer unique campaign ads).

77 *Id.*

78 FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 493 (1985).

79 *See, e.g.*, Christine B. Williams & Girish J. "Jeff" Gulati, *Digital Advertising Expenditures in the 2016 Presidential Election*, 36 SOC. SCI. COMPUT. REV. 406, 407 (2018) (observing that the 2016 general presidential election campaigns spent approximately fifty-eight percent and sixty percent of their respective budgets on media); DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 42–43 (2014) (explaining that nearly seventy-five percent of campaign budgets in 2012 were spent on television advertising).

80 *See* Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989).

broadly is just one speech act with many listeners. This distinction matters, because it sets the stage for arguing that one speech amplified to a thousand has the same constitutional weight as a thousand separate speeches. Indeed, the Court seems not to see much difference when it comes to campaign finance. As the Court says in a famous footnote in *Buckley*, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[81] In cases in which amplification is conceived of as quantity rather than TPM, the normative value of amplification is also rated highly.

But we see a very different model of amplification in the TPM cases. There, the Court takes the opposite view described above: it sees the amplification of a speech as just one speech act. As a result, the Court treats the amplification as less integral to the speech act, less on a par with content. What matters is being able to get *your* message out, not getting it out to the maximal number of persons.

We can see further just how central the idea of amplification-as-quantity is to the Court's analysis of campaign expenditures by contrast with the Court's treatment of another sort of campaign spending that it deems *not* to involve amplification: contributions. The original FECA legislation capped not just "expenditures," or money spent directly on campaigning speech of one's own, but also "contributions," or individual and corporate donations to candidate campaigns or campaign committees. For instance, if I spend $10,000 to make and air my own thirty-second ad in favor of a candidate, then I have made an "expenditure" under federal law; but if I send $10,000 directly to my candidate, then I have made a "contribution." In *Buckley*, the Court drew a firm constitutional line between the two categories: while Congress could not cap independent expenditures, it could cap contributions.[82] Contribution regulations are, unlike expenditure caps but like TPM rules, subject to the low bar of intermediate constitutional scrutiny.[83] Since *Buckley*, caps on contribution limits are expected to survive unless they are set very low.[84]

Contributions, in the Court's view, do not involve amplification. What contributions do is best explained by the Court's oft-cited description of a contribution in *Buckley*:

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81 *Buckley*, 424 U.S. at 19 n.18 (per curiam).

82 *Id.* at 20–23; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding a Missouri statute that limited contributions to state election campaigns to $1,075 per candidate).

83 *See Buckley*, 424 U.S. at 25 (per curiam).

84 *See, e.g.*, *Shrink Mo. Gov't PAC*, 528 U.S. 377 (upholding a state contribution limit); *cf.* Randall v. Sorrell, 548 U.S. 230 (2006) (striking down Vermont contribution caps as too low).

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.[85]

In other words, a contribution is, whatever its amount, just *one* speech act. It expresses association and does not communicate much more with any precision, so the amount of money contributes only minorly to the content of the act. As a result, a ceiling on contributions "does not in any way infringe the contributor's freedom to discuss candidates and issues"[86] and "entails only a marginal restriction upon the contributor's ability to engage in free communication."[87] Contributions, in other words, are far from the core of the free speech right.

Here we see the parallel with the TPM cases. There, the Court sees the use of a given amplifier as just one manner, among many, of speaking; and nearly any alternative amplifier is adequate. Similarly, the Court also sees almost any alternative to contributing money for speaking about election campaigns as adequate. *Buckley* describes contribution limits as "leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources."[88] As in the TPM cases, the Court is relatively unfazed by the fact that these methods of speaking vary drastically in their expected audience size.

Yet the Court's distinction between contributions and expenditures is largely a fiction. Both forms of spending are primarily used to increase amplification. One can either pay a team employed by the candidate's campaign to create an ad and then air it many times, or one can pay one's own team to create an ad and then air it many times. Indeed, Justice Thomas, who has for decades opposed the description of contributions as mere associative acts, clearly sees how they amplify speech.[89] In his words, "[c]ontributions do increase the quantity of communication by 'amplifying the voice of the candidate' and 'help[ing] to ensure the dissemination of the messages that the

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85 *Buckley*, 424 U.S. at 21 (per curiam).

86 *Id.*

87 *Id.* at 20–21.

88 *Id.* at 28.

89 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 413–16 (2000) (Thomas, J., dissenting).

contributor wishes to convey.'"[90] As a result, it is hard to see why the distinction between contributions and expenditures has the normative significance that it does.

The Court's commitment to the individual's freedom to buy amplification over mass media has only deepened over the last decade. Now the Court finds that freedom is threatened not just by expenditure caps but also when expenditures come with *burdens*, like state funding for a poorer opponent. As a result, public financing schemes that in any way tether the public funding levels or contribution/expenditure limits of one candidate to the expenditure of money by a privately and better-financed opponent are constitutionally vulnerable. For example, in *Davis v. FEC*, the Supreme Court struck down the Millionaire's Amendment to FECA, which tripled federal contribution limits for candidates whose opponent declared an intent to spend over $350,000 of their personal wealth on their campaign.[91] According to the Court, the resulting burdens on the speech of privately financed candidates were—while not as severe as direct caps—still too great.

In sum, the most powerful speakers' amplification remains the freest from regulation.

3. Mass Amplification: Media Regulation

There is one more puzzle piece to add with respect to the doctrine of mass amplification: how the rights of media gatekeepers themselves are analyzed. The Supreme Court has primarily maintained that gatekeepers to amplifying platforms have their own rights as speakers to determine which speech is welcomed onto their platforms. For instance, in the seminal *Miami Herald Publishing Co. v. Tornillo*, the Court overturned a Florida statute that required newspapers to print opposing views on any public issue covered in their pages, in light of the newspaper owners' editorial discretion.[92]

While the Supreme Court has not yet extended such rights to tech companies, such as search engines and social media platforms, other courts have. In 2014 in *Zhang v. Baidu.com, Inc.*, prodemocracy advocates sued the search engine Baidu, a popular alternative to Google in China, under various New York antidiscrimination laws for blocking

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90 McCutcheon v. FEC, 572 U.S. 185, 230 (Thomas, J., concurring) (second alteration in original) (quoting *Shrink*, 528 U.S. at 415 (Thomas, J., dissenting)); *see also Shrink*, 528 U.S. at 418 (Thomas, J., dissenting) ("By depriving donors of their right to speak through the candidate, contribution limits relegate donors' points of view to less effective modes of communication.").

91 Davis v. FEC, 554 U.S. 724 (2008).

92 418 U.S. 241, 254–56 (1974).

their articles from its search results.[93] The district court ruled that Baidu has free speech rights to block whatever content it would like. Three years later, a Florida district court found Google to have similar rights.[94] Given the recent de-platforming decisions by social media networks, the Court is likely to be asked to weigh in on these questions.

The answer seems predictable, given that, in the recent litigation over net neutrality, lower courts have just barely denied full-blown editorial discretion rights even to Internet service providers (ISPs), like AT&T and Comcast—and even then, with a current member of the Supreme Court dissenting. Net neutrality rules seek to ensure that ISPs do not discriminate against different content creators (usually companies) in granting access to the Internet, by blocking them, slowing connections to them, or charging them higher rates. Federal-level net neutrality rules have ebbed in and out with alternating Democratic and Republican administrations over the past couple of decades, though many states have passed their own.[95] Most recently, the Obama Administration passed net neutrality rules in 2010, and these were functionally repealed by the Trump Administration in 2018 by the reclassification of broadband Internet as a service not subject to them.[96] It was before the reclassification, in 2016, that the D.C. Circuit upheld the rules against a First Amendment challenge in *United States Telecom Ass'n v. FCC*.[97]

The court concluded that ISPs lack First Amendment rights because they do not make substantive judgments about content and therefore are mere "conduits" for the speech of their users.[98] While it is surely correct that ISPs currently operate as mere conduits,[99] they could choose to be otherwise. As then-Judge Brett Kavanaugh pointed out, the court's version of editorial rights seems to rest on a "use it or lose it" theory of free speech rights, whereby, counterintuitively, a decision *not* to speak or interfere is considered no speech at all.[100] If editorial rights are analogous to individual speech rights, then surely Kavanaugh is right. One cannot lose one's future speech rights by remaining silent in

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93 10 F. Supp. 3d 433, 434–35 (S.D.N.Y 2014).

94 e-ventures Worldwide, LLC v. Google, Inc., No. 14-cv-646-FtM-PAM-CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017).

95 *See, e.g.*, CAL. CIV. CODE § 3101 (Deering 2021); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.175 (2021).

96 *See* Mozilla Corp. v. FCC, 940 F.3d 1, 18–19 (D.C. Cir. 2019) (per curiam) (describing the Agency interpretation).

97 825 F.3d 674 (D.C. Cir. 2016).

98 *Id.* at 740–43.

99 *See, e.g.*, Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1685–89 (2011).

100 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

the present. As a result, if net neutrality rules are enacted again and come before the Court on which Justice Kavanaugh now sits, they could well be overturned.

In other words, the owners of the most powerful amplifying platforms appear to also have unlimited rights to choose whom to amplify.

II. AMPLIFICATION AND DEMOCRACY

The speech rights guaranteed by the First Amendment are meant to serve not just the interests of individual speakers, but also structural interests.[101] The First Amendment's structural interests are those served by the entire system of freedom of expression, rather than by individual acts of speech. The primary structural interest identified in the doctrine interpreting the Free Speech Clause is democracy. This Part explores the conditions under which mass amplification serves democracy.

Generally speaking, the mass amplification of speech is indispensable to the democratic process. Mass amplification makes easier the widespread dissemination of information and ideas. It allows the approximation of responsive nationwide "conversations": public figures and pundits are able to respond to one another precisely because they all hear one another; and citizens are able to converse with one another more coherently given their shared common knowledge of the latest news and opinions expressed in widely circulated newspapers, television shows, and tweets. Without mass amplification, we would likely all be stuck in our own silos, uninformed and unchallenged.

But just because mass amplification is *generally speaking* indispensable to democracy does not mean that every instance of it is. Consider a single speaker who commandeers an entire mass-amplifying platform and crowds out all other speakers. Her amplification presumably serves her *own* interests, but at the same time undermines the democratic interest in educating voters about competing views.

This Part explains in detail how speakers' amplification and democracy come to collide in certain cases. It also offers a diagnosis for why the Supreme Court has denied any such collision. In short, the Court has been captivated by an erroneous, long-discredited laissez-faire vision of the marketplace of ideas that sees all speaker interests and democratic interests as harmonious.

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101 To clarify, structural interests can also have an individual component: for instance, an audience interest is also an interest in each audience member receiving information. *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 520–28 (1979) (walking through types of speaker interests).

The tension I am introducing between speakers and democracy at first appears in a troublesome constitutional guise. Speakers' interests and democratic interests *both* appear to be protected by the First Amendment. Unless one interest is less weighty than the other, how are courts to adjudicate conflicts between them? However, I will ultimately argue in Part III that the constitutional nature of the conflict is merely apparent in cases involving mass amplification. The specific speaker interests at stake in these cases are not the sort protected by the First Amendment. As a result, sometimes constraints on speakers' amplification will on balance clearly promote First Amendment values. For this Part, however, I set aside the constitutional protection of speakers, and focus exclusively on the democratic threats they can pose.

A. *Democracy in First Amendment Doctrine*

The first point to establish is that, in spite of the doctrine's primary emphasis on speakers, structural values are in fact relevant in interpreting free speech rights.

Generally speaking, rights are justified because they advance fundamental interests of persons.[102] Ordinarily, the interests advanced are those of the right-holder, or the individual who exercises the right.[103] This is the most familiar understanding of rights, and in law it is furthered by our legal process: it is individual right-holders who bring lawsuits. However, it is well established in political philosophy, and accepted in law, that the moral or legal recognition of a right can also be justified because of the value that third parties, or even society as a whole, derive from that recognition. For instance, parents' custodial rights benefit not just parents but children, too; education rights benefit individual students, but also create a more educated population of citizens. And these "structural" interests are considered in interpreting the scope and application of the right.

Free speech rights are likewise grounded in both individual and structural interests.[104] As First Amendment scholars well know, when

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102 *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1986); *see also* T.M. Scanlon, *Rights and Interests*, *in* 1 ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN 68, 70 (Kaushik Basu & Ravi Kanbur eds., 2009). This premise is widely accepted by courts. *See infra* note 104.

103 On the philosopher Joseph Raz's view, for instance, the interests that justify the recognition of a right must *include* the right-holder's interest. Joseph Raz, *Rights and Individual Well-Being*, 5 RATIO JURIS 127, 134 (1992).

104 *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart

interpreting the Free Speech Clause, courts consider the benefits that speech rights can have not just for speakers but for audiences and society at large, too. These nonspeaker benefits inhere not in the value of the individual's freedom of choice but in the consequences for the entire *system* of freedom of expression. That system provides for the general dissemination of information and ideas, including about the economic marketplace,[105] and opportunities for exchange and debate.

