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# THE SOCIETAL INTEREST THEORY— PRESERVING THE MARKETPLACE OF IDEAS IN THE TWENTY-FIRST CENTURY

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*With respect to free speech, the good is prior to the right: the goods achievable by the practice of free speech are the reason for protecting speech, and the protection should be shaped with those goods in mind.*<sup>1</sup>

## INTRODUCTION

On January 6, 2021, a mob of 2,000 to 2,500 supporters of then-President Donald Trump rushed into the Capitol building and disrupted a joint session of Congress in response to the former president’s allegations of vote fraud on Twitter.<sup>2</sup> Soon afterward, Twitter banned President Trump’s account on its platform. To justify the ban, a spokesman expressed concerns regarding the risks of keeping President Trump’s commentaries live.<sup>3</sup> The spokesman stated, “[o]ur public interest policy—which has guided our enforcement action in this area for years—ends where we believe the risk of harm is higher.”<sup>4</sup> Facebook and Instagram followed Twitter’s actions by barring former President Trump from posting on their social network platforms for twenty four hours.<sup>5</sup> While some responded by pressing for more regulations to prevent future potential spread of misinformation and

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1. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 713 (2013).

2. *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (June 10, 2022), <http://www.bbc.com/news/world-us-canada-56004916> [<http://perma.cc/4WLN-CA96>].

3. Kate Conger, Mike Isaac & Sheera Frenkel, *Twitter and Facebook Lock Trump’s Accounts After Violence on Capitol Hill*, N.Y. TIMES (Jan. 14, 2021), <http://www.nytimes.com/2021/01/06/technology/capitol-twitter-facebook-trump.html> [<http://perma.cc/6RFB-HZBN>].

4. *Id.*

5. *Id.*

violent insurrections, others met the social media companies' actions with criticism, alleging that these companies silenced "conservative viewpoints and ideas."<sup>6</sup> Within the broad range of responses were the Florida and Texas legislatures' criticism of these companies' actions. To express their disapproval, the two states passed legislation prohibiting social media companies from certain behaviors such as deplatforming a candidate in office.<sup>7</sup> For example, the 2021 Florida legislature enacted Senate Bill 7072, which created three Florida statutes: section 106.072, section 287.137, and section 501.2041.<sup>8</sup> The statutes were met with vigorous disapproval from major social media companies and unsurprisingly resulted in a lawsuit filed by NetChoice and the Computer & Communications Industry Association challenging the statutes' constitutionality.<sup>9</sup>

In response to the district court's grant of a preliminary injunction enjoining enforcement of the Florida statutes, Jameel Jaffer—the executive director of the Knight First Amendment Institute at Columbia University—and Scott Wilkens—an attorney at the Knight Institute—raised an interesting point:

The companies are right that the laws violate the First Amendment, but some of the arguments they are making are deeply flawed. If these arguments get traction in the courts, it will be difficult for legislatures to pass sensible and free-speech-friendly laws meant to protect democratic values in the digital public sphere . . . . [T]he companies' arguments would make it almost impossible for legislatures to enact carefully drawn laws that protect the integrity of the digital public sphere. They would make it difficult for legislatures to impose even modest transparency requirements on the companies, to require the companies to share data with academic researchers or to require them to provide explanations to users whose posts are removed or . . . accounts are suspended.<sup>10</sup>

The discussion poses a pressing question: Is limited government regulation of private entities, particularly social media companies, justified to protect the integrity of public discourse on social media platforms?

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6. Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-Opt the First Amendment. Courts Shouldn't Let Them.*, N.Y. TIMES (Dec. 9, 2021), <http://www.nytimes.com/2021/12/09/opinion/social-media-firstamendment.html?partner=slack&smid=sl-share> [<http://perma.cc/YS7A-EXK3>].

7. See Decoder, *Can We Regulate Social Media Without Breaking the First Amendment?*, VERGE (Dec. 16, 2021, 7:00 AM), <http://www.theverge.com/22838473/social-media-first-amendment-regulation-section-230-decoder-podcast> [<http://perma.cc/AY4T-65RA>] (explaining the Texas and Florida regulations on social media companies and discussing the arguments made in criticism of the regulations).

8. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1085 (N.D. Fla. 2021), vacated in part, 34 F.4th 1196 (11th Cir. 2022); FLA. STAT. §§ 106.072, 287.137, 501.2041 (2022).

9. *NetChoice, LLC*, 546 F. Supp. 3d at 1082; see Jaffer & Wilkens, *supra* note 6 (discussing both parties' arguments presented before the court and their flaws).

10. Jaffer & Wilkens, *supra* note 6.

Although the First Amendment is ordinarily thought to apply only to government actions, is the fundamental value of free speech rights so essential to also warrant government regulation of private entities? This Note attempts to address these issues and argues that the societal interest of free speech values calls for government regulation of private social media companies to protect the integrity of the public squares of the twenty first century.

## I. DEFENSES OF THE FREEDOM OF SPEECH: PROMINENT THEORIES

The constitutional free speech doctrine protects a large subset of speech acts from restrictions, even though some of the acts may have harmful consequences that would normally justify legal sanctions.<sup>11</sup> Although the scholarship on the freedom of speech includes a wide range of justifications for preserving and protecting individuals' free speech rights, three main values lead the debate—autonomy, democracy, and truth.<sup>12</sup> Most scholars present pluralistic theories to justify protecting free speech rights and acknowledge that there are multiple values to justify the freedom of speech.<sup>13</sup> However, other scholars approach the subject with a unificationist perspective by stating that there is only one central reason or value underlying free speech.<sup>14</sup> The most common single value that unificationist scholars state is democracy.

Using the concepts underlying autonomy, democracy, and truth values as important foundations, this Note proposes a new theory to justify free speech values—the societal interest theory. This new theory emphasizes the societal value of maximizing contributions to the marketplace of ideas<sup>15</sup> and argues for a greater protection of free speech rights. To better understand the societal interest theory, it is important to first understand the underlying foundational free speech values.

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11. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil. & Pub. Affs.* 204, 204 (1972).

12. This Note focuses on prominent and foundational scholars for each justification—for autonomy values, a summarization of T.M. Scanlon's arguments is presented; for democracy values, a summarization of Alexander Meiklejohn and Robert Post's arguments is presented; and for truth values, a summarization of John Stuart Mill's arguments is presented. However, it is important to note that each value is not limited to these scholars.

13. See *supra* text accompanying note 12; see T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 *U. PITT. L. REV.* 519, 528–37 (1979); see, e.g., Seana Valentine Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 *CONST. COMMENT.* 283, 283–307 (2011).

14. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 592–611 (1982); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 14–28 (Greenwood Press 1979) (1960); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 299–322 (1978).

