NOTE

CORPORATIONS' FIRST AMENDMENT RIGHTS AND ALGORITHMIC COCOONS

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This Note examines how corporate First Amendment doctrine applies to algorithmic systems that curate commercial information and public discourse across online platforms. Courts have increasingly treated ranking, recommendation, and moderation practices as exercises of protected editorial judgment. At the same time, the Court has justified protection for corporate speech in part by reference to listener-centered interests in access to information and competitive comparison. This Note argues that the interaction between these doctrinal strands and contemporary algorithmic intermediation reveals a structural tension. Data-driven optimization can generate individualized informational environments—what this Note terms "algorithmic cocoons"—in which users encounter content, offers, and prices shaped by inferences drawn from their own past behavior. Through iterative feedback loops, these systems tend to reinforce prior interactions, narrowing the range of information users are likely to encounter in both commercial and public discourse.

By reconstructing the genealogy of corporate constitutional rights and the justificatory strands of corporate speech doctrine, this Note shows that existing doctrine contains the conceptual resources for articulating a distinction between core editorial expression and infrastructural mechanisms of behavioral optimization. Recognizing this distinction clarifies how First Amendment doctrine can accommodate a more granular analysis of algorithmic intermediation without collapsing infrastructural design into protected editorial

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judgment, while also identifying space for forms of regulation that can operate consistently with the doctrine's existing commitments.

INTRODUCTION

Digital life has become a central part of everyday experience, and much of it now runs through corporate platforms whose systems quietly decide what users see. When you open TikTok, Instagram, or a delivery app, you find a stream of videos, posts, products, and prices that no one human being has "chosen" for you. Instead, ranking and recommendation systems, trained on vast collections of behavioral data,[1] assemble and reorder content

1. Nick Clegg, *How AI Influences What You see on Facebook and Instagram*, META (June 29, 2023), https://about.fb.com/news/2023/06/how-ai-ranks-content-

in real time. In recent litigation, these platforms present themselves as First Amendment speakers. In *Moody v. NetChoice*[2] and *TikTok v. Garland*,[3] the platforms argued that their feeds, moderation policies, and ranking systems were exercises of corporate editorial judgment and should therefore receive strong constitutional protection.[4]

This Note focuses on a structural consequence of that claim. The architectures that platforms defend as speech mediate both the commercial marketplace and the marketplace of ideas. Within the commercial domain, targeted advertising, sponsored placement, and dynamic pricing create what this Note calls a commercial marketplace cocoon: users see only a subset of products and offers, often on individualized terms that are difficult to compare to what others receive. In the public discourse domain, engagement-driven feeds, recommendation engines, and political microtargeting contribute to a marketplace-of-ideas cocoon: users encounter dense streams of content that track inferred preferences and identities, while other perspectives and framings are set aside. In both scenarios, the user is not simply seeing less information; the environment itself is built out of what the system has learned about the user's past behavior.

The result is a structural tension for corporate First Amendment doctrine. When courts protect corporate platform control over ranking, recommendation, and moderation, they often do so by analogizing their activity to that of newspapers and broadcasters making recognizable editorial choices.[5] At the same

on-facebook-and-instagram/ [https://perma.cc/39GG-J5DH]; *Recommendations*, YOUTUBE, https://www.youtube.com/intl/en_be/howyoutubeworks/recommendations/ [https://perma.cc/ M592-2K7H] (last visited Mar. 28, 2026).

2. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 721 (2024); Brief for Respondents at 5–6, 35–40, Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023) (No. 22-277).

3. *See* TikTok Inc. v. Garland, 604 U.S. 56, 67 (2025).

4. *See id.*; *Moody*, 603 U.S. at 721 (describing facial First Amendment challenges brought against Florida and Texas's statutes regulating social media platforms' content moderation policies).

