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# Freedom of Thought in the United States: The First Amendment, Marketplaces of Ideas, and the Internet

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## Abstract

Freedom of thought is not directly protected as a right in the United States. Instead, US First Amendment law protects a range of rights that may allow thoughts to be expressed. Freedom of speech has been granted especially robust protection. US courts have extended this protection to a wide range of commercial activities judged to have expressive content. In protecting these rights, US jurisprudence frequently relies on the image of the marketplace of ideas as furthering the search for truth. This commercial image, however, has increasingly detached expressive rights from the understanding of freedom of thought as a critical forum for individual autonomy. Indeed, the commercialization of US free speech doctrine has drawn criticism for "weaponizing" free speech to attack disfavoured economic and regulatory policies and thus potentially affecting freedom of thought adversely. The Internet complicates this picture. This paper argues that the Supreme Court's expansion of the First Amendment for the benefit of commercial actors lies in the problematic tension with the justification for individual freedom of thought resting in personal self-direction and identity.

## Keywords

Freedom of thought, freedom of speech, First Amendment, commercial speech, marketplace of ideas, identity autonomy

## 1. Introduction

US constitutional law provides no direct protection for freedom of thought. Instead, it protects a range of associated rights such as freedom of expression or freedom of religion that might be thought to bolster freedom of thought more or less directly. US jurisprudence, however, has interpreted these associated rights through the lens of the marketplace of ideas. This commercialization, once metaphorical and today increasingly literal, creates deep tensions in the US between freedom of thought as critical to personal self-direction and identity and rights such as freedom of speech with which it has been associated. Analyzing how, in the US, a confluence of legal streams linking speech and commerce has drawn free speech away from freedom of thought is the goal of this article.

The US First Amendment does not address what might be characterized as the inner sanctum of free thought: the ability of individuals to exercise robust autonomy in the ideas they formulate, entertain, and believe. Instead, the First Amendment to the US constitution protects residents against governmental interference with a list of freedoms: the free exercise of religion, freedom of speech, freedom of the press, the right to assemble peaceably, and the right to petition government for redress of grievances. Each of these rights bears a clear relationship to freedom of thought. For example, protecting free exercise of religion allows people to worship in accord with their religious beliefs. Together, these rights would appear to provide extensive protection for the manifestation of thoughts in the world. Neither separately nor together, however, do they directly protect thoughts themselves. For example, allowing people to worship in accord with their religious beliefs is not the same as protecting people from practices that inhibit their ability to reconsider their religious beliefs.

Moreover, US First Amendment doctrine for at least a century has moved toward understanding speech in marketplace terms. US Supreme Court doctrinal support for free speech is rooted in the idea that market competition will winnow out better ideas from inferior ones. First Amendment doctrine also protects both natural and corporate persons as speakers in this market, placing both persons and commercial entities on the same level. What is more, commercial actors are receiving increased protection under an additional First Amendment freedom, the free exercise of religion. These developments, we contend, are at best orthogonal to and more likely in tension with justifications for individual freedom of thought resting in personal self-direction and identity. So are developments in a related area of free speech doctrine: compelled speech, where court decisions protect commercial actors from requirements to reveal information that might be economically deleterious.

Against this backdrop, the Internet brings further challenges to freedom of thought in the US. Ever-present in the world in which US First Amendment doctrines are continuing to develop, the Internet remains largely undertheorized in US jurisprudence. The immediacy and scale of social media, big data analytics, and powerful methods for tracking individuals challenge both the functioning of the marketplace of ideas and individuals' ability to maintain any semblance of privacy and secrecy of thought. Yet US law and First Amendment doctrine leave the Internet largely on its own, viewing platform providers not as themselves speakers but merely as the now-virtual location in which speech takes place. A further problem is that, as private actors, platform providers are not subject to the First Amendment restrictions on state actors. Thus constructed, US free speech doctrine may ironically provide cover for losses of individual privacy and full understanding of how information is presented that take place in the forum of the Internet—both essential to freedom of thought in the deeper sense of mental

autonomy or personal sovereignty.[1] Finally, the Court has not developed privacy jurisprudence in a way that could counter these trends.[2]

## 2. First Amendment Rights and Freedom of Thought

In this short contribution, we cannot hope to give a full account of the many difficult questions in political and legal theory raised by freedom of thought. Here, we outline only a few claims about the right to freedom of thought that are essential to our discussion. Most fundamentally, we think that US jurisprudence in its focus on freedom of expression characterized in commercial terms has moved away from a jurisprudence supportive of freedom of thought. We begin with a brief characterization of freedom of thought.

Freedom of thought differs from freedoms to manifest thoughts. Yet characterizing freedom of thought as a right apart from its manifestations is difficult. Spatial metaphors such as the "inner sanctum" of the mind are common but obscure. Here, the United Nations Declaration of Human Rights Article 18 provides suggestive guidance: "Everyone has the right to freedom of

[1] *E.g.*, S. McCarthy-Jones, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century", *Frontiers in Artificial Intelligence* 2(9) (2019). Retrieved 12 April 2021 https://doi.org/10.3389/frai.2019.00019.

[2] Although the Court's decisions about intimate personal matters such as reproduction initially were framed in terms of privacy, these decisions are now framed in terms of liberty. *E.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). The only U.S. Supreme Court decision dealing with informational privacy is Whalen v. Roe, 429 U.S. 589 (1977), which upheld the authority of the state to collect patient records of controlled substance prescriptions as long as the confidentiality of the information was adequately protected. Today, however, these data bases and their use are controversial. J. D. Oliva, "Prescription-Drug Policing: The Right to Health-Information Privacy Pre- and Post-Carpenter", *Duke Law Journal* 69 (2020) 775-853.

thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[3] The European Convention on Human Rights mirrors the Article 18 language in Article 9(1), with an accompanying provision, Article 9(2), permitting restrictions on external manifestations of beliefs in accord with law as necessary to protect others.[4]

These human rights documents understand freedom of thought to involve the ability to formulate and change beliefs about matters of deepest importance to human life, not only the ability to express whatever thoughts come to mind. Thus understood, freedom of thought is closely related to, but far broader than, the freedom to formulate moral beliefs (conscience) or to adopt spiritual beliefs (religion). Swaine describes freedom of thought in this sense as encompassing a wide range of mental phenomena, including "deliberation, imagination, belief, reflection, reasoning, cogitation, remembering, wishing, sensing, questioning, and desiring."[5] Bublitz similarly characterizes freedom of thought as protecting "all kinds of mental states."[6] McCarthy-Jones delineates three contours of the right: the right not to reveal one's thoughts, not to be penalized for one's thoughts, and not to have one's thoughts manipulated.[7]

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[3] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), https://www.un.org/en/universal-declaration-human-rights/.

[4] COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS (1950), https://www.echr.coe.int/Documents/Convention_ENG.pdf; J.C. Bublitz, "Freedom of Thought in the Age of Neuroscience", *Archiv für Rechts- und Sozialphilosophie* 100(1) (2014) 1–25.

[5] L. Swaine, "Freedom of Thought as a Basic Liberty", *Political Theory* 46(3) (2018) 405-425, p. 411.

[6] Bublitz, *supra* note 4, at 3.

[7] McCarthy-Jones, *supra* note 1, drawing on S. Alegre, "Rethinking Freedom of Thought for the 21st Century", *European Human Rights Law Review* 3 (2017) 221- 233, in turn drawing on B. Vermeulen, "Article 9", in P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.) *Theory and Practice of the European Convention on Human Rights*, 4th edn (Cambridge: Intersentia Press 2006), p. 751. *See also* P. O'Callaghan and B. Shiner, "The Right to Freedom of Thought in the

The close connection of freedom of thought to freedom of speech is that freely-created ideas may be voiced and tested publicly. Expressing their thoughts enables people to assess their thoughts' value for others and how these thoughts may be changed, abandoned or accepted. The metaphor developed in US law for this process is the marketplace of ideas. In this competition, better ideas, like better products, win out over time. As we argue below, however, this metaphor has lent a commercialized turn to US speech jurisprudence in a number of ways that may prove to be in tension with freedom of thought.[8]

Freedom of thought understood as freedom of mental life requires some protections in the world. How it does so may be complex. Some thoughts—daydreams or fleeting emotions—may occur without external manifestations, although even these require protections from intrusions such as torture that blot out all possibilities of mental life. Other thoughts—perhaps criticisms of others or unpopular political positions—may require protection from compelled expression. Still other views—deeply held moral or religious convictions, for example—arguably require direct expression in the world.[9]

Conversely, freedom of thought is arguably important for other freedoms. For example, freedom of expression may depend on freedom of thought at least to some extent. A society in which people are able to say whatever they want but have nothing to say might not be a society

European Convention of Human Rights", *European Journal of Comparative Law and Governance* (2021) 1-34.