15. I use the terms “marketplace of ideas” and “public marketplace” interchangeably throughout this article.

A. AUTONOMY VALUES

A theory emphasizing autonomy values places great importance on an individual's ability to function as an autonomous person and independent judge who does not let anyone else, especially the government, make judgements for them.<sup>16</sup> More specifically, each citizen is sovereign in deciding what to believe and in weighing reasons for his or her actions. Under an audience-based theory of autonomy, as supported by T.M. Scanlon,<sup>17</sup> a major benefit of protecting the freedom of speech is the individual's ability to have access to information coming to them and make judgments based on that information.<sup>18</sup> In Scanlon's discussion of autonomy values, he mentions that an audience-based theory justifies protecting free speech rights by focusing on the benefits received by the listener, such as the listener's ability to intake what is being communicated by the speaker, rather than by focusing on the speaker's right to express what they wish to communicate.<sup>19</sup>

However, scholars who advocate for autonomy values range along a broad spectrum and have differing views on whether the freedom of speech is a positive or negative right. A negative view of autonomy values subscribes to the idea that the legitimate powers of government exist only to the extent that they can be defended on grounds compatible with the autonomy of its citizens. Consequently, it restrains the government from preventing individuals' access to information or exposure to speech and states that individuals should be free from any government restrictions affecting the amount or type of information in the public. For example, Scanlon proposes a negative view of autonomy that accepts the Millian Principle—which involves restrictions on the government from taking information off the table and removing an individual's ability to make decisions independently—as the basic principle of freedom of expression.<sup>20</sup>

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16. See Scanlon, *supra* note 11, at 215–16 (Scanlon describes the characteristics of an autonomous individual: “To regard himself as autonomous in the sense I have in mind a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. . . . An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.”). Scanlon's emphasis on the autonomous individual would be beneficial to maintaining the quality of ideas contributed to the marketplace of ideas but is not necessary for the societal interest theory. The proposed societal interest theory focuses on maximizing the quantity of ideas contributed and enhancing the diversity of ideas.

17. *Id.* at 204–22 (explaining Scanlon's audience-based approach to autonomy values for free speech).

18. See Scanlon, *supra* note 11, at 215–19. See generally Shiffrin, *supra* note 13 (discussing the importance of having a diversity of ideas available for individuals to form their own beliefs and contribute to the democratic process).

19. See Scanlon, *supra* note 11, at 215–18.

20. See Scanlon, *supra* note 11, at 218 (stating government restrictions that limit access to information work against fostering individuals' autonomous decisions because preselected evidence

Scanlon acknowledges that the Millian Principle is an important component to the conception of autonomy as a major free speech value:

Persons who see themselves as autonomous see themselves as having a right to make up their own minds, hence also a right to whatever is necessary for them to do this; what is wrong with violations of the Millian Principle is that they infringe this right . . . . [T]he authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to ensure that they will maintain certain beliefs."<sup>21</sup>

An example of the government violating the Millian Principle would be the government restricting all information about COVID-19 vaccines from the public and preventing individuals from acting as autonomous beings capable of making decisions for themselves. Unlike a negative view of the autonomy value, a positive view involves the government affirmatively providing resources for individuals to gain access to information or exposure to speech.<sup>22</sup> In other words, a positive view of autonomy values involves taking affirmative measures for people to have access to more views and information in the world.<sup>23</sup> Under the COVID-19 example, a positive view of autonomy would involve regulatory agencies disseminating information for people to have access to information regarding the COVID-19 vaccination, such as its benefits, side effects, and effectiveness.

#### B. DEMOCRACY VALUES

Alexander Meiklejohn's First Amendment philosophy on the democracy value of free speech leads the discussion on the relationship between free speech and democracy, or more specifically self-government.<sup>24</sup> Meiklejohn asserts that the idea of self-government is foundational to Americans, who believe themselves to be politically free, and that the power of the government comes from the consent of those it governs.<sup>25</sup> Meiklejohn consistently refers back to the foundational idea that governments have no justified power without the consent of the governed to argue that the government should not be permitted to take actions that restrict individuals' access to information and prevent them from self-government.<sup>26</sup> To this point, Meiklejohn's First Amendment philosophy adds that the First

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promotes autonomy only in an "empty sense").

21. *Id.* at 221–22.

22. *Id.*

23. *Id.*

24. *See generally* MEIKLEJOHN, *supra* note 14.

25. *See id.* at 14–19.

26. *Id.* at 15.

Amendment “does not forbid the abridging of speech” broadly but “does forbid the abridging of the *freedom* of speech” that is related to self-government.<sup>27</sup>

Additionally, Meiklejohn advocates for the democratic value of free speech with a listener-focused approach that stresses audience values.<sup>28</sup> Under this approach, Meiklejohn places importance on ensuring that all speech needed to be said is said rather than ensuring an opportunity for everyone to speak.<sup>29</sup> This conception of freedom of speech is exemplified in his town hall meeting analogy—Meiklejohn states that at a town hall meeting, every man attends the meeting as “political equals,” but not all are free to speak as a moderator runs the meeting and calls it into order.<sup>30</sup> However, Meiklejohn argues that the moderator’s role in the meeting does not abridge the freedom of speech.<sup>31</sup> He asserts that in self-governing societies, freedom of speech does not mean that “every individual has an unalienable right to speak whenever, wherever, however” an individual chooses because the town hall meeting cannot be run or even opened unless speech is abridged by common consent.<sup>32</sup> The most important aspect to the freedom of speech, Meiklejohn argues, lies not in the “words of the speakers, but the minds of the hearers.”<sup>33</sup> Meiklejohn’s theory also emphasizes the importance of well-informed voters in a self-governing society, stating that if people are not well-informed, their decisions in the self-governing election process will not be legitimate.<sup>34</sup> This reasoning is different from Scanlon’s focus on individual autonomy as the core free speech value because Meiklejohn’s argument heavily focuses on voters in elections and political speech.

In contrast to Meiklejohn’s listener-focused approach to free speech, Robert Post applies a speaker-focused approach to the democratic values of free speech, arguing that the importance lies in the speaker’s participation in public discourse to engender a feeling of speaker participation in the democratic process.<sup>35</sup> Unlike Meiklejohn’s reasoning that discounts the importance of ensuring each individual’s opportunity to speak, Post stresses actual speaker participation and the individual’s feeling of authorship of a

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27. *Id.* at 21 (emphasis added).

28. *See id.* at 14–28.

29. *See id.*

30. *Id.* at 24.

31. *Id.* at 25.

32. *Id.*

33. *Id.* at 26.

34. *See id.* at 14–28.

35. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–83 (2011).

public opinion or law.<sup>36</sup> As a result, Post attaches importance to ensuring that individuals have the opportunity to participate in the formation of public opinions. Though Meiklejohn and Post would propose different regulatory schemes protecting free speech rights in society, both propose that democracy is the core value of free speech rights.

### C. TRUTH VALUES

While both autonomy and democracy values are major justifications for free speech rights, truth is a value frequently discussed in Supreme Court opinions, such as in Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*.<sup>37</sup> In *Abrams*, the Court upheld the Espionage Act, which criminalized speech opposing the U.S. war efforts against Germany in the early 1900s and ruled that it did not violate the First Amendment. In doing so, it sustained the convictions of individuals who distributed leaflets that stated their political views on the war efforts.<sup>38</sup> In his dissent, Justice Holmes emphasized truth values in defending free speech:

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.<sup>39</sup>

Justice Holmes's reasoning draws from John Stuart Mill's theory favoring a free marketplace of ideas to discover truth values.<sup>40</sup> Mill's main theoretical premise lies on the importance of continuously having a living, dissenting voice present in a free marketplace of ideas to discover truth.<sup>41</sup> This idea is based on the presumption that human beings are fallible beings and founded on three foundational premises: (1) the truth is difficult to decipher, (2) we cannot get to the truth without all perspectives being brought to the table, (3) the test for truth requires someone who is able to refute an idea.<sup>42</sup> Mills provides that the process of antagonism requires the marketplace of ideas to have competing sides engaging in an adversarial discussion for the discovery of truth.<sup>43</sup> Further, Mills states that character traits such as thoughtfulness, open-mindedness, and tolerance are highly

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36. *Id.*

37. *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

38. *Id.* at 617, 627.