5. *See Moody*, 603 U.S. at 716–17 (2024). The case was presented as a facial challenge, and the Court vacated and remanded because the lower courts had not determined the laws' full scope or compared their constitutional and

time, the Court has described protection for corporate speech in functional and structural terms. In the commercial line, it emphasizes the informational value of advertising for consumers and its role in supporting comparison and competition among lawful products and services.[6] In the public debate and campaign-finance cases, it frames corporate political expression as part of the set of messages voters may consider,[7] and stresses that it is not the government's role to reduce the influence of some speakers in

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unconstitutional applications. *Id.* at 723–26. Still, the Court addressed the First Amendment issues to correct the 5th Circuit's view that platform curation is "not speech," explaining that feed-curation reflects protected editorial discretion. *Id.* at 726–27. Several Justices also emphasized the limits of the holding given the posture of the case: because NetChoice brought a facial challenge on an underdeveloped record, the Court could not determine how platforms actually moderate content or whether all algorithmic practices are expressive. *See id.* at 748–49 (Jackson, J., concurring in part and concurring in the judgment); *id.* at 749–50 (Thomas, J., concurring). Justice Alito underscored this point, noting that NetChoice was suing on behalf of multiple distinct platforms and that the Court lacked sufficient information about how each of them actually moderates users' content. *See id.* at 766–67 (Alito, J., concurring).

6. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763–65 (1976) (emphasizing consumers' interest in the free flow of commercial information and that such information is indispensable to informed resource allocation in a free-enterprise economy); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562–63 (1980) (stating that commercial expression assists consumers and furthers the societal interest in the fullest possible dissemination of information, and that the First Amendment's concern for commercial speech is based on the informational function of advertising); Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650–52 (1985) (extending First Amendment protection to commercial speech justified by the value to consumers, and used to justify compelled factual disclosures); Sorrell v. IMS Health Inc., 564 U.S. 552, 566–67 (2011) (reaffirming, in the context of pharmaceutical marketing data, that consumers may have a particularly strong interest in the free flow of commercial information, especially where information can save lives) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977))).

7. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777, 791–92 (1978) (treating corporate advocacy on public-issue ballot measures as core political speech and emphasizing that voters, not the State, judge the merits of competing arguments regardless of the speaker's corporate identity); Citizens United v. FEC, 558 U.S. 310, 339, 349 (2010) (reaffirming that political speech is indispensable to decision making in a democracy even when it comes from corporations (quoting *Bellotti*, 435 U.S. at 777)).

order to amplify others.[8] Those justifications are articulated against a picture of communication environments in which the central aim is to prevent the state from filtering or rebalancing expression; they are not meant to guarantee any particular distribution of information or viewpoints. Algorithmic cocoons complicate that picture. Corporate control over digital architectures can produce self-referential information environments, as ranking and recommendation systems rely on feedback loops built from users' own inferred preferences to shape what they see. Yet, the platforms invoking the First Amendment often describe these processes as exercises of editorial judgment.[9]

This Note argues that corporate constitutional doctrine and algorithmic intermediation now interact in ways that expose a gap between some of the reasons the Court has traditionally offered for protecting corporations' constitutional rights and the kinds of environments those protections now help sustain. To that end, Part I reconstructs the corporate-rights background against which corporate speech doctrine developed, emphasizing both the limited, instrumental way early cases treated corporations and the later development of corporate speech doctrine, which has been justified through a combination of speaker-neutral principles and information- and competition-based rationales. Part II describes how algorithmic systems now mediate the flow of commercial information and public debate, and how courts have begun to treat those systems. Part III identifies the dual cocoon effect: it shows how corporate use of behavioral data and platform design narrows commercial and informational choice sets in ways that are not well captured by existing doctrinal categories. Part IV

8. *See, e.g.*, *Bellotti*, 435 U.S. at 790–91 (rejecting the notion that government may restrict the speech of some elements of our society to enhance the relative voice of others (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976))); *Citizens United*, 558 U.S. at 349–50 (rejecting *Austin v. Michigan Chamber of Commerce's* antidistortion rationale as incompatible with the First Amendment because it suppresses political speech based on the speaker's corporate identity); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734–35, 748–50 (2011) (striking down matching-funds scheme and holding that leveling the playing field is not a legitimate basis for burdening campaign speech).

9. *See Moody*, 603 U.S. at 721; Brief for Respondents, *supra* note 2, at 5–6, 35–40.

situates these developments within the broader corporate-rights genealogy and explains why the current framework struggles to recognize, let alone address, the kinds of structural harms that follow when corporate control over information environments operates through behavioral optimization and interface design.

