NOTES

INCITEMENT AND SOCIAL MEDIA-ALGORITHMIC SPEECH: REDEFINING *BRANDENBURG* FOR A DIFFERENT KIND OF SPEECH

TABLE OF CONTENTS

INTRODUCTION

As social media use has proliferated,[1] social media algorithms have become integral to our lives.[2] Social media companies design algorithms to increase user engagement, which increases advertisement exposure and, therefore, profit.[3]

How do social media algorithms increase engagement? Algorithms try to fill each user's feed with content of interest to the user.[4] To put "interesting and relatable" content on a user's page, the algorithm analyzes data generated by the user's interactions online.[5] The algorithm interprets these interactions as indicators of interest, and as such, it analyzes things such as what content the user likes or shares, time spent with a given page or profile on-screen, profiles and pages searched, whom the user directs messages, and whom the user knows in real life,[6] as well as location data and the user's friends' interests.[7] Based on this information, the algorithm creates a pool of content that it predicts might interest the user.[8] Then, the algorithm uses certain factors to rank how appealing each piece of content will be to the user.[9] Finally, the algorithm pushes the content that it predicts will most interest the

---

1. In 2005, just 5 percent of American adults used social media. As of February 2021, 72 percent of American adults use social media. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/6BCH-LRDL].

2. All the major social media companies use algorithms. *See* Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them.*, WALL ST. J. (Jan. 17, 2021, 7:00 AM), https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800?mod=rss_Technology [https://perma.cc/KP2T-ECVL].

3. *See* Sang Ah Kim, Technology Explainer, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 147-48 (2017).

4. *See id.* at 148.

5. *See id.*

6. *See id.* at 149-50.

7. *See* Joe Tidy, *Why Phones That Secretly Listen to Us Are a Myth*, BBC NEWS (Sept. 5, 2019), https://www.bbc.com/news/technology-49585682 [https://perma.cc/G8KU-P67H].

8. *See* Kim, *supra* note 3, at 150.

9. *See id.* The algorithm considers factors such as interactions by close friends and the type of content involved to create these rankings. *See id.* at 150-51. However, the exact ranking system and way in which an algorithm curates a user's feed varies by social media company. *See id.* at 151.

user to the top of the user's feed.[10] Putting such content at the top of a user's feed "is expected to increase the chance a user will engage with the [content]."[11]

By predicting the kinds of content a user might like and placing only those kinds of content into a user's feed, social media algorithms create "filter bubbles."[12] A social media algorithm creates a filter bubble when it places only the same or similar kinds of information and content into a user's feed, creating an echo chamber.[13] These echo chambers are not innocuous.[14] Filter bubbles skew the information that a user receives such that the user learns only one side of a given story.[15] These bubbles persist across social media platforms both because algorithms share user information across platforms[16] and because some companies own multiple platforms.[17] Given the echo chambers these bubbles create and the persistence of information bubbles across platforms, algorithms contribute to modern political polarization.[18] Furthermore, algorithms actively encourage this polarization.[19]

---

10. *See id.* at 150.

11. *Id.*

12. Emilie Robichaud, *How Social Media Algorithms Drive Political Polarization*, MEDIUM (Oct. 8, 2020), https://medium.com/swlh/how-persuasive-algorithms-drive-political-polarization-75819854c11d [https://perma.cc/54S5-QT33]; Rabbit Hole, *One: Wonderland*, N.Y. TIMES at 21:13-14 (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/podcasts/rabbit-hole-internet-youtube-virus.html? [https://perma.cc/AGX5-6PHV].

13. *See* NPR Staff, *The Reason Your Feed Became an Echo Chamber—And What to Do About It*, NPR (July 24, 2016, 7:01 AM), https://www.npr.org/sections/alltechconsidered/2016/07/24/486941582/the-reason-your-feed-became-an-echo-chamber-and-what-to-do-about-it [https:// perma.cc/3VXD-RHSF]; Rabbit Hole, *supra* note 12, at 21:13-22:14.

14. *See* Rabbit Hole, *supra* note 12, at 22:13-20 (describing how during a certain protest, YouTube users received only one side of the story in their feeds and which side of the story the user heard depended on the algorithm's assessment of the user's past interactions and interests).

15. *See id.*

16. *See Facebook's Data-Sharing Deals Exposed*, BBC NEWS (Dec. 19, 2018), https://www.bbc.com/news/technology-46618582 [https://perma.cc/SZK2-AAMK].

17. *See* Sam Shead, *Facebook Owns the Four Most Downloaded Apps of the Decade*, BBC NEWS (Dec. 18, 2019), https://www.bbc.com/news/technology-50838013 [https://perma.cc/Z8KL-E5EX] (stating that Facebook, now known as Meta, owns Instagram); Associated Press, *Google Buys YouTube for $1.65 Billion*, NBC NEWS (Oct. 9, 2006, 3:54 PM), https://www.nbcnews.com/id/wbna15196982 [https://perma.cc/AJ3U-RFUD].

18. *See* Robichaud, *supra* note 12.

19. *See id.*

Moreover, social media companies design algorithms to do more than simply provide information: they intentionally design these algorithms to persuade.[20] To turn a profit for themselves and those advertising on their sites, social media companies design algorithms with "the underlying motive of modifying a certain attitude or behavior, exploiting psychological and sociological theories, such as persuasion and social influence."[21] As such, social media algorithms can have real-world impacts on people's beliefs and actions.[22] This is where the problem arises.

As algorithms designed to modify beliefs and behavior funnel people into filter bubbles, social media sites become breeding grounds for violence.[23] Within these information bubbles, users begin to inaccurately believe that other people support violence.[24] Furthermore, being inundated with a specific idea across platforms leads users to believe that the idea is true or give the idea more credence.[25] As such, when users repeatedly see content with violent messages, users begin to believe that many others support these violent, extreme ideas even though this belief is not aligned with reality.[26] When users believe that violent ideas are supported truths, users become more likely to engage in violence themselves.[27]

---

20. *See id.*

21. *Id.*

22. *See id.*

23. *See* James Temple, *Evidence Is Piling Up That Facebook Can Incite Violence*, MIT TECH. REV. (Aug. 21, 2018), https://www.technologyreview.com/2018/08/21/2339/evidence-is-%20piling-up-that-facebook-can-incite-racial-violence/ [https://perma.cc/S7KP-M878] (detailing a study showing that higher Facebook use corresponded to more attacks on refugees); Khandis R. Blake, Siobhan M. O'Dean, James Lian & Thomas F. Denson, *Misogynistic Tweets Correlate with Violence Against Women*, 32 PSYCH. SCI. 315, 323 (2021) (showing that more misogynistic tweets in a geographic area corresponded with increased rates of violence against women in that area); *Rohingya Sue Facebook for $150bn over Myanmar Hate Speech*, BBC NEWS (Dec. 7, 2021), https://www.bbc.com/news/world-asia-59558090 [https://perma.cc/AK2K-QUXW] (describing a suit alleging that Facebook's algorithm "amplified hate speech against the Rohingya people," thereby increasing violence against that group).

24. *See* Temple, *supra* note 23.

25. *See* Emily Dreyfuss, *Want to Make a Lie Seem True? Say It Again. And Again. And Again*, WIRED (Feb. 11, 2017, 7:00 AM), https://www.wired.com/2017/02/dont-believe-lies-just-people-repeat/ [https://perma.cc/3SLV-CGQD] (describing the "illusory truth effect" where people "equate[ ] repetition with truth"); Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS 38, 38 (2021).

26. *See* Hassan & Barber, *supra* note 25; Temple, *supra* note 23.

27. *See* Rabbit Hole, *supra* note 12; Temple, *supra* note 23.