39. *Id.* at 630.

40. *Id.*

41. JOHN STUART MILL, ON LIBERTY 86–120 (1859).

42. *Id.* at 118–20.

43. *Id.*

valuable because societies benefit even if only a few are thinking—an open, fearless person who shares their thoughts makes valuable contributions to the marketplace of ideas because knowledge is formed by a combination of both discussions and expressions.<sup>44</sup>

## II. A NEW THEORY: THE SOCIETAL INTEREST THEORY

In *On Liberty*, John Stuart Mill adopts a utilitarian approach to free speech rights and advocates for a rule consequentialist view in search for the best moral rule to defend free speech rights and benefit the entire society.<sup>45</sup> In sharing Mill's approach and borrowing his concept of the marketplace of ideas, I argue for the societal interest theory. This theory emphasizes two imperatives to secure the societal interest in individuals' life, liberty, and pursuit of happiness: (1) maximizing the input of ideas in the marketplace of ideas and (2) fostering an individual's sense of belonging in a society. The best mechanism to promote these societal interests is to guarantee positive rights for individuals to maximize their contribution of ideas to the marketplace of ideas. Such positive speech rights would involve the right and ability to engage in free speech and the government's affirmative actions to secure this right.<sup>46</sup>

As Jerome A. Barron in *Access to the Press—A New First Amendment Right* states, “[c]reating opportunities for expression is as important as ensuring the right to express ideas without fear of government reprisal.”<sup>47</sup> To create these opportunities through positive rights, the societal interest theory proposes performing a balancing test of the harm to society with the benefits provided by the positive rights. This balancing would help determine the extent of positive free speech rights provided to each individual. This framework distinguishes itself from a laissez-faire approach to the

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44. *Id.*

45. See MILL, *supra* note 41, at 112–14, 117–20 (advocating for a view placing truth values as the fundamental value underlying free speech rights; in doing this, Mill adopts a utilitarian and rule consequentialist approach, searching for a rule that serves to be the most beneficial to society as a whole).

46. See Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 970–74 (2020) for a discussion on positive rights and distributive justice. Tebbe extends the discussion of positive rights to economic resources, social regard, and basic liberties and states, “[d]emocracy . . . entails the political efficacy and equality of its members, and that requires social and economic parity of a certain kind and degree. . . . [T]he conviction is that people cannot meaningfully cooperate in the collective formation of ideas and interests if they are so deprived of primary goods that they are burdened in their basic activities or debased in their status. And a government will find its democratic legitimacy impaired if its members are prohibited from freely participating as full members in the political community.” *Id.* at 970–71. Though Tebbe's discussion of positive rights extends further than free speech rights, his arguments provide a strong justification for why individuals should be provided with positive free speech rights.

47. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1654 (1967).



marketplace of ideas that disallows government regulation of free speech rights; under this framework, government regulation would be permitted to the extent that it provides individuals with a baseline guarantee of free speech rights.<sup>48</sup> A distinguishing quality of the theory is that it extends government regulation to private companies in hopes of engendering equal opportunities for users to voice their opinions on privately-owned platforms.<sup>49</sup> Allowing government regulation of private companies—specifically social media companies—will provide individuals with the right to access social media platforms, which function as the soundboards of the twenty-first century.

The primary purpose of regulating private social media companies is to provide individuals with positive speech rights and increase the baseline guarantee of free speech rights, which would now include access to the marketplace of ideas on social media platforms. A balancing test weighing the harms and benefits of providing individuals with a certain set of positive rights can be a practical way to determine how much government regulation should be warranted. This balancing test would consider a wide range of important factors, such as unequal speaking opportunities due to differentials in power and resources and potential effects overly stringent government regulations can have on social media companies. To be clear, the societal interest theory does not advocate for an egalitarian framework of positive rights, which would ensure that each individual has an equal amount of free speech rights. Instead, the societal interest theory takes the more modest sufficientarian approach to ensure that each individual is provided with a certain baseline or minimum amount of free speech rights. Adopting a sufficientarian approach refrains from indirectly chilling speech and placing unrealistic expectations on privately-owned social media companies.

#### A. DEFINING THE SOCIETAL INTEREST THEORY

Though prominent theorists—such as Meiklejohn, Redish, Scanlon, and Mill—prioritize autonomy and democracy as central values underlying free speech rights, these values are insufficient to address pressing problems such as unequal speaking opportunities among individuals. Focusing too much on autonomy and democracy values fails to adequately address other values underpinning the right to free speech, such as the constitutional rights to life, liberty, and pursuit of happiness that serve as the foundation of the First Amendment’s guarantee of the right to free speech. To fill in these gaps, the societal interest theory draws on a broader set of values. In this section,

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48. See, e.g., *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (discussing the flaws of a laissez-faire approach to the marketplace of ideas and calling for some form of governmental intervention, especially in the context of broadcasting companies).

49. See *infra* Section III.D for proposing the creation of the Free Speech Agency.

I will first introduce the societal interest theory and compare it to other prominent theories, specifically focusing on those that prioritize truth, autonomy, and democracy values.

The societal interest theory focuses on protecting the societal interests that emerge from the marketplace of ideas. To protect these societal interests, the theory emphasizes two imperatives: (1) maximizing the input of ideas in the marketplace of ideas and (2) fostering an individual's sense of belonging in a society. These two objectives are interrelated in the sense that fostering an individual's sense of belonging in a society aids in maximizing the contribution of ideas to the marketplace of ideas—engendering an individual's sense of belonging in a society encourages individuals to contribute and share their ideas in the marketplace of ideas. Because of the two objectives' interdependence, I will pursue the single objective of maximizing the input of ideas to the public marketplace throughout this Note.

Both individuals and society benefit economically, culturally, and socially from maximizing the number of ideas in the public marketplace because it leads to a diversity of ideas. Striving to achieve a diversity of ideas in the marketplace has inherent benefits—it allows us to test for the best idea and provides more opportunities for individuals to generate new innovative ideas from this process. Additionally, ensuring diversity in the marketplace serves three social values: (1) protecting the interest of minority speakers against oppression from dominant groups with more resources, mainly by ensuring them an opportunity to speak; (2) providing a mechanism to test for the best idea; and (3) allowing new ideas to develop in the test for truth.