The aim is not to revisit the Court's rejection of equalization rationales or to diminish the protection afforded to editorial judgment. It is to clarify, within the Court's own framework, which aspects of contemporary algorithmic intermediation reflect the kind of expressive choice that First Amendment doctrine was designed to shield, and which aspects are better understood as infrastructural or data-processing practices that may be subject to structurally oriented regulation. That regulatory space is not external to the doctrine, but anchored in the listener-centered and informational justifications the Court has recognized alongside its commitments to speaker neutrality and editorial autonomy. The project here is interpretive and clarificatory rather than overtly prescriptive. Its contribution lies in showing that existing corporate First Amendment doctrine, understood within the broader genealogy of corporate constitutional rights, already contains the conceptual resources for articulating a distinction between core editorial expression and the infrastructural mechanisms through which that expression now flows, and in explaining how that distinction clarifies the scope of permissible structural regulation.

I. CORPORATE FIRST AMENDMENT FOUNDATIONS

A. The Backdrop: Corporate Constitutional Rights Before First Amendment Recognition

The Court's first encounters with corporations as constitutional subjects had little to do with expression. They arose out of disputes over charters, property, jurisdiction, and regulation. In *Trustees of Dartmouth College v. Woodward*,[10] the Court treated the college's charter as a contract within the meaning of the Contract Clause and held that the New Hampshire

10. 17 U.S. (4 Wheat.) 518 (1819).

legislature could not unilaterally alter it.[11] The opinion famously describes the corporation as an "artificial being, invisible, intangible, and existing only in contemplation of law," created to hold property and outlive its members.[12] The point was not to ascribe natural rights to a collective entity, but to protect a particular institutional arrangement, endowed property held in corporate form, from retroactive legislative interference.[13]

Other nineteenth-century decisions extended that basic recognition of corporations as entities capable of holding rights, while still insisting that they were creatures of law. In *Bank of the United States v. Deveaux*,[14] the Court permitted a federally chartered bank to sue in federal court by looking through to the citizenship of its members for diversity purposes.[15] Later, *Bank of Augusta v. Earle*[16] treated corporations as "persons" in the sense that they could make contracts and do business across state lines, subject to principles of comity;[17] even though afterward, in *Paul v. Virginia*,[18] the Court refused to treat corporations as "citizens" for Privileges and Immunities Clause purposes.[19] These decisions acknowledged that corporations could invoke some constitutional protections in order to transact, without equating them with natural persons for all constitutional purposes.

At the same time, the Court used corporate cases to articulate the emerging doctrines of police power and economic regulation.

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11. *See id.* at 650 ("[T]his is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States.").

12. *Id.* at 636.

13. *See id.* at 661–62 (explaining that Dartmouth, endowed and founded by private persons, derived its corporate powers, rights and privileges from the founder's property, and that legislative changes to the trustees and management impaired the contractual arrangement governing that endowment).

14. 9 U.S. (5 Cranch) 61 (1809).

15. *See id.* at 87.

16. 38 U.S. (13 Pet.) 519 (1839).

17. *See id.* at 590, 592 (recognizing corporations as artificial persons and allowing them, by comity, to make contracts in other states).

18. 75 U.S. (8 Wall.) 168 (1869).

19. *See id.* at 177 (holding that a corporation cannot claim the rights of citizens under the Privileges and Immunities Clause because it is not a member of the political community; but rather an artificial entity "created by the legislature, and possessing only the attributes which the legislature has prescribed").

The *Slaughter-House Cases*[20] upheld a state-created slaughterhouse monopoly against a Privileges and Immunities Clause challenge, emphasizing the breadth of state authority to regulate the "health and comfort" of the population and confining federal privileges or immunities to a narrow set of rights.[21] Later, the *Railroad Commission Cases*[22] and related rate-regulation decisions accepted that corporations could be subject to extensive control over the prices they charged and the services they provided, but treated government interference as a potential violation of due process when regulation became confiscatory or so unreasonable as to amount to a plain abuse of power.[23] The premise was that corporations could invoke constitutional protection against extreme regulatory measures, even as they remained subject to general schemes of economic regulation.