The primary structural value of the First Amendment, and the one on which this Article focuses, is democratic discourse.[106] Free speech scholarship also now overwhelmingly emphasizes the democratic dimension of the First Amendment, and for good reason.[107] The Court variously describes free speech and discussion as "at the foundation of free government by free men," "vital to the maintenance of democratic institutions,"[108] "essential to free government,"[109] the only means through which "government remains responsive to the will of the people and peaceful change is effected,"[110] and even "the guardian of our democracy."[111] One of the Court's most common refrains in First Amendment cases is that "speech concerning public affairs is more than

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from the speaker's interest in self-expression." (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978))); *Bellotti*, 435 U.S. at 777 n.12 ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . . ."); *see also* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1268 (2005) ("[A] large number of the widely accepted justifications for freedom of speech are about the social and not individual value of granting to individuals an instrumental right to freedom of speech.").

105 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976) ("[S]ociety . . . may have a strong interest in the free flow of commercial information.").

106 Some First Amendment scholars see cultural discourse as fitting into political discourse; I am inclined to agree. *See, e.g.*, Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016) (arguing that the First Amendment protects both political and cultural democracy); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486 (2011) [hereinafter *Participatory Democracy*] ("Art and other forms of nocognitive [sic], nonpolitical speech fit comfortably within the scope of public discourse."); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 560–61 (2011) ("I would think that the justification of generous protection for the public sphere lies in John Dewey's conception of a democratic culture, a notion of democracy that is not confined to politics or political participation.").

107 *See* sources cited *supra* note 17.

108 Schneider v. State, 308 U.S. 147, 161 (1939).

109 Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

110 Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

111 Brown v. Hartlage, 456 U.S. 45, 60 (1982).

self-expression; it is the essence of self-government."[112] The structural democratic value of free speech was an important—if not leading—reason why the free speech, press, and assembly clauses of the First Amendment were adopted.[113]

I will sometimes call this value "democracy" for short, but I always mean to refer to democratic discourse in particular. On nearly all democratic theories, political decisions—by voters and officials alike—must be made against an ongoing background of public discourse. By "public discourse," I mean the aggregation of all public discussions, which may be more or less centralized and more or less overlapping. While the First Amendment could serve democracy more broadly, it is generally interpreted to safeguard this discursive aspect of democracy in particular.

Public discourse serves two core functions in the democratic process: (1) disseminating the information and ideas that shape public opinion and public character; and (2) legitimizing democratic decisions.[114] Call these the epistemic function and the legitimacy function. The epistemic function dominates the doctrine.[115] The interest and even right of the people to "receive information and ideas" has been cited in free speech cases since the early twentieth century, and consistently set on a par with the quintessential speaker interest in self-expression.[116] As Justice Brandeis says in his seminal concurrence in

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112 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)). Here, self-government refers to collective, not individual, self-government.

113 *See* Roth v. United States, 354 U.S. 476, 484 (1957) (observing that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Thomas v. Collins, 323 U.S. 516, 545–46 (1945) (Jackson, J., concurring) ("As I read [the Founders'] intentions, this liberty [of speech] was protected because they knew of no other way by which free men could conduct representative democracy."); *Schneider*, 308 U.S. at 161 (declaring that the freedom of speech and press "reflect[] the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men").

114 *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("[T]he people of this nation have ordained in the light of history, that . . . these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

115 The value of democracy greatly overlaps with a third purpose usually ascribed to the First Amendment, truth. Insofar as the former requires informing and educating voters, I treat the two together for simplicity. The Court also views the two as intertwined. *See infra* note 117 and accompanying text.

116 *Stanley*, 394 U.S. at 564; *see also* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion) (quoting *Kleindienst*, 408 U.S. at 762); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936); Red Lion Broad. Co. v. FCC,

Whitney v. California, the freedom of speech is "indispensable to the discovery and spread of political truth."[117] The Court often tellingly cites the free speech scholar Alexander Meiklejohn with approval.[118] Meiklejohn argued that the sole purpose of the First Amendment is to protect the informed judgment process of the democratic citizenry, and as such that it should be used to ensure that public discourse aided in that process.[119] Most of what I say in the following relates to the epistemic function of democratic discourse, because of its doctrinal primacy, but I will explain as I go how the legitimacy function can usually be served in conjunction with the epistemic function.

While many of these decisions recognizing the democratic value of the First Amendment are old classics, the Roberts Court continues the tradition. Take *Citizens United v. FEC*, in which the Court struck down federal restrictions on corporate campaign spending. Many have assumed that the Court focused on the value of the speech to the corporations. Yet much of the argument was instead about democratic discourse. The Court reiterated that the value of speech lies at least partly in its democratic value: "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[120]

The Court went on to devote many words to establishing that the corporate speech in the case was valuable to public discourse. The Court's primary concern was that, through the law regulating corporate expenditures, "the electorate [had] been deprived of information,

395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners . . . which is paramount." (first citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); and then citing FCC v. Allentown Broad. Corp., 349 U.S. 358, 361–62 (1955))); *Thomas*, 323 U.S. at 534 (holding that a regime for licensing labor organizers violated not only the particular organizer defendant's "right to speak" but "the rights of the workers to hear what he had to say").

117 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

118 *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978); Saxbe v. Wash. Post Co., 417 U.S. 843, 862 n.8 (1974) (Powell, J., dissenting); Police Dep't v. Mosley, 408 U.S. 92, 96 n.4 (1972); *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY 49 (1986) (describing the Court's defamation jurisprudence based on *New York Times v. Sullivan* as a "Meiklejohn-*Sullivan* alliance"); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (suggesting that the Court of which he was part was poised to interpret the First Amendment in a roughly Meiklejohnian way after *Sullivan*).

119 Meiklejohn believed, as the Court acknowledges but does not expressly condone, that the purpose of self-government is the paramount value of the First Amendment. *See* MEIKLEJOHN, *supra* note 19, at 24.

120 Citizens United v. FEC, 558 U.S. 310, 339 (2010) (citation omitted).

knowledge and opinion vital to its function."[121] In particular, the government had "muffle[d] the voices that best represent the most significant segments of the economy."[122]

B. *Competing Models of Epistemic Competition*

The bedrock American free speech principle is that government should stay mostly out of the picture when it comes to speech. This principle has obvious advantages for speakers, but it is understood to advance the democratic goals of the First Amendment, too. The Court has offered two different explanations for how democratic discourse thrives best on a strict government-hands-off approach; one applies to its primary epistemic function of discourse and the other applies to its secondary legitimacy function. This Section discusses the epistemic side of the matter, while the next Section treats the legitimacy side.

No notion has a firmer grip on First Amendment doctrine than the marketplace of ideas.[123] Sometimes conceived of as a theory, sometimes as a metaphor, it (very roughly) analogizes public discourse to an economic marketplace. Yet in this marketplace, ideas, rather than products and services, compete against one another for acceptance. And

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121 *Id.* at 354 (quoting United States v. Cong. of Indus. Orgs., 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in result)).

122 *Id.* (alteration in original) (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

123 *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." (citing AP v. United States, 326 U.S. 1, 20 (1945); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940) ("Abridgment of the liberty of . . . discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." (citing Schenk v. United States, 249 U.S. 47, 52 (1919); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting))); Hustler Mag. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . ." (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 344 n.9 (1974))). The "marketplace of ideas" is also mentioned in at least one opinion in nearly every major First Amendment case of the 2010s. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374 (2018) (quoting McCullen v. Coakley, 573 U.S. 464 (2014)); Reed v. Town of Gilbert, 576 U.S. 155, 182 (2015) (Kagan, J., concurring); *McCullen*, 573 U.S. at 476 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)); United States v. Alvarez, 567 U.S. 709, 718 (2012) (plurality opinion) (quoting *Falwell*, 485 U.S. at 52); Sorrell v. IMS Health Inc., 564 U.S. 552, 591 (2011) (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 335 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

truth is thought to be more likely to emerge through this competition.[124] The origin of the theory in Supreme Court doctrine is usually traced to Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*, in which he remarked that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[125]

Constitutional doctrine contains two different strands of thinking about what "the competition of the market"—i.e., *epistemic competition*—entails. The first is the more familiar *laissez-faire model*, which ties the health of epistemic competition to the absence of government intervention. The second is what I call the *process model*, which ties the health of epistemic competition to the existence of certain background conditions of discourse. This Section examines each in turn. The Court often regards these models as reconcilable, but the final passages of this Section explain how they are actually in tension (and why the latter should prevail).

1. The Laissez-Faire Model

On the laissez-faire model, the government is the great nemesis of epistemic competition: the marketplace of ideas functions best to produce truth when government refrains from intervening in private speech. The model takes the sensible fear that the government will distort the marketplace toward views it favors and elevates it to the primary First Amendment concern.

Sometimes, the Court's laissez-faire model rests only on a distrust of government and assumes nothing at all about the epistemic merits of an unregulated marketplace of ideas. On this view, the truth may or may not emerge from public discourse, but it has at least a fighting chance only if government does not rig the process. This view of laissez-faire as the best we can hope for is reflected in the Court's description of the First Amendment as removing "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, *in the hope* that use of such

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124 I use "truth" as a shorthand for more nuanced concepts such as knowledge or rational, informed judgment. *See generally* Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019) (interpreting the First Amendment as protecting knowledge rather than truth).

125 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). *But see* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2–4 (arguing that Holmes did not intend to draw a strict analogy with the economic marketplace).

freedom will ultimately produce a more capable citizenry and more perfect polity."[126]

Other times, the Court's laissez-faire model draws on the further assumption that the marketplace of ideas itself has epistemic merit; the competition of the market is such that truthful speech possesses inherent advantages over false speech. In this vein, the Court sometimes implies that *all* speech has some value in the pursuit of truth, or at least cannot hurt it. John Stuart Mill, often thought to be the originator of the marketplace of ideas theory and an inspiration of Holmes's, laid out the case for this view with particular elegance in his nineteenth-century writings.[127] First, speech believed to be false or harmful may in fact be true or helpful. Humans, even when acting in good faith, are notoriously unreliable in distinguishing between truth and falsity, good and evil.[128] Second, even if speech truly is false, its existence out there somewhere can actually contribute to the elevation of truth, either because it often contains at least a grain of truth itself or because responding to it sharpens our understanding of the truth.[129]

When drawing on this thicker version of the laissez-faire model, the Court maintains that government intervention in private speech is harmful not just because it might distort discourse but because it reduces the total volume of speech in competition.[130] For instance, the doctrine's well-known remedy for false speech is "more speech."[131] This also explains why the Court, when striking down regulations on speech, tends to stress the contribution that the targeted speech would make to the search for truth—as it did in *Citizens United* when it emphasized that corporate speakers offer a unique perspective on the economy.[132]

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126 Cohen v. California, 403 U.S. 15, 24 (1971) (emphasis added) (citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring)).

127 For the Supreme Court's citations of Mill, see *Red Lion Broad. Co.*, 395 U.S. at 392 n.18, and *Sullivan*, 376 U.S. at 279 n.19.

128 JOHN STUART MILL, ON LIBERTY 18–19 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

129 *Id.* at 17–52.

130 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 361 (2010) ("[M]ore speech, not less, is the governing rule."); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) (explaining that the government must avoid causing a "net decrease in the amount of available speech"); Meyer v. Grant, 486 U.S. 414, 423 (1988) (lamenting that a state law had "the inevitable effect of reducing the total quantum of speech on a public issue").

131 *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 727 (2012) (plurality opinion) ("The remedy for speech that is false is speech that is true."); *see also Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Noxious doctrines . . . may be refuted and their evil averted by the courageous exercise of the right of free discussion.").

132 *Citizens United*, 558 U.S. at 354.

Both the thinner and thicker versions of the laissez-faire model hold up fairly well in at least one context: outright censorship. The government has the unique power to effectively censor views in all or most forums and ulterior motives to exercise it. If certain views are removed from discourse altogether, it takes little imagination to see the damage to epistemic competition—if we take seriously Mill's contention that human beings are fallible arbiters of truth. But later in this Section, I will offer arguments that show why, in other contexts, even the thinner version of the laissez-faire model falters.

2. The Process Model

A second model of how democratic discourse achieves epistemic competition can be distilled, with some care, from the doctrine. This model—the *process model*—and the laissez-faire model are not logically contradictory, though I explain below why in practice they conflict.

The *process model* construes epistemic competition not as an absence of government intervention but as a positive process with certain defining features that are conducive to the emergence of truth. These features are ones that allow the average citizen, consuming and potentially participating in public discourse, to make an informed, rational judgment about public issues (if she is so inclined). They are also—consistent with the "process" name—purely procedural, in the sense of being neutral with respect to what the truth is.

I cannot here offer a comprehensive accounting of all of the truth-conducive, purely procedural features of democratic discourse. More empirical research than we currently have would help in doing so. However, at least three such features already have firm footholds in constitutional doctrine: diversity, mobility, and antagonism.