It is important to note, however, that the societal interest theory does not consider the objective of maximizing ideas contributed to the marketplace in isolation; it takes into account the harmful realistic effects overly broad speech rights can have on other parties in society. This is one of the distinguishing factors of the theory to other prominent theories. The societal interest theory prioritizes maximizing the collective interests of society by performing a balancing test, and it aims to achieve the two objectives of maximizing ideas contributed to the marketplace and fostering an individual's sense of societal belonging because they are effective objectives to securing the collective societal interests. Most importantly, the theory remains flexible and features an inherent balancing characteristic by being mindful of possible negative social consequences. To give an extreme theoretical example, the government would not be allowed to compel individuals to produce a certain amount of speech to maximize the number of ideas contributed because it would affect safeguarding the societal interests of life, liberty, and pursuit of happiness for individuals. Maximizing

ideas and fostering an individual's sense of belonging in society are important objectives to protect the societal interests, but they are not the sole value of the societal theory. They must be pursued within the limitations of securing the collective interest of society as a whole.

#### 1. The Societal Interest Theory Contrasted with Other Prominent Free Speech Theories

The societal interest theory has a strong similarity to, yet an important distinction from, prominent free speech theories focused on the value of truth and its discovery in the marketplace of ideas, such as Mill's argument in *On Liberty* and Justice Holmes's dissent in *Abrams v. United States*.<sup>50</sup> As mentioned, Mill's argument for the truth value in *On Liberty* focuses on the process of antagonism and having competing sides engage in an adversarial discussion to maintain a living, dissenting voice that keeps ideas alive.<sup>51</sup> His argument summarizes the truth value with four points: (1) nobody is infallible, and there is a chance that a suppressed opinion is correct; (2) although a silenced opinion might be false, there commonly contains a portion of truth; (3) expressing and debating opposing opinions is beneficial in the test for truth to justify our own opinions; and (4) the meaning of an opinion will be lost if unchallenged.<sup>52</sup> Mill also adds that society benefits even if only a few are thinking, and this consequently values highly the characteristics of a thinking, open-minded, and tolerant individual who contributes their thoughts openly and fearlessly.<sup>53</sup>

The societal interest theory proposed in this Note, however, has a marked distinction. While Mill and Justice Holmes in his dissent in *Abrams v. United States* attach importance to the *process* of ideas competing in an unregulated marketplace,<sup>54</sup> the societal interest theory attaches importance to the diversity and aggregate number of ideas in the marketplace. Because of this important distinction, the societal interest theory withstands potential counterarguments against Mill's argument for truth. For example, Mill's argument for truth runs afoul with the possibility of there being no such thing as truth or that there aren't enough people rational enough to recognize the truth. However, under the societal interest theory, the mere existence of diversity and interaction of ideas in the marketplace serves inherent social values, even if the marketplace of ideas does not result in the discovery of

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50. See MILL, *supra* note 11; *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

51. See MILL, *supra* note 11, at 89–90.

52. *Id.* at 118–20.

53. *Id.* at 90.

54. See MILL, *supra* note 11, at 89–92; *Abrams*, 250 U.S. 616, 628–30 (Holmes, J., dissenting).

truth. The societal interest theory prioritizes societal values such as these and focuses on maximizing ideas contributed to the marketplace of ideas to foster these values.

Another prominent theory justifying free speech rights is one prioritizing democracy as the core value. While Meiklejohn, a scholar advocating for such theory, argues that democracy is the sole value for protecting free speech,<sup>55</sup> his narrow perspective focuses on only particular kinds of speech, such as political speech, and neglects other types of valuable speech, such as abstract art. For example, Meiklejohn's theory focuses on speech informing voters to produce well-informed voters that contribute to the democratic system.<sup>56</sup> Although Meiklejohn's theory encompasses a broad scope of speech that includes all speech that informs voters, it still has too narrow of a focus on political speech contributing to democracy and precludes including other categories of speech that are potentially valuable, such as instrumental music or abstract art.<sup>57</sup>

One might also argue that autonomy values are the core values underlying free speech rights.<sup>58</sup> A theory that holds autonomy as the core value argues for the protection of a broader range of speech, because it regards each citizen as sovereign in deciding what to believe and protects all categories of expression that aids in informing the independent judge. However, a free speech theory that places autonomy values at its core results in vast inequalities of speaking opportunities—if everyone has autonomy to use their own resources to further speech, then people who have more resources will inevitably have more opportunities to speak. Though the societal interest theory does not require all individuals to have equal free speech rights, it aims to eradicate major differences that would engender a feeling of injustice in society, such as in cases where some speakers would not have any opportunities at all or only have very few opportunities to speak. Baker states in *Scope of the First Amendment Freedom of Speech*, “no one has seriously suggested that the existing distribution of access opportunities, which surely are most available to the rich and powerful, is fair or is apportioned in accordance with the contribution each group can make to a ‘best’ understanding of the world.”<sup>59</sup> Baker emphasizes realistic

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55. See MEIKLEJOHN, *supra* note 14; Redish, *supra* note 14. Both scholars argue that democracy is the only one central reason and value to protect free speech.

56. MEIKLEJOHN, *supra* note 14, at 14–24.

57. *Id.* Though beyond the scope of this Note, see MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT*, 46–52 (2017) for a discussion on the value of instrumental music to free speech.

58. T.M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 531 (1978).

59. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964,

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problems of an unregulated marketplace of ideas as “improperly biased in favor of presently dominant groups” because they both have greater access to the marketplace and possess the resources to legally restrict opportunities for other dissident groups to present new plausible ideas.<sup>60</sup> A theory that holds autonomy as the core value fails to address this problem.

When we recenter the focus to the primary purpose of government institutions—the purpose of protecting the pursuit of life, liberty, and happiness of its people—it brings us to the societal interest theory. In the societal interest framework, the imperatives of fostering an individual’s sense of belonging in a society to encourage the contribution of diverse ideas to the marketplace of ideas work to secure important societal interests. Maximizing input of ideas into the public marketplace benefits both individuals and society because it leads to a diversity of ideas, which in turn benefits society economically, culturally, and socially. As mentioned previously, a diversity of ideas has three inherent social values: (1) it protects the interest of minority speakers by ensuring them an opportunity to speak (serving democratic values); (2) it allows for the test of the best idea (serving truth values); and (3) it allows new ideas to spark during the search for truth. By shifting the focus to diversity as the core value, democracy and truth values are mutually served.

It is important to note that this framework still regards autonomy, democracy, and truth values as important foundations underlying free speech rights. However, a framework that focuses on maximizing the input of ideas into the public marketplace attempts to encompass a higher baseline of guaranteed free speech rights. Though the societal interest theory sets Mill’s theory of truth as the foundation, it extends the scope of protected speech to encompass forms of expressions such as artwork, which arguably might not be protected under the free speech right as it does not involve the expression of an opinion that can be supported by reasoning for the pursuit of truth. The societal interest allows for a broader scope of protected speech because it values diversity in the marketplace of ideas as the best test for truth. Following this logic, speech under the societal interest theory is defined as any expression of thought.

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978 (1978).

60. *Id.*

B. PURSUING THE SOCIETAL INTEREST THEORY

1. An Outdated Framework: The Laissez-Faire Regime of Free Speech

With clear objectives of the societal interest theory in mind, we must then ask the question: Under this framework, which mechanism best maximizes the input of ideas to foster diversity? How can we help individuals feel a sense of belonging in a society to encourage their contribution of ideas to the public marketplace? Justice Holmes in his dissent in *Abrams v. U.S.* argued for a laissez-faire regime: “[T]he 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 . . . .”<sup>61</sup> Such arguments made in the spirit of laissez-faire are also prevalent in different areas of speech regulation, including media regulation. For example, Justice Douglas in his concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee* argued for a laissez-faire framework of media regulation in stating that the “one hard and fast principle which [the First Amendment] announces is that Government shall keep its hands off the press.”<sup>62</sup> The Court’s implicit support of a laissez-faire regime flows from its reasoning that the government’s power is limited to the enumerated powers in the Constitution.