Therefore, calls for violence and circulation of information about violent ideas on social media platforms present real risks and correlate to real-world violent outcomes.[28] Moreover, recent whistleblower testimony demonstrates that social media companies are aware that their algorithms amplify "dangerous speech that has led to violence and death," but companies have ignored or buried these findings, prioritizing engagement and profit over the very real risk of violence.[29]

This is an incitement problem. Speech causes tangible harm when it incites violence.[30] Inciting speech falls outside the First Amendment's protection and can, therefore, be punished civilly and/or criminally.[31] Currently, courts use the *Brandenburg* standard to determine whether speech qualifies as unprotected incitement.[32] To qualify as incitement, the *Brandenburg* standard requires that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[33] Three basic elements comprise this standard: (1) intent, (2) imminence, and (3) likelihood.[34]

Scholars have argued that algorithm-based decisions, like the ones that social media algorithms make about what content to put into people's feeds, qualify as speech.[35] Social media algorithms'

28. *See* Temple, *supra* note 23 (describing three thousand instances of violence observed over a two-year period, finding that violence was much more likely in areas with increased Facebook use, which held true regardless of city size, political leanings, or economic status, and linking speech on Facebook to violence in Myanmar); Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html [https://perma.cc/H2AD-V6VQ] (discussing how the groups that stormed the Capitol first found one another and began to plan together on mainstream social media sites, such as Twitter and Facebook).

29. *See* Rob Reich, Mehran Sahami & Jeremy M. Weinstein, Opinion, *Facebook Isn't the Only Problem*, CNN BUS. (Oct. 14, 2021, 9:06 AM), https://www.cnn.com/2021/10/14/perspectives/facebook-frances-haugen-big-tech-regulation/index.html [https://perma.cc/KC6L-LVH8]; *see also Facebook Admits It Was Used to 'Incite Offline Violence' in Myanmar*, BBC NEWS (Nov. 6, 2018), https://www.bbc.com/news/world-asia-46105934 [https://perma.cc/42TS-FQAY] (describing that since at least 2018, Facebook has been aware that its platform and algorithm have enabled violence against the Rohingya people).

30. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

31. *See id.*

32. *See id.*

33. *Id.*

34. *See id.*

35. *See* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 884-85 (2012); Stuart Minor Benjamin,

decisions have a message of their own, beyond the message of any individual piece of content: the message of the filter bubble itself.[36] While a post might say "I hate lawyers," a social media algorithm that sends this post to a user will send countless similar pieces of content, culminating in a message from the algorithm itself that "lawyers are bad." As such, these scholars argue that the First Amendment applies or should apply to these algorithmic decisions.[37]

Assuming that these scholars are correct and that social media algorithms' decisions qualify as speech to which the First Amendment applies (social media-algorithmic speech),[38] this Note proposes a legal solution to the increasing problem of violence stemming from social media. This Note asserts that the incitement standard for social media-algorithmic speech should be less stringent because the *Brandenburg* standard does not apply well to new media, social media-algorithmic speech is much more likely than other speech to actually produce lawless action, and the traditional First Amendment justifications do not apply to social media algorithms' speech. Therefore, the Supreme Court should tweak the incitement standard for social media-algorithmic speech by altering *Brandenburg*'s intent and imminence requirements.

Part I of this Note provides relevant history and background about the rationales behind and values of free speech and the current incitement standard. Part II presents the problem at hand, which is that social media-algorithmic speech is uniquely likely to produce lawless action while the *Brandenburg* standard does not and cannot address this problem sufficiently. Part III discusses a solution to this problem, arguing that the Court should modify the *Brandenburg* standard as applied to social media-algorithmic speech by altering the intent requirement and relaxing or removing the imminence requirement. Part III also addresses potential counterarguments.

Algorithms and Speech, 161 U. PA. L. REV. 1445, 1446-47 (2013).

36. *See* Benjamin, *supra* note 35, at 1446-47.

37. *See* Volokh & Falk, *supra* note 35, at 887-91; Benjamin, *supra* note 35, at 1446-47.

38. *See* Volokh & Falk, *supra* note 35, at 887-91; Benjamin, *supra* note 35, at 1446-47.

I. HISTORY AND BACKGROUND

This conversation should start at the very beginning. Why is there a right to free speech enshrined in the First Amendment? What is the current standard for incitement and why? How are justifications for free speech and the *Brandenburg* standard interrelated? This Part discusses these preliminary questions to lay the groundwork for later discussion about how free speech justifications and the *Brandenburg* standard interact with and fail to address the problems of social media-algorithmic incitement and solutions to this issue.

A. Free Speech Justifications and Values

Free speech is somewhat unique in Supreme Court constitutional jurisprudence because in dealing with free speech, the Court generally does not look to history or the Framers' intent for interpretive guidance.[39] The Court does not look to history in part because it did not begin building a body of free speech jurisprudence until the early twentieth century.[40] Furthermore, the Court tends not to look to history or the Framers' intent because free speech history is sparse and conflicting and the Framers' intent is unclear.[41]

Initially, the free speech right appeared to be a response to England's licensing and seditious libel laws.[42] England required that people submit publications to royal officials for licensing before printing.[43] These licensing laws were a form of prior restraint on speech.[44] England also prosecuted seditious libel, which is inten-

39. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1179 (Rachel E. Barkow et al. eds., 6th ed. 2020).

40. *See generally* Schenck v. United States, 249 U.S. 47 (1919) (one of the first instances in which the Court took up a case about First Amendment freedom of speech).

41. *See* CHEMERINSKY, *supra* note 39, at 1178-79.

42. *See id.*

43. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW 2 (Robert C. Clark et al. eds., 6th ed. 2016).

44. *See id.*

tional criticism of the government, government officials, or laws.[45] Against this backdrop, one might assume that the Framers enshrined the free speech right to eliminate prior restraints and seditious libel laws.[46] However, certain Framers passed the Alien and Sedition Acts of 1798, which prohibited seditious libel in the United States much like England's laws did, muddying the waters of the Framers' intent in establishing freedom of speech.[47] Aside from this conflicted history, there is "little indication of what the [F]ramers intended."[48]

Thus, the Court has instead turned to philosophical justifications for free speech as a fundamental right.[49] These justifications fall into a few categories: the search for truth, self-government, autonomy, and negative justifications,[50] as well as tolerance.[51]

As for the search for truth, the argument is that suppressing ideas is wrong because people can only discover truth by subjecting all ideas to the "marketplace of ideas."[52] Even false ideas are necessary to the search for truth because only false ideas adequately test truth, and truth will always survive the marketplace of ideas.[53] Furthermore, the best way to alleviate false or dangerous speech and ideas is to subject them to good, truthful counterspeech.[54]

The self-government justification is that free speech is crucial to democratic self-governance, providing essential functions to the democratic process.[55] The ability to speak freely ensures that cit-

---

45. *See id.*

46. *See id.* at 2-3; CHEMERINSKY, *supra* note 39, at 1178-79.

47. *See* CHEMERINSKY, *supra* note 39, at 1178.

48. *Id.*

49. *See id.* at 1179-84; SULLIVAN & FELDMAN, *supra* note 43, at 5.

50. *See* SULLIVAN & FELDMAN, *supra* note 43, at 5-10; Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis & Holmes, JJ., concurring).

51. *See* CHEMERINSKY, *supra* note 39, at 1184.

52. *See id.* at 1181-82; SULLIVAN & FELDMAN, *supra* note 43, at 5-6; *Whitney*, 274 U.S. at 375-78 (Brandeis & Holmes, JJ., concurring).

53. *See* CHEMERINSKY, *supra* note 39, at 1181-82; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

54. *See* CHEMERINSKY, *supra* note 39, at 1181-82; SULLIVAN & FELDMAN, *supra* note 43, at 5-6; *Whitney*, 274 U.S. at 375-78 (Brandeis & Holmes, JJ., concurring).