By the end of the nineteenth century, the Court began to speak more explicitly in terms of liberty and corporate autonomy. *Allgeyer v. Louisiana*[24] read the Fourteenth Amendment's protection of liberty[25] to include the freedom to pursue lawful business purposes, including the ability to "enter into all contracts which may be proper, necessary and essential" to that pursuit.[26] The case struck down a Louisiana statute that penalized a local firm for mailing a letter into New York to initiate coverage under an open marine insurance policy with a New York insurer.[27] *Allgeyer* does not turn on any natural rights of the corporation as such; rather, it treats the corporate defendants as rights-holders for purposes of liberty of contract and limits the reach of state police power when it interferes with lawful out-of-state transactions.[28] The opinion marks a shift from the earlier focus on protection against confiscatory interference with property toward

20. 83 U.S. (16 Wall.) 36 (1873).
21. *See id.* at 37.
22. 116 U.S. 307 (1886).
23. *See id.*
24. 165 U.S. 578 (1897).
25. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]")
26. *See Allgeyer*, 165 U.S. at 586.
27. *Id.*
28. *Id.*

describing corporate actors as bearers of substantive due process rights in their own name.

Early twentieth-century decisions deepen this pattern and also highlight its limits. In *Hale v. Henkel*,[29] the Court held that a corporation is "but an association of individuals with a distinct name and legal entity," and that in organizing itself as a collective body it does not waive "constitutional immunities appropriate to such body."[30] Corporations are entitled to some protection under the Fourth Amendment against unreasonable searches and seizures of their papers, but they cannot invoke the Fifth Amendment privilege against self-incrimination.[31] At the same time, *Hale* underscored that corporations remain subject to investigation and that there is a "reserved right" in the legislature to inquire whether they have exceeded their powers.[32] The opinion thus crystallizes a dual message: corporations may claim certain constitutional protections, but they also stand in a position of heightened accountability relative to natural persons.

Some scholars read this doctrinal pattern against the broader background of a transformation in the American economy. For Berle and Means, that transformation consisted in the replacement of the typical nineteenth-century firm, which was small, owner-managed, and limited in scale by the proprietors' personal wealth.[33] This model was replaced by large corporate aggregates in which the wealth of "innumerable individuals" was combined into single producing organizations employing tens or hundreds of thousands of workers under unified control.[34] In this new corporate system, investors surrender direct control over their property to centralized managers, breaking older property relationships and making the corporation the dominant mechanism for mobilizing capital and organizing production.[35] Thus, the authors portray the modern business corporation as the primary vehicle for pooling dispersed capital, separating

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29. 201 U.S. 43 (1906).
30. *See id.* at 76.
31. *Id.* at 70, 76.
32. *Id.* at 75.
33. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 2–3 (Macmillan, 1933).
34. *Id.*
35. *See id.* at 2–5, 7–8.

ownership and control, and organizing large-scale enterprise.[36] They emphasize that the modern corporation depends on investors receiving legally protected rights in their shares,[37] including the right to the enterprise's profit.[38] They further note that, because modern enterprises operate over long or indefinite periods and investors can recover their capital by selling their securities in public markets rather than through direct control or eventual liquidation, individuals can still commit their wealth to these large corporate organizations.[39] Legally, Berle and Means stress that the corporate form evolved from a chartered association of owners tightly supervised by the state into a mechanism through which many individuals deliver capital into the hands of a centralized control, endowed with broad powers over the beneficial interests in that capital.[40]

Kolko likewise treats the early twentieth century as a period in which industrialism was reorganized into what he calls "political capitalism": a synthesis of politics and economics in which major firms used federal legislation and administrative structures to secure stability, predictability, and protection from competition.[41] On his account, mergers, the scale of effective production, and the direction of technological change were not the outcome of impersonal market forces, but of deliberate decisions by corporate and financial elites to rationalize the economy on terms favorable to large enterprise.[42] He emphasizes that, as large firms consolidated, they often came to favor certain forms of federal regulation and uniform rules that stabilized competition and protected incumbents.[43]

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36. *Id.* at 4–5, 7–8, 69.

37. *See id.* at 347 ("Private property in the share of stock . . . continues, since the owner possesses the share and has power to dispose of it, but his share of stock is only a token representing a bundle of ill-protected rights and expectations.")

38. *See id.* at 338 ("The expectation of the entire profit is the precise lure used to induce investment in corporate enterprises.")

39. *See id.* at 281–82.

40. *See id.* at 127.

41. *See* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916 3–4, 279–80 (Free Press, 1963).

42. *See id.* at 303.

43. *See id.* at 174–76.