However, the laissez-faire regime is unable to provide individuals with positive speech rights to increase the baseline level of protected free speech rights. To meet the objectives of the societal interest theory, more is needed than a regime that is completely hands-off. One plausible reading of the government’s enumerated powers in the Constitution would be one that includes implied powers permitting a limited form of government regulations to secure free speech rights, which are expressly guaranteed in the Constitution. Still, it is important to note that the societal interest theory functions with limits and considers the realistic consequences of an overly broad form of government regulation by including a balancing test, as discussed later in this Note.

2. Advocating for a New Framework Involving Positive Rights

If not the often relied on laissez-faire regime of free speech rights, what framework would best serve the societal interest? *The best framework for free speech would be one allowing government regulation of private actors in the marketplace of ideas to guarantee individuals positive rights to speech.* As Professor Brown states in her paper *The Harm Principle and Free*

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61. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

62. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 160–61 (1973).

*Speech*, “While democratic legitimacy and liberty depend on the robust protection of individual rights, including, centrally, the freedom of speech, it is important to remember also that governments are instituted for the purpose of protecting liberty and the pursuit of happiness for the people as well.”<sup>63</sup> The same logic can be used to justify government regulation to guarantee positive rights to individuals.

Unlike a laissez-faire framework that harbors the issue of unequal speaking opportunities, the societal interest theory addresses this specific problem by providing individuals with positive rights under a sufficientarian theory. A sufficientarian theory provides each person with a baseline of speech rights through government regulation of private companies to maximize the contribution of ideas to the public marketplace. Because maximizing the contribution of ideas is a primary objective of the societal interest theory, the theory requires raising the baseline guarantee of free speech rights to guarantee access to a marketplace of ideas where they can communicate their ideas with others, such as social media platforms.

Under the societal interest theory, all individuals would be provided with a baseline guarantee of free speech rights including a positive right to access and post on social media platforms. Especially in the American free speech arena, where the guarantee of free speech rights for individuals is set at too low a bar, a laissez-faire regime that only enforces a formalistic conception of equality disregards the reality of unequal speaking opportunities. Under a laissez-faire regime, the government may treat each individual equally by refusing to intervene. For example, if campaign expenditures are assumed to fall under the category of speech, the government may under a laissez-faire regime refuse to impose any regulations on campaign spending to provide each party with equal treatment. However, this equality would be equality in name only as it disregards the practical reality of unequal opportunities for individuals to communicate their ideas to others. Though the government should be careful to not overstep its limits, a completely laissez-faire approach to free speech unavoidably neglects certain individuals that are unable to effectively use their rights.

This inequality is intensified in the Internet-dependent society we live in today—a free speech right to speak in a public park is incomparable to having the opportunity to share a Tweet with a click. Further, one can also make the argument that tweeting today is comparable to what speaking in a park was a hundred years ago. Even in the case where an individual does not have any followers on Twitter, the effort needed to gather 100 followers on

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63. Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 959 (2016).

Twitter is comparably minimal compared to gathering 100 listeners in the park because it can be done with a few clicks and in a short amount of time. Without access to social media platforms, individuals lack access to a huge sector of the marketplace of ideas. For speech to be effective and for free speech rights to serve the societal interest, there must be an opportunity for the speech to reach a viable marketplace of ideas, meaning a space that has an audience and where ideas may be freely shared and communicated to that audience. The most important example of a viable and effective public marketplace would be social media platforms.

Take, for example, the Black Lives Matter movement throughout 2013 to 2022. By June 10, 2020, the hashtag #BlackLivesMatter had been tweeted roughly 47.8 million times, averaging to around 3.7 million times a day.<sup>64</sup> Additionally, statistics from the Pew Research Center demonstrated that the discussion of a particular relevant topic on a social media platform such as Twitter, as measured by the use of news-related hashtags, was often correlated with individuals' responses to major news events.<sup>65</sup> For example, research demonstrated that the hashtag #BlackLivesMatter on Twitter spiked to an average of above 1,300,000 tweets on July 7, 2016, when five police officers were killed in the Dallas protests, which were held in response to police killings of black males Alton Sterling of Baton Rouge and Philando Castile from the Minneapolis-Saint Paul area.<sup>66</sup> These statistics suggest that social media platforms are where most people's speech will be listened to about current events; this is a new powerful opportunity that people in the pre-Internet era did not have.

If an individual is censored from sharing his or her views on privately-owned social media companies, the guarantee of free speech rights fails to allow individuals to contribute their views to an effective marketplace of ideas. Though protesting alone on the streets may contribute to the marketplace of ideas if heard by another individual, this sets too low of a bar for a baseline guarantee of free speech rights and returns us to the problem of major inequalities of opportunities to voice one's opinions. If the core value of free speech rights is to encourage a contribution of ideas to the

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64. Monica Anderson, Michael Barthel, Andrew Perrin & Emily A. Vogels, *#BlackLivesMatter Surges on Twitter After George Floyd's Death*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/blacklivesmatter-surges-on-twitter-after-george-floyds-death> [https://perma.cc/KC5U-3EXL].

65. Monica Anderson, Skye Toor, Kenneth Olmstead, Lee Rainie & Aaron Smith, *Activism in the Social Media Age*, PEW RSCH. CTR. (July 11, 2018), <https://www.pewresearch.org/internet/2018/07/11/an-analysis-of-blacklivesmatter-and-other-twitter-hashtags-related-to-political-or-social-issues> [https://perma.cc/AUQ9-SANB].

66. See *id.*; Alejandra Martinez, *5 Years Later, Trauma From Deadly 2016 Dallas Police Shootings Still Remains*, KERA NEWS (July 6, 2021, 3:53 PM), <https://www.keranews.org/2021-07-06/5-years-later-trauma-from-deadly-2016-dallas-police-shooting-still-remains> [https://perma.cc/Y6HF-C6].

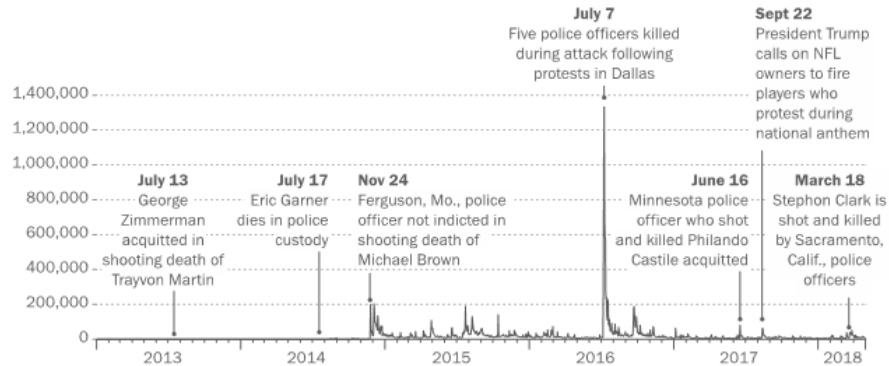


public marketplace to generate a diverse array of ideas, there should be a higher bar for the baseline guarantee of free speech rights.