[8] In this respect, our argument parallels that of Vincent Blasi, who contended that the turn towards the marketplace of ideas in U.S. free speech jurisprudence "has had the undesirable effect of focusing attention too much on the truth seeking and self-government values [of speech] and on the function of free speech as a social mechanism." Blasi argues that this turn has made the defence of speech too dependent on problematic empirical assumptions about how speech countered by more speech encourages enlightening dialogue. V. Blasi, "Holmes and the Marketplace of Ideas", *Supreme Court Review* (2004) 1-46.

[9] Swaine, *supra* note 5, at 416.

in which freedom of expression is manifest. Conceptualizing freedom of expression as linked to freedom of thought in this way requires understanding freedom of expression as not merely a right against interference in the immediate moment of voicing opinions. This conceptualization invites controversies about so-called "positive" and "negative" rights.[10] In this contribution, we assume that all rights have at least some "claims against" and "claims for" features.[11] For example, the right to freedom of expression as a right against interference requires sufficient public order to assure non-interference. The issue is not whether a right is "positive" or "negative" per se, but the constellation of restraints and assurances involved in its recognition.

More deeply, some argue that freedom of thought is the foundational value for freedom of expression. Justice Cardozo wrote over 75 years ago that freedom of thought and expression was so critical as to justify application of this right to states through the constitutional protection of liberty in the Fourteenth Amendment[12]:

> This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment

[10] *See e.g.*, I. Berlin, *Four Essays on Liberty* (Oxford, UK: Oxford University Press, 1979).
[11] *See e.g.*, H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1980); G. MacCallum, Jr., "Negative and Positive Freedom", *The Philosophical Review* 76(3) (1967) 312-334.
[12] In the U.S., the Bill of Rights initially applied to the federal government. The Fourteenth Amendment to the Constitution, adopted in the aftermath of the Civil War, prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision has been construed to apply most of the guarantees of the Bill of Right to the states.

by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[13]

Notably, however, Justice Cardozo conceives of thought and expression as a single freedom here, so it is unclear whether he would regard freedom of thought as the more basic value. Seana Shiffrin, professor of law and philosophy at UCLA, has argued that the best justification for freedom of expression is freedom of thought, although she is clear that her view is a normative one that is not necessarily reflected in US case law.[14] Neil Richards, a law professor at Washington University in St. Louis and an expert in privacy law, has argued that what he calls "intellectual privacy" is necessary for the justification of freedom of speech.[15] Without protection from intrusion on processes of developing thoughts, Richards contends, we may have nothing to say.[16] For Richards, there are three core elements of intellectual privacy: freedom of thought, the right to read, and the right to communicate with others in confidence. Richards' case for intellectual privacy is primarily a moral one; he writes: "The commitment to intellectual freedom outlined here is a moral one—that we should protect intellectual freedom

[13] Palko v. Connecticut, 302 U.S. 319, 327 (1937).
[14] S. V. Shiffrin, "A Thinker-Based Approach to Freedom of Speech", *Constitutional Commentary* 27 (2011) 283-307. Shiffrin defends political speech, religious speech, artistic speech, personal speech, and dissent as foundational. Her view is that the case for commercial speech is only instrumental: "On the other hand, protection for commercial and non-press, business corporate speech is a less central matter, one that reasonably may involve weaker protections and may reasonably rely heavily on more instrumental concerns." *Ibid.* p. 285. She thus rejects the centrality given commercial speech by the Court that we describe later in this article. Moreover, she voices the concern that corporate speech may be shaped by pressures that run counter to individual freedom of thought: "…non-press, business corporate and commercial speech, by design, issue from an environment whose structure does not facilitate and, indeed, tends to discourage the authentic expression of individuals' judgment." *Ibid.* p. 296.
[15] N. Richards. *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford, UK: Oxford University Press, 2015).
[16] *Ibid*. p. 122.

and intellectual privacy because they are necessary elements of a good and free society."[17] The question we will address more fully below is whether the current directions of US Supreme Court jurisprudence run against these justifications for free speech in terms of freedom of thought.

Moreover, on many views the protections required for freedom of are not merely protections from interference. To engage fully in freedom of thought requires contexts for reflection, exposure to information and ideas, and protection from pressures about how to think. The Internet poses particular challenges to reflection of this fuller kind. Aggregating data from many sources—such as people's Internet searches or social media posts—may reveal what people might be thinking, even when they do not fully recognize it themselves. The knowledge that such aggregation could occur may chill exploration of new ideas from the wide range of sources now available over the Internet. Hidden methods for altering or faking apparent facts or sources destabilize reliance on information. Other technological developments, such as neuroimaging or remote sensing, portend far fuller abilities to uncover the privacy of the mind.[18]

Despite these developments, US jurisprudence addresses First Amendment liberties rather than freedom of thought. First Amendment jurisprudence primarily rules on actions by federal or state governments judged to interfere with expressions. US law has not addressed thought formation explicitly. Nor has it considered the role of private power in shaping how or what people can think. Instead, the focus of US jurisprudence is on marketplace competition among ideas.

[17] *Ibid*. p. 105.
[18] Bublitz, *supra* note 4, at 7.

### 3. US Free Speech Doctrine and the Marketplace of Ideas

Although protections for free speech and the free exercise of religion were enshrined in the US constitution and date from the beginning of the republic, US First Amendment jurisprudence is primarily a creation of the twentieth century and its aftermath.[19] Protection for dissidents against criminal prosecution—war protesters, religious groups such as Jehovah's Witnesses, and civil rights advocates—was a common sub-text. The metaphor of truth emerging from the marketplace of ideas as the frame for First Amendment protection of such disfavoured speech was invoked frequently in decisions and helped to shape the course of First Amendment law.

A very brief account of the US framework for analysis of rights protection may be helpful for what follows. The framework applies levels of scrutiny, from "strict" to merely rational basis. The level of scrutiny applied depends on whether the right to be protected is characterized as fundamental. Political speech protected under the First Amendment is an example of a fundamental right. A right's status as fundamental does not mean that the right can never be abridged by the state. Rather, it means that to limit the right the state must have a justification that is sufficiently strong to survive "strict scrutiny." To pass strict scrutiny, the government must have a compelling interest, such as protecting national security, protecting life, or protecting health. In addition, laws or regulations in furtherance of this interest must be "narrowly tailored," neither sweeping too broadly nor carving out only part of what must be included to further the compelling interest. Speech of the highest value, such as political speech, may only be limited when the state can pass this exacting strict scrutiny test.

[19] *See e.g.*, E. Zoller, "Foreword: Freedom of Expression: 'Precious Right' in Europe, 'Sacred Right in the United States?", *Indiana Law Journal* 84 (2009) 803-808; E. Zoller, "The United States Supreme Court and the Freedom of Expression", *Indiana Law Journal* 84 (2009) 885-916.

In contrast, "rational basis" scrutiny requires only that the state have some reason supporting the law or regulation at issue, even if the reason is not a particularly plausible one. This level of scrutiny is applied to the vast array of economic regulations in place today. "Intermediate" scrutiny may be applied to important rights that do not rise to the level of being fundamental. This scrutiny requires the state to show an important interest and a law that is carefully defined to further that interest. Regulation of speech that is considered of lesser value than political speech, such as commercial speech, has historically been given intermediate scrutiny, although there are indications that the Court is increasingly moving towards tightening the level of scrutiny applied to commercial speech regulation.[20] Importantly, some utterances—obscenity or certain insults—may not be considered protected speech at all by US courts and thus are treated as outside the purview of the First Amendment.

A parallel analytic framework is applied in US equal protection jurisprudence. Strict scrutiny is required for laws or regulations that employ "suspect classifications" such as race. Rational basis analysis applies to many other categorizations, including perhaps surprisingly disability.[21] "Intermediate" scrutiny may be applied to categories that are not fully "suspect," such as sex. The framework has increasingly collapsed in recent Supreme Court decisions,

[20] *E.g.*, CONGRESSIONAL RESEARCH SERVICE, ASSESSING COMMERCIAL DISCLOSURE REQUIREMENTS UNDER THE FIRST AMENDMENT, R45700 (Apr. 23, 2019), https://fas.org/sgp/crs/misc/R45700.pdf.

[21] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The Court majority applied rational basis scrutiny to disability because it judged that the state needed to be able to engage in regulation for the benefit of people with disabilities and that it had largely done so beneficently. It did, however, find that the regulation in question in the case, a zoning regulation that prohibited group homes in the area, could not meet the rational basis test. Justice Marshall dissented vigorously in the case, pointing out the long history of isolation and mistreatment of people with disabilities.

however. We will discuss how this framework evolved with respect to commercial speech in particular more fully in what follows.