55. *See* CHEMERINSKY, *supra* note 39, at 1180-81; SULLIVAN & FELDMAN, *supra* note 43, at 6-8; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

izens are informed and active in discussions of policy and politics.[56] Therefore, protecting speech from censorship informs citizens and enhances policy making, the quality of the government, and the quality of policies.[57] Furthermore, by promoting discussion of a variety of ideas, free speech helps to prevent incumbent governments from entrenching themselves indefinitely.[58] Additionally, free speech helps to prevent tyranny and abuses of power.[59] Free speech allows citizens to expose abuses and potentially tyrannical acts and critique them, thereby mitigating these evils.[60] Finally, free speech promotes democratic self-governance "by providing a safety valve for dissent," which helps to promote political safety.[61]

Autonomy justifies free speech because free speech is essential to individual development, which is the ultimate goal of the state.[62] When people can speak freely, they grow by expressing and defining themselves.[63] Furthermore, censorship is inconsistent with the idea of autonomous people.[64]

The negative justification for freedom of speech is based on the idea that there are "special reasons to distrust government in the realm of speech regulation."[65] Even if speech is not especially worthy of protection, the Constitution must nonetheless protect it because the government is ill-suited to regulate speech.[66] For example, if the government regulated speech, it would be incentivized to censor dissenting views, minority views, and criticism (all of which are essential to self-governance).[67] Moreover, the government struggles

---

56. *See* CHEMERINSKY, *supra* note 39, at 1180-81; SULLIVAN & FELDMAN, *supra* note 43, at 6-8; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

57. SULLIVAN & FELDMAN, *supra* note 43, at 7.

58. *Id.*

59. *Id.* at 7-8.

60. *See* CHEMERINSKY, *supra* note 39, at 1180-81; SULLIVAN & FELDMAN, *supra* note 43, at 7-8.

61. SULLIVAN & FELDMAN, *supra* note 43, at 8; *see also Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

62. *See* CHEMERINSKY, *supra* note 39, at 1183; SULLIVAN & FELDMAN, *supra* note 43, at 8-9; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

63. *See* SULLIVAN & FELDMAN, *supra* note 43, at 9.

64. *See id.*

65. *Id.*

66. *See id.*

67. *See id.*; Virginia v. Black, 538 U.S. 343, 367 (2003) (plurality opinion).

to make correct distinctions and accurately distinguish truth from falsehood.[68]

The final justification for free speech is tolerance.[69] The basic argument is that free speech exposes people to new and different ideas, which is integral to tolerance, which, in turn, is—or should be—a crucial value in society.[70] Free speech exists to shape society's intellectual character by developing people's capacity to control intolerant responses to various social stimuli.[71]

Because history and the Framers' intent are sparse and contradictory,[72] the Court has turned to these philosophical justifications for the free speech right.[73] The Court has used these justifications to undergird its rationales in its free speech jurisprudence.[74] Thus, these justifications are relevant—even essential—to understanding the *Brandenburg* standard for incitement[75] as well as this Note's critiques of the *Brandenburg* standard.

B. Brandenburg *Standard for Incitement*

For decades, the Court used a less speech-protective standard—the "clear and present danger" test—for incitement.[76] In 1969, in *Brandenburg v. Ohio*, the Court announced a new standard

68. *See* SULLIVAN & FELDMAN, *supra* note 43, at 10.

69. *See* CHEMERINSKY, *supra* note 39, at 1184.

70. *See id.*

71. *See id.*

72. *See id.* at 1178-79; SULLIVAN & FELDMAN, *supra* note 43, at 3.

73. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 365-67 (2003) (plurality opinion) (discussing the need to allow discussions of even hateful ideas in a tolerant society); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (espousing the truth, self-government, and autonomy justifications for free speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing the self-government justification for free speech).

74. *See, e.g.*, *Black*, 538 U.S. at 365-67; *Whitney*, 274 U.S. at 375-77; *Sullivan*, 376 U.S. at 270.

75. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam).

76. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (announcing the "clear and present danger" test, under which speech qualified as incitement if it was "used in such circumstances and [was] of such a nature as to create a clear and present danger that [it would] bring about the substantive evils that [the government] has a right to prevent"). The "clear and present danger" test was applied such that it was not particularly protective of free speech. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 654-55, 671-72 (1925) (applying the "clear and present danger" test to uphold a criminal anarchy statute and a conviction under that statute); *Whitney*, 274 U.S. at 359-60, 371-72 (applying the "clear and present danger" test to uphold a criminal syndicalism statute and a conviction under that statute).

for assessing whether speech qualifies as unprotected incitement.[77] The *Brandenburg* standard is more protective of speech than the "clear and present danger" test.[78] The Court shifted its incitement standard after acknowledging that the old test, under which mere teaching or advocacy of the necessity of violent action could be punished, did not adequately protect free speech.[79] Instead, that test risked censorship that could harm self-government, autonomy, and the search for truth.[80] In contrast, the *Brandenburg* standard declares that speech must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action" for it to qualify as unprotected incitement.[81] As such, the *Brandenburg* standard breaks down into three essential elements: (1) intent, (2) imminence, and (3) likelihood.[82]

The first element of the *Brandenburg* standard is intent.[83] This element requires that speech be "directed to inciting or producing imminent lawless action."[84] The Court fleshed out this requirement in later cases, demonstrating that a reckless intent might not be adequate to satisfy the *Brandenburg* standard.[85] Speech that is simply reckless with respect to possible future consequences is generally not sufficient to meet the *Brandenburg* standard and qualify as unprotected incitement.[86]

The second element of the *Brandenburg* standard is imminence.[87] This element requires that the speech be intended to incite or produce "imminent lawless action."[88] Imminence seems to require

---

77. *See* 395 U.S. at 447.

78. *Compare id.* at 444-45, 447-49 (using the new standard to invalidate Ohio's criminal syndicalism law and a conviction based on that law), *with Whitney*, 274 U.S. at 359-60, 371-72 (applying the "clear and present danger" test to uphold a criminal syndicalism law and a conviction based on that law).

79. *See* Dennis v. United States, 341 U.S. 494, 505-11 (1951) (plurality opinion); *Brandenburg*, 395 U.S. at 447-49; NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926-29 (1982).

80. *See, e.g.*, *Brandenburg*, 395 U.S. at 447-49; *Claiborne Hardware*, 458 U.S. at 926-29.

81. *See Brandenburg*, 395 U.S. at 447.

82. *See id.*

83. *See id.*

84. *Id.*

85. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

86. *See id.*

87. *See Brandenburg*, 395 U.S. at 447.

88. *Id.*

a fairly immediate response.[89] In *Brandenburg*, a contingent statement that *if* something continued, "there might have to be some revengeance [sic] taken" did not qualify as imminent.[90] Further considerations that might also have prevented the speech in *Brandenburg* from being imminent were that it was about possible violence at a *future time* and that it was spoken far from the proposed location of potential future violence.[91] Similarly, in *Hess*, the speech was not imminent because it counseled future action.[92] The dissent highlighted that the speech at issue might even have been counseling future action that would occur soon—within mere hours.[93] As such, the imminence element seems to require that speech be directed toward producing lawless action very immediately.

The third element of the *Brandenburg* standard is likelihood.[94] This element requires that the speech be "likely to incite or produce" imminent lawless action.[95] In *Hess*, to evaluate likelihood, the Court considered to whom speech was directed, the volume of speech, and the direction the speaker faced.[96] Because the speech was not directed to any specific person or group and did not exhort the crowd to take lawless action, the speech failed to meet the likelihood requirement.[97] Furthermore, the Court has held that speech does not satisfy the likelihood element if lawless activity does not actually follow speech and do so quickly.[98]

Ultimately, because the *Brandenburg* standard is so exacting in practice, it is very speech-protective in service of free speech's theoretical justifications.[99] However, this Note will elucidate that

---

89. *See, e.g.*, *id.* at 446-49; *Hess*, 414 U.S. at 108-09.

90. *See Brandenburg*, 395 U.S. at 446-49.

91. *See id.* at 444-47.

92. *See* 414 U.S. at 108-09.

93. *See id.* at 111 (Rehnquist, J., dissenting).

94. *See Brandenburg*, 395 U.S. at 447.

95. *Id.*

96. *See* 414 U.S. at 107.

97. *See id.* at 107-09.

98. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (stating that the speech in question was not likely to produce imminent lawless action because it was not followed by acts of violence and the acts of violence identified occurred weeks or months after the speech occurred).

99. *See Brandenburg*, 395 U.S. at 444-49; *Hess*, 414 U.S. at 107-09 (1973) (per curiam); *Claiborne*, 458 U.S. at 928.

this protectiveness does not serve society well or advance free speech ideals and justifications properly in the arena of social media-algorithmic speech. This problem with the *Brandenburg* standard arises due to the uniqueness of social media-algorithmic speech, which this Note describes in detail in Part II.