FIGURE 1.<sup>67</sup>

**Use of the #BlackLivesMatter hashtag on Twitter periodically spikes in response to major news events**

Number of Twitter posts mentioning the #BlackLivesMatter hashtag, Jan. 1, 2013–May 1, 2018



Source: Pew Research Center analysis of publicly available tweets using Crimson Hexagon. "Activism in the Social Media Age"

PEW RESEARCH CENTER

Allowing private companies to freely regulate the social media public forums of the twenty-first century would indirectly and effectively deprive individuals of a realistic opportunity to speak. An individual's rights to free speech must be viewed comparatively with respect to the rights of other individuals and entities in society. In other words, because the widespread use of social media has provided society with an effective and efficient mode of communication and interconnectedness that had not been previously available, it has raised the minimum bar of what can be expected for an individual's speech to be effective. When free speech rights are viewed comparatively with the technological advancements that allow individuals to efficiently communicate and share their ideas with others, it raises the minimum basic guarantee of free speech rights that an individual can and should be provided with. Realistically, the baseline guarantee of free speech rights has not caught up to the technological advancements of the Internet, which now allows for a globalized marketplace of shared ideas. The consequences of a merely formalistic distribution of free speech rights and

67. Anderson, Toor, Olmstead, Rainie & Smith, *supra* note 65.

ignorance of the disparate societal impact one's speech can have online are too great to ignore.

A great example can be seen in online political speech. Regardless of one's political affiliation, it is difficult to defend the position that political candidates and their supporters are given fair opportunities to exercise their free speech rights when they are banned from major social media platforms. Political speech in particular is integral to the societal interest because it serves as the foundation for democracy, which in turn acts to secure the rights of life, liberty, and the pursuit of happiness for individuals. A candidate or political party may take out as many billboards and television advertisements as they can, but the reality of today's campaigns is one that is heavily influenced by social media. Though other sources such as the television can be a major news source in the United States, it does not compare cost-wise to social media platforms because of the costless nature of sharing information on the Internet. A laissez-faire approach to free speech rights would allow private social media companies to readily censor and influence political campaigns based on their private agendas. This would impinge on the democracy and autonomy values underlying free speech rights and bear consequences that would be too great to tolerate.

### III. ARGUMENT

#### A. A NEW FRAMEWORK: ALLOWING GOVERNMENT REGULATION

As mentioned, the best framework for free speech would be one allowing government regulation of private actors in the marketplace of ideas to guarantee individuals positive rights to speech. Because the First Amendment is ordinarily understood to apply only to government actions, there must be a legitimate justification for government regulation of private entities to guarantee positive rights for individuals.

##### 1. Justifying Government Regulation to Provide Positive Speech Rights

To justify the societal interest theory, it must first be established that a certain degree of government regulation over private entities is warranted. Jerome A. Barron in *Access to the Press—A New First Amendment Right* argues that “a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced.”<sup>68</sup> With this premise, Barron justifies that it is within the scope of the First Amendment to impose an

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68. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1676 (1967).

affirmative responsibilities on private entities, such the “monopoly newspaper,” to act as a “sounding board for new ideas and old grievances.”<sup>69</sup> Barron accurately notes the pressing need to extend beyond preventing governmental censorship and into preventing censorship by private entities:

The possibility of governmental repression is present so long as government endures, and the first amendment has served as an effective device to protect the flow of ideas from governmental censorship . . . . But this is to place laurels before a phantom—our constitutional law has been singularly indifferent to the reality and implications of nongovernmental obstructions to the spread of political truth. This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability . . . .<sup>70</sup>

Nongovernmental obstructions to free speech by private companies result in the same consequences as governmental obstructions. When comparing government censorship with private-entity censorship under the societal theory framework, both cause a net decrease in the contribution of ideas to the marketplace as individuals are prevented from voicing their opinions to others. Today, private social media companies hold the key to individuals’ access to the online marketplace of ideas and possess the power to silence certain voices according to their private agendas. This leaves the door open for social media companies to cause greater damage to the marketplace of ideas than government censorship as such cherry-picking skews the representation of ideas on the public marketplace to a particular point of view. Without government regulation, for example, a social media company may decide to utilize an algorithm that promotes only some points of views while demoting other posts using certain words by making them appear much later, or not at all, in other users’ feeds. These effects are intensified as speech is increasingly “spoken” online and society becomes more dependent on social media for major aspects of public life, such as entertainment, business, and information.

It might be argued that private companies, especially social media companies, are incentivized to act in the public interest and provide individuals with a platform to voice their opinions because it is in their best economic interest to maintain as many users on their platforms as possible. For instance, a major source of income for Twitter was from advertising formats to users on the platform.<sup>71</sup> However, it follows from this reasoning

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69. *Id.* at 1641. *See id.* at 1676 for a discussion on how legislation providing a right of access to the media could be enacted within the framework of the first or tenth amendment of the Constitution.

70. *Id.* at 1643.

71. Nathan Reiff, *How Twitter Makes Money*, INVESTOPEDIA (Oct. 30, 2022), <https://www.investopedia.com/ask/answers/120114/how-does-twitter-twtr-make-money.asp>

that once the company no longer benefits from protecting individuals' free speech rights, it is free to turn to other policies—even ones involving censorship—that are more economically advantageous. For example, Twitter might identify its major user target group as individuals who are within the twenty-to-forty-year age range and discover that individuals over sixty years of age might discourage users within the twenty-to-forty-year age range. To maintain the target group users on its platform, Twitter might implement policies restricting users over the age of sixty from joining and speaking on its platform. Without a reserved authority for government regulation, the government would not be equipped to keep private companies in compliance with the public interest and to keep private companies in check. This would result to a decrease in both the number of available ideas in the public forum and a lack of diversity.

A counterargument could be made that the invisible hand of the economic market encourages other companies to respond to the needs of those who are neglected on a platform and, for example, create a platform specifically targeting those over sixty years of age. With a forum dedicated for each group of individuals, the total net number of ideas in the overall public marketplace on the Internet would render government regulation of private companies unnecessary. However, this argument has two flaws. First, having separate platforms for different types of individuals does not allow ideas to mix and clash in the marketplace of ideas and fails to present a diverse array of ideas to individuals. A major benefit of having diverse ideas in the public marketplace is that it creates more opportunities for individuals to produce new innovative ideas as they are exposed to a wider range of thought and are able to freely interact with different perspectives. Confining different users to different platforms discourages ideas from mixing and detracts from the societal benefit of diversity. Second, a small group of disfavored users might still be unable to access a social media platform if their group size does not make it economically attractive to create a separate platform for them. The size of the minority group might not be sufficient to incentivize companies to create a platform for these individuals on the Internet. Without a check on private companies to ensure that the public interest in speech rights on social media platforms is met, the societal interest in free speech rights remains vulnerable.