### *3.1 The introduction of the marketplace of ideas amid fears of subversion*.

The development of US free speech jurisprudence was closely intertwined with fears of subversion that rose and fell in the US across the twentieth century. The analogy of the marketplace of ideas first came into play in a series of cases during and after the first World War, an era of heightened US reaction to perceived threats of European socialism.[22] In these cases, advocates of pacifism and labour rights were prosecuted for alleged espionage or domestic terrorism under the federal Espionage Act of 1917. In *Schenck v. U.S.*, regarded as the first "important case involving free speech" decided by the Supreme Court[23] and the classic source for the doctrine that speech may be restricted when it poses a "clear and present danger," Justice Holmes wrote for the Court that "the character of every act depends upon the circumstances in which it is done ... [t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."[24]

Justice Holmes's support for upholding the prosecutions, however, did not extend to speech restrictions that arguably went far beyond the immediate danger he had judged apparent in *Schenck*. It was in defence of dissenting speech that he deployed the image of the struggle for truth in the competition of ideas in the market. As the Court majority continued to uphold

[22] *E.g.*, Whitney v. California, 274 U.S. 357 (1927).
[23] This is the description of *Schenck* given by the Court itself in Dennis v. United States, 341 U.S. 494, 503 (1951).
[24] Schenck v. United States, 249 U.S. 47, 52 (1919). Decisions utilizing this analytical frame include Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920).

restrictions by balancing the benefits of speech against its perceived risks, Justice Holmes famously wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[25]

Holmes's defence of speech as free trade was rooted in his pragmatist vision of the First Amendment[26] and apparently also his reading of John Stuart Mill.[27] However, it is highly questionable whether Mill himself thought of the economic marketplace as the justification for freedom of expression.[28] Nowhere in *On Liberty* does Mill himself use the marketplace imagery, although he is often associated with it.[29] Nor is it clear that pragmatist views about truth as related to scientific experimentalism should be thought of in market terms.[30]

As fears of war waned and decades passed, the Court adopted increasingly robust speech protections expanding what was to count as speech and insisting on the immediacy of threats to

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[25] Abrams v. United States., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[26] C. P. Wells, "Old Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.", *Brooklyn Law Review* 63 (1997) 59-85.
[27] Blasi, *supra* note 8, at 19.
[28] J. Gordon, "Mill and the 'Marketplace of Ideas'", *Social Theory and Practice* 23(2) (1997) 234-249.
[29] *See e.g.*, J. B. Biddle, "Advocates or Unencumbered Selves? On the Role of Mill's Political Liberalism in Longino's Contextual Empiricism", *Philosophy of Science* 765 (2009) 612-623.
[30] *See e.g.*, J. Capps, "The Pragmatic Theory of Truth", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2019/entries/truth-pragmatic/>.

justify prohibitions of expression.[31] Marketplace imagery was invoked frequently in these evolving speech protections. For example, in upholding the rights of peaceful picketers in a labour dispute, Justice Murphy wrote for the Court: "Abridgment of the liberty of such 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."[32] In sum, the metaphor of the marketplace of ideas served to defend speech against periodic concerns about the supposed dangers of subversion that waxed and waned in the US with fears of war and supposed communist infiltration.

### *3.2 Diverging Patterns: Speech Robustly Protected and Speech Completely Unprotected.*

As speech gained increasing protection against regulation except in the face of immediate danger, US courts also faced cases in which, it seemed, speech had no claim to value. Doctrines developed that excluded some utterances from protection as speech altogether, such as obscenity or so-called fighting words. In the other direction, doctrines increasing developed that insulated protected speech from any regulation of its content. In some of the decisions, the Court invoked the marketplace of ideas to support this bifurcation of the unprotected from the protected. *Chaplinsky*, decided in 1942, set the stage by holding that lewd, obscene, profane, libellous, and insulting words are "no essential part of any exposition of ideas, and of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the

[31] *E.g.*, Terminiello v. City of Chicago, 337 U.S. 1 (1949).
[32] Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940). *See also* Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) (a fair trial "is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'").

social interest in order and morality."[33] This reasoning stopped short of determining the unprotected categories to be "non-speech," however, instead seeing their expressive content as meagre and outweighed by other social values.

This divided analytic frame has proved jurisprudentially problematic. The Court has struggled to delineate categories of speech with such limited expressive content that it warrants no protection, while refusing to adopt tests that would balance the value of any other speech against its potential social harm.[34]

"Hate" speech has posed particular difficulties because it presents a mix of instigation and offensive content. Seen as instigation, it falls outside the realm of protected speech. Seen as conveying a message of hate, it is speech, and the Court has refused to allow it to be prohibited because of the content it expresses. Cross-burning, the iconic symbol of the racist Ku Klux Klan's threats against blacks, has been seen both as non-protected intimidation and as protected expressions of racist enmity. Statutes seeking to prohibit cross-burning only pass constitutional muster if they can be framed in terms of intimidation or the intent to intimidate rather than as efforts to restrict racism. For example, a St. Paul Minnesota ordinance prohibiting the display of symbols that arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was judged an impermissible content-based regulation because it addressed the content of the symbol used to arouse anger, rather than the angry threats themselves.[35] In reaching this conclusion for the Court, Justice Scalia relied directly on the marketplace of ideas:

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[33] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
[34] Gooding v. Wilson, 405 U.S. 518 (1972). Some earlier decisions reached different conclusions, however. For example, in Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court upheld an ordinance prohibiting the distribution of lithographs portraying the lack of virtue of members of a group and sustained a conviction of Beauharnais under the ordinance for distributing leaflets to halt the further encroachment of blacks into white neighbourhoods.
[35] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

"content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace …'"[36]

On the other hand, the Court has allowed a Virginia state ban on cross-burning with the intent to intimidate, while rejecting the ban's presumption that cross-burning intends to intimidate. Here, too, the Court said that the goal of the First Amendment is to "allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[37] It is consistent with this goal to allow speech with slight social value that intends to threaten the social interest in order and morality to be prohibited. Threats to intimidate may be prohibited. But the state may not single out some threats because their content—cross-burning—is assumed to have the content of expressing an intent to intimidate. In the judgment of the Court, to prohibit cross-burning because its racist symbolism is assumed to be intended to intimidate would risk suppressing important ideas, for example cross burning as a statement of group solidarity among members of the Ku Klux Klan. This reasoning arguably detaches content from context; the Court's observation that cross-burning could intend messages other than intimidation based on race hatred[38] (perhaps the message "I wish you weren't my next door neighbour" or "I'm glad you share my support for white supremacy") might seem disingenuous at best in the US today.

Obscenity is another category often characterized as beyond First Amendment protection altogether. Although the Court has struggled to delineate the boundaries of obscenity, material

[36] 505 U.S. at 387.
[37] Virginia v. Black, 538 U.S. 343, 358 (2003).
[38] 538 U.S. at 362–363. To be fair, the Court began its opinion by recognizing the deep connections between cross burning and Ku Klux Klan intimidation, 538 U.S. at 352–358. However, the Court refused to allow this historical background to support the direct link between cross burning and race intimidation drawn by the Virginia legislature.

judged to appeal primarily to prurient interests with little social value has not been protected as speech.[39] In addition, the Court has permitted statutes banning child pornography that reach beyond the contours of obscenity.[40] These statutes ban depictions of children engaged in sexual performances to discourage the performances themselves when their producers cannot be identified. In upholding these prohibitions, the Court has emphasized protecting children from exploitation despite effects on otherwise constitutionally protected activity.