II. THE PROBLEM

This Note argues that social media algorithms' decisions are uniquely likely to produce lawless action and that the *Brandenburg* standard does not apply well to social media-algorithmic speech. This Part will describe how this type of speech is especially likely to produce lawlessness and why the *Brandenburg* standard is ill-suited to the kind of speech and risks at issue here.

A. Social Media-Algorithmic Speech Is Uniquely Likely to Produce Lawless Action

Research has found that social media use uniquely correlates with violence.[100] This research shows that more hours spent using social media "correlates directly with aggressive behavior."[101] Furthermore, people who see violent content online are not only more likely to be violent but also to commit serious crimes and have increased potential to engage in copycat behavior.[102] Given the real-world violence that directly correlates with increased social media use,[103] people should be concerned about the content they view. This unique correlation between increased social media use and user violence[104] demonstrates a connection between social media algorithms' decisions and violence because what distinguishes social

100. *See* The Digital Age, *Social Media: Is There a Correlation Between Its Use and Violent Behavior?*, THE DIGIT. AGE AT THE U. OF NEW S. WALES (Dec. 4, 2018), https://web.archive.org/web/20210309235142/https://blogs.unsw.edu.au/thedigitalage/blog/2018/12/social-media-is-there-a-correlation-between-its-use-and-violent-behavior/ [https://perma.cc/Z5FF-HCND].

101. *Id.*

102. *Id.*

103. *See, e.g.*, *id.*

104. *See id.*; Temple, *supra* note 23; Blake et al., *supra* note 23, at 323.

media use from regular speech is the algorithm itself, which is designed to influence and alter people's beliefs and ideas.[105]

The connection between increased social media use and violence is particularly disconcerting because people use social media so much. In 2020, Americans spent an average of 1,300 hours on social media.[106] Americans spend nearly an hour on Facebook and nearly an hour on Instagram each day on average.[107]

Moreover, not only is increased social media use connected with violence but some studies have also suggested that the more time a user spends on a social media site, the more extreme the content the algorithm sends the user.[108] TikTok users watch videos for an average of twenty seconds and therefore can consume four hundred videos in approximately two hours.[109] If a user interacts with transphobic content, over the course of four hundred videos, the TikTok algorithm will begin sending the user increasingly extreme, far-right content, including thinly veiled threats and open calls for violence.[110] People use social media overwhelmingly, and this increased use not only correlates with increased violence but also sends more violent content to users, which is likely to inspire violence.

Furthermore, social media-algorithmic speech inspires violence in a way that is inescapable. Social media-algorithmic speech has a message of its own—the message of the echo chamber itself—rather than just each individual piece of content's message.[111] For example, a piece of content, such as a tweet, might say, "I hate lawyers." An algorithm that decides to send this piece of content to a user will

105. *See* Robichaud, *supra* note 12.

106. Peter Suciu, *Americans Spent on Average More Than 1,300 Hours on Social Media Last Year*, FORBES (June 24, 2021, 3:47 PM), https://www.forbes.com/sites/petersuciu/2021/06/24/americans-spent-more-than-1300-hours-on-social-media/?sh=1b7d472547 [https://perma.cc/A68E-WXPY]; *see also* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/ social-media-use-in-2021/ [https://perma.cc/HM9L-XW98] (showing that a majority of Facebook, Snapchat, and Instagram users visit these sites daily).

107. Suciu, *supra* note 106.

108. *See, e.g.*, Olivia Little & Abbie Richards, *TikTok's Algorithm Leads Users from Transphobic Videos to Far-Right Rabbit Holes*, MEDIA MATTERS FOR AM. (Oct. 5, 2021, 9:03 AM), https://www.mediamatters.org/tiktok/tiktoks-algorithm-leads-users-transphobic-videos-far-right-rabbit-holes [https://perma.cc/KRK7-WV6E].

109. *See id.*

110. *See id.*

111. *See* Benjamin, *supra* note 35, at 1446.

send countless similar pieces of content from different sources, all culminating in a message from the algorithm itself that "lawyers are inherently bad, and we should eliminate this problem with violence." In the context of "normal" spoken or written speech, people can avoid speech by stepping away—"simply by averting their eyes" or covering their ears.[112]

However, online, people cannot simply step away from social media algorithms' speech. Social media use is incredibly pervasive.[113] Social media algorithms are just as pervasive.[114] Moreover, social media is addictive, prompting people to use it more and more for increased levels of dopamine.[115] Thus, the vast majority of American adults are exposed to social media-algorithmic speech on a daily basis.[116] These algorithms create filter bubbles that bombard users with only content containing the same or similar messages, creating powerful echo chambers.[117] Just blocking, muting, or reporting certain users or pieces of content is not enough to combat these filter bubbles because when creating filter bubbles, algorithms draw from a vast array of sources, many of which users cannot control.[118]

Furthermore, these filter bubbles do not exist solitarily. Generally, a user will not have one filter bubble on Twitter where the algorithm says "lawyers are bad" while having a different filter bubble on Facebook where the algorithm says "lawyers are good." Instead, because some companies own multiple social media platforms[119] and

112. *See* Cohen v. California, 403 U.S. 15, 21 (1971).

113. *See Social Media Fact Sheet*, *supra* note 1 (demonstrating that currently, 72 percent of American adults use social media).

114. *See* Stern, *supra* note 2 (showing that all major social media companies use algorithms to order content).

115. *See* Bruce Goldman, *Addictive Potential of Social Media Explained*, STAN. MED. (Oct. 29, 2021), https://scopeblog.stanford.edu/2021/10/29/addictive-potential-of-social-media-explained/ [https://perma.cc/FJ7D-F4HU].

116. *See Social Media Fact Sheet*, *supra* note 1 (showing that of the 72 percent of American adults who use social media, the majority of these adults use social media daily); Stern, *supra* note 2.

117. *See* NPR Staff, *supra* note 13.

118. *See* Tidy, *supra* note 7 (explaining that algorithms decide what to put in a user's feed based on a wide range of sources, many of which users cannot easily evade or change, such as time spent on a page or profile, whom the user knows in real life, the user's location data, and the user's friends' interests).

119. *See* Shead, *supra* note 17 (saying that Facebook/Meta owns Instagram); Associated Press, *supra* note 17 (saying that Google owns YouTube).

share information,[120] and because different platforms' algorithms use similar information to decide what content to push,[121] the same filter bubble persists across platforms. Thus, people cannot "simply ... avert[ ] their eyes"[122] and thereby avoid social media-algorithmic speech. Instead, this speech bombards people with the same messaging across platforms inescapably.

Not only is social media-algorithmic speech especially pervasive[123] and correlated with violent outcomes,[124] the way algorithms are designed means that this kind of speech inevitably causes and correlates with violence. Through their speech, social media algorithms polarize people.[125] By creating filter bubbles that act as echo chambers, social media algorithms increase polarization.[126]

Moreover, social media companies intend for their algorithms to encourage polarization.[127] To increase engagement and, therefore, profits, social media algorithms intentionally push inflammatory content.[128] As algorithmic decisions funnel people into polarizing filter bubbles, natural psychological processes cause people to believe the increasingly radicalized information that they receive.[129]

---

120. *See Facebook's Data-Sharing Deals Exposed*, *supra* note 16.

121. *See* Kim, *supra* note 3, at 149-51 (stating that social media algorithms decide what content to push to users based on things such as time spent with a given page or profile on the screen, profiles and pages searched, whom the user direct messages, whom the user knows in real life, likes, shares, and type of content involved); Tidy, *supra* note 7 (explaining that social media algorithms also consider location data and friends' interests).

122. Cohen v. California, 403 U.S. 15, 21 (1971).

123. *See supra* notes 106-07 and accompanying text.

124. *See supra* notes 100-05 and accompanying text.

125. *See* Robichaud, *supra* note 12; Rabbit Hole, *supra* note 12, at 24:00-13.

126. *See* Robichaud, *supra* note 12; Rabbit Hole, *supra* note 12, at 20:49-21:00, 21:43-24:13.

127. *See* Robichaud, *supra* note 12; Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, PBS (Mar. 28, 2019), https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms/ [https://perma.cc/T5GK-3NYM].