Against this economic and doctrinal backdrop, the early corporate-rights cases can be understood as treating corporations as artificial entities that can hold property, make contracts, and invoke selected constitutional protections, while insisting that those entities remain subject to substantial public regulation. Read in light of the transformation Berle and Means describe, and of Kolko's account of "political capitalism," these decisions stabilize corporations as the main private instruments for raising capital and supplying goods and services. The protection of corporate charters, property, and contractual autonomy is not presented as an end in itself; rather, it is implicitly tied to the role of corporations as institutional devices for organizing productive activity within a regulatory state that purports to retain authority over them.

The genealogy of corporate constitutional rights cases described earlier matters for later First Amendment doctrinal development. When the Court eventually extended robust protection to corporate expression, first in a series of commercial speech cases and then in a line of cases involving public debate and campaign finance, it did so against a background in which corporations were already entrenched as central economic actors with constitutionally protected property and contract rights, but also with an accepted expectation of regulatory supervision. The information-based and speaker-neutral justifications for protecting corporate speech sit on top of these earlier developments. Part IV returns to those developments and asks how they fare when the core corporate activity at issue is not the holding of property or the making of contracts, but the design of algorithmic architectures that structure other people's commercial and informational environments.

B. Information and Competition as a Justificatory Strand

Among the justificatory strands supporting modern corporate speech protection is a functional account of what expression does for listeners. In the commercial context, the Court in *Virginia State Board of Pharmacy* invalidated a ban on price advertising for prescription drugs, because consumers had a strong interest in receiving price information. The First Amendment, the Court held, protects "the free flow of commercial information" so that consumers can compare lawful products and services and make better choices among them.[44] The opinion links consumer interests in information to a background assumption that transparent price advertising promotes vigorous competition on terms that matter to buyers. That premise reappears in *Central Hudson*, which describes commercial speech as valuable because of its "informational function," even as the Court announces a more deferential intermediate scrutiny test for restrictions on it.[45]

Later cases refine this logic. *Zauderer* allows the state to compel the disclosure of "purely factual and uncontroversial information" in commercial advertising when doing so is reasonably related to preventing deception or improving consumer understanding, on the theory that more information will better equip consumers to evaluate offers.[46] *Sorrell v. IMS Health* invalidates a Vermont statute that restricted the sale and use of prescriber-identifying information for targeted pharmaceutical marketing, but it does so while reaffirming that commercial speech is "less protected" than political speech and that regulations aimed at misleading or coercive sales practices remain permissible.[47] At the same time, *Sorrell* treats the flow of information to prescribers as part of how pharmaceutical markets function, and it is wary of regulations that selectively burden

44. *See* Va. State Board of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763–65, 769–70 (1976) (recognizing consumers' interest in prescription-drug price information and concluding that "the free flow of commercial information is indispensable" to intelligent decision making in a free-enterprise economy).

45. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–63 (1980) (describing commercial speech as "expression related solely to the economic interests of the speaker and its audience" that "serves the economic interest of the speaker" and "assists consumers and furthers the societal interest in the fullest possible dissemination of information").

46. *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651–53 (1985) (upholding compelled disclosure of "purely factual and uncontroversial information" reasonably related to the State's interest in preventing deception in attorney advertising).

47. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66, 578–79 (2011) (characterizing Vermont's law as content- and speaker-based, reiterating that commercial speech receives "less protection" than other forms of expression, and emphasizing that the State may still regulate misleading or coercive marketing practices)

particular speakers in those markets.[48] Across these cases, the Court consistently describes commercial speech as a vehicle for giving consumers accurate, non-misleading information and enabling meaningful comparison and competition among lawful products and services.

A similar listener-centered rationale appears in the Court's treatment of corporate participation related to campaign financing. In *First National Bank of Boston v. Bellotti*,[49] the Court struck down a restriction on corporate expenditures in ballot measure campaigns. The opinion emphasizes that "the proper question" is not who is speaking, but whether the speech informs voters on matters of public importance.[50] In *Citizens United*, the Court extends this reasoning to independent corporate spending in candidate elections. The opinion invokes listener-facing premises about voters' access to messages and the voices they may consider, while simultaneously foregrounding speaker-centered and speaker-neutral principles: political speech is an "essential mechanism of democracy," and the First Amendment does not allow government to restrict the "voices" or spending of corporations simply because they are influential or unpopular.[51] Voters, not the state, are presumed to be the proper judges of which messages to accept or reject.