The Court has resolutely refused to extend these models to any additional kinds of speech, however, in decisions explicitly favouring commercial interchange. For example, in 2010, the Court held that a federal statute criminalizing the commercial creation or sale of depictions of animal cruelty violated the First Amendment.[41] The statute had been narrowly drafted to try to track the Court's obscenity jurisprudence. It only applied in states where the underlying conduct violated state or federal law. It exempted depictions with "'serious religious, political, scientific, educational, journalistic, historical, or artistic value.'"[42] The statutory goal was to prevent the transfer or sale of "crush" videos in which small animals are stomped on by women wearing high heels. These videos were proliferating anonymously over the Internet, thus shielding their producers from prosecution. The statute sought to deter transmission as an

[39] Cases include Roth v. United States, 354 U.S. 476 (1957); Stanley v. Georgia, 394 U.S. 557 (1969); and Miller v. California, 413 U.S. 15 (1973).
[40] New York v. Ferber, 458 U.S. 747 (1982)
[41] United States v. Stevens, 559 U.S. 460 (2010). The statute was Depiction of Animal Cruelty—Punishment, Pub. L. No. 106-152, § 1. It has been amended to prohibit the creation or distribution of "animal crush" videos, Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, §1, 18 U.S.C. § 48(a) (2021). Some states have decisions to similar effect. For example, California has rejected bans on grisly photographs of dead foetuses displayed by anti-abortion protesters, Ctr. for Bio-Ethical Reform v. The Irvine Co., LLC, 37 Cal. App. 5th 97 (2019). The ban was imposed by a shopping centre; under California law, shopping centres are public fora subject to First Amendment protection, *Id.* at 104.
[42] 559 U.S. at 465.

indirect attack on production, a strategy that had been upheld for child pornography. The Court, however, found that the statute regulated speech based on its content because it only prohibited depictions of intentional harm to a living animal rather than other kinds of depictions of harm. (The underlying harm to the animal could of course have been prohibited.) The government argued that the speech in question had minimal social value and was clearly outweighed by the moral harm it might cause, but the Court rejected any such balancing. Instead, the Court refused to construe the statute narrowly and recited multiple types of potentially outlawed depictions, from dog fighting to wild boar hunting to humane (but illegal) killing of a stolen cow. The Court thus found the statute invalid on its face. Congress replied by enacting a very limited statute[43] banning transmission of obscene animal crush videos; the statute has been upheld as banning obscenity but has very limited coverage.[44]

California's law prohibiting the sale or rental of violent video games to minors without parental consent[45] met a similar fate. Drafters had sought to limit the law's reach by incorporating language from statutes prohibiting obscenity; it covered games "'in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being' … depicted in a manner that '[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors…'"[46] Emphasizing the difficulty of distinguishing entertainment from speech and the importance of protecting expression, the Court refused to add any new category of speech as "too

[43] 18 U.S.C. § 48(a)(3), (f)(2) (2019). *See* note 41 *supra*.
[44] United States v. Richards, 755 F.3d 269 (5th Cir. 2014), *cert. denied*, Justice v. United States, 575 U.S. 915 (2015).
[45] West's Ann. Cal. Civ. Code § 1746(d) (2021).
[46] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 789 (2011).

harmful to be tolerated."[47] Obscene games could be prohibited, but not violent ones. According to Justice Scalia, the medium of speech does not change the basic principles of First Amendment protection. Video games, novels, and fairy tales raise the same issues and must be judged by the same standards. Ideas—"whether [they] be violence, or gore, or racism—and not [their] objective effects, may be the real reason for governmental proscription," and so the restriction on violent video games impermissibly limits speech.[48] This assertion—that the medium does not change the message or its claim to First Amendment protection—is critical to the Court's hesitancy to address the content of speech on the Internet, as discussed further below.

**4. Protecting the Press and Other Traditional Media.**

One of the most noteworthy developments about expression involves the growing role of the Internet in comparison to traditional broadcast and print media. In the US, broadcast and print media historically have received significant protection against suits for damages through the First Amendment but some of these protections may be waning—and they pale against the situation of speech over the Internet.

In 1964, the Supreme Court greatly expanded protection against defamation suits from the doctrine that the truth is a defence to the doctrine that plaintiffs must prove actual malice in the form that the publisher knew that the publication was false or acted with reckless disregard for its falsity. The critical decision emerged during resistance to school integration in the US South, when *The New York Times* published a full-page advertisement criticizing actions of the police in Montgomery, Alabama, against civil rights protesters.[49] The ad was purchased by

[47] 564 U.S. at 791.
[48] 564 U.S. at 799.
[49] New York Times v. Sullivan, 376 U.S. 254 (1964).

people known to *The Times* and the paper did not check its accuracy. The public official responsible for supervising the police sued the *Times* for defamation in a suit seen by many as a racist effort to suppress publicity about the violence of Alabama officials against civil rights protests. Because some details in the ad were false, *The Times* could not invoke truth as a defence; an Alabama jury awarded Sullivan an unprecedented $500,000 in damages on a finding that the publication was libellous *per se*—that is, false and presumed injurious to the person's reputation without further proof of harm.[50] The Supreme Court held that the Alabama libel law violated the First Amendment commitment to the "'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[51] Erroneous statements, the Court said, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need…to survive.'"[52] A subsequent decision extended *Times v. Sullivan* to any public figures.[53] The Court refused, however, to extend the holding to create an evidentiary privilege for editorial deliberations, concluding that such a privilege would effectively preclude any libel suits by public figures.[54] This refusal to protect the editorial process behind the speech might be thought of as a grant of protection to speech in the world but not a protection to underlying processes of thought.

Controversies about truth and "fake news" have brought the continued viability of *Times v. Sullivan* under fire. Former President Donald Trump vehemently condemned the precedent for making it too difficult for public figures to win libel suits.[55] In 2019, Justice Clarence

[50] *Id.* at 262.
[51] *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
[52] 376 U.S. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
[53] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
[54] Herbert v. Lando, 441 U.S. 153 (1979).
[55]N. Cooper. 2019."Reevaluating *New York Times v. Sullivan* in the Wake of Modern Day Journalism", American Bar Association. 27 February. Retrieved 4 August 2020

Thomas reached out to attack the holding in a concurrence to a denial of certiorari. A woman who had accused the entertainer Bill Cosby of harassment claimed that Cosby's lawyer had defamed her by making allegations about her reputation; her suit was dismissed because as a public figure she came under the *Times v. Sullivan* requirement to show actual malice. Although agreeing with the Court's decision not to disturb the lower court's ruling, Justice Thomas wrote separately to "reconsider the precedents that require courts to ask it in the first place."[56] He scathingly characterized *Times v. Sullivan* and similar decisions as "policy-driven decisions masquerading as constitutional law."[57] Justice Thomas's approach would draw a sharp distinction between false attacks on public figures—which would receive no protection and warrant at least nominal damages even absent any proof of reputational harm—and criticisms that are true. The approach would subject traditional print and broadcast media to suits such as the one in *Times v. Sullivan*. Adopting the approach would amplify the impact of the current US legal treatment of social media platforms as not responsible for the content of the material they transmit, about which more below.

Invasion of privacy is another domain in which the Court has invoked the First Amendment. Traditional media have been protected against suits when they publish information that has been lawfully obtained, such as reports that identify alleged crime victims. In a 1975 decision, a reporter learned the name of a 17-year old rape-murder victim and broadcast her name; the victim's identity was in the indictments which were public records available for

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https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2019/reevaluating-new-york-times-v-sullivan-in-the-wake-of-modern-day-journalism/.

[56] McKee v. Cosby, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring).

[57] 139 S. Ct. at 676.

inspection at the court but not otherwise publicised.[58] Her father sued for damages for invasion of privacy. A Georgia statute that made it a misdemeanour to publish the name of a rape victim[59] was the basis for the father's claim that rape victim were not public figures. The Court analysed the case as a conflict between privacy and constitutional protection for speech but did not rely on the broader proclamation that truth is a defence in all suits against newspapers by private figures. Instead, in striking the statute as violating the First Amendment, the Court invoked the importance of fair reporting of trials and the beneficial effects of public scrutiny.

A later decision reached a similar conclusion about publication despite the victim's contention that her family had received threatening phone calls. Florida law prohibited publication of rape victims' identities in police reports, but the police department erroneously released the victim's name and the paper published it in violation of their internal policy against naming rape victims. In rejecting her suit against the paper, the Court said that although the state could protect victims' confidentiality, any restriction on publishing lawfully released material must be narrowly tailored to state interests of the highest order. Although the state might have a strong interest in protecting victims, a damages award for later newspaper publication was not narrowly tailored to achieve this goal.[60] These decisions predated the Internet; presumably the materials in question would today be revealed in the US by Internet searches, putting the victims at risk of vilification. [61] In the EU, the right to delisting, better known as the "right to be forgotten," might yield more privacy protection.

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[58] Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).
[59] *Id.* at 472.
[60] Fla. Star v. B.J.F., 491 U.S. 524 (1989).
[61] M. Stubbs-Richardson, N. E. Rader and A. G. Cosby, "Tweeting rape culture: Examining portrayals of victim blaming in discussions of sexual assault cases on Twitter", *Feminism & Psychology* 28(1) (2018) 90-108.
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### 5. Commercial Speech and Commercial Actors

Justifying freedom of expression in terms of the marketplace of ideas invites conceptualization of speakers as commercial actors. Not surprisingly, interpretations of the First Amendment have expanded to protect commercial speakers as nearly on a par with human speakers. These interpretations are especially prevalent among the Supreme Court's conservative justices. Anti-paternalism is a key theme in this evolution, with the Court rejecting any effort to protect the public against the economic motivations of speakers.