Diversity obtains when a wide range of views from differing perspectives are included in the mainstream of public discourse.[133] Discourse lacks diversity when certain widely held or important voices are generally not heard. *Mobility* obtains when a pathway—even if a difficult one—exists for views to move from the fringes to the

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133 *See* Lyle A. Brenner, Derek J. Koehler & Amos Tversky, *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION MAKING 59 (1996); Alvin I. Goldman, *Argumentation and Social Epistemology*, 91 J. PHIL. 27, 31–32 (1994). When it comes to "testimonial" evidence, epistemologists suggest that one must gather such evidence from a diversity of sources. *See, e.g.*, MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007); Elizabeth Fricker, *Against Gullibility*, *in* KNOWING FROM WORDS: WESTERN AND INDIAN PHILOSOPHICAL ANALYSIS OF UNDERSTANDING AND TESTIMONY 125 (Bimal Krishna Matilal & Arindam Chakrabarti eds., 1994); Richard J. Hall & Charles R. Johnson, *The Epistemic Duty to Seek More Evidence*, 35 AM. PHIL. Q. 129 (1998).

mainstream of public discourse. *Antagonism* obtains when diverse views are articulated at least sometimes in an adversarial fashion. That is, the same media consumer will hear these views in close proximity, or even dialogue, and these views will be articulated by actual proponents who are best positioned to passionately advocate for them. Antagonism is especially missing in so-called echo chambers.[134]

Diversity and antagonism are both straightforwardly endorsed in great classics of First Amendment law. In *AP v. United States*, the Court expressly states, and has repeated many times since, that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[135] Parallel language can be found in one of the most oft-quoted lines from *New York Times Co. v. Sullivan*, which warns that government intervention in public discourse can "dampen[] the vigor and limit[] the variety of public debate."[136]

Similar themes echo up and down the cases in later years, with the Court declaring that government cannot limit "the *range* of information and ideas to which the public is exposed"[137] and that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[138] Even in *Citizens United*, the Court states that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[139] In addition, in many cases the Court praises the vigor and vibrance of public discourse and the need for citizens to hear views they do not like.[140]

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134 *See* BENKLER, FARIS & ROBERTS, *supra* note 43, at 74 (describing echo chambers in today's television news ecosystem).

135 AP v. United States, 326 U.S. 1, 20 (1945); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("[S]elf-government suffers when those in power suppress competing views on public issues from 'diverse and antagonistic sources.'" (quoting *AP*, 326 U.S. at 20)).

136 New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

137 Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) (emphasis added) (first citing *Bellotti*, 435 U.S. at 776–78, 781–83; and then citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 533–35 (1980)).

138 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994).

139 Citizens United v. FEC, 558 U.S. 310, 341 (2010). The Court also claims that its decision in an earlier case to uphold the Bipartisan Campaign Reform Act's disclosure provisions was based "on the ground that they would help citizens 'make informed choices in the political marketplace.'" *Id.* at 367 (quoting McConnell v. FEC, 540 U.S. 93, 197 (2003)).

140 *See* United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (plurality opinion) ("Society has the right and civic duty to engage in open, dynamic, rational discourse."); *Sullivan*, 376 U.S. at 270 ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may

The Court's endorsement of mobility is implied in its embrace of the marketplace of ideas theory. Roughly, the idea is that no views may be suppressed, so that they may make their way into larger discourse where they can compete for acceptance. As the Court says, "[b]y protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."[141] This would not work unless a path to receipt existed.

Diversity, mobility, and antagonism most directly produce epistemic competition, but they also bolster political legitimacy as a byproduct.[142] Those who feel shut out of democratic discourse may well not respect democratic decisions.[143] But mobility ensures that they have a fair shot, and diversity ensures that at least those whose views are held by substantial numbers are part of the debate of the polity.

In conclusion, note that the process model is not a model of what, overall, makes public discourse function best for democracy. Epistemic competition is just one crucial component—and one that happens to have solid roots in the Court's jurisprudence. However, scholars have posited other, thicker accounts of the foundations of democratic discourse. For instance, many new democratic-egalitarian readings of the First Amendment emphasize the importance of equality and even civility among speakers in public discourse.[144] These interpretations are unfortunately far from the traditional doctrine, but some of their goals can be realized just by safeguarding epistemic competition. For instance, disadvantaged voices will often benefit the most from the promotion of mobility and diversity, because it is these voices that struggle to gain traction. At the same time, antagonism can help to

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well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (first citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); and then citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937))); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.").

141 *Pac. Gas*, 475 U.S. at 8 (first citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940); and then citing Saxbe v. Wash. Post Co., 417 U.S. 843, 863–64 (1974) (Powell, J., dissenting)).

142 Some political theorists have actually construed democratic legitimacy as a function of truth. *See, e.g.*, DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008).

143 *See* Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72, 73–77 (2007) [hereinafter *Portraits of Muhammad*]; *see also* Ronald Dworkin, *The Right to Ridicule*, N.Y. REV. BOOKS, Mar. 23, 2006, at 44.

144 *See* sources cited *supra* note 17; Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, *in* EXTREME SPEECH AND DEMOCRACY (Ivan Hare & James Weinstein, eds., 2009) (arguing that hate speech that deprives its targets of recognition as free and equal citizens violates the fundamental ground rules of democratic debate).

break down the echo chambers that fuel the spread of hatred and intolerance.

3. The Limitations of the Laissez-Faire Model

Ordinarily, the Court operates as though the laissez-faire and process models are in harmony: the absence of government intervention is what *allows for* the preconditions of epistemic competition. If true, this would reconcile the First Amendment's democratic values and speaker values, too, because (at least plausibly) speakers are better off when the government does not intervene in their choices. The overarching First Amendment principle would be to resist government intervention. The trouble, highlighted in this Section, is that the two models of epistemic competition are actually in tension—and it is the laissez-faire model that is untenable. (At least this is true outside the one, simple context mentioned above: outright censorship.) Once the laissez-faire model is out, we can see how, in some cases, speakers threaten (the process model of) epistemic competition and therefore democratic discourse.

The laissez-faire picture of the marketplace of ideas goes awry in large part because it is flat.[145] It evokes speakers sitting around a circular table, exchanging ideas. Everyone gets to speak and everyone listens. The only threat at the table is the censor. Yet real public discourse has tiers, defined by levels of amplification: only very few speakers rise to the topmost level to be heard by larger numbers. And they make it to the top because the gatekeepers of the amplifying platforms let them in.

These top gatekeepers have power over democratic discourse rivaling that of government. They can immediately transform a national conversation by changing their criteria of entry. We have seen this illustrated most recently by the de-platforming of Donald Trump by Twitter and Facebook.[146] Largely, this power is due to the increasing

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145 Another key reason is that more speech does not necessarily help listeners. *See* Eric W. Orts & Amy J. Sepinwall, *Collective Goods and the Court: A Theory of Constitutional Commodification*, 97 WASH. U. L. REV. 637, 659–60 (2020) (explaining that the Court assumes that more spending produces more diverse speech without empirical support). Generally speaking, the laissez-faire picture has been thoroughly criticized. *See, e.g.*, Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1160 (2015) (noting that there is "at best mixed support for the [marketplace] metaphor's veracity"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) ("The assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today.").

146 *See* Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021, 9:33 AM), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827 [https://perma.cc/6598-WMPA].

concentration of the ownership of mass-amplifying platforms in a small number of hands.[147] The big tech giants such as Facebook and Google have also bought up rivals (such as Instagram and YouTube, respectively) to further consolidate their power.[148] At the same time, these powerful gatekeepers lack stable incentives to prioritize diversity, antagonism, and mobility when deciding who gets the most amplification. Rather, they face market pressure to favor paid and sensationalist speech and to entrench echo chambers.

The Court has occasionally recognized private threats to diversity, when under the sway of the process model rather than the laissez-faire model. For instance, in *Red Lion Broadcasting Co. v. FCC* in 1969, the Court upheld the now-defunct "fairness doctrine" because it promoted epistemic competition. That Federal Communications Commission directive required that—to maintain a license to broadcast—a radio or news channel had to (a) cover controversial issues of public interest and (b) devote some of its coverage to opposing views on those issues.[149] The Court recognized that the broadcast companies had an outsized influence on public discourse, given the scarcity of the airwaves, and thus that the policy served the diversity of discourse. As the Court said, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, *rather than* to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[150] The FCC's intervention, according to the Justices, was supported by the people's "collective right to have the medium [of radio] function consistently with the ends and purposes of the First Amendment."[151] While *Red Lion* remains good

147 *See supra* notes 38–39; *see also* Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) ("[E]verybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people."); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) ("[O]ur constitutional law has been singularly indifferent to the reality and implications of nongovernmental obstructions to the spread of political truth. This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability . . . .").

148 *See* Cecilia Kang & Mike Isaac, *In Suits, U.S. and Over 40 States Ask Court to Break Up Facebook*, N.Y. TIMES, Dec. 10, 2020, at A1.

149 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969).

150 *Id.* at 390 (emphasis added) (first citing AP v. United States, 326 U.S. 1, 20 (1945); then citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); and then citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

151 *Id.*

law, the Court has rarely followed its reasoning outside of the broadcast context.[152]

But it is antagonism that most visibly suffers in today's media climate, dominated as it is by social media platforms. Facebook, Twitter, Instagram, and YouTube all use algorithms that promote content to users at least in part based on what they have previously liked.[153] This algorithmic design can encourage the development of echo chambers, in which users hear only speech expressing views similar to their own.[154] This can lead to an intolerance toward opposing views and, in extreme cases, radicalization.[155]

What this discussion suggests is that government is not only a potential threat to epistemic competition: it may be the only means of countering *other* potential threats. Only government is powerful enough to set basic ground rules for public discourse—rules that apply to either amplifying platforms or their users. This is a key objective behind campaign finance laws, net neutrality rules, and many other forms of regulation.

Perhaps government can be trusted here to do what it does in the antitrust context: police the background rules of competition—in this case, *epistemic* competition. Antitrust laws are designed to protect the process of competition, not individual competitors. To do so, they restrict free private transactions—such as collusion, horizontal mergers that lead to monopolies, and price discrimination—that distort that process. These laws also hold bigger players (those with greater market share) to different standards because of their scale.[156]

None of this is to deny that the risk of government intervention is heightened in the free speech arena. If the state privileged the amplification of certain views over others, it could substantially distort the marketplace. But in the absence of government intervention, discourse *is already* skewed by the choices of those who control the amplifiers. Indeed, the status quo skew could itself serve to entrench government power because public officials often have influential allies in industry and media. This is all the more likely when the voices

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152 *But see* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (upholding "must-carry" rules that required cable companies to carry local broadcast stations, in order to prevent local and noncommercial educational programming from dying).

153 *See* TAINA BUCHER, IF . . . THEN: ALGORITHMIC POWER AND POLITICS 78–79 (2018).

154 *See* Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi, Walter Quattrociocchi & Michele Starnini, *Echo Chambers on Social Media: A Comparative Analysis*, ARXIV (Apr. 20, 2020), https://arxiv.org/pdf/2004.09603.pdf [https://perma.cc/N68K-FVCJ] (finding echo chambers on Facebook and Twitter).

155 *See, e.g.*, Zeynep Tufekci, *YouTube Has a Video for That*, SCI. AM., Apr. 2019, at 77.

156 *See generally* RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).

missing from the conversation are those of dissenters or disadvantaged speakers.

It is thus not clear if state action or inaction poses a greater risk to epistemic competition. Arguably the answer is inaction *if* the state's power is circumscribed to purely viewpoint-neutral regulations designed to promote epistemic competition. In many of the campaign finance laws, for instance, government is not skewing the market *toward* any particular view, but simply encouraging diversity. These sorts of regulations are certainly much less risky than the censorship or content discrimination of which First Amendment nightmares are made.

C. *Competing Theories of Legitimacy*

The doctrine also contains glimpses of the idea that wholly uninhibited public discourse is required not just for the proper working of the marketplace of ideas but also for self-government to be legitimate. In the vein of Jürgen Habermas's deliberative democracy theory, democratic decisions are justified exercises of political authority only when they emerge from a reasonable discursive process engaged in by citizens—either preceding any public vote, or always ongoing in the background.[157] For the Court, the reasonable discursive process has one crucial feature: the absence of government intervention in citizens' speech.

One of the most prominent theories of how participation in public discourse legitimizes democratic decisions—and which maps fairly closely onto the doctrine—is that of Robert Post.[158] Post argues, drawing on Habermas, that the process of opinion formation is legitimizing for democracy because it is by participating in this process, and crucially *choosing* how she will do so, that the individual citizen "experience[s]" democratic authority for herself and makes democratic decisions her own.[159] Public opinion formation, then, must be permitted to proceed

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157 *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 304 (William Rehg trans., Polity Press 1996) (1992) ("Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation . . . .").

158 *See Participatory Democracy*, *supra* note 106, at 483 ("The function of public discourse is to enable persons to experience the value of self-government."); *Meiklejohn's Mistake*, *supra* note 8, at 1134 ("This argument begins from the premise that public discourse serves the value of self-government because it engenders the sense of participation, identification, and legitimacy necessary to reconcile individual with collective autonomy. Even if public discourse is formally free, it cannot fulfill this function if the actual practices of public debate cause citizens to experience alienation or disaffection.").

159 *Participatory Democracy*, *supra* note 106, at 483.

in unregulated fashion, at least in the public domain, because this is what allows each individual participant to choose her own manner of participation.[160]

Post's theory of legitimacy, and the Court's, runs into problems given scarcity, too. Post's central argument for government restraint in involvement with public discourse is that the individual must, in order to acquiesce in democratic decisions she disagrees with, feel that she has been able to participate in the formation of public opinion on those decisions in the manner she pleases.[161] In other words, legitimacy, on his view, hinges on individuals' subjective experiences. But if the manner in which one individual wants to participate makes it harder for *others* to participate or to be heard in the manner that *they* want, then these other citizens may experience democratic decisions as illegitimate. Indeed, Post goes some way toward acknowledging this in later works, after *Citizens United*, in which he writes that campaign finance regulations might be justified if their absence creates the perception of electoral illegitimacy.[162] But if one goes so far, then the ostensibly tight link between speaker choice and democratic discourse is broken.