This line of reasoning is sometimes expressed in marketplace-of-ideas metaphors. Decisions, such as *Red Lion Broadcasting Co. v. FCC*,[52] describe the First Amendment as compatible with demanding, in specific circumstances, for someone to behave "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred[.]"[53] Although *Red Lion* arises in a broadcast regulation context and does not involve corporations as such, its rhetoric

48. *Id.* at 576.

49. 435 U.S. 765 (1978).

50. *See id.* at 776–77.

51. *See* Citizens United v. FEC, 558 U.S. 310, 339–40, 354 (2010) (describing political speech as "an essential mechanism of democracy" and rejecting attempts to suppress corporate political spending in order to reduce the influence of certain speakers).

52. 395 U.S. 367 (1969).

53. *See id.* at 389.

reinforces the assumption that richer information flows and multiple sources can benefit listeners. The later campaign-finance and corporate speech decisions, by contrast, express deep skepticism of regulations that explicitly seek to "equalize" influence among speakers.[54] The commercial speech and public debate cases, thus, converge on a common theme: constitutional protection for corporate expression is defended as a way to enhance the information and options available to consumers and citizens, not as a reward for corporate identity.

At the same time, these decisions do not rest exclusively on listener interests. Especially in the political speech cases, the Court couples informational rationales with a strong formal commitment to speaker neutrality and a rejection of equalization-based justifications. The protection of corporate expression thus reflects overlapping strands: an instrumental concern with information and competition, and a structural concern with preventing government discrimination among speakers.

However, the argument advanced here does not depend on treating listener-centered justifications as exclusive or dominant. It requires only that such justifications form part of the Court's justificatory architecture. Their presence matters because it demonstrates that corporate speech protection has been defended, at least in part, by reference to the informational and competitive conditions of the marketplace of ideas and products. Once that is acknowledged, there is room within the Court's own framework to ask which aspects of contemporary algorithmic intermediation reflect the kind of expressive choice those justifications were designed to protect, and which aspects are better understood as infrastructural or data-processing practices that may be subject to structurally oriented regulation consistent with those same premises.

Occasionally, the Court also recognizes that listener interests include not only exposure to information but control over what enters certain spaces. *Rowan v. Post Office Department*,[55] for example, upholds a statute that allows householders to bar specific mailers from sending them further material, emphasizing the "right of every person 'to be let alone'" in the home.[56] *Rowan*

54. *See Citizens United*, 558 U.S. at 350.
55. 397 U.S. 728 (1970).
56. *See* 397 U.S. at 736–38.

does not involve corporate speakers as such, and it does not treat the reduction of available information as a constitutional harm; instead, it frames the statute as protecting personal autonomy within a bounded, intimate space.[57] The case therefore illustrates that the First Amendment's concern for listeners is not exhausted by maximizing exposure to speech, but can also encompass respect for individual control over unwanted expression in settings experienced as personal. Although digital platforms lack the spatial intimacy of the home, algorithmic curation tailors feeds and interfaces around users' inferred preferences and past behavior, producing individualized informational environments rather than a single shared publication. *Rowan*, thus, underscores that informational control can function as a dimension of personal autonomy in certain settings; a consideration that becomes newly salient when platforms construct user-specific informational environments that can be experienced as intimate too.

C. Speech, Not Speakers

Running alongside the information and competition justifications is a second constraint: a strong reluctance to let government discriminate based on who is speaking. In *Bellotti*, the Court rejects the state's attempt to justify restrictions on corporate political expenditures by arguing that corporations have too much power and might distort public debate.[58] The opinion insists that the First Amendment does not permit the state to restrict speech simply because the speaker is a corporation.[59] Citizens are entitled to hear all viewpoints and decide for themselves.

Citizens United intensifies this principle. There, the Court invalidates limits on independent corporate expenditures in federal elections and treats the identity of the speaker as irrelevant to the level of protection.[60] Laws that single out

57. *Id.*

58. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776–77, 784 (1978).

59. *Id.* at 784.

60. *See* Citizens United v. FEC, 558 U.S. 310, 339–40 (2010) (emphasizing that the First Amendment "stands against attempts to disfavor certain subjects or viewpoints" and that speaker identity does not diminish protection).

corporations or other disfavored entities for speech burdens are treated as presumptively unconstitutional, particularly when they appear to be motivated by a desire to "equalize," influence or dampen the voices of successful speakers.[61] *Sorrell* extends this suspicion into the commercial sphere, treating Vermont's restriction on the use of prescribing information for targeted marketing as a