Supreme Court doctrine regarding speech by commercial actors did not begin in this way, however. Only in 1975 did the Court clarify the eligibility of commercial speech for First Amendment protection. And it was in 1978 that the Court placed corporations on a par with natural persons as speakers.[62] These decisions outlined differing levels of protection for commercial speech and political speech, parallel to the levels of protection found in the equal protection law of the time. Although advertising is speech, regulation of commercial advertising was required to pass heightened scrutiny in the form of a requirement for there to be a substantial governmental interest in the regulation and a regulatory measure carefully defined to further that state interest. Regulation of non-commercial speech was held to the even higher standard of strict scrutiny, a compelling state interest coupled with narrow tailoring to further that interest. These levels have been collapsing for commercial speech, however, as we now explain.

The clear assertion of First Amendment protection for commercial speech began with challenges to restrictions on advertising by professionals. In *Virginia State Board of Pharmacy v.*

[62] Zoller, *The United States Supreme Court and the Freedom of Expression*, *supra* note 19, at 886; First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

*Virginia Citizens Consumer Council*,[63] decided in 1976, the Court was asked to rule on a state law banning pharmacists from advertising prescription drug prices. Consumers had brought the suit, seeking access to the price information that the pharmacists wished to advertise. The Court explicitly disavowed any earlier cases that had suggested commercial speech might not be eligible for First Amendment protection and relied on a decision the year before that invalidated a state statute prohibiting advertisements by abortion providers.[64] Society, the Court said, has "a strong interest in the free flow of commercial information,"[65] especially information about prices. Other advertising bans soon fell, too, such as bans on unsolicited mailing of information about contraceptives,[66] bans on printed advertising by lawyers,[67] or bans on advertising alcoholic beverage prices.[68] In the earlier decisions, the Court applied a lower standard of scrutiny to commercial speech, especially for regulation to assure truthfulness and to protect consumers against undue pressures of solicitation. By 1980, the Court had clarified that significantly lower scrutiny only applied in these limited situations. In a decision invalidating a state ban on advertising to encourage energy consumption,[69] the Court emphasized that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[70] Rejecting paternalistic protection of consumers, the Court heightened the scrutiny test for regulation of

[63] Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
[64] Bigelow v. Virginia, 421 U.S. 809 (1975). This case was decided after Roe v. Wade, 410 U.S. 113 (1973), had established the constitutional right to abortions in the U.S.
[65] 425 U.S. at 764.
[66] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
[67] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985).
[68] Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).
[69] Zoller, *The United States Supreme Court and the Freedom of Expression*, *supra* note 19, at 905.
[70] Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980).

commercial speech, requiring any regulation to be backed by a "substantial" state interest and "designed carefully to achieve the State's goal."[71]

By the second decade of the twenty first century, any lesser protection of commercial speech had largely atrophied. The decisions described in what follows have eliminated nearly all regulation of campaign financing and have struck down other economic regulation for its supposed effects on speech. Decisions in these cases increasingly reflect splits in the Court between the more conservative and the more liberal justices.

The watershed decision concerned a federal prohibition of "electioneering communication" by corporations or unions from their general treasury funds. Citizens United, a non-profit that had produced a film highly critical of Hillary Clinton, sought to increase distribution of its film before the 2008 election through on-demand video and advertising. Concerned that the film and advertising would be considered electioneering, it brought suit seeking a declaration that the provision of the campaign finance law prohibiting financing electioneering from corporate or union funds was unconstitutional and preventing its application.

Prevailing Court precedent had upheld a Michigan law prohibiting direct contributions by corporations to state political campaigns.[72] In overruling this precedent in a 5-4 decision authored by Justice Kennedy, the Court applied strict scrutiny to any burdens on political speech, even by corporations.[73] It found that differentiation among speakers is directly connected to control of their viewpoints and the content of their speech.[74] The public may not be deprived "of

[71] 447 U.S. at 564.
[72] Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990). In justifying the compelling state interest in preventing corruption, the Court observed that legal protections for corporations, such as limited liability, would enable them to transform economic resources into unfair political advantage, 494 U.S. at 659.
[73] Citizens United v. Federal Election Com., 558 U.S. 310, 340 (2010).
[74] 558 U.S. at 340–41.

the right and privilege to determine for itself what speech and speakers are worthy of consideration."[75] The *Citizens United* Court rejected any consideration of whether the corporate form gave some speakers a legally-created advantage over others.[76] In so doing, it also explicitly rejected any suggestion that speech by media corporations or indeed corporations of any particular type could be restricted.[77] And it emphasized the rationale that restrictions on corporate speech interfere with open competition in the marketplace of ideas,[78] dismissing as mere "rhetoric…[that] ought not to obscure reality" the potential influence of "massive corporate treasuries."[79] Freedom of thought emerged in the Court's rationale as well: "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."[80] Finally, the Court also relied on technological innovation and the looming presence of the Internet as reasons not to limit particular sources of speech.[81] A strongly-worded dissent by Justice Stevens (joined by Justices Ginsburg, Breyer, and Sotomayor) emphasized the importance of the distinction between corporate and human speakers in elections.[82]

In the aftermath of *Citizens United*, corporate money has flooded US political campaigns, to the delight of some and the consternation of many others.[83] Measures designed to counter

[75] 558 U.S. at 341.
[76] 558 U.S. at 348.
[77] 558 U.S. at 351.
[78] 558 U.S. at 354.
[79] 558 U.S. at 355.
[80] 558 U.S. at 356.
[81] 558 U.S. at 364.
[82] 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).
[83] *See e.g.*, T. B. Edsall, "After *Citizens United*, a Vicious Cycle of Corruption", *The New York Times* [online] (6 December 2018). Retrieved 4 August 2020 https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html.

these effects have also been met with disapproval from the Court in 5-4 decisions pitting the Court's conservative majority against its more liberal justices. In 2011, the Court rejected Arizona's provision allowing candidates in state elections who accepted public financing to receive funds matching expenditures by privately financed candidates over a set threshold.[84] Candidates and independent groups financing them claimed that the state's efforts to equalize expenditures unconstitutionally penalized their First Amendment rights. The state contended that the matching funds increased speech, but the Court concluded instead that it burdened and thereby reduced the speech of privately funded candidates.[85] On the other side, it rejected the state's asserted interest in levelling the playing field and opening electoral opportunities for candidates with less wealth. Here, the Court said, "…in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair."[86] The Court did not reject all public financing for campaigns but insisted that any such financing must comport with its view of what the First Amendment requires. Justice Kagan's scathing dissent (joined by Justices Ginsburg, Breyer, and Sotomayor), pointed out that the Court's reasoning undermined any state efforts to protect democracy by ensuring that public financing programs provide financing that is competitive with private funding of candidates.[87] These justices saw the state's program as providing a subsidy available to anyone who chose to use it, and the petitioners as

[84] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).
[85] 564 U.S. at 740.
[86] 564 U.S. at 750.
[87] 564 U.S. at 756 (Kagan, J., dissenting).

demanding "essentially a right to quash others' speech" through the prohibition of the subsidy program, a right with which the "Court gladly obliges."[88]

In 2014, the Court rejected an aggregate cap on campaign contributions by individual donors. In this decision, the Court reiterated that the government could not attempt to level the political playing field. And it stated explicitly that contributions may not be regulated to reduce the amount of money in politics.[89] At this point in the US, the only permissible restrictions on campaign contributions are those targeted directly to quid pro quo corruption or its appearance.[90] Restrictions on how much money a donor may target to a political candidate or committee remain permissible to combat corruption, but aggregate limits are not.

Commercial speech doctrine has continued to expand since *Citizens United* to forms of speech that are clearly not political. In 2011, in *Sorrell*, the Court invalidated a state law prohibiting the sale or use of information identifying the prescribing practices of individual health care providers without their consent.[91] The law's stated purpose was to reduce health care costs. Although prohibiting use of the information for marketing, the law permitted it for health care research, care management, or cost-effective utilization. The Court, again in an opinion by Justice Kennedy, concluded that the law's restrictions were based on the content of the speech and the speaker and therefore violated the First Amendment. The restrictions were content based because they disfavoured uses of the information for marketing, "that is, speech with a particular content."[92] This analysis apparently disavows any distinction between what is said and how what is said is used. The conclusion that the restrictions disfavoured particular speakers was more

[88] 564 U.S. at 766 (Kagan, J., dissenting).
[89] McCutcheon v. Fed. Election Com., 572 U.S. 185 (2014).
[90] 572 U.S. at 192.
[91] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
[92] 564 U.S. at 564.

straightforward, however, as the statute forbade the use of the provider-specific information by pharmaceutical manufacturers and marketers.[93] Justice Breyer's dissent (joined by Justices Ginsburg and Kagan) would have applied a lesser standard to government regulation that may affect commercial messages and expressed concern that the Court's reasoning signalled a return to judicial interference with government regulation of economic activity.[94]