128. *See* Ryan Mac & Sheera Frenkel, *Internal Alarm, Public Shrugs: Facebook's Employees Dissect Its Election Role*, N.Y. TIMES (Oct. 25, 2021), https://www.nytimes.com/2021/10/22/technology/facebook-election-misinformation.html [https://perma.cc/35V9-9WUB]; Adam Satariano & Mike Isaac, *Facebook Whistle-Blower Brings Campaign to Europe After Disclosures*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/25/business/frances-haugen-facebook.html [https://perma.cc/DM2N-DJ5L]. Similarly, most social media users report seeing content that makes them angry. *See* Aaron Smith, *Algorithms in Action: The Content People See on Social Media*, PEW RSCH. CTR. (Nov. 16, 2018), https://www.pewresearch.org/internet/2018/11/16/algorithms-in-action-the-content-people-see-on-social-media/ [https://perma.cc/9LQJ-B6H2].

129. *See* Wu, *supra* note 127 (describing how social media algorithms push increasingly polarized and polarizing information, shaping beliefs); Dreyfuss, *supra* note 25 (describing the

The more that people see an idea repeated—which happens with increasing frequency in the echo chambers that social media algorithms' decisions create[130]—the more likely they are to believe that idea, regardless of whether the idea is true or supportable.[131] Thus, within filter bubbles, under social media algorithms' direction, people come to believe that violence is more widely supported than it is.[132] These influences are especially pernicious precisely because social media algorithms are designed to sway users' beliefs, attitudes, and, ultimately, behavior.[133] In this setting, it is unsurprising that exposure to social media algorithms correlates with violent outcomes—they are designed to create polarization that pushes people towards violence.

Social media algorithms are primed to be associated with real-world violence given their pervasiveness,[134] influential nature,[135] polarizing influence,[136] and association with beliefs that violence is supported.[137] Given its relationship to violence, social media-algorithmic speech presents an incitement problem. However, as the next Section will elucidate, the current incitement standard is ill-suited to address the problems of social media-algorithmic speech.

B. Brandenburg *Is Ill-Suited to Social Media-Algorithmic Speech*

Despite the violent outcomes uniquely associated with social media-algorithmic speech, because the *Brandenburg* standard is so stringent, any form of internet speech is highly unlikely to qualify as unprotected incitement. Thus, even social media-algorithmic

---

"illusory truth effect," which means that people "equate[ ] repetition with truth"); Hassan & Barber, *supra* note 25.

130. *See supra* notes 108-28 and accompanying text.

131. *See* Dreyfuss, *supra* note 25.

132. *See* Temple, *supra* note 23; Jillian Petersen & James Densley, Opinion, *How Social Media Sends Extremism into Overdrive*, CNN (Aug. 23, 2017, 1:24 PM), https://www.cnn.com/2017/08/23/opinions/social-media-fuels-right-wing-extremism-opinion-peterson-densley/index.html [https://perma.cc/C345-6KS5] (stating that speech about violence on social media "dials up the expectation that 'everyone is doing it'").

133. *See* Robichaud, *supra* note 12.

134. *See supra* notes 106-14 and accompanying text.

135. *See* Dreyfuss, *supra* note 25; Robichaud, *supra* note 12.

136. *See* Robichaud, *supra* note 12; Rabbit Hole, *supra* note 12; Wu, *supra* note 127; Mac & Frenkel, *supra* note 128; Satariano & Isaac, *supra* note 128.

137. *See* Temple, s*upra* note 23.

speech that is highly likely to result in violent outcomes[138] remains within the sphere of First Amendment protection. Theoretical justifications for free speech do not warrant this level of protection for social media-algorithmic speech because it does not implicate the same concerns as human speech.

1. The Brandenburg *Standard Applied to Social Media-Algorithmic Speech*

To review, the *Brandenburg* standard requires three essential elements for speech to qualify as unprotected incitement: (1) intent, (2) imminence, and (3) likelihood.[139] Despite the high likelihood of violence associated with social media-algorithmic speech,[140] all social media-algorithmic speech, no matter how dangerous, would likely fail to satisfy the intent and imminence elements of the *Brandenburg* standard.

The intent element of *Brandenburg* requires that speech be "directed to inciting or producing imminent lawless action."[141] The Supreme Court's free speech jurisprudence suggests that a simply negligent or reckless intent is likely not enough to satisfy this intent element.[142] Social media-algorithmic speech might be simply negligent or reckless about inciting lawless action because social media companies might not have the practical certainty that lawless action will result from this speech or the conscious object to produce lawless action.[143] Failing to meet this element alone means that

138. *See supra* Part II.A.

139. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

140. *See supra* Part II.A.

141. 395 U.S. at 447.

142. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

143. *See* MODEL PENAL CODE § 2.02(2)(a)-(d) (defining the different kinds of criminal intent). However, recent whistleblower testimony suggests that there might actually be a strong argument that at least some social media sites meet the requirements for something greater than merely negligent or reckless intent. *See* Reich et al., *supra* note 29 (describing how whistleblower testimony has revealed that Facebook is aware that its algorithms amplify "dangerous speech that has led to violence and death" but has ignored and buried these findings, suggesting that Facebook, at least, and likely other social media companies may have the kind of practical certainty of lawless action resulting from social media-algorithmic speech to have a knowing intent).

social media-algorithmic speech does not qualify as unprotected incitement.[144]

To compound social media-algorithmic speech's inability to satisfy the *Brandenburg* standard, this kind of speech likely would not meet the imminence element, which requires that speech be intended to incite or produce "imminent lawless action."[145] This element seems to require very immediate lawless action.[146] Speech that proposes contingent lawless action or counsels future action does not satisfy the imminence element.[147] Furthermore, when a speaker speaks at a location far from the proposed site of violence, the speech likely does not meet the imminence element.[148] Given the very medium of the internet, social media-algorithmic speech by default likely cannot be imminent. The nature of the internet is such that online speech does not have the same immediacy as speech delivered in person. When a social media algorithm decides to place content into a user's feed, there is no telling when the user will receive social media-algorithmic speech. The user might not be privy to the results of the algorithm's decisions until hours (at least) after they have been made, especially because social media-algorithmic speech is the culmination of placing many pieces of content in the user's feed, which is likely not imminent.[149] Social media-algorithmic speech also occurs in cyberspace, potentially far from proposed sites of violence.[150] As such, social media-algorithmic speech would likely also fail the imminence element of the *Brandenburg* standard.

The *Brandenburg* standard is stringent in order to be highly protective of speech.[151] This standard is speech-protective to advance the theoretical values of truth, self-government, autonomy, negative

144. *See Brandenburg*, 395 U.S. at 447.

145. *See id.*

146. *See, e.g.*, *id.* at 446-49; *Hess*, 414 U.S. at 108-09.

147. *See Brandenburg*, 395 U.S. at 446-49; *Hess*, 414 U.S. at 108-09.

148. *See Brandenburg*, 395 U.S. at 444-47.

149. *See Hess*, 414 U.S. at 108-09.

150. *See Brandenburg*, 395 U.S. at 444-47.

151. *Compare Brandenburg*, 395 U.S. at 444-49 (using the new standard to invalidate Ohio's criminal syndicalism law and a conviction based on that law), *with* Whitney v. California, 274 U.S. 357, 359-60, 372 (1927) (applying the "clear and present danger" test to uphold a criminal syndicalism law and a conviction based on that law).

justifications, and tolerance that justify freedom of speech.[152] However, these theoretical justifications are less relevant to social media-algorithmic speech, and this speech requires less protection than human speech. Therefore, social media-algorithmic speech's inability to meet the *Brandenburg* standard is even more troubling given the high risk of violent lawless action associated with this kind of speech.