The concern cuts deeper. If one ties democratic legitimacy to the occurrence of any particular procedure, then one must defend the significance of that procedure. Post's legitimizing procedure is effectively the absence of government involvement in public discourse. But why is government intervention the *only* illegitimate influence on discourse? Why would not the influence of major concentrations of wealth, for instance, be similarly illegitimate? For instance, it seems plausible that Habermas, who was not so exclusively opposed to government interventions,[163] might see campaign finance regulations as necessary to justify democratic elections.

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160 *Id.* at 484–85.

161 *See Portraits of Muhammad*, *supra* note 143, at 76.

162 *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 87–88 (2014). His general preference, though, is for floors, not ceilings, on campaign speech. *See* Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1837 (1999).

163 Habermas does not expressly address campaign finance in his major works, though one can draw inferences from his principles. *Cf.* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 41–42 (1998) (defending campaign finance regulations on Habermasian grounds).

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If the conclusion of this Part is correct, and government intervention may sometimes further the democratic purposes of the First Amendment, then it leaves us with the other tension mentioned at the beginning of this Part: that between the First Amendment's democratic values and its speaker values. Some laws regulating the amplification of speech that are necessary to maintain epistemic competition in public discourse also appear to encroach on speakers' interests, as in *Bennett*, *Citizens United*, and *Baidu.com*. Given such an internal First Amendment conflict, should courts favor speakers or democracy?

III. AMPLIFICATION AND SPEAKERS

The last Part explored how speech is indispensable to the democratic process—but can also sometimes undermine it. But speakers are protected under the First Amendment, too. And none of the scholars who advocate interpreting the First Amendment to protect democracy have seriously confronted the potential cost of that protection to speakers. Doing so is all the more pressing if law is needed to safeguard democratic discourse, because the Supreme Court has—albeit without acknowledging any conflict with democracy—usually sided strongly with speakers.[164]

Take *Bennett*, in which the Court struck down a public funding scheme for electoral candidates. Under the scheme, Arizona made initial funding grants to candidates who agreed to abide by certain conditions, and then gave additional public funds if and when these candidates' privately financed opponents spent more than a threshold "trigger" amount against them.[165] The law would have created more balanced electoral discourse. But the Court lamented that the privately financed candidates' expenditures would be "less effective" once publicly financed opponents gained matching funds, because "an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted."[166] This remark provoked Justice Kagan, dissenting, to quip, "[e]xcept in a world gone topsy-turvy, additional campaign

164 *See* Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 25 (2015) (explaining that individual speech-rights claims are now more rhetorically powerful and likely to succeed).

165 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–29 (2011).

166 *Id.* at 747.

speech and electoral competition is not a First Amendment injury."[167] More importantly, it revealed the depth of the Court's preference for speakers.

This Part explains why, in cases involving *mass* amplification, First Amendment claims based on speakers' interests are weaker than the Court usually assumes. If one combs the doctrine for the speaker interests on which the First Amendment rests that could, in theory, ground a speaker claim to unlimited amplification, two emerge: autonomy and political participation.[168] Addressing each of these interests in turn, this Part demonstrates that both interests gain decreasing marginal benefits from additional degrees of amplification—at least past a point. The fall is especially steep in the case of autonomy. The result is that any right to mass amplification is supported mostly by democratic structural interests rather than speaker interests, and thus cannot preclude carefully tailored efforts to secure epistemic competition.

A. *Autonomy*

Autonomy, on anyone's accounting, involves living our *own* lives.[169] In the words of John Stuart Mill, "[i]f a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."[170] But what, exactly, is required for laying out one's own existence is far from obvious.[171]

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167 *Id.* at 763 (Kagan, J., dissenting).

168 Other speaker interests might be thought to justify freedom of speech. *See, e.g.*, BOLLINGER, *supra* note 118 (tolerance); Vincent Blasi, Essay, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569, 1571 (1999) (character traits including courage to confront evil, receptivity to change, and distrust of authority). The two interests I mention, however, are the ones with firmest grounding in the doctrine. I also suspect that mass amplification is even less necessary to promote, for example, the speaker's good character traits, than the interests I discuss in this Part.

169 *See* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 289 (2011) (explaining that autonomy involves "[b]ecoming a *distinctive* individual" (emphasis added)).

170 MILL, *supra* note 128, at 64.

171 In philosophy, autonomy is a highly contested term and has many interpretations. *See* John Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 ETHICS 109 (1988) (explaining the four meanings of autonomy); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 28 (1986) (explaining his own four senses of autonomy).

First Amendment doctrine is not much help. My use of the term "autonomy" comes primarily from the First Amendment scholarship,[172] because the Court rarely uses the word "autonomy" in free speech cases. However, the Court does appear to employ the concept of autonomy, or something like it, using a range of apparently interchangeable words such as "self-determination," "self-realization," or "self-fulfillment."[173] The Court's emphasis on the self is consistent with the general understanding of autonomy as living one's own life. But the Court seems to justify the freedom of speech using several distinct conceptions of autonomy.

One conception equates autonomy with freedom simpliciter, i.e., with the absence of constraints on the will. Call this negative autonomy, insofar as it is chiefly characterized by an absence. In the first part of this Section, I argue that negative autonomy is too thin to justify speech rights.

I then trace two other, more promising conceptions of autonomy that also appear in the doctrine as justifications for free speech. Unlike the *negative* conception of autonomy as freedom from constraint, these other conceptions are *positive* because they identify autonomy as the presence of certain basic preconditions for meaningful human agency. First is the capacity to think freely and independently. Second is a sense of dignity or self-respect.

In the final part of this Section, I explain how autonomy, understood in either of these latter two ways, gains only diminishing marginal returns from amplification to large audiences.

1. Negative Autonomy

Many scholars have worried that, when upholding free speech claims, the Supreme Court sometimes appeals to autonomy understood

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172 *See* Richard H. Fallon, Jr., Essay, *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–71 (1991); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204 (1972).

173 *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) (describing the importance of the "use of communication as a means of self-expression, self-realization, and self-fulfillment"); Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630–31 (1943) ("The sole conflict is between authority and rights of the individual. . . . The latter stand[s] on a right of self-determination in matters that touch individual opinion and personal attitude.").

as no more than freedom from constraint by others—and, in particular, the government.[174] This is what I have referred to as "negative" autonomy.[175] The value of negative autonomy is thought to derive from the value of the human faculty for making choices and acting on them. Philosophers since Kant have argued that this faculty, often known as rational agency, is a uniquely valuable characteristic—if not the distinguishing characteristic—of humans.[176] Nearly all sane, adult humans possess it. It is the faculty that allows us to "author" our own lives and to take credit and responsibility for our actions.[177] If agency is so valuable, then—on this view—the way to respect it is by leaving agents alone to make decisions for themselves rather than allowing others to make decisions for them.[178]

If free speech rights are recognized in order to protect negative autonomy, then the law must—at least absent an exceedingly strong justification—refrain from invading speakers' free choice about whether and how to speak.[179] Such a negative autonomy-based protection for speech should in principle extend to *all* features of an individual's speech—including her use of any amplifying platforms. If it did not, then an explanation would need to be offered for why some choices about speech are more valuable than others—just the sort of

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174 *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 382 (1996) (describing Cass Sunstein in *Democracy and the Problem of Free Speech* as warning of "the spectre of the self-fulfillment rationale run wild, equating freedom with autonomy"); *see also* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017); Tushnet, *supra* note 164; Kessler & Pozen, *supra* note 16, at 1969–71.

175 *See* Isaiah Berlin, *Two Concepts of Liberty* (1958), *reprinted in* LIBERTY 166 (Henry Hardy ed., 2002) (advocating a conception of negative liberty that is closely related to negative autonomy). *See generally* BAKER, *supra* note 172; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

176 Kant can be interpreted as valuing humans' choice-making capacity in this way, though his view of the relevant capacity is thicker and distinctively moral: it involves the ability to impose the moral law upon oneself. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *reprinted in* PRACTICAL PHILOSOPHY 353, 375 (Mary J. Gregor ed. & trans., 1996).

177 Many philosophers describe an agent as autonomous when she possesses the bare minimum capacities necessary for competency, such as rationality and absence of duress or serious manipulation. However, I do not take these philosophers' discussions as evidence in favor of a thin view of autonomy, because these philosophers are simply after a different sort of concept: they are not exploring why particular rights, such as free speech, are valuable or not, but instead usually searching for the conditions under which an agent can be deemed responsible for her actions (a concept that is enormously important, for instance, in assigning legal competency to agents). *See, e.g.*, FEINBERG, *supra* note 171, at 28–45 (distinguishing this notion of autonomy as a bare capacity from autonomy as a more robust condition or even ideal).

178 *See* BAKER, *supra* note 172, at 59.

179 Of course, these rights need not be absolute: sometimes the value of free choice might be outweighed by the value of other societal objectives.

value judgment eschewed by a negative account of autonomy, which would rather leave that judgment up to the speaker herself.

Negative autonomy surely has normative force. It is arguably the consideration that weighs against paternalistic legislation: each individual should be able to decide *for herself* what is best for her, so long as her choice does not cause harm to others. It also works well as an explanation for a general presumption of individual liberty, or the idea that government should not be involved unless it has a justification to be.[180] But it is of limited use in defining the scope and strength of First Amendment speech *rights*, which offer additional protection for individual choice. Insofar as the Court has invoked negative autonomy in the past, it should refrain from doing so further.

First, negative autonomy cannot explain what is so special about speech. We recognize any right because we have a justification for government to *guarantee* freedom within special zones of individual choice. The justification usually appeals to one or more fundamental interests of persons that freedom in the zone will advance. It is these justifications that courts draw on to interpret the contours of a right—i.e., whether it is implicated or can be overridden in a given case. For instance, the Supreme Court interprets Second Amendment rights so as to advance the interest in self-defense.[181] But the justification for a right cannot simply be "freedom" in general, because this would offer no explanation for guaranteeing freedom in *this* specific zone—here, speech.[182]

Negative autonomy also cannot explain why some speech should be protected more than other speech. Yet the freedom of speech intuitively has a core, subject to maximal protection. Some acts of speech seem to go to the heart of the freedom of speech more than others—among them, artistic speech, speech about political affairs, speech on matters of conscience, speech in the workplace, speech in the home, and speech about one's identity.[183] Being hushed, whatever you say, in a library does not carry the same blow as being told that you cannot mention your political views at work.

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180 *See, e.g.*, RAZ, *supra* note 102, at 8 (discussing presumption of liberty); H. L. A. HART, LAW, LIBERTY, AND MORALITY (1963).

181 District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

182 It might just be that negative autonomy is preserved specifically in the case of speech and thought because speech has on average fewer direct consequences for others than other types of acts. But this does not explain the reverence with which our society has generally treated free speech in particular.

183 In the end I do not think that the core of free speech is merely a list of substantive categories. But the fact that some speech seems to be valued more than other speech needs to be explained by any theory of free speech.

None of this is to say that government should be in the business of finely gradating the value of different speech acts. Rights generally extend beyond their cores precisely to avoid such difficult line drawing. But a view of free speech rooted in negative autonomy is located at the opposite extreme: it has no core, and is therefore both counterintuitive and no guide to interpretation in hard cases.[184] The next Section offers two more specific and plausible conceptions of autonomy that the Court has used to justify speech rights.

2. Positive Autonomy

Fortunately, negative autonomy is not the only conception of autonomy appealed to in First Amendment doctrine. The Court also often describes free speech as serving at least two other conceptions of autonomy: one associated with independence of thought, and the other with self-respect. These might be thought of as "positive" conceptions of autonomy, insofar as they locate autonomy in a positive process or characteristic that enables a certain healthy *sort* of agency. I explain each conception before examining the evidence that the Court embraces them.

A human being is continuously engaged in the process of forming and reforming his self, or the central features of his mind—including his values, principles, commitments, identity, opinions, and dispositions—that *determine* who he is and plans to be.[185] For this process to be autonomous, however, requires some degree of free thinking, or independence from others. Only then is it true *self*-determination. An individual who is indoctrinated to become a specific sort of person or to carry out a very specific life plan, and then—without any further intervention—in fact becomes that person and carries out that plan, is not autonomous. Of course, no person can be detached from their community or culture, as we are fundamentally shaped by our culture.[186] As Mill says, a person's "desires and impulses are his own" when they "are the expression of his own nature, as it has been

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184 For further exploration of the downsides of a negative conception of autonomy, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 52 (1982) (discussing how a liberty of self-expression threatens to collapse into a general liberty to do everything). *See also* Weiland, *supra* note 174, at 1455–60 (describing the Court's view of "thin autonomy").

185 *See* Shiffrin, *supra* note 169, at 289 (explaining that autonomy involves "[b]ecoming a *distinctive* individual" (emphasis added)).