#### B. VALID CONCERNS—REFLECTING ON THE INDIAN GOVERNMENT

Allowing the government to regulate these private entities raises valid concerns: If we give the government the power to regulate social media

companies in any way, what is there to prevent them from using that power to block, rather than to keep open, access to certain channels of communication? A real example of such concerns can be seen in Twitter's relation with the Indian government in the Indian political landscape. As a private company operating in India, Twitter is required to balance following national regulations in India with maintaining a public platform that accommodates users' needs. Section 69A of the Information Technology Act is an example of India's regulations for private social media companies. It allows the Indian government to block access to a media intermediary, which includes not only social medial platforms but also TV networks and search engines. The statute grants the governmental broad governmental powers with only a few qualifications—restrictions are enforceable when “in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence . . . .”<sup>72</sup>

Granted, the statute attempts to have regulatory procedures limiting the government's power, such as requiring that the reasons for a blockage be recorded in writing. However, these procedures are insufficient to prevent important consequences like a deprivation of the private companies' due process rights and a lack of transparency for users. The statute fails to provide much guidance for private companies or their intermediaries throughout the remaining portions of the section, as it only lays out vague guidelines subject to change at the government's disposal. For example, one provision states: “The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.”<sup>73</sup>

These flawed procedures have not gone unnoticed. Paroma Soni, a journalist at the Columbia Journalism Review, criticized the lack of transparency in India's regulatory procedures:

“If Twitter takes down a random piece of content—it's a private company, they can act according to their internal guidelines and don't have to explain anything publicly” . . . . But when the government makes a demand to remove a citizen's free speech of any kind, it has to follow due

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72. The Information Technology Act, 2000, §69A (India) (The relevant provision of Section §69A states: “Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.”).

73. *Id.* at §69A(2).

process and disclose all relevant information publicly according to India's Code of Criminal Procedure . . . . The government has not made any of its court orders to Twitter publicly accessible.<sup>74</sup>

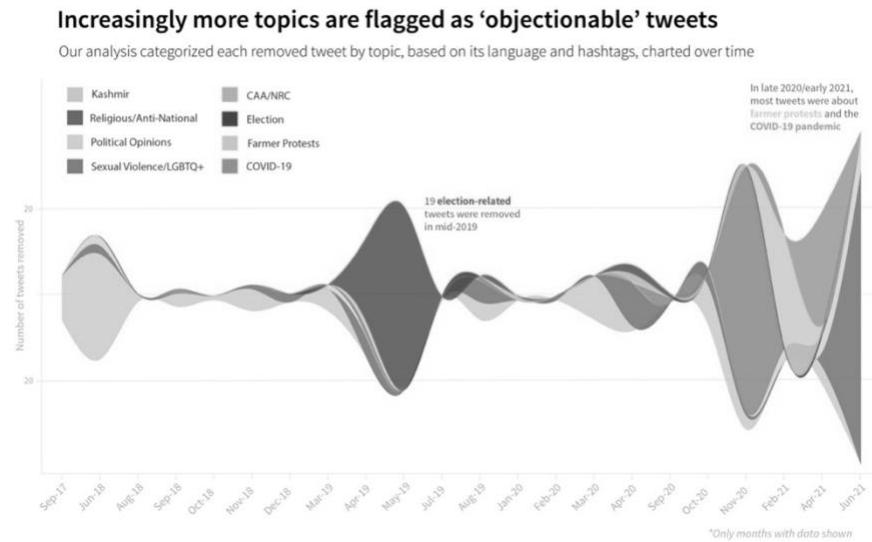
Soni raises an important point—a regulatory agency or legislation implemented to maximize the contribution of ideas may backfire and instead create social distrust in social media platforms. If governmental content regulation affects individuals' trust of these platforms and prevents them from seeing these platforms as a public forum that both accurately and objectively portrays thoughts and ideas, social media platforms will lose their effectiveness as the sounding boards or accessible marketplace of ideas in today's society. For example, a wide variety of topics were marked as objectionable tweets and consequently removed by the Indian government under The Information Technology Act.<sup>75</sup> Most importantly, a majority of tweets that were removed by the Indian government as objectionable tweets under The Information Technology Act consisted of tweets were related to the election, social issues, farmer protests, and the COVID-19 pandemic.<sup>76</sup>

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74. Paroma Soni, *Online Censorship is Growing in Modi's India*, COLUM. JOURNALISM REV. (Dec. 14, 2021), <https://www.cjr.org/investigation/modi-censorship-india-twitter.php> [<https://perma.cc/HJX6-MRHB>] (quoting Tanmay Singh, a lawyer working in the Internet Freedom Foundation).

75. *Id.*

76. *Id.*

FIGURE 2.<sup>77</sup>

First Amendment scholars like Meiklejohn that place democracy values and the importance of well-informed voters as the major justifications underlying freed speech right would fervently criticize such an outcome of a legislation. If social media platforms practically serve as the public forums of the 21st century, any legislation harming or affecting the integrity of this democratic process should not be justified because it undermines the free speech value itself. Such negative consequences would be counter-effective under the societal interest theory because a distrust in the integrity of ideas in the public marketplace would lead to a decrease in the overall contribution of ideas to the marketplace.

Learning from India's example, any legislation implementing regulatory procedures for private social media companies should still ensure these companies with adequate procedural due process. Further, *any* governmental regulation placed on a social media company should be clearly stated and made available to the public.

77. *Id.*

## C. EXPLORING CURRENT U.S. LEGISLATION ON CONTENT REGULATION

Under the Section 230 of the Communications Decency Act, federal law immunizes online platforms from liability over their content moderation decisions, or for “Good Samaritan” blocking and screening, and states that platforms are free “to restrict access to or availability of material” as long as they are made in good faith.<sup>78</sup> Further, Section 230 creates a distinction between “interactive computer service providers,” which include social media platforms and online services that publish third-party content, in stating that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>79</sup> This in essence states that “interactive computer service providers” are not responsible for the content published by users on their platforms. Further, the statute states that a main objective is to promote the “continued development of the Internet and other interactive computer services” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services . . . .”<sup>80</sup> It also acknowledges individuals’ reliance on the Internet for political, cultural, entertainment, and educational services and the simultaneous increase of control that online service providers have over information as technology continues to develop.<sup>81</sup> While this act protects important interests such as preserving “the vibrant and competitive free market” for the Internet, it fails to hold service providers accountable for potential restrictions of free speech.<sup>82</sup>

Since the addition of Section 230 to the Communications Decency Act, technology has continued to development and is constantly changing the power dynamic of social media companies in the American society.<sup>83</sup> Today, social media companies wield, or at the very minimum have the potential to wield, a great deal of power over political, social, and educational issues. In light of this continued increase of unchecked power, state legislatures have attempted to regulate these companies to prevent potential abuses.

One major state legislation targeting social media platforms is the Texas legislature’s passing of HB20 in 2021, in light of Twitter and Facebook’s

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78. Communications Decency Act, 47 U.S.C. § 230(c)(2)(A) (1996).

79. *Id.* at § 230(c)(1).

80. *Id.* at § 230(b)(1)–(2).

81. *Id.* at § 230(a)(1)–(5).

82. *Id.* at § 230(b)(2).