2. First Amendment Theoretical Justifications Applied to Social Media-Algorithmic Speech

The theoretical justifications that underpin robust First Amendment protection of speech do not apply well to social media-algorithmic speech. Under the truth justification, the First Amendment protects speech because people can only discover truth by subjecting all ideas to the "marketplace of ideas."[153] Even false ideas deserve protection because they test truth in the marketplace of ideas, and only good, truthful counterspeech can remedy falsehood.[154] However, social media algorithms do not bolster but instead radically distort the marketplace of ideas. Social media algorithms so distort the marketplace by creating filter bubbles that present users with echo chambers that repeat the same idea,[155] thereby making the truth justification much less relevant to this kind of speech. In a setting where users are essentially presented with only one idea, ideas are no longer subjected to the counterspeech that tests truth and counters falsehood.[156] Thus, the search for truth cannot adequately justify the robust protection that social media-algorithmic speech

152. *See* Dennis v. United States, 341 U.S. 494, 503, 507 (1951) (plurality opinion); *Brandenburg*, 395 U.S. at 447-49; NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926-29 (1982).

153. *See* CHEMERINSKY, *supra* note 39, at 1181-82; SULLIVAN & FELDMAN, *supra* note 43, at 5-6; *Whitney*, 274 U.S. at 375-78 (Brandeis & Holmes, JJ., concurring).

154. *See* CHEMERINSKY, *supra* note 39, at 1181-82; SULLIVAN & FELDMAN, *supra* note 43, at 5-6; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

155. *See* Robichaud, *supra* note 12; Rabbit Hole, *supra* note 12; NPR Staff, *supra* note 13.

156. *See* CHEMERINSKY, *supra* note 39, at 1181-82; SULLIVAN & FELDMAN, *supra* note 43, at 5-6; *Whitney*, 274 U.S. at 375-78 (Brandeis & Holmes, JJ., concurring).

currently enjoys with respect to incitement under the *Brandenburg* standard.

Similarly, self-government fails to justify the high level of protection the *Brandenburg* standard gives social media-algorithmic speech. Free speech advances self-government by ensuring that citizens are informed,[157] promoting discussions of policies and alternatives that stop current regimes from entrenching themselves indefinitely,[158] preventing tyranny and abuses of power by providing a medium to discuss and expose them,[159] and providing an outlet for dissent.[160] But, again, social media-algorithmic speech creates filter bubbles.[161] Within these filter bubbles, algorithms do not inform citizens because people only receive partial information—whatever ideas comprise the echo chambers that algorithms have created for them, social media-algorithmic speech.[162] Similarly, social media-algorithmic speech does not help to prevent tyranny, abuse of power, or entrenchment of current regimes because they funnel users into filter bubbles that do not provide full and adequate information.[163] The self-government-related idea of providing a safety valve for dissent applies particularly poorly to social media-algorithmic speech. As nonhuman creatures of technology,[164] social media algorithms have no need or ability to voice dissent because they cannot vote and are not people. Ultimately, social media-algorithmic speech does not promote self-government and, therefore, does not merit such stringent protection under this justification.

Autonomy also fails to justify applying such a protective standard to social media-algorithmic speech. Under the autonomy justification, the end goal of the State is autonomy, to which free speech is essential because it empowers expression and self-definition.[165]

---

157. *See* CHEMERINSKY, *supra* note 39, at 1180-81; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

158. *See* CHEMERINSKY, *supra* note 39, at 1180-81; SULLIVAN & FELDMAN, *supra* note 43, at 7.

159. *See* SULLIVAN & FELDMAN, *supra* note 43, at 7-8.

160. *See id.* at 8; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

161. *See* Robichaud, *supra* note 12.

162. *See id.*; Rabbit Hole, *supra* note 12; NPR Staff, *supra* note 13.

163. *See* Robichaud, *supra* note 12; Rabbit Hole, *supra* note 12.

164. *See* Kim, *supra* note 3, at 149.

165. *See* CHEMERINSKY, *supra* note 39, at 1183; SULLIVAN & FELDMAN, *supra* note 43, at 8-9; *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

Furthermore, censorship is inconsistent with the idea of autonomy.[166] Because algorithms are not human,[167] they have no need or ability to develop the kind of autonomy that this justification imagines. Although social media algorithms shape human self-definition and self-expression,[168] robotic tools for ordering social media content have no need or ability to self-define or self-express.[169] Thus, censoring algorithms is not inconsistent with autonomy because algorithms lack the capacity for the kind of autonomy that this justification envisions.

Negative justifications do not adequately justify such stringent protections of social media-algorithmic speech. The negative justifications rationale is that the government is ill-suited to regulate speech because it would be incentivized to censor dissenting views, minority views, and criticism[170] and struggles to distinguish truth and falsehood.[171] Here, the risks of government censorship are de minimis. Platform users' underlying speech (in the form of posts, shares, likes, et cetera) would remain intact if the government chose to be less protective of social media-algorithmic speech, which is the message sent when a social media algorithm pervasively and repeatedly pushes the same types of ideas in a filter bubble, culminating in an overarching idea that belongs to the social media algorithm itself rather than to any individual content creator. People would still be able to voice their views, but social media algorithms, in certain instances, would not be able to promulgate messages of their own creation with impunity. Censoring social media algorithms this way is less concerning because these algorithms are merely creatures of technology that cannot vote.[172]

---

166. *See* SULLIVAN & FELDMAN, *supra* note 43, at 9.

167. *See* Kim, *supra* note 3, at 149.

168. *See* Kathryn Jones, *The Fallacy of Self-Expression: How Algorithms Have Invaded Your Closet*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J.: BLOG (Oct. 5, 2018), http://www.fordhamiplj.org/2018/10/05/the-fallacy-of-self-expression-how-algorithms-have-invaded-your-closet/ [https://perma.cc/95W6-953E].

169. *See* Kim, *supra* note 3, at 147-50.

170. *See* SULLIVAN & FELDMAN, *supra* note 43, at 9-10; CHEMERINSKY, *supra* note 39, at 1180-81.

171. *See* SULLIVAN & FELDMAN, *supra* note 43, at 10.

172. *See* Kim, *supra* note 3, at 147-50.

Finally, the tolerance justification is the least applicable to protecting social media-algorithmic speech from regulation. The tolerance justification for free speech is that free speech exposes people to many ideas with which they disagree, increasing tolerance, which is an integral value.[173] But social media-algorithmic speech does precisely the opposite of what the tolerance justification envisions.[174] This form of speech prevents people from interacting with an array of ideas by creating filter bubbles that act as echo chambers.[175] In fact, this speech actually makes people less tolerant precisely by funneling people into filter bubbles of increasingly polarized content.[176]

Because even the most dangerous social media-algorithmic speech is likely unable to meet the *Brandenburg* standard[177] and because free speech theoretical justifications do not support protecting this form of speech so robustly,[178] the *Brandenburg* standard is unjustifiably protective of this kind of speech. The question then becomes: is there anything that can be done to address this problem, or is the law unwaveringly wedded to the *Brandenburg* standard in every scenario? Supreme Court dicta provide an answer. The Court has acknowledged that different mediums present unique First Amendment issues[179] and that old doctrines cannot always be imported to the digital world.[180] As such, this Note argues that the law can and should evolve from the

173. *See* CHEMERINSKY, *supra* note 39, at 1184.

174. As previously discussed, social media-algorithmic speech creates filter bubbles in which people are not exposed to a variety of views and ideas and instead only see one side of a given idea or issue. *See supra* notes 109-19 and accompanying text.

175. *See* Robichaud, *supra* note 12; NPR Staff, *supra* note 13; *supra* notes 119-22, 127-37 and accompanying text.

176. *See* Wu, *supra* note 127; Dick Lilly, Opinion, *Social Media's Algorithms Lead Us Down Dark, Divisive Rabbit Holes*, SEATTLE TIMES (Oct. 28, 2018, 9:47 AM), https://www.seattletimes.com/opinion/social-medias-algorithms-lead-us-down-dark-divisive-rabbit-holes/ [https://perma.cc/28QJ-D9EW].

177. *See supra* Part II.B.1.

178. *See supra* Part II.B.2.

179. *See* F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978) (plurality opinion) ("We have long recognized that each medium of expression presents special First Amendment problems." (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952))).

180. *See* Riley v. California, 573 U.S. 373, 386 (2014) (barring warrantless searches of cell phone data).

Brandenburg standard when assessing incitement with respect to social media-algorithmic speech.