186 *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 171–73, 506–13 (1989); ARISTOTLE, POLITICS 4 (Carnes Lord trans., The Univ. of Chi. Press 2d ed. 2013) (c. 324 B.C.E.).

developed and modified by his own culture."[187] But, lest he lose his own nature in this process, the individual must not be subject to overly invasive pressures toward conformity with prevailing social norms and expectations, which must instead be either adopted or rejected *on his own terms*.[188]

Even having formed herself with the requisite independence, an individual is not autonomous unless she can act consistently with herself. To form intentions and act, she must be motivated to do so. Such motivation requires, above all, *self-respect*, or—to borrow the philosopher John Rawls's definition—enough self-confidence in the worth of her plans and in her ability to carry them out.[189] Self-respect can partly be found within ourselves.[190] But, as Rawls recognized, we acquire most of our self-respect, at some point or another, from the recognition and affirmation of other human beings.[191] The attitude is transferable; when others respect us, we tend to respect ourselves.[192] For us to respect ourselves, then, we must have our self—our specific traits and talents and goals and commitments—assessed and praised or, ideally, admired. Child psychologists have documented the necessity of affirmation in the ordinary development of children, and research

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187 MILL, *supra* note 128, at 57.

188 *See* TAYLOR, *supra* note 186, at 174–76 (describing the individual's personal reevaluation of her or his culture and broader context as a defining feature of the modern ideal of the self).

189 JOHN RAWLS, POLITICAL LIBERALISM 319 (expanded ed. 2005). Indeed, Rawls's theory of justice is structured so as to ensure that each citizen can have self-respect.

190 For instance, we might gain self-respect when we recognize that we are using or have used our capacities to the fullest. *See* JOHN RAWLS, A THEORY OF JUSTICE 374 (rev. ed. 1999) [hereinafter A THEORY OF JUSTICE].

191 *Id.* at 387 ("[U]nless our endeavors are appreciated by our associates it is impossible for us to maintain the conviction that they are worthwhile . . . ."). This concern with affirmation and recognition is consistent with a long tradition of philosophical thinking. *See* G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 111 (A.V. Miller trans., Clarendon Press 1977) (1807); Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 37 (Amy Gutmann ed., expanded ed. 1994).

192 For us to respect ourselves enough to follow our chosen life path, we must have that life path affirmed as specially worthwhile. *See* SCHAUER, *supra* note 184, at 62 ("When we suppress a person's ideas, we are in effect saying that although he may think his ideas to be as good as (or better than) the next person's, society feels otherwise. . . . Society is saying that his ideas, and by implication he himself, are not worthy."). We must have our self—our specific traits and talents and goals and commitments—assessed and praised or, ideally, admired. This is what is known as appraisal respect. STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 122 (2006). Appraisal respect is most easily conferred by like-minded persons who are predisposed to favor the particular characteristics, virtues, traits, values, and commitments of an individual.

suggests that affirmation continues to play an important role in adult success.[193]

The Court often runs these two notions of freedom of thought and self-respect together. For example, in an oft-cited passage, the Court describes free speech as "an integral part of the development of ideas, of mental exploration and of the affirmation of self."[194] Justice Thurgood Marshall used similar but even loftier terms:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[195]

But the Justices have most often emphasized the freedom-of-thought conception, by tightly linking the freedom of speech with the freedom of thought.[196] The Court has gone so far as to describe the freedom of speech as a "complementary component[] of the broader concept of 'individual freedom of mind.'"[197] Above all, when the Court mentions freedom of the mind it shows concern for the *individuality* of mind. For the Court, the speaker's right is not just to speak but to "speak his own mind."[198] In *Cantwell v. Connecticut*, the Court declared that "[t]he essential characteristic of [speech] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."[199] Similarly, in *West Virginia State Board of Education v. Barnette*, the Court extolled "intellectual

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193 *See* Willard W. Hartup, *Friendships and Their Developmental Significance*, *in* CHILDHOOD SOCIAL DEVELOPMENT: CONTEMPORARY PERSPECTIVES 175, 190 (Harry McGurk ed., 1992); *see also* Geoffrey L. Cohen & David K. Sherman, *The Psychology of Change: Self-Affirmation and Social Psychological Intervention*, 65 ANN. REV. PSYCH. 333 (2014); Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, 21 ADVANCES EXPERIMENTAL SOC. PSYCH. 261, 266 (1988).

194 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 805 (1978) (White, J., dissenting) (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963)).

195 Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

196 *See* Thomas v. Collins, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience." (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944))).

197 Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

198 *Barnette*, 319 U.S. at 634; *see also* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (describing the First Amendment as protecting against the "standardization of ideas").

199 Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

individualism,"[200] and announced its famous maxim that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[201]

The Roberts Court also affirms the importance of freedom of thought, but, perhaps more than prior courts, emphasizes the self-respect conception of autonomy. For instance, three years ago, in *Janus v. AFSCME, Council 31*, the Court linked the speech right to dignity:

> Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends. When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . .[202]

Similarly, in *Citizens United*, the Court praised the "right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[203] In these quotes, the Court emphasizes the human need for recognition and affirmation—for respect from *others*.

3. Amplification and Positive Autonomy

Here we see why the speaker's speaking to ever larger audiences delivers only diminishing marginal benefits to *both* the freedom-of-thought and self-respect conceptions of autonomy.

a. Freedom of Thought

Speech is indispensable in the free development of one's own mind because of how speech assists thinking. Verbalizing thoughts, especially aloud or in writing, tends to clarify and refine them.[204] In particular, an audience helps to sharpen our words. And dialogue is better for this purpose than monologue. Others' responses to our speech allow us to see more fully and vividly the space of possible views and how our own fit among them. Because these responses issue from other minds with

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200 *Barnette*, 319 U.S. at 641–42.

201 *Id.* at 642.

202 Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018) (first citing *Barnette*, 319 U.S. at 633; and then citing Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796–97 (1988)).

203 Citizens United v. FEC, 558 U.S. 310, 340–41 (2010).

204 *See* Shiffrin, *supra* note 169, at 291 (noting the importance of the precision speech allows); *cf.* WILFRID SELLARS, EMPIRICISM AND THE PHILOSOPHY OF MIND (2d ed. 1997) (arguing that thought and belief are just internalized speech); SCHAUER, *supra* note 184, at 55.

different perspectives, experiences, and biases, they can also create forceful challenges to our views that pressure us to rethink and defend (or modify) our views. Or, when the responses reflect agreement with us, they can help us to deepen and refine our views.

For our speech to most helpfully aid our free thinking, it is essential that we have control over the exact verbalization—or content—of that speech.[205] For one, we must not be cowed from honestly voicing any of our opinions, hypotheses, or doubts. We must be able to follow our thoughts exactly where they go. We must even try on for size ideas we *do not* believe, so that we can better understand if and why they are wrong. If we do not undergo this free-thinking and free-speaking process, we are more likely to simply absorb the beliefs that happen to be articulated around us—and not to develop our *own*, distinctive self.[206]

What is *not* needed for autonomy is an audience that is very large. It is true that larger audiences expand possibilities for diversity and responsiveness: the larger the audience, the more likely that clear and more capable interlocutors of diverse views will be reached. But is this a linear relationship? Does an audience of 500,000 offer 5,000 times the advantages of an audience of 100? Past a point, which I shall call *n*, the advantages that additional audience members provide for freedom of thought begin to decline. What we need to be autonomous agents is not every nuance of every view held on earth, but enough of a space of possibilities and enough challenge to our own views to gain a critical distance from them. In a random sampling of 100 people on the streets of New York City, one should quickly find a range of views—atheists, libertarians, doctors, lawyers, artists, religious adherents, etc.—and plenty of people generally willing to engage in conversation. If one lives in a community where even large crowds lack diversity, or willingness to engage, then one might achieve the same benefits to autonomy by just talking to 100 people outside one's community. The idea is not to defend 100 as *n*, but simply to suggest that this number is not enormously different from, say, half a million for freedom-of-thought purposes.

Even if the largest crowds maximize diversity, they make the sort of responsive dialogue for which we wanted diversity harder to achieve. The greatest benefits of freedom of thought come not just from monologuing to a crowd and then taking questions, or from posting a

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205 *See, e.g.*, Fallon, Jr., *supra* note 172, at 902 ("By linking autonomy, and thus speech, to critical and self-critical awareness, descriptive autonomy accounts for the elevated scrutiny applied to content-based regulation of speech.").

206 *See, e.g.*, Dennis v. United States, 341 U.S. 494, 550 (1951) (Frankfurter, J., concurring); *Barnette*, 319 U.S. at 641–42.

video on YouTube and then scrolling through comments. They come from sustained, back-and-forth dialogue. While in theory a speech to 10,000 could generate 10,000 responses, we lack the time to hear all of them and the cognitive capacity to process all of them—much less to reply to all.

Yet this last point suggests an important counterargument. As mentioned above, speaking to larger and therefore more diverse crowds does offer the possibility of finding certain small subsets within them: perhaps a randomized, highly diverse set or, conversely, a set of like-minded people scattered across a population. But while it might be a sign of cosmopolitanism to seek engagement with ever more diverse groups, it is not clear that doing so is required in order to gain the critical distance from one's own views and surroundings that is necessary for freedom of thought. Any further resulting refinements to the self would be, at most, subtle. Moreover, diverse and like-minded people may be sought in alternative ways, such as by traveling or searching online or making oneself available by search online. It does seem plausible, however, that speaking to very large crowds makes the task of finding these crowds considerably easier and likelier to succeed. To that extent, I acknowledge that this might contribute marginally to the benefits amplification offers autonomy.

b. Self-respect

Speech is critical, too, in the quest for respect and, therefore, self-respect. For others to respect us as individuals, we must express to them who we are. Sometimes such self-expression involves nonverbal representations of one's emotions, preferences, style, artistic sensibility, etc.—say, through tattoos, clothing, interior design, or music. However, speech is especially important in that endeavor because of the nuance that it enables in conveying our particularity. As Milan Kundera says, "[E]veryone is pained by the thought of disappearing, unheard and unseen, into an indifferent universe, and because of that everyone wants, while there is still time, to turn himself into a universe of words."[207]

Here, too, autonomy suffers if the broadest freedom to decide the content of speech is not protected.[208] For self-respect to be instilled, we need our actual self, or at least our actual understanding of our self, to be recognized. Respect for some *other* self—perhaps one tailored to fit the prevailing social climate—will not give us the confidence needed to carry out our *own* life plans. It is possible that under certain

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207 MILAN KUNDERA, THE BOOK OF LAUGHTER AND FORGETTING 147 (Aaron Asher trans., Perennial Classics 1999) (1978).

208 *See* FEINBERG, *supra* note 171, at 28.

circumstances, being recognized as and treated as someone we are not might be confidence boosting, such as when the false self carries high status. But the effects only run so deep. Psychological evidence suggests that hiding, or remaining closeted, may be harmful to one's psychological health.[209] It is therefore essential that speakers be allowed to be authentic whenever possible, if they choose. This is why the Court shows such empathy for those who are compelled to speak contrarily to their beliefs.[210]

To engender respect, our self-expression needs a certain type of audience—but not necessarily a large one. Respect is most easily conferred by like-minded persons who are predisposed to favor the existing characteristics, virtues, traits, values, and commitments of an individual. Thus, philosophical and psychological research suggests that recognition by a small community of supporters is for most people sufficient to establish self-respect.[211] Rawls, for instance, suggests that all we need for self-respect is the praise of a community of like-minded persons.[212] We just need enough recognition to come to believe that our life plans are *worthwhile*, not to come to judge ourselves to be Übermenschen. Indeed, psychologists find that the greatest boost to self-confidence comes from the development of close, enduring relationships.[213] These relationships have the capacity to affirm a larger range of our qualities than superficial relationships between celebrities

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209 *See, e.g.*, Eric W. Schrimshaw, Karolynn Siegel, Martin J. Downing, Jr. & Jeffrey T. Parsons, *Disclosure and Concealment of Sexual Orientation and the Mental Health of Non-Gay-Identified, Behaviorally-Bisexual Men*, 81 J. CONSULTING & CLINICAL PSYCH. 141 (2013) (finding that bisexual men reported lower levels of mental health when they concealed their sexual orientation).

210 *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463–64 (2018); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018).

211 Some have argued that humans cannot make meaningful connections beyond a small community. *See* R.A. Hill & R.I.M. Dunbar, *Social Network Size in Humans*, 14 HUM. NATURE 53 (2003) (explaining that the average network size in humans is around 150 and that this number may be limited by cognitive constraints).

212 A THEORY OF JUSTICE, *supra* note 190, at 388 ("[W]hat is necessary is that there should be for each person at least one community of shared interests to which he belongs and where he finds his endeavors confirmed by his associates."); *see also* Jonathan Seglow, *Hate Speech, Dignity and Self-Respect*, 19 ETHICAL THEORY & MORAL PRAC. 1103, 1109 (2016) (arguing that self-respect is gained through pursuing common aims together).

213 *See* Brooke C. Feeney, *The Dependency Paradox in Close Relationships: Accepting Dependence Promotes Independence*, 92 J. PERSONALITY & SOC. PSYCH. 268, 268 (2007) (describing close relationships as "associated with less dependence, more autonomous functioning, and more self-sufficiency (as opposed to more dependence) on the part of the supported individual"); Michelle A. Harris & Ulrich Orth, *The Link Between Self-Esteem and Social Relationships: A Meta-Analysis of Longitudinal Studies*, 119 J. PERSONALITY & SOC. PSYCH. 1459, 1469 (2020) (explaining "the key role of positive social relationships, social support, and social acceptance" in developing self-esteem "in all phases of the human life span").

and fans can. Studies of social media users, for instance, suggest that social media use does not positively impact one's self-confidence or mental health.[214]

That said, the *desire* to express oneself to large, adoring crowds is common. A teenager does not simply aspire to be a musician or an actress of medium renown but a rock *star* or a movie *star*. In the age of social media, many go to extreme lengths in the pursuit of likes and followers.[215] Even academics often aspire to sell books to tens of thousands, not dozens. Nor do these pursuits seem irrational: high levels of recognition often confer social status; the pursuit of recognition for a particular talent or ability can motivate one to develop that talent or ability; and maybe there is even some rare thrill that can only be experienced by those who step onstage to see tens of thousands of fans below.