Restrictions on trademark registrations have also fallen. The Lanham Act[95], the federal statute establishing the federal registration system for trademarks, in effect for over 70 years, prohibited registration of trademarks that disparaged members of racial or ethnic groups or that were considered immoral or scandalous.[96] The first of these prohibitions to come before the Court involved disparaging names. The Asian rock group "The Slants" sought to trademark their name as a way to reclaim the slur. In a decision featuring an even split on reasoning, the Court ruled that the prohibition of disparaging trademarks was facially unconstitutional as viewpoint discrimination.[97] In applying strict scrutiny to the prohibition, Justice Alito's opinion for four justices reasoned that the First Amendment does not apply to the government as speaker and concluded that trademarks are not government speech or government subsidies. Instead, trademarks reflect the speech choices of those applying for them and may not be subjected to restrictions based on their content unless these restrictions meet a test of heightened scrutiny. In selecting the heightened scrutiny to be applied, the Court did not decide whether the trademark was commercial speech; instead, it held that the prohibition of disparaging trademarks could not meet the standard for commercial speech that regulation must be narrowly drawn to serve a

[93] 564 U.S. at 558–59.
[94] 564 U.S. at 591–92l
[95] 15 U.S.C. §§ 1051 *et seq.* (2021).
[96] 15 U.S.C. § 1052(a) (2021).
[97] Matal v. Tam, 137 S. Ct. 1744 (2017).

substantial interest of the government.[98] State interests in preventing ideas that offend, Justice Alito said, fly in the face of the First Amendment's protection of "the freedom to express 'the thought that we hate.'"[99] Interests in promoting the orderly flow of commerce also will not suffice to justify regulation; while the government may prohibit discrimination, it may not insist that commerce be cleansed of unhappy messages. Justice Kennedy wrote an opinion for Justices Ginsburg, Sotomayor, and Kagan concurring in part and dissenting in the judgment. These justices agreed that the government could not regulate commercial speech based on its viewpoint and invoked the metaphor of the marketplace of ideas to support this view.[100] They stopped short, however, of agreeing that the government is exempt from First Amendment scrutiny altogether. In 2019, Justice Kagan wrote for the Court that the Lanham Act prohibition on "immoral" or "scandalous" trademarks was also improper viewpoint discrimination.[101] This case involved a trademark application for "FUCT," a line of clothing. Justice Kagan's opinion was not joined by several justices who were concerned about its sweep and would instead have upheld a narrow construction of the prohibition on scandalous trademarks.[102] These justices were concerned to avoid any suggestion that the government is immune from First Amendment scrutiny because of the potential implications for government-sponsored messages about abortion, discussed below.

### 6. Compelled Speech

[98] 137 S. Ct. at 1764.
[99] *Id.*
[100] 137 S. Ct. at 1767–68 (Kennedy, J., concurring in part and concurring in the judgment). Justice Gorsuch did not participate in the decision as he was not yet appointed to the Court when the case was argued.
[101] Inacu v. Brunetti, 139 S. Ct. 2294 (2019).
[102] 139 S. Ct. at 2308 (Sotomayor, J., concurring in part and dissenting in part).

Requiring speech is the converse of regulating it. In the US, requirements to speak are also analysed as violations of the First Amendment. The Court's compelled speech jurisprudence, however, has been especially friendly to messages favoured by conservatives and to protection of speakers with conservative viewpoints. In these cases, moreover, the Court has greatly expanded the scope of what is considered to be speech itself.

Abortion jurisprudence is a particularly good example of the Court's approach. A number of US states have passed statutes requiring physicians to read messages to their patients designed to discourage abortion. Pennsylvania required physicians to inform patients of the nature of the procedure, the health risks of the abortion and childbirth, the "probable gestational age of the unborn child," and the availability of materials published by the state about alternatives to abortion. The Court held that the state may require these disclosures as a matter of informed consent "even when in so doing the State expressed a preference for childbirth over abortion."[103] Many physicians object to reading state-prescribed statements to their patients, especially when they consider these statements to be misleading and potentially damaging. States, however, are permitted to require physicians to make statements that are scientifically questionable, such as statements that abortion may increase risks of breast cancer or psychological trauma, or that a foetus may feel pain early in development.[104]

Yet the Court has struck down state requirements that patients be provided with accurate information about the availability of abortions and the services provided by crisis pregnancy

[103] Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833, 883
[104] C. T. Richardson and E. Nash, "Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials", *Guttmacher Policy Review* 9(4) [online] (23 October 2006). Retrieved 4 August 2020 https://www.guttmacher.org/gpr/2006/10/misinformed-consent-medical-accuracy-state-developed-abortion-counseling-materials.

centres seeking to discourage abortions.[105] California required licensed facilities providing reproductive or pregnancy care to provide notice to pregnant patients of the availability of abortion services funded by the state. The same statute required unlicensed facilities to inform patients that they did not provide medical care or have a physician on staff. The state's justification for these requirements was informed consent: patients should be aware of care alternatives and should be accurately informed about the services being offered. Pregnancy centres sought a preliminary injunction against enforcement of the statute. Granting such an injunction required the Court to determine that the moving party is likely to succeed on the merits and the Court granted the injunction in a 5-4 decision. In the opinion for the Court, Justice Thomas first concluded that the statute regulated speech based on its content, because it altered what the plaintiffs would say, and would thus have to meet the high threshold of strict scrutiny.

Justice Thomas then determined that the Court had not recognized a special category of professional speech as an exception to the high level of scrutiny applied to content-based regulation. Regulation of professional speech, Justice Thomas said, contains the same risks of suppressing unpopular views as regulation of speech in other contexts. Moreover, the marketplace of ideas is just as important in the professional context as elsewhere. Justice Thomas distinguished the California statute regarding licensed clinics from the Court's earlier decisions regarding the truth of professional advertising on the bases that the speech requirement did not concern the clinic's own services but services available from the state, and that the required disclosure was not an uncontroversial statement about the facts.

The dissent challenged both of these reasons. Providing information about alternatives, the dissent said, is a standard aspect of informed consent. The dissent also averred that the

[105] Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361 (2018).

disclosure requirement was purely factual, about the services available from the state. With regard to the unlicensed facilities, the Court also applied strict scrutiny, concluding that California's supposed reason for the requirement (to inform patients that they were not receiving medical services) was not supported by evidence and that the requirement was an undue burden on the facilities. In a concurrence, Justice Kennedy (joined by the other three justices in the majority) wrote separately to emphasize that the problem with the California statute was not that it was insufficiently narrowly tailored in the facilities to which it applied—a signal that even amended versions of the statute would not be approved by the current Court. In the concurrence, Justice Kennedy specifically linked the forced speech to freedom of thought: "Governments must not be allowed for force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief…".[106]

The federal government, too, has been permitted to attach messages to programs it funds. Title X is a program that provides family planning grants to states. Lawmakers opposed to abortion have sought to ensure that Title X funds are used for contraception only. A 1988 regulation prohibited facilities receiving Title X funds from providing abortion counselling or referring patients for abortions—while requiring facilities to refer patients for prenatal services.[107] The Court upheld the regulation against a facial challenge based on the First Amendment, among other grounds. In response to the contention that the restriction was impermissible viewpoint discrimination, the Court said: "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[108] Although upheld by the Court, this version of the regulation was suspended. However,

[106] 138 S. Ct. at 2379 (Kennedy, J., concurring).
[107] Rust v. Sullivan, 500 U.S. 173 (1991).
[108] 500 U.S. at 193.

action by the administration of former President Donald J. Trump to revive the 1988 regulation and in addition require programs receiving Title X funds to separate entirely from providing abortions was in ongoing litigation in early 2021.[109]

Religious speakers likewise receive protection, even when it is questionable whether speech is involved at all and the right in question is the First Amendment right to the free exercise of religion. To illustrate very briefly, a decision upholding a baker's refusal to create a cake celebrating a same sex wedding was based on the free exercise of religion rather than freedom of speech, although the baker had contended that the cakes he made had expressive content and a cake celebrating a same sex marriage would make statements with which he disagreed.[110] The cake shop owner has appeared on Fox news in support of other merchants refusing to provide services to same sex couples in violation of state anti-discrimination laws. He has directly linked his case and the case of others to the importance of their beliefs.[111]

A final illustration of the Court's willingness to entertain some messages but not others in the area of compelled speech concerns the activities of public employee unions. Public employees who opposed unions challenged required contributions to union activities that benefit all employees. The union segregated all funds that were used for lobbying or political activities and charged only the percentage of union dues that could be attributed to negotiations with employers and other union responsibilities under the collective bargaining agreement.[112]