83. Glenn Harlan Reynolds, *Are Facebook, Twitter, Google Evil or Just Everywhere? What We Have to Do About Big Tech*, USA TODAY (May 28, 2019, 11:11 AM) <https://www.usatoday.com/story/opinion/2019/05/28/social-media-giants-facebook-google-twitter-menace-threat-column/1251108001> [<https://perma.cc/8TM7-DEKN>].



ban of former President Trump's social media account.<sup>84</sup> The law requires social media platforms with more than 50 million monthly users in the United States, such as Twitter and Facebook, to disclose their content regulation procedures and provide public reports of removed content from their platforms. The Texas legislature's basis for passing HB20 was to effectively prohibit large social media companies from silencing viewpoints, particularly conservative viewpoints, on their platforms and to provide a process for users who were wrongly censored to seek recourse.<sup>85</sup> However, the U.S. District Court for the Western District of Texas granted a preliminary injunction against the enforcement of HB20, ruling that the legislation was unconstitutional because it violated the First Amendment.<sup>86</sup> Judge Robert Pitman noted that the disclosure requirements on social media companies were "unduly burdensome" and that the Texas legislature unjustly intended to target large social media platforms perceived as being biased against conservative views.<sup>87</sup> However, does the legislation violate the First Amendment even if it does not require social media platforms to host a particular message? The district court's ruling raises an important question: to what extent can the government regulate social media companies' content policies without violating the First Amendment?

#### D. A METHOD OF ENFORCEMENT: THE FREE SPEECH AGENCY (FSA)

Rather than relying on individual state legislatures to enact statutes with varying regulations for social media companies, I propose the creation of federal agency called the Free Speech Agency ("FSA") to provide sufficient and uniform guidance for these companies. The government agency would oversee social media companies' regulation of speech on their respective platforms and ensure that companies refrain from discriminating against a user's speech based on his or her viewpoint. This would avoid an overly broad or narrow legislation and prevent an arbitrary decision process in the courts. Rather than allowing judges to balance the potential harms of a censorship policy, it places the evaluation of private company censorship policies in a single agency with set guidelines that can be applied coherently across different cases. This avoids having conflicting court decisions in different jurisdictions. The oversight process should require social media companies to submit certain categories of censorship policies to the agency.

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84. See Introduction of this Note for a discussion on Twitter and Facebook's ban on former President Trump's account.

85. Kailyn Rhone, *Social Media Companies Can't Ban Texans Over Political Viewpoints Under New Law*, THE TEXAS TRIBUNE (Sept. 2, 2021, 4:00 PM) <https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature> [https://perma.cc/6EXX-8Z5R].

86. See *NetChoice, LLC v. Paxton*, 596 U.S. 1, 4 (2022).

87. *Id.* at 35.

The agency would then review the policy by performing a balancing test that considers the benefits of such censorship and harms to individuals' free speech. Individuals would be allowed to submit any claims regarding harmful censorship policies. Though the agency would not be required to review each submitted claim, it may do so and use the submitted claims to help decide which categories of censorship policies it should review.

It is important to note that only certain categories of censorship policies would be reviewed by the agency, such as censorship policies involving political or social content or resulting in major changes on the platform. This would prevent the agency from overreaching into a company's internal management and still allow it to adopt beneficial and necessary screening measures without approval, such as screening for obscene material or harassment. This is an important distinction from the Texas legislature's HB20 because it avoids enforcing overly burdensome disclosure requirements and limits oversight to certain categories of censorship policies that might actually harm the marketplace of ideas. Further, reviewing the companies' censorship policies beforehand can prevent potential harm *ex-ante* and present a potential remedy for individuals who might not have the resources to litigate an improper censorship. In cases where a company's censorship policy violates a general policy and warrants review *ex-post*, the FSA will determine whether the violation was justified by performing a balancing test weighing the specific costs and benefits resulting from the policy. By doing this, the agency will consider realistic consequences from a particular policy rather than applying a blank rule to all companies and situations.

Another role the FSA could play is through implementing general principles that social media companies must abide by. For example, the FSA could have general principles restricting content-based censorship policies, such as restrictions on posts with an unpopular political point of view. Though the agency will have flexibility in drafting the general policies, they should be rooted in longstanding free-speech principles that allow differences in opinion and focus on fostering a diversity of thought and protecting individuals from improper censorship. One suggestion for forming these general policies is through a rulemaking committee within the agency that allows executive officials from social media companies to participate as members. The officials can provide expertise into their company's internal regulations and also serve as a check to prevent overly broad governmental regulations from de-incentivizing investment and growth in social media companies. Another possibility is to have FSA compliance agents placed at social media companies, which would be similar

to the oversight roles public compliance accountants play at corporations.<sup>88</sup> These agents can help ensure a company's compliance to the FSA's policies and internally provide guidance on how a specific censorship policy can be adjusted in accordance with FSA regulations.

The FSA would play a role similar to the regulators in Meiklejohn's analogy of a townhall meeting. Meiklejohn analogizes regulating speech to a townhall meeting, in which citizens gather to discuss matters of public interest, express their thoughts, and listen to other arguments.<sup>89</sup> However, Meiklejohn stresses that the right to free speech is not abridged even in the presence of a moderator regulating the discussion and preventing individuals from speaking over each other.<sup>90</sup> Free speech in this context does not mean that "every individual has an unalienable right to speak whenever, wherever, however" the person chooses, but rather that everything that needs to be said is said.<sup>91</sup> In Meiklejohn's illustration, the FSA would perform the role of the moderator in today's public forums, which are social media platforms. Through regulatory committees, agents, and policies, the authority to regulate the "town hall meeting" would be shared between private social media companies and a governmental agency. This would provide a stronger guarantee of securing the societal interest and maximizing diverse ideas contributed to the public marketplace.

### CONCLUSION

A narrow understanding of free speech rights can "make the law blind to the actual consequences of legal rules and damage both individual liberty and democracy."<sup>92</sup> Especially in times of intense political and social polarization, a framework that effectively protects free speech rights is a pressing need for society. The societal interest theory attempts to do so and proposes securing the societal interests of individuals' life, liberty, and pursuit of happiness by pursuing two interrelated objectives: (1) maximizing the contribution of ideas to the public marketplace, and (2) fostering an individual's sense of belonging in society. Unlike other prominent theories, such as one prioritizing the autonomy value, the societal interest theory considers the realistic problems of unequal speaking opportunities among individuals and attempts to address this problem by providing individuals

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88. See KJ Henderson, *Accounting Operations and Compliance Job Description*, CHRON., <https://smallbusiness.chron.com/accounting-assistant-duties-4052.html>, for a description of the role of public compliance accountants.

89. MEIKLEJOHN, *supra* note 14, at 24–28.

90. *Id.*

91. *Id.* at 25.

92. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 647 (2013).

with a higher baseline guarantee of positive free speech rights. These positive rights would be provided through government regulation of private social media companies to ensure that all individuals are provided access to the marketplace of ideas on social media platforms.

Having a right to free speech should entail the opportunity to speak and contribute to a marketplace of ideas, and this includes having access to social media platforms in today's Internet age. Consequently, the societal interest theory proposes that government regulation of such platforms is not only justified but also necessary. To secure the rights of life, liberty, and pursuit of happiness for all individuals, the government should share the responsibility with private companies to ensure each individual's right to free speech.