Such fame could translate into higher levels of *self-esteem*, or one's appraisal of one's own merit or accomplishments. But self-esteem is different from self-respect, as I understand the latter term.[216] Self-respect is one's assessment of the worth of one's self, including one's life plans, and is closely tied to dignity, motivation, and agency. Those who are self-respecting can hold their head high and execute their life plans without pathological self-doubt. Self-respect also can, unlike self-esteem, be seen as a binary: we are either self-respecting or we are not. At the same time, it is far from clear that self-esteem brings self-respect. Fame is generally not linked to mental health or motivation to carry out one's plans.[217] Some psychological studies suggest that celebrities are

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214 *See* Muqaddas Jan, Sanobia Anwwer Soomro & Nawaz Ahmad, *Impact of Social Media on Self-Esteem*, EUROPEAN SCI. J., Aug. 2017, at 329, 337 (finding that using social networking sites reduces self-confidence); Shivani Sharma & Divya Sahu, *Effect of Social Networking Sites on Self Confidence*, 3 INT'L J. INFO. & COMPUTATION TECH. 1211, 1213 (2013) (same); *see also* Junghyun Kim & Jong-Eun Roselyn Lee, *The Facebook Paths to Happiness: Effects of the Number of Facebook Friends and Self-Presentation on Subjective Well-Being*, 14 CYBERPSYCHOLOGY BEHAV. & SOC. NETWORKING 359, 362 (2011) ("Facebook friendships, just as traditional friendships, may serve as a meaningful source of social support, but only up to the point in which Facebook users can devote a sufficient amount of time and effort to developing and maintaining close connections with friends.").

215 *See* Horst Eidenmüller, *Setting Up Dates with Death? The Law and Economics of Extreme Sports Sponsoring in a Comparative Perspective*, 30 MARQ. SPORTS L. REV. 191, 192 (2019).

216 *See* David Sachs, *How to Distinguish Self-Respect from Self-Esteem*, 10 PHIL. & PUB. AFFS. 346 (1981).

217 *See, e.g.*, Surabhika Maheshwari, *Identity and Self as Reflected in Fame and Its Processes*, 64 PSYCH. STUD. 306, 309 (2019) (explaining that famous individuals can become alienated from themselves through fame); Donna Rockwell & David C. Giles, *Being a Celebrity: A Phenomenology of Fame*, 40 J. PHENOMENOLOGICAL PSYCH. 178 (2009) (explaining that fame can lead to a host of psychological concerns, including feelings of isolation); Mark Schaller, *The Psychological Consequences of Fame: Three Tests of the Self-Consciousness Hypothesis*, 65 J. PERSONALITY 291 (1997) (suggesting celebrity status leads to self-destructive behavior).

more depressed and have higher suicide rates.[218] Similarly, new research on social media users suggests that the number of followers one has is not obviously correlated with ratings of self-confidence.[219] Perhaps the sort of affirmation that comes with fame—of people showing up to hear you speak or "subscribing" to you on YouTube—is too vague or thin to establish self-respect.

But why should we think that the Free Speech Clause promotes self-respect rather than self-esteem? On most philosophical accounts of rights, rights are rooted in fundamental human interests. These tend to be interests that nearly all humans, across a wide variety of life paths, find desirable—precisely because they *enable* the pursuit of so many life paths.[220] By contrast, rights are not granted in order to guarantee that any particular life path goes successfully, or even to guarantee most of the means to make that happen. One is not given a right to become wealthy, win elected office, or be awarded the Fields Medal. Fame is a life path; it is not a life path *enabler*. To put this intuitively, imagine that one state prevents its citizens from fostering close companions, while a second state prevents its citizens from becoming famous. Both states might well be unjust, but the first state seems significantly more so; friends are necessary for *almost any* life to go well, but fame is necessary for only certain lives—those of, for example, influencers and public figures—to go well.

The foregoing arguments are not meant to establish that amplifying speech provides *no* benefits to autonomy. Rather, they are meant to show that those benefits begin dropping off steadily past some threshold audience size, and eventually cease to be appreciable. Mass amplification, therefore, is not essential to safeguarding the autonomy at the core of free speech rights.

B. *Political Participation*

While free speech jurisprudence mainly stresses the speaker's interest in autonomy, it sometimes indicates that the Free Speech Clause serves a second speaker interest: participating in democratic

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218 *See, e.g.*, Dianna T. Kenny & Anthony Asher, *Life Expectancy and Cause of Death in Popular Musicians: Is the Popular Musician Lifestyle the Road to Ruin?*, 31 MED. PROBS. PERFORMING ARTISTS 37 (2016) (finding that popular musicians are more likely than the average citizen to die unnatural deaths, and suicide is a common cause).

219 *See, e.g.*, Adriana M. Manago & Lanen Vaughn, *Social Media, Friendship, and Happiness in the Millennial Generation*, *in* FRIENDSHIP AND HAPPINESS: ACROSS THE LIFE-SPAN AND CULTURES 187 (Melikşah Demir ed., 2015) (finding that building large social media networks may impair self-esteem in adolescents).

220 *See* T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 661 (1975).

discourse. This is the speaker-interest equivalent of the democratic interest discussed in the last Part: our interest not in consuming democratic discourse but in actively participating in it *ourselves*, as speakers. The Court staunchly defends the First Amendment "right of citizens to participate in political affairs" and in political debate in particular.[221] It describes the "core political speech" shielded by the First Amendment as speech intended to "persuade" that "involves both the expression of a desire for political change and a discussion of the merits of the proposed change."[222] It has shown special solicitude toward classical forms of persuasive political communication, such as leafletting, picketing, petitioning, and canvassing.[223]

Political participation is also the darling of contemporary theoretical First Amendment scholarship.[224] On almost all theories of democracy, the legitimacy of democratic decisions requires not just that the people vote but that the vote be preceded by public deliberation.[225] Because that deliberation affects voting outcomes, scholars argue that it is part of the process of "self-government" and thus that the people must be able to participate in it just as they participate in voting.[226] Theoretical explanations for this entitlement abound. Some, such as Robert Post and Frank Michelman, argue that this contribution to the process of self-government allows us to consider ourselves *authors* of the laws.[227] Some have argued that having the opportunity to contribute secures our status as equal citizens.[228]

These theories suggest that every individual in a democracy is entitled to at least a minimum of opportunities to influence public opinion through speech, and therefore to some threshold level of amplification. As the Supreme Court says, "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners

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221 Connick v. Myers, 461 U.S. 138, 145 (1983).

222 Meyer v. Grant, 486 U.S. 414, 421–22 (1988).

223 *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 488–89, 489 n.5 (2014) (pamphlets); Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997) (leafletting); Boos v. Barry, 485 U.S. 312, 318 (1988) (plurality opinion) (picketing).

224 *See Meiklejohn's Mistake*, *supra* note 8; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 499 (2011); BAKER, *supra* note 172, at 28; SCHAUER, *supra* note 184, at 42 ("Especially when we look upon freedom of speech as a speaker's interest, the core of the theory has much more to do with individual dignity and equality, the moral right of equal participation, than it does with any notion of electoral sovereignty . . . .").

225 *See, e.g.*, *Portraits of Muhammad*, *supra* note 143; Dworkin, *supra* note 143.

226 *See, e.g.*, Tebbe, *supra* note 17.

227 *Participatory Democracy*, *supra* note 106, at 482; Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605 (1999).

228 *See, e.g.*, Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 308 (2014).

and to do so there must be opportunity to win their attention."[229] To feel like a meaningful participant in the collective task of self-governance, or an equal citizen, one may need more than a miniscule such opportunity.[230] Perhaps one is even entitled to a significant chance—at least when one's voice is combined with other voices. Some have gone so far as to argue that this chance must be equal.[231]

Wherever the threshold lies, however, it is not extremely high. The interest in political participation cannot support a right to unlimited—or even mass—amplification by private means. An interest in *participating in a process* means participating in a process according to its own rules. An interest in winning chess cannot support a right to sweep all the pieces off the board when your king is in check. So, an interest in participating in a *democratic* process like the formation of public opinion on political issues comes with an internal caveat: it cannot be served by speech that disrupts the basic integrity of democratic discourse. And if we accept my arguments from Part II, this means the interest excludes speech that disrupts the basic conditions of epistemic competition, such as by crowding out other voices.[232] Such internally qualified rights are not unfamiliar. The right to vote, for instance, represents an interest in participating in political decisions according to a legitimate electoral process. We might disagree about what constitutes a legitimate process, but we should be able to agree that no one has a claim to participate to whatever degree that their private resources will allow—say, by buying others' votes.

IV. TOWARD A NEW AMPLIFICATION DOCTRINE

As explained in Part I, the Court tends to be more concerned about the ability of advantaged speakers and media actors to amplify speech to an unlimited extent than about the ability of disadvantaged speakers to even have a chance of being heard.[233] In other words, mass amplification seems to be more stringently protected by the Constitution than smaller-scale amplification. This is exactly backward.

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229 Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (plurality opinion).

230 *See* Niko Kolodny, *Rule Over None I: What Justifies Democracy?*, 42 PHIL. & PUB. AFFS. 195, 197–200 (2014); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 203 (2000) (arguing that citizens must have the "opportunity for *some* influence—enough to make political effort something other than pointless" (emphasis added)).

231 *See* Ryan Pevnick, *Does the Egalitarian Rationale for Campaign Finance Reform Succeed?*, 44 PHIL. & PUB. AFFS. 46 (2016) (listing arguments).

232 *See supra* Sections II.B, II.C.

233 See discussion *supra* Section I.B.

The normative analysis of Parts II and III showed how the justification for protecting amplification under the Free Speech Clause shifts as amplification increases: while small degrees of amplification are protected because of their benefits for individual speakers, larger degrees of amplification are protected instead because of their benefits for the overarching system of free expression in a democracy.[234] The implication is that some laws constraining individuals' choices about how and when to use mass amplifying platforms may—depending on their purpose and execution—actually serve the First Amendment's democratic values without undermining its individualistic values.

To be clear, not just any regulation of mass amplification will be constitutional. Such regulations would need to pass intermediate scrutiny: they would need to refrain from discriminating among viewpoints, and to be closely drawn to actually promote epistemic competition.

This Part starts to explore types of mass-amplification regulation that this Article's analysis might make constitutional room for, and exactly how, doctrinally speaking, that room would be made. I explore in detail only the familiar areas of campaign finance and social media, though my argument may also have implications for defamation, incitement, and other areas of speech law.[235] I also offer a few thoughts on how, as a result of my analysis, certain regulations of small-scale amplifiers, like those used in public forums, might be *more* constitutionally troublesome than previously recognized. I conclude by addressing whether we can trust legislatures and courts to implement my analysis.

A. *Mass Amplification*

Courts should treat mass amplification and the resources necessary for it in a manner similar to the time, place, or manner of speech—as just part of the context of speech, and not vital to any of a speaker's First

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234 The point at which larger audiences yield only diminishing marginal returns for autonomy is admittedly indeterminate. It likely varies by speaker and would be hard to measure with precision. This poses no real problem, though, for two reasons. First, the best protection against indeterminate thresholds is to offer a wide berth; legislation should not even come close to undermining autonomy. But amplification on the level of mass media, for example, certainly crosses the threshold. Second, the democratic qualification on amplification rights that I advocate activates at far above the level of amplification at which autonomy ceases to be of much value.

235 For instance, the scale of amplification may make a difference to the "imminen[ce]" of clear and present danger under the incitement standard, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), and to the likelihood that a speaker can disavow compelled speech, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

Amendment interests. When it comes to mass amplification, "[i]t is the right of the viewers and listeners . . . which is paramount."[236] Accordingly, courts should review interventions designed to assist listeners under the lower bar of intermediate scrutiny, like they do TPM rules.

1. Campaign Finance Doctrine

Reviewing campaign expenditure limits under intermediate scrutiny would bring the doctrinal treatment of expenditures in line with that of contributions. As mentioned above, campaign contribution limits are reviewed under intermediate scrutiny because they only marginally encroach on speakers' expressive interests. The Court explains the marginal nature of the encroachment by reference not to amplification but to the "symbolic" nature of contributions.[237] Yet the simpler and more persuasive explanation is that any large campaign spending—whether in the form of a donation or an expenditure—goes primarily toward mass amplification designed to change the political landscape and not toward the speaker's expressive interests. Both forms of spending should therefore be subject to the same intermediate standard.

The result would transform campaign finance law. Legislatures would have more leeway to ensure that voters are exposed to a range of views on electoral questions, whether via direct caps on campaign spending or public funding schemes tailored to balance out electoral discourse. Again, even if justified by the interest in preserving epistemic competition in democratic discourse, any such interventions would still need to be closely tailored to achieve that interest. But many could be, if they strictly target mass-amplified speech and do not overcorrect. For instance, the careful expenditure limits that the Court has overturned in cases like *Buckley v. Valeo*, *Citizens United v. FEC*, and *McCutcheon v. FEC*[238] may turn out to pass constitutional muster. After all, the Court has approved other types of restrictions on campaign expenditures under the intermediate scrutiny standard, such as requirements that donors be disclosed.[239] Public funding schemes like the one struck down

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236 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (first citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); and then citing FCC v. Allentown Broad. Corp., 349 U.S. 358, 361–62 (1955)).