III. THE SOLUTION

Social media-algorithmic speech presents a uniquely high risk of actual violent, lawless outcomes.[181] However, currently, despite social media-algorithmic speech's high incitement risks, the Court would most likely use the *Brandenburg* standard to evaluate potential social media-algorithmic incitement.[182] This incredibly speech-protective standard[183] affords social media-algorithmic speech more protection than theoretical free speech justifications warrant.[184] To address the incitement problems inherent in social media-algorithmic speech, the Court can[185] and should break from the *Brandenburg* standard when assessing potentially inciting social media-algorithmic speech. The Court should craft a new incitement standard for social media-algorithmic speech that is less exacting by altering *Brandenburg*'s intent and imminence elements.

A. A New Incitement Standard for Social Media-Algorithmic Speech

Social media-algorithmic speech is uniquely likely to produce lawless action.[186] However, the *Brandenburg* standard for incitement cannot address the problem of social media-algorithmic incitement because internet speech is incredibly unlikely to meet the standard's stringent requirements.[187] The theoretical justifications underpinning Supreme Court free speech jurisprudence simply cannot justify protecting social media-algorithmic speech

181. *See supra* Part II.A.

182. *See* Benjamin, *supra* note 35, at 1446 (arguing that algorithm-based decisions, like those of social media algorithms, are speech that the First Amendment protects); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (announcing the current standard for assessing whether speech qualifies as unprotected incitement).

183. *Compare Brandenburg*, 395 U.S. at 444-49, *with* Whitney v. California, 274 U.S. 357, 359-60, 372 (1927).

184. *See supra* Part II.B.2.

185. *See supra* notes 177-80 and accompanying text.

186. *See supra* Part II.A.

187. *See supra* Part II.B.1.

so robustly.[188] Therefore, to assess social media-algorithmic incitement, the Court should craft a less stringent sliding-scale standard, one that balances likelihood against intent and imminence such that when lawless action is extremely likely, intent can be reckless and lawless action does not have to be as imminent as *Brandenburg* requires.

At present, the *Brandenburg* standard's intent element seems to require more than recklessness as to the potential for lawless action.[189] Instead, for social media-algorithmic speech, the Court should require a lower standard of intent. The Court should allow recklessness to suffice because lawless action is so likely to occur[190] and the resulting lawless action is often incredibly severe.[191] Furthermore, the Court previously allowed a decision to stand that held a company liable for a less clearly directed intent.[192] The lower court held the company liable in part precisely because the risks and likelihood of lawless action were so high.[193]

Similarly, social media-algorithmic speech is unlikely to meet the *Brandenburg* standard's imminence requirement.[194] Because it matters not just *when* the algorithm *spoke* but also *when* the user *received* that speech, it is highly unlikely that social media-algorithmic speech could be found to incite lawless action imminently.[195]

---

188. *See supra* Part II.B.2.

189. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

190. *See supra* Part II.A.

191. *See* Temple, *supra* note 23 (attacks on refugees increased a full 50 percent in towns where Facebook use increased); Blake et al., *supra* note 23, at 315 (showing that more misogynistic tweets in a geographic area corresponded with increased rates of violence against women in that area); Frenkel, *supra* note 28 (discussing how the violence of the Capitol insurrection began on mainstream social media sites); Reich et al., *supra* note 29 (discussing that social media-algorithmic speech on Facebook has led to extreme violent outcomes, including death); Francis Agustin, *Activists and Healthcare Professionals Are Trying to Stomp Out Anti-Vaxx Info Online—but Social Media Algorithms Are Working Against Them*, BUS. INSIDER (Oct. 2, 2021, 7:52 AM), https://www.businessinsider.com/social-media-algorithms-unwinnable-misinformation-battle-2021-9 [https://perma.cc/X64W-2FQ9].

192. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 242-43 (1997), *cert. denied*, 523 U.S. 1074 (1998).

193. *See id.* at 267 (noting "the extraordinary comprehensiveness, detail, and clarity of ... instructions for criminal activity ... the boldness of ... palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction").

194. *See supra* Part II.B.1; Emerson J. Sykes, *In Defense of* Brandenburg*: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15, 33-34 (2019).

195. *See* Sykes, *supra* note 194, at 33-34.

What kind of lag will exist between an algorithm making the decisions it makes and a user receiving the product of those decisions is simply uncertain. This becomes especially uncertain because this Note does not propose that the algorithm should be held liable for single pieces of content. A social media algorithm speaks by making decisions that create filter bubbles, which are the byproduct of algorithms pushing multitudinous pieces of content.[196] These bubbles make messages of their own, and it is this accumulation that ultimately sends the inciting message for which social media companies should be liable. Attempting to use imminence to measure such a thing is basically impossible. Because social media-algorithmic speech is uniquely tied to violence[197] and is so unlikely to satisfy the imminence requirement,[198] the Court should do away with or at least severely scale back the imminence requirement when assessing potential social media-algorithmic incitement.

After altering these prongs, the Court should use the doctrine of respondeat superior to hold social media companies liable for incitement that their algorithms cause. Under this doctrine, employers are liable for their employees' wrongful acts.[199] At least one scholar has argued that companies should be liable for their algorithms under the doctrine of respondeat superior, saying that "[i]f a corporation employs an algorithm that causes criminal or civil harm, the corporation should be liable just as if the algorithm were a human employee."[200] Social media algorithms are essentially equivalent to social media company employees because the algorithms work in the service of the employer and the employer has

196. *See* NPR Staff, *supra* note 13.

197. *See supra* Part II.A; Andrew Marantz, Opinion, *Free Speech is Killing Us: Noxious Language Online Is Causing Real-World Violence. What Can We Do About It?*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/Q5KS-LJ4C].

198. *See* Sykes, *supra* note 194, at 33-34.

199. *See Respondeat Superior*, BLACK'S LAW DICTIONARY (11th ed. 2019). This includes employees' wrongful criminal acts. *See* Robert Luskin, *Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification*, 57 AM. CRIM. L. REV. 303, 303 (2020).

200. Mihailis E. Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 DUKE L.J. (forthcoming 2023) (manuscript at 1-2).

the right to control the details of how the algorithm works.[201] Algorithms make inciting speech in the scope of their employment.[202]

Thus, the solution to the problem of social media-algorithmic incitement is this: when lawless action is extremely likely, courts should hold social media companies liable under the theory of respondeat superior for their algorithms' speech such that the intent requirement is more relaxed and the imminence requirement is practically eliminated.

B. Counterarguments Regarding Social Media-Algorithmic Speech, Provision of Information, and § 230

It is worthwhile to address why this solution is possible despite certain counterarguments. Specifically, some may argue that social media-algorithmic speech is protected provision of information.[203] Others may argue that this kind of regulation of social media-algorithmic speech runs afoul of 47 U.S.C. § 230(c)(1), which dictates that social media companies cannot be held liable for users' speech.[204] However, these arguments are substantially flawed such that they do not undermine this Note's proposal.

1. Social Media-Algorithmic Speech Is More Than Provision of Information

Some argue that communicating information that facilitates criminal acts but does not advocate lawlessness fails the *Brandenburg* standard.[205] These people may also argue that social

---

201. *See Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019); Diamantis, *supra* note 200, at 7.

202. *See Scope of Employment*, BLACK'S LAW DICTIONARY (11th ed. 2019); Diamantis, *supra* note 200, at 1-2.

203. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 444-49 (1969) (per curiam) (exemplifying that under the Court's current incitement standard, simply providing information might not qualify as unprotected incitement because it might fail the intent and imminence elements of the *Brandenburg* standard); SULLIVAN & FELDMAN, *supra* note 43, at 52-53.

204. *See* 47 U.S.C. § 230(c)(1); Will Oremus, *Lawmakers' Latest Idea to Fix Facebook: Regulate the Algorithm*, WASH. POST (Oct. 12, 2021, 9:00 AM), https://www.washingtonpost.com/technology/2021/10/12/congress-regulate-facebook-algorithm/ [https://perma.cc/HM5V-283X].