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[109] California v. Azar, 950 F.3d 1067 (9th Cir. 2020) (en banc), *cert. granted by* Oregon v. Cochran, No. 20-539, 2021 WL 666378 (U.S. 2021).
[110] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Com., 138 S. Ct. 1719 (2018).
[111] J. Phillips, "Masterpiece Cakeshop owner Jack Phillips: Florist Barronelle Stutzman deserves another chance at justice", Fox News [online] ( 16 January 2020). Retrieved 4 August 2020 https://www.foxnews.com/opinion/masterpiece-cakeshop-jack-phillips-florist-barronelle-stutzman.
[112] Janus v. Am. Fed'n of State, County, and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

Overruling an earlier decision, the Court ruled 5-4 that the required contributions violated the First Amendment. In paying the contributions, Justice Alito wrote, "individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason . . . a law commanding 'involuntary affirmation' of objected -to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."[113] These claims hold even when all that is required is a subsidy for the disfavoured beliefs, and even when the union is required by statute to act on behalf of all employees. This is the decision that, Justice Kagan wrote, "weaponizes the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[114] The Court, said Justice Kagan, "has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy…..And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions."[115]

To summarize briefly, the Court's free speech jurisprudence has continued to clear away regulations perceived as stifling market freedoms of commercial actors. The Court has reached out to find expressive content in economic relationships and thereby disallowed regulations as violating the First Amendment. Commentator Tim Wu describes the contemporary First

[113] 138 S. Ct. at 2464.
[114] 138 S. Ct. at 2501 (Kagan, J., dissenting).
[115] 138 S. Ct. at 2502 (Kagan, J., dissenting).

Amendment as a "tool of Regulatory leverage used by politically powerful groups . . . in tension with its goal of promoting democracy."[116] Connections to freedom of thought are at best opaque in these decisions, especially when they give freer rein to powerful economic actors. At the same time, the Court has sharpened the distinction between this robust First Amendment freedom accorded private actors and governments themselves, to which the First Amendment apparently does not apply in the same way. The federal government has required speakers to adhere to moral messages conveyed by programs that it funds. States have been permitted to require questionable messages of abortion providers—but forbidden to require abortion opponents to speak truths that might violate their religious convictions. These doctrines threaten to detach freedom of speech from freedom of thought, detachments that are even more apparent with respect to speech over the Internet.

### 7. The Internet and Social Media

Transmission of material over the Internet takes place with unprecedented rapidity and range. Screen time is seductive: there is always something new to click, follow, or watch. Internet searching is of an utterly different order from the days in which physical visits to newspaper archives, court records, or libraries were necessary to gather information. The Internet also enables data aggregators to assemble remarkably complete pictures of individual behaviour, not only through tracking online searches but also from apps and increasingly smart devices from doorbells to refrigerators. Algorithms generate predictions about highly sensitive

[116] T. Wu, "Beyond First Amendment Lochnerism: A Political Process Approach", Knight First Amendment Institute at Columbia University (21 August 2019). Retreived 4 August 2020 https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach.

matters such as health or financial status, sometimes with questionable accuracy or discriminatory impact.[117] In addition, the Internet is filtered and structured by the economic interests of advertisers and platforms in ways that are opaque to ordinary users.[118] No version of the fairness doctrine that once applied to broadcast media but now does not has ever been instituted for the private Internet. For all these reasons, it seems fair to say that the Internet presents both enormous opportunities and enormous challenges to reflection and refined thought—and perhaps to freedom of thought itself. In a nutshell, the Internet's great success in spreading materials may also be its greatest threat to reflective thought.

Calls for legal intervention in how the Internet currently functions in the US are mounting but have as yet met with little success and their future in legislatures in the U.S. remains unsettled as of this writing. Electoral intervention and rapid transmission of dangerous falsehoods about health or security are primary targets. Websites such as Twitter have responded voluntarily by taking down material that is judged to be dangerous during the COVID-19 pandemic. Other targets are concerns about uses of information about individuals without their understanding or agreement, including the utilization of algorithms to serve up advertisements, suggest pricing, or to otherwise disaggregate groups in ways that may magnify disadvantage or implicitly discriminate. The Internet also creates boundless opportunities to insult, gaslight, harass, dox, and deceive.

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[117] *E.g.*, Frank Pasquale, *The black box society: the secret algorithms that control money and information* (Cambridge, MA: Harvard University Press, 2016).

[118] *See e.g.*, J. Stiglitz, "Facebook does not understand the marketplace of ideas", *Financial Times* [online] (17 January 2020). Retrieved 4 August 2020 https://www.ft.com/content/d4419bd8-3860-11ea-ac3c-f68c10993b04; C. Lombardi, "The Illusion of a 'Marketplace of Ideas and the Right to Truth", *American Affairs* [online] 3(1) (2019). Retrieved 4 August 2020 https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/.

On the other hand, defenders of Internet freedom caution about risks of suppression of content or innovation. Some celebrate a raucous, boisterous, cacophonous "free market in ideas."[119] The Internet also offers genuine opportunities to learn new techniques and technologies. It allows explorations that transcend immediate limits of time and space. From TED talks to self-published novels and individual blog postings, the Internet is a new forum for telling personal stories. Quotidian information is readily available, too: how to fix your car, what to make for dinner, or what tomorrow's weather may bring. The net can bring famous performances into anyone's living room, often for free, even if they occurred more than half a century ago.

In the US the marketplace of ideas has proven to be an especially powerful metaphor in countering efforts to tame the Internet. The US legal regime governing the Internet was put into place before the development of social media platforms such as Facebook or Twitter, which function through user-posted content, reactions to content posted by others, and decisions to share content with others. Through "Section 230," enacted as part of the Communications Decency Act of 1996, US law stipulates that providers and users of interactive computer services are not publishers or speakers of information provided by other content providers.[120] The overall aim of the Act was to protect children especially from indecent content, at a time when effective filtering technologies had not yet been developed. Section 230 was a compromise between defenders of the untrammelled Internet and those who wanted to protect users from what they did not want to hear.[121] Thus Section 230 also insulates providers and users from liability for

[119] J. Waldron, "A Raucous First Amendment", Knight First Amendment Institute at Columbia University (21 August 2019). Retrieved 4 August 2020 https://knightcolumbia.org/content/a-raucous-first-amendment-1.
[120] 47 U.S.C. § 230(c)(1).
[121] M. Reynolds,

"any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[122] In its statutory findings in support of section 230, Congress explicitly cited the importance of developing new technologies for user control and preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[123]

In 1997, in *Reno v. ACLU*, the Court struck down the portion of the Communications Decency Act intended to protect minors by prohibiting the knowing transmission of obscene or indecent messages to recipients under 18.[124] There were exceptions for good faith efforts to restrict access by minors or to require proof of age such as a verified credit card. The Court held 7-2 that these restrictions were impermissible content-based regulations of speech. It refused to analogize these restrictions to time, place, and manner restrictions that had been upheld for broadcast media, stating quaintly (this was 1997) that "the Internet is not as 'invasive' as radio or television."[125] Instead, the Court found the government's contention that the unregulated availability of indecent material was driving many people away from the Internet "singularly unpersuasive," observing the "dramatic expansion of this new marketplace of ideas."[126]

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"The Strange Story of Section 230, the Obscure Law That Created Our Flawed, Broken Internet", *Wired* [online] (28 March 2019). Retrieved 4 August 2020 www.wired.co.uk/article/section-230-communications-decency-act.

[122] 47 U.S.C. § 230(c)(2)(A).

[123] 47 U.S.C. § 230(b)(2).

[124] Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997).

[125] 521 U.S. at 869.

[126] 521 U.S. at 885.

Section 230 has been interpreted as a complete shield from any liability for social media platforms.[127] The leading case involved an anonymous hoax: postings on AOL of tasteless shirts for sale about the Oklahoma city bombing, using "Ken's" name and the home telephone number of Ken Zeran, who had nothing to do with the posts or shirts. New posts continued, despite Zeran's requests to have them taken down; their impact was magnified by a radio broadcaster who urged people to call "Ken's" number to complain. Ken Zeran, who allegedly had nothing to do with the ad and had not produced the shirts, was besieged by phone calls and death threats; he sued AOL for posting the ads. His suit was met with AOL's successful assertion of section 230 as a defence, with the court quoting the Supreme Court's language in *Reno v. ACLU* hailing the Internet as a market of ideas. [128]

Commentators today note that section 230 was enacted and interpreted[129] in an era in which the "weaponized virality" of the Internet was utterly unanticipated.[130] Proposals to modify or repeal section 230 are proliferating from all sides of the political spectrum.[131] Even Facebook has appeared to recognize that some changes may be gathering support and argued in early 2020

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[127] *See e.g.*, M. Laslo, "The Fight over Section 230—and the Internet as We Know It", *Wired* [online] (13 August 2019). Retrieved 4 August 2020 https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/; P. Ehrlich, "Communications Decency Act § 230", *Berkeley Technology Law Journal* 17 (2002) 401-419.