237 *Cf.* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam).

238 McCutcheon v. FEC, 572 U.S. 185, 193 (2014) (plurality opinion) (invalidating federal limits on individuals' total donations to *all* candidates each election season).

239 *See* McConnell v. FEC, 540 U.S. 93, 201–02 (2003); *see also* Doe v. Reed, 561 U.S. 186 (2010).

in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* could be especially valuable for ensuring diversity in electoral discourse in a minimally restrictive manner, because they primarily level *up*.[240]

To be clear, I am not trying to revive a government interest that the Court has already unequivocally repudiated: the "antidistortion" rationale. In *Austin v. Michigan Chamber of Commerce*, the Court upheld a state law that required any corporation wishing to engage in election expenditures to do so from a separate, segregated fund rather than its general treasury. The Court endorsed the State's aim to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[241] Exactly two decades later, *Citizens United* explicitly overruled *Austin* on this point.[242]

Many pages have been written defending *Austin* since *Citizens United*.[243] But this Article is not *Austin* redux. *Austin*'s principle of antidistortion opposed what we might think of as *democratic* distortion: the representation of ideas in discourse out of proportion to their support from the population. According to *Austin*, making corporations spend on elections from separate funds made sense because this ensured that any such spending reflected the views of the corporation's members. Indeed, *Citizens United*'s refutation of *Austin* focuses almost entirely on the latter opinion's differential treatment of the corporate form.[244] By contrast, the concern of this Article is better described as one about *epistemic* distortion, or interventions that prevent a reasonably diverse range of views from being heard. An epistemic antidistortion rationale may lead to many of the same outcomes as *Austin*'s would, because sometimes diversity will demand moving the microphone to different hands. But its epistemic spirit, as examined in Part II, has the Court's own blessing.

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240 *See* discussion *supra* pp. 138–39. There is reason to prefer such systems over laws that attempt to level down and that may be easily evaded. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (arguing that campaign finance laws rarely suppress spending but rather redirect it to different channels).

241 Austin v. Mich. State Chamber of Com., 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

242 *Citizens United*, 558 U.S. at 365–66.

243 *See, e.g.*, Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011); Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243 (2010).

244 *Citizens United*, 558 U.S. at 349.

2. Potential Internet Regulations

Today the greatest threats to the health of American public discourse can be found online.[245] Especially since the 2016 presidential election, concerns have focused on the rapid spread of misinformation, the creation of echo chambers, the promotion of emotionally exploitative and sensationalist content, the encouragement of radicalism and harassment, and the demise of quality journalism.[246] While not all of these problems are directly a matter of epistemic competition, most could be partially alleviated if the speech users saw online was more diverse and antagonistic.[247] Even if these concerns are partly endemic to Internet communication, commentators insist that the dominant online amplifying platforms, including ISPs, search engines, and social media platforms, have at least exacerbated them.[248] Further, tech companies possess broad and unsettling discretion to shape democratic discourse and democratic decisions into the future.[249]

Legislatures, law schools, political science departments, and the world of punditry are swimming with potential regulations to cabin that discretion in ways that will promote epistemic competition—several of

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245 *See* David M. Howard, *Can Democracy Withstand the Cyber Age?: 1984 in the 21st Century*, 69 HASTINGS L.J. 1355 (2018); Nathaniel Persily, *Can Democracy Survive the Internet?*, J. DEMOCRACY, Apr. 2017, at 63; Anya Schiffrin, *Disinformation and Democracy: The Internet Transformed Protest but Did Not Improve Democracy*, J. INT'L AFFS., Fall/Winter 2017, at 117.

246 *See, e.g.*, Jeff Gary & Ashkan Soltani, *First Things First: Online Advertising Practices and Their Effects on Platform Speech*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/first-things-first-online-advertising-practices-and-their-effects-on-platform-speech [https://perma.cc/WDT9-75R9] (describing social media business practices that systematically favor misinformation, hate speech, and harassment).

247 For instance, echo chambers exacerbate misinformation's spread. *See, e.g.*, Milan Djordjevic, *Corporate Attempts to Combat Fake News*, *in* FAKE NEWS IN AN ERA OF SOCIAL MEDIA: TRACKING VIRAL CONTAGION 103, 104 (Yasmin Ibrahim & Fadi Safieddine eds., 2020).

248 *See, e.g.*, Joseph Thai, *Facebook's Speech Code and Policies: How They Suppress Speech and Distort Democratic Deliberation*, 69 AM. U. L. REV. 1641 (2020); Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631 (2021).

249 *See, e.g.*, DIGITAL DOMINANCE: THE POWER OF GOOGLE, AMAZON, FACEBOOK, AND APPLE (Martin Moore & Damian Tambini, eds., 2018); Lakier, *supra* note 146; Mathew Ingram, *Platform Ban of Trump and Parler Raises Questions About Speech and Power*, COLUM. JOURNALISM REV. (Jan. 14, 2021), https://www.cjr.org/the_media_today/platform-ban-of-trump-and-parler-raises-questions-about-speech-and-power.php [https://perma.cc/M4U6-TFEV]; Nathan J. Robinson, *What Rights Do We Have on Social Media?*, CURRENT AFFS. (Jan. 13, 2021), https://www.currentaffairs.org/2021/01/what-rights-do-we-have-on-social-media [https://perma.cc/B66W-572Q].

which I will discuss below.[250] These regulations would likely only pass constitutional review, however, if courts review them under intermediate scrutiny.

Courts will apply strict scrutiny if, as explained in Part I, a regulation infringes on the "editorial discretion rights" of a mass media corporation.[251] These rights are apparently construed to serve the autonomy interest.[252] So the argument about autonomy from Part III applies here, too. Because editorial discretion is exercised to decide who has access to amplifying platforms, it itself becomes a matter of mass amplification. Editors could choose to voice their preference for certain content in places other than at their platform gate—and could even choose, in their own voices, to disclaim certain content. No danger is posed to freedom of thought or self-respect. Editorial discretion therefore has marginal value for autonomy purposes.[253]

Instead, editorial discretion rights exist *in service* of democratic discourse. Editorial control, when exercised, serves a signaling function, pulling ideas upward in public attention. While this signaling will always involve a degree of arbitrariness, it can sort some better ideas from worse ones and plays an indispensable function in the operation of the marketplace. Then again, it can also be used to unacceptably reduce the diversity of ideas seen by the largest swaths of the population. The question for regulating media platforms is thus whether the exercise of complete editorial discretion in a certain class of cases is consistent with democratic discourse. Usually it will be, given the importance of uninhibited media to democratic discourse; but tensions will start to emerge to the extent that media undermines epistemic competition itself. For instance, in *Red Lion Broadcasting Co. v. FCC*,

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250 *See generally* Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/4UYB-36M4?type=image]; Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019); TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 43–44 (2018); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 213–15 (2017); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE ch, 7 (2014).

251 *See* discussion *supra* Section I.B.3.

252 Perhaps editorial discretion rights could be defended on the ground that they serve media corporations' political participation rights. This would, I believe, involve a strained reading of *Citizens United*; corporations cannot be thought of as equal members of the polity who have participation rights. However, if the Court meant to extend political membership to corporations, a parallel argument drawn from Part III can be raised: smaller levels of amplification give corporations adequate opportunities for political participation.

253 Others have criticized the "editorial analogy" for social media platforms on other grounds. *See, e.g.*, Whitney, *supra* note 47 (arguing that social platform operators are not analogous to newspaper editors).

the radio company challenging the fairness doctrine invoked their editorial right "to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[254] But the Court concluded that the scarcity of broadcast radio waves gave each channel *too much* control over what voters heard.[255]

Of course, many proposals for Internet regulation that seek to achieve goals beyond epistemic competition are arguably at odds with the First Amendment. For instance, Germany and France have in the past several years passed laws, which some would like emulated in the United States, that have forced social media companies to remove nonviolent, nonpornographic, and non-copyright-infringing content[256] and would fail any interpretation of the First Amendment content-neutrality test.[257]

However, some regulatory proposals do seek to further epistemic competition in ways that are at least broadly in keeping with the recommendations of this Article—though the devil may be in the details. I describe two below: net neutrality and social media diversification.

Net neutrality rules, described above, ensure that Internet service providers do not discriminate in their service.[258] While no such rules are currently in place, the Biden Administration will likely restore those from the Obama Administration.[259] However, those may rest on shaky ground. While they were upheld in *United States Telecom Ass'n*, the D.C. Circuit opinion rested on the conclusion that ISPs lack editorial discretion rights because they do not make content moderation

254 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

255 *Id.* at 390 (first citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); and then citing FCC v. Allentown Broad. Corp., 349 U.S. 358, 361–62 (1955)).

256 *See* Netzdurchsetzunggesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BUNDESGESETZBLATT I [BGBL I] at 3352, last amended by Gesetz [G], June 3, 2021, BGBL I at 1436 (Ger.), https://www.gesetze-im-internet.de/netzdg [https://perma.cc/B4QA-6CMY]; *France to Force Web Giants to Delete Some Content Within the Hour*, REUTERS (May 13, 2020, 12:14 PM), https://www.reuters.com/article/us-france-tech-regulation/france-to-force-web-giants-to-delete-some-content-within-the-hour-idUSKBN22P2JU [https://perma.cc/9QKV-RBWK].

257 *See* McCullen v. Coakley, 573 U.S. 464, 478 (2014).

258 *See supra* Section I.B.3; *see also Net Neutrality: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 109th Cong. 54 (2006) (statement of Lawrence Lessig, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford Law School), *reprinted in* Lawrence Lessig, *In Support of Network Neutrality*, 3 I/S 185 (2007); TIM WU, A PROPOSAL FOR NETWORK NEUTRALITY (2002), http://timwu.org/OriginalNNProposal.pdf [https://perma.cc/2L88-QGGB].

259 *See* Jon Brodkin, *Biden Wants the FCC to Fix Net Neutrality—But It Can't Yet*, WIRED (July 11, 2021, 9:00 AM), https://www.wired.com/story/biden-fcc-restore-net-neutrality [https://perma.cc/YL2Q-74U6].

decisions.[260] In theory, robust economic competition among a large number of firms might keep ISPs out of content moderation, but in fact ISPs are scarce because the cables and other infrastructure necessary for their operation are physically limited. Nothing in practice stops them from engaging in limited content moderation—as then-Judge Kavanaugh pointed out in his dissent from a denial of rehearing en banc in the case.[261]

Firmer ground for the affirmation of net neutrality comes from recognizing that ISPs are amplifying platforms with a unique role in maintaining epistemic competition: holding open the gates to the very lowest levels of public discourse for the widest possible array of views. By providing a gateway to the Internet, and to the mass-amplifying platforms found there, they facilitate mobility and epistemic competition.

Unlike ISPs, social media companies have not yet been the serious target of American regulation. But many proposals aim to preserve epistemic competition on them. One common strategy, endorsed by Senator Elizabeth Warren, proposes to break up social media companies like Facebook and Twitter, perhaps stimulating the creation of a wider range of competing forums.[262] Another common strategy would require social media platforms to adopt independent review boards for content-moderation decisions.[263] Other strategies actually tinker in nondiscriminatory ways with the content of social media, by imposing "must-carry" rules in the style of the old fairness doctrine,[264] restricting sorting algorithms from solely using the metric of popular

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260 U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743–44 (D.C. Cir. 2016).

261 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 429 (D.C. Cir. 2017) (petition for rehearing en banc) (Kavanaugh, J., dissenting).

262 Warren, *supra* note 250. An alternative proposal from the Stanford Working Group on Platform Scale would keep platforms intact but promote "middleware" companies to offer users diverse options for filtering content; these companies would then share advertising revenue with the platforms. *See* Francis Fukuyama, *Making the Internet Safe for Democracy*, 32 J. DEMOCRACY 37, 41–43 (2021).

263 See Ben Wagner, Krisztina Rozgonyi, Marie-Therese Sekwenz, Jennifer Cobbe & Jatinder Singh, *Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act*, *in* ASS'N FOR COMPUTING MACH., FAT* 20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 261 (2020); BEN BRADFORD ET AL., YALE L. SCH., REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP 36–38 (2019), https://law.yale.edu/sites/default/files/area/center/justice/document/dtag_report_5.22.2019.pdf [https://perma.cc/PFY2-SU3Y].

264 *But see, e.g.*, SUNSTEIN, *supra* note 250, at 228–29 (describing must-carry rules but concluding that they have "no legitimate role on the Internet").

engagement,[265] and requiring stricter disclosure of speakers' identities and backers.[266]

Whether or not these particular proposals are advisable, nearly all of them—except for antitrust solutions—would face serious constitutional stumbling blocks if social media companies were deemed to have editorial rights analogous to autonomy- or political participation–based speech rights of individual speakers. The platforms have thus far held themselves out to be "neutral conduits" like ISPs.[267] But all of them engage in exactly the sort of content moderation that courts have deemed ISPs not to.[268] To name just a few, Facebook promotes "reliable" news stories,[269] YouTube demotes conspiracy videos,[270] and Twitter flags tweets that have been repeatedly identified by users as factually false and cuts off access to some.[271] Yet even assuming these companies exercise editorial judgment in filtering their content, any editorial rights they have serve no autonomy purposes and must be interpreted instead to serve—and to extend only so far as they serve—the voters' interest in epistemic competition online. As the

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265 *See* Lauren Jackson & Desiree Ibekwe, *Jack Dorsey on Twitter's Mistakes*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/07/podcasts/the-daily/Jack-dorsey-twitter-trump.html [https://perma.cc/3H7X-LLJN] ("We need to open up and be transparent around how our algorithms work and how they're used, and maybe even enable people to choose their own algorithms to rank the content or to create their own algorithms, to rank it.").