205. *See, e.g.*, SULLIVAN & FELDMAN, *supra* note 43, at 52-53.

media-algorithmic speech essentially communicates information that facilitates criminal acts but does not advocate lawlessness. True, social media-algorithmic decisions placing content in users' feeds do not come with explicit statements advocating crime-facilitating messages. However, sending such crime-facilitating information so overwhelmingly[206] does send a kind of message of support.[207]

Furthermore, not all scholars agree that crime-facilitating communication of information should be protected speech,[208] and the Supreme Court has never weighed in definitively on either side.[209] In some instances, lower courts have held that providing crime-facilitating information qualifies as unprotected incitement even under *Brandenburg*.[210] In one such instance, the Supreme Court explicitly refused to review the lower court's ruling.[211] In this vacuum, Professor Eugene Volokh has proposed a rule for handling crime-facilitating speech:

> [C]rime-facilitating speech ought to be constitutionally protected unless (1) it's said to a person or a small group of people when the speaker knows these few listeners are likely to use the information for criminal purposes, (2) it's within one of the few classes of speech that has almost no noncriminal value, or (3) it can cause extraordinarily serious harm (on the order of a nuclear attack or a plague) even when it's also valuable for lawful purposes.[212]

Social media-algorithmic speech might meet Professor Volokh's rule. This kind of speech could satisfy the first scenario because it

206. *See supra* Part II.A (discussing how social media-algorithmic speech inundates users by creating filter bubbles that act as echo chambers and by persisting across platforms such that this inundation is inescapable).

207. *See* Hassan & Barber, *supra* note 25 (describing how being inundated with information can lead people to lend it more credence); Temple, *supra* note 23 (showing that within filter bubbles, people come to believe that violence is more supported than it actually is).

208. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1106 (2005).

209. *See id.* at 1103.

210. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 242-43 (1997), *cert. denied*, 523 U.S. 1074 (1998).

211. *See generally id.*

212. *See* Volokh, *supra* note 208, at 1106 (emphasis omitted).

curates for and is directed to specific, individual users[213] and, therefore, is actually "said" to a single person even though algorithms operate across entire platforms for all users.[214] Moreover, the algorithmic speaker knows that the user is likely to use social media-algorithmic speech for criminal purposes.[215] Social media-algorithmic speech might also satisfy Professor Volokh's third scenario. This type of speech contributed to the January 6, 2021, insurrection,[216] which is arguably an "extraordinarily serious harm" that is "on the order of a nuclear attack or a plague."[217] Furthermore, social media-algorithmic speech has contributed to the spread of COVID-19,[218] which is precisely "on the order of ... a plague."[219]

Moreover, this counterargument somewhat misses the mark of this Note's argument. The argument that social media-algorithmic speech that communicates crime-facilitating information but does not advocate lawless action does not amount to incitement operates under the presumption of applying the *Brandenburg* standard.[220] Professor Volokh's argument similarly presumes application of the *Brandenburg* standard.[221] But this Note argues for a break from the *Brandenburg* standard when assessing social media-algorithmic speech's potential incitement. Frankly, this Note's proposed altered, less stringent standard is all the more supported precisely because social media-algorithmic incitement is so dangerous that it can satisfy rules that presume application of the *Brandenburg* standard.[222]

---

213. *See generally* Kim, *supra* note 3.

214. *See generally id.*

215. *See* Reich et al., *supra* note 29 (writing that certain social media companies know that algorithmic speech "has led to violence and death"). The companies' knowledge is the algorithms' knowledge because companies create and manage algorithms. *See generally* Kim, *supra* note 3; Diamantis, *supra* note 200.

216. *See* Frenkel, *supra* note 28; Reich et al., *supra* note 29; Mac & Frenkel, *supra* note 128.

217. Volokh, *supra* note 208, at 1106 (emphasis omitted).

218. *See* Agustin, *supra* note 191.

219. *See* Volokh, *supra* note 208, at 1106.

220. *See* SULLIVAN & FELDMAN, *supra* note 43, at 52-53.

221. *See* Volokh, *supra* note 208, at 1103-06.

222. *See supra* notes 216-19 and accompanying text.

2. Regulating Social Media-Algorithmic Speech Would Not Run Afoul of § 230

Others may argue that this proposed solution to the problem of social media-algorithmic incitement runs afoul of 47 U.S.C. § 230(c)(1).[223] Under § 230, social media companies cannot be held liable for their users' speech.[224] As such, social media companies are not liable when content that users have posted to companies' sites causes lawless activity.[225] At first blush, this counterargument seems formidable. But this counterargument misses the mark. This Note does not argue that social media companies should be held liable for users' speech. Instead, this Note argues that social media companies should be held liable for *their own* speech as made through their algorithms.[226] Social media-algorithmic decisions amount to speech of their own apart from the content about which they make decisions.[227] This social media-algorithmic speech has a message of its own, distinct from the message of any underlying individual piece of content: the message of the filter bubble's echo chamber. An individual piece of content written by a user might say "I hate lawyers." A social media algorithm sending countless similar pieces of increasingly radicalized content from a vast array of users sends a message of its own—for example: "lawyers are fundamentally bad, and we should get rid of them by using violence."

Some have argued that other, seemingly similar proposals that attempt to leave § 230 in place nonetheless run afoul of § 230.[228] Some lawmakers have proposed legislation that would prohibit algorithms from discriminating "on the basis of race, age, gender and other protected classes."[229] Certain scholars have critiqued this idea of regulating the types of speech that social media algorithms

223. *See* Oremus, *supra* note 204.

224. *See* 47 U.S.C. § 230(c)(1).

225. *See id.*; Oremus, *supra* note 204; Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html [https://perma.cc/RNE7-SJV3].

226. *See* Benjamin, *supra* note 35, at 1446. This idea draws on the concept of respondeat superior, under which employers (social media companies) are liable for their employees' (algorithms) wrongful acts. *See Respondeat Superior*, *supra* note 199; Diamantis, *supra* note 200.

227. *See* Benjamin, *supra* note 35, at 1446.

228. *See* Oremus, *supra* note 204.

229. *Id.*

can amplify, arguing that such proposals likely run afoul of § 230 and the First Amendment.[230] Yet those proposals are fundamentally distinct from this Note's proposed solution. Those proposed regulations depend on prohibiting algorithms from amplifying certain categories of underlying messages by users.[231] This Note does not propose altogether disallowing algorithmic amplification of certain categories of messages. Instead, this Note proposes that when social media algorithms go too far and express an overarching inciting idea so frequently and inescapably with their speech that they incite lawless action, social media companies should be held liable for incitement under a less exacting standard than *Brandenburg*.

CONCLUSION

Social media algorithms make lawless action a particularly likely outcome.[232] Lawless action is especially likely with social media-algorithmic speech precisely because of how social media algorithms operate.[233] However, under the current *Brandenburg* standard for assessing whether speech qualifies as unprotected incitement, social media-algorithmic speech (and internet speech in general, for that matter) is highly unlikely to meet the necessary requirements to qualify as inciting.[234] Instead, *Brandenburg* robustly protects social media-algorithmic speech.[235] But the theories that undergird First Amendment protection simply do not justify protecting social media-algorithmic speech so robustly.[236]

As such, instead, when social media algorithms go too far and express an overarching inciting idea so frequently and inescapably that their speech becomes inciting, the Court should hold social media companies liable for incitement under a less stringent standard than *Brandenburg* through the theory of respondeat superior. This less stringent standard should operate such that when lawless

230. *See id.*
231. *See id.*
232. *See supra* Part II.A.
233. *See supra* Part II.A.
234. *See supra* Part II.B.1; Sykes, *supra* note 194, at 31-34.
235. *See supra* Part II.B.1; Sykes, *supra* note 194, at 31-34.
236. *See supra* Part II.B.2.

action is extremely likely, the intent requirement can be downgraded and lawless action need not be imminent. This solution would take steps to remedy the problematic relationship between social media-algorithmic speech and violent lawless outcomes.

Anna Rhoads[*]

* J.D. Candidate, 2023, William & Mary Law School; B.A., English and Political Science, 2020, University of North Carolina at Chapel Hill. This Note would not have been possible without the hard work and dedication of the *William & Mary Law Review* staff. Thank you to Professor Timothy Zick. Special thanks to Sarah Fisher, Kristen Vicknair, Ram Reddy, my parents, and my sister for their constant support and willingness to listen.