[128] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997). Zeran also lost his invasion of privacy suit against the broadcaster, Zeran v. Diamond Broad. Inc., 203 F.3d 714 (10th Cir. 2000).

[129] 521 US 844 (1997).

[130] J. Bowers and J. Zittrain, "Answering impossible questions: content governance in an age of disinformation", *(Mis)information Review* [online] (14 January 2020). Retrieved 4 August 2020 https://misinforeview.hks.harvard.edu/article/content-governance-in-an-age-of-disinformation/.

[131] L. Feiner, "Big Tech's favorite law is under fire", CNBC [online] (19 February 2020. Retrieved 4 August 2020 https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html.

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that procedures for accountability are preferable to content regulation.[132] One statutory change has been enacted, the FOSTA-SENSA Act[133] to hold online platforms responsible for advertising sex trafficking. FOSTA-SENSA is embroiled in controversy, with Internet sites shutting down personal advertising and sex workers concerned that they have been further endangered as a result.[134] FOSTA-SENSA has been challenged by free speech advocates and groups protecting sex workers; as of early 2021, the litigation was ongoing,[135] as was litigation in other cases involving FOSTA-SENSA.[136]

The First Amendment is unlikely to help, as it is currently interpreted. The Court has strongly suggested that the constitution does not require treating the Internet as a public forum subject to First Amendment protections. In 2019, the Court refused to use the First Amendment to declare statutorily established public access cable networks a public forum on which speech must flourish.[137] Justice Kavanaugh's opinion for a 5-4 conservative majority drew a sharp line between a "traditional, exclusive public function"[138] and a private function, a line that would portend that operators of platforms on the Internet are not public forums.[139] This test is a

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[132] M. Bickert, 2020. "Charting a Way Forward: Online Content Regulation", Facebook (February 2020). Retrieved 4 August 2020 https://about.fb.com/wp-content/uploads/2020/02/Charting-A-Way-Forward_Online-Content-Regulation-White-Paper-1.pdf.
[133] 18 U.S.C. § 2421A(a).
[134] A. Romano, "A new law intended to curb sex trafficking threatens the future of the internet as we know it", *Vox* [online] (2 July 2018). Retrieved 4 August 2020 https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom.
[135] Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020).
[136] U.S. v. Martono, 2021 WL 39584 (N.D. Tex. 2021) (denying motion to dismiss of sex trafficking defendant; motion claimed FOSTA unconstitutional).
[137] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).
[138] 139 S. Ct. at 1926.
[139] M. A. Franks, "The Gravitational Pull of the First Amendment", Knight First Amendment Institute at Columbia University (21 August 2019). Retrieved 4 August 2020 https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment.

conjunction: the function must be traditionally and exclusively performed by the government. The First Amendment, stated Justice Kavanaugh, "prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgement of speech."[140] Writing in dissent, Justice Sotomayor emphasized that cable franchises are actors established by the state and thus function as state agents.[141]

Self-regulation by Internet platforms has addressed some abusive practices, particularly those associated with bots and false representations of identity. The COVID-19 pandemic has brought a number of further efforts to root out misinformation that may have dangerous health consequences, such as the idea of drinking bleach as a way to counteract the infection. Technological strategies have been proposed, such as moving away from centralized platforms supported by advertising to decentralized protocols that would allow users to choose their own filters for material they access.[142] Suggestions have also been made that antitrust law should be applied to break up corporations such as Facebook or Amazon and increase competition. Ananny argues for increased transparency about probabilistic logics used by internet platforms to determine whether content appears, circulates, or is removed.[143] Ananny is especially concerned to examine the distribution of false positives and false negatives, thresholds of tolerable error, and accountability of platforms for probability judgments that affect the content that is available

[140] 139 S. Ct. at 1928 (emphasis in original).
[141] 139 S. Ct. at 1934 (Sotomayor, J., dissenting).
[142] M. Masnick, "Protocols, Not Platforms: A Technological Approach to Free Speech", Knight First Amendment Institute at Columbia University (21 August 2019). Retrieved 4 August 2020 https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech.
[143] M. Ananny, "Probably Speech, Maybe Free: Toward a Probabilistic Understanding of Online Expression and Platform Governance", Knight First Amendment Institute at Columbia University (21 August 2020). Retrieved 4 August https://knightcolumbia.org/content/probably-speech-maybe-free-toward-a-probabilistic-understanding-of-online-expression-and-platform-governance.

and heard. But self-regulatory efforts are met with counter-incentives: protestors objecting to private censorship and the continuing economic pressures of advertisers, data miners, and the platforms that profit from them.[144]

In the US, change beyond self-regulatory strategies will require amendment of section 230 to address the behaviour of social media platforms directly. Moreover, any content-based changes in section 203 will surely encounter difficult First Amendment scrutiny from the current conservative majority on the Court. Under *Sorrell*, so will any efforts to prohibit particular data uses, or data uses by particular users.

## 8. Conclusion: Or What Next?

The First Amendment, we have argued, has been interpreted aggressively to protect freedom of speech. Over the past century, the US Supreme Court has been the principal institutional force defining this understanding. To justify a strong defence of unrestricted free speech and increasingly to strike down regulations with effects on speech, the Court has relied on the metaphor of the marketplace for ideas as the animating force. Along with this metaphor, the Court has closely connected free speech to commercial speech. This link has given considerable latitude to traditional businesses as speakers and to the rise of global social media firms.

Such aggressive use of the First Amendment, we suggest, may be in tension with at least some of the conditions required for freedom of thought. It distracts from reflection. It potentially subjects people to intense shaming and bullying for what they say. It allows subtle and unrecognized commercial incentives to shape awareness and vision. It lets people, corporations, and the government track, surveil, and react. Current First Amendment doctrine, in short, is far

[144] Stiglitz, *supra* note 118.

from friendly to freedom of thought. Ironically, in the US speech may be garnering such increased protection that it makes freedom of thought more difficult.

So, what next? We see three possible approaches to the current state of affairs in the US The first is greater reliance on individuals as choosers and the conditions needed for effective choice. This is the notice and consent approach to data access and use. Much has already been written about the advantages and disadvantages of this approach.[145] It would seem to be the least intrusive and most respectful of individual differences. But it is only as effective as the conditions created for choice: whether options are meaningful, people have the information they need, and there is time for adequate reflection.

The second is increasing self-regulation by commercial actors. This may be the direction of the future, but it is by no means guaranteed to be free thought friendly. From the standpoint of free thought values, the preferable solution would be for large international infrastructure owners and social media platforms to change their self-conception. Ideally, they would come to understand themselves as a new kind of media company, with obligations to protect the global public good of information and ideas. Defenders of democratic values should work hard to emphasize the social responsibilities of digital infrastructure companies and help them both to understand and to accept their constitutive role in the emerging global public sphere. This would not be the first such transformation. In the twentieth century, the norms of American journalism changed. In the 1890s newspapers were still rabidly partisan. In the early twentieth century, influenced by Progressive era reforms, newspaper publishers and reporters gradually recognized that they (and their competitors) had social responsibilities to the public as a whole rather than to

[145] *E.g.*, D. Susser, "Notice After Notice-and-Consent: Why Privacy Disclosures Are Valuable Even If Consent Frameworks Aren't", *Journal of Information Policy* 9 (2019) 37-62.

political parties. Over time they developed the professional norms of objectivity that we now think of as the goals of properly trained professional journalists.

The third is increased regulation. Process-based regulations that increase accountability for users and publishers are the most likely to be held constitutionally permissible in the US Crafting these regulations may be difficult, as current US free speech jurisprudence would not allow particular content, speakers, or uses to be targeted. Under *Sorrell*, for example, it will be difficult to target commercial uses of data that consumers might find objectionable. Regulations may become so narrow that they are of very limited impact, as with the current prohibition on the transmission of animal crush videos that only applies to videos of this type that are also obscene. Or, ironically, regulations that may be permissible because they are content-neutral may be struck down because of their broader effects on speech by commercial actors, as with *Citizens United.* If political pressures for change mount, however, pressures on the Court to retreat from the weaponization of the First Amendment may mount as well. So may political pressures to increase antitrust enforcement against what may be see as monopolistic practices by giant technology companies.

Perhaps the best we can do at this point is to emphasize the importance of thinking about freedom of thought and how it can be both constrained and enabled in the current environment. While the Internet is novel, censorship is not. Just as there are more pressures today, there are also more means to counter pressures. The marketplace of ideas is not the right metaphor for this process, as the US exemplifies. A better metaphor than the marketplace of ideas for freedom of thought, we suggest, is John Stuart Mill's metaphor of an English garden flourishing with different plants at different seasons, affected by and affecting the natural and social circumstances in which it exists.