266 *See, e.g.*, MD. CODE ANN., ELEC. LAW § 13-405 (West 2021), *invalidated by* Wash. Post v. McManus, Jr., 944 F.3d 506 (4th Cir. 2019); N.Y. ELEC. LAW § 14-107-b (McKinney 2021).

267 *See Facebook, Social Media Privacy, and the Use and Abuse of Data: Joint Hearing Before the S. Comm. on Com., Sci., & Transp. and the S. Comm. on the Judiciary*, 115th Cong. 111 (2018) (statement of Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook) (explaining that Facebook is a technology company, not a publisher).

268 Many commentators have made such arguments in order to argue for the repeal of Section 230 of the Communications Decency Act, which shields Internet companies from liability for users' illegal or defamatory content. *See, e.g.*, Timothy B. Lee, *Mark Zuckerberg Is in Denial About How Facebook Is Harming Our Politics*, VOX (Nov. 10, 2016, 10:25 PM), https://www.vox.com/new-money/2016/11/6/13509854/facebook-politics-news-bad [https://perma.cc/26ZY-MUV8]; Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMEND. INST. (Apr. 1, 2018), https://knightcolumbia.org/content/discriminatory-designs-user-data [https://perma.cc/5Y6L-EBJ6].

269 Emily Dreyfuss & Issie Lapowsky, *Facebook Is Changing News Feed (Again) to Stop Fake News*, WIRED (Apr. 10, 2019, 1:00 PM), https://www.wired.com/story/facebook-click-gap-news-feed-changes [https://perma.cc/3HJJ-KRX9].

270 *See, e.g.*, Marc Faddoul, Guillaume Chaslot & Hany Farid, *A Longitudinal Analysis of YouTube's Promotion of Conspiracy Videos*, ARXIV (Mar. 6, 2020), https://arxiv.org/pdf/2003.03318.pdf [https://perma.cc/ZQS3-UHP2].

271 *See* Gilad Edelman, *Twitter Finally Fact-Checked Trump. It's a Bit of a Mess*, WIRED (May 27, 2020, 12:21 PM), https://www.wired.com/story/twitter-fact-checked-trump-tweets-mail-in-ballots [https://perma.cc/67M4-57YD].

Court itself has implied, social media platforms are the new soapboxes "in the modern public square."[272]

To reiterate once more, nothing said so far provides a constitutional carte blanche for Internet regulation. Just as for campaign finance regulations, any Internet regulations would need to be closely drawn to achieve epistemic competition in democratic discourse. The Internet is still a relatively new beast, and any rules governing it must be enacted with caution. Indeed, the German regulations on social media appear to have produced serious chilling effects.[273] Regulations must minimize chill by involving regulators only in broad structural interventions, not case-by-case line-drawing; and they must produce empirically verifiable results.

Perhaps, to avoid these pitfalls, Internet companies should for now be left to self-regulate, as some scholars have advocated.[274] The major trifecta of platforms Facebook, Twitter, and YouTube have all expressed concern about their impact on democratic discourse, either out of a genuine sense of social responsibility or concern for their public image, and all have enacted and called for internal reforms that would increase epistemic competition. For instance, Twitter's CEO Jack Dorsey has floated the idea of allowing users to choose their own content-filtering algorithms.[275] YouTube has altered its "recommended videos" list to decrease radicalization.[276] Facebook has established a "supreme court" to review content decisions.[277]

But the arguments of this Article are actually relevant to social media self-regulation, too. Major social media platforms have *also* intimated that they are at least informally bound by the First Amendment, as though they are public actors. Sometimes they express concern that any changes in their algorithms that demote the content of users will violate (informal) free speech rights.[278] If the companies are

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272 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

273 *See* Rebecca Zipursky, Note, *Nuts About NETZ: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT'L L.J. 1325, 1359–60 (2019).

274 *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

275 *See* Jackson & Ibekwe, *supra* note 265.

276 *See* Jack Nicas, *YouTube Drives Viewers to the Internet's Darkest Corners*, WALL ST. J., Feb. 8, 2018, at A1 (arguing that YouTube has not gone far enough).

277 Kate Klonick, *Inside the Making of Facebook's Supreme Court*, NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court [https://perma.cc/Y8HS-TP47]; *see also* Mike Isaac, *After Zuckerberg's Invitation to Regulate Facebook, a Closer Look*, N.Y. TIMES, Apr. 1, 2019, at B3.

278 *See* Gilad Edelman, *How Facebook Gets the First Amendment Backward*, WIRED (Nov. 7, 2019, 5:29 PM), https://www.wired.com/story/facebook-first-amendment-backwards [https://perma.cc/EY5C-HKUY]; *cf.* Eric Johnson, *Should the First Amendment Apply to*

taking their cues from the Constitution, then they should be less concerned about depriving users of mass amplification and more concerned about epistemic competition.

At the same time, other scholars have predicted that self-regulation will fail.[279] What this Article shows is that, if failure happens, any proposals for state intervention to correct it should not be dismissed merely on the grounds that they violate the speech rights of the social media companies themselves.

B. *Small-Scale Amplification*

In the public forum cases discussed earlier, the Court correctly grasps that the speaker's freedom to choose her amplification is not central to the freedom of speech.[280] Ever-higher levels of amplification are unnecessary for autonomy. The Court's chief error is in neglecting how the low-level amplification provided by some platforms can be critical for (a) the mobility of ideas in democratic discourse and, sometimes, (b) political participation. For many citizens lacking wealth and resources, speaking at certain public places or times, or in certain manners, are roughly their only gateways into broader public discourse and the formation of public opinion. Letters to the editor of newspapers are often not accepted; internet blogs and webpages will not be visited unless they are picked up by amplifying algorithms.

What the doctrine needs is a more robust inquiry into the amplification effects of any TPM regulation that blocks disadvantaged voices. In particular, courts must ask if alternative channels of communication with similar amplification potential are accessible to the speakers raising the claim; if not, then the regulation may stifle viewpoints that might otherwise not be expressed in significant numbers.

The Court does look carefully at degrees of amplification in an aberrant recent case, *McCullen v. Coakley*, which struck down a Massachusetts law that restricted activists' advocacy in areas surrounding abortion clinics. The law required that protestors stand at least six feet from anyone entering a clinic. The Court criticized the restrictions in part because, since their enactment, antiabortion activists

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Facebook? It's Complicated., VOX (Nov. 19, 2018, 1:43 PM), https://www.vox.com/2018/11/19/18103081/first-amendment-facebook-jameel-jaffer-freedom-speech-alex-jones-decode-podcast-kara-swisher [https://perma.cc/ME8F-ZQ78].

279 *See* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1244–46 (2018).

280 *See* discussion *supra* Section I.B.1.

had "reache[d] 'far fewer people'" and convinced fewer women to terminate their pregnancies.[281] While scholars have actually challenged this description of the law's effects, it is rare to see these sorts of before-and-after amplification comparisons made by the Court.[282] While one may or may not agree with the outcome of the case, the inquiry about amplification is the right one.

Reasoning like this may well have changed the outcomes in a number of TPM cases over the decades. For example, in *Kovacs*, the case discussed in Part I that upheld a conviction for the use of a sound truck in the streets, the dissenters were right to question whether the communist activists had equally inexpensive alternative methods of amplifying their method. To take another example, *Members of the City Council v. Taxpayers for Vincent* involved a ban on affixing posters to utility poles. The Court sustained the regulation, suggesting that speakers could instead post signs on private property or else print handbills to distribute to passersby.[283] Dissenting, Justice Brennan provided a better model for analyzing the ampleness of alternative channels of communication. Brennan objected that the law foreclosed what was perhaps the most effective speech platform available to poorer speakers.[284] The Court's proposed substitutes, he argued, were inadequate for these speakers, because handbills were more costly to produce and distribute, while reaching a smaller audience; and private property owners might not consent to the use of their property to disseminate these speakers' messages.

C. *Institutional Limitations*

I have already mentioned that the amplified speech doctrines advocated here would not remove all limits on the regulation of mass amplification. In this Section, I explore the firmest boundaries at greater length and explain how courts can police them.

The first is content neutrality: government must not attempt to remove any views from the conversation, or seriously disadvantage them. Of course, legislative motives can always be mixed, with some legislators aiming to improve discourse and others aiming to gain political advantages for themselves. But this is true for every law. The

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281 McCullen v. Coakley, 573 U.S. 464, 487 (2014) (discussing at great length the actual numbers).

282 *See* Ho & Schauer, *supra* note 145, at 1204–19 (questioning whether the empirical analysis in this case was accurate).

283 Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 794–95, 812 (1984).

284 *Id.* at 819–20 (Brennan, J., dissenting).

routine judicial inquiry is whether the law is well supported by legitimate reasons. Indeed, courts have no trouble upholding contribution limits as anticorruption measures, even though these laws may offer benefits for incumbents, who typically have fundraising advantages over challengers.[285] A unique advantage of diversity, mobility, and antagonism as government justifications is that they would provide exceptionally poor cover for any legislature or agency deliberately attempting to skew public discourse: a law that creates rather than dismantles extreme advantages or disadvantages for any viewpoint is not narrowly tailored to achieve these goals.

Second, government cannot attempt to engage in fine line drawing when it comes to democratic discourse. Diversity does not require that every view achieves exactly equal airtime; antagonism does not require that opposing views be juxtaposed fifty-fifty on every channel. When such hairsplitting is attempted, unanswerable questions proliferate. What *is* a view? *Which* views need to be heard by everyone? *How much* time should be given to any particular view? While public officials may be better placed to make political judgment calls than courts, they still cannot be relied upon to make such exact determinations.[286] The history of the ill-fated fairness doctrine bears out this point. The doctrine was difficult to enforce, because the Agency lacked a clear answer to questions like those above, and media companies could not accurately predict which conduct would result in sanctions.[287]

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285 *See* Alexander Fouirnaies & Andrew B. Hall, *The Financial Incumbency Advantage: Causes and Consequences*, 76 J. POL. 711 (2014) (discussing and confirming the incumbency advantage). Researchers have, however, long debated whether campaign contribution limits necessarily favor incumbents. *See, e.g.*, Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RSCH. Q. 99 (2006) (reviewing the conflicting literature, but finding that contribution limits can actually reduce incumbency advantage); Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125 (2010) (concluding that contribution limits in state assembly elections made races more competitive, even when incumbents were involved).

286 *See, e.g.*, Friends of the Earth, 24 F.C.C.2d 743 (1970) (determining that a radio commercial for cars did not present a view on the controversial issue of air pollution, and thus that the radio station that ran it was not also required by the fairness doctrine to air opposing views from environmentalists).

287 *See generally* Steven J. Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine*, 65 CALIF. L. REV. 546 (1977) (outlining complications the FCC faced in determining who represented the opposition on each issue); Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (arguing that, under the fairness doctrine, media companies refrained from covering public issues because they feared the doctrine's enforcement). *But see* Patricia Aufderheide, *After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest*, 40 J. COMMC'N 47 (1990) (arguing that the fairness doctrine was flexibly and minimally enforced).

More reasonable rules would opt for structural adjustments aimed at bringing out disadvantaged views.[288] Such structural adjustments might concentrate on the resources for accessing media platforms, the options for pooling resources for speech, and amplification platforms themselves—that is, the sources of advantage and disadvantage—rather than specific views.

CONCLUSION

One might have thought, from reading recent constitutional doctrine and scholarship, that the First Amendment is divided against itself, torn between its value of individual liberty and its value of democracy. Some scholars and jurists have taken up the torch of the individual; others that of collective self-governance. This Article offers the beginning of a détente between the two sides, explaining that in one crucial field of speech, the two values are reconcilable.

If the arguments I have presented are correct, then the right to amplify speech to very large audiences is qualified: it is not protected when its exercise interferes with the background conditions that enable democratic discourse to function. The reason is that, as I argued in Parts II and III, amplification rights are justified based on their contribution to the First Amendment value of democratic discourse, rather than to the other, more individualistic First Amendment values. A right cannot be recognized that contradicts its own foundation.

This insight explains why certain speech-restrictive measures can be taken to preserve the integrity of democratic discourse without infringing on individuals' free speech rights. These measures, from campaign finance laws to media regulations, target primarily speech amplified over mass-media platforms. These platforms are scarce, and access to them is granted to no small degree due to socioeconomic advantages. Thus, laws designed to ensure, in service of democratic discourse, that a diversity of voices are heard over those platforms, should, if narrowly tailored, survive constitutional scrutiny. At least in this field, the twin First Amendment goals—the free individual and the free society—are in harmony.

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288 *See, e.g.*, Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMMC'NS & ENT. L.J. 137, 158 (1994) ("Flexible solutions, supplementing market arrangements, should be presumed preferable to government command-and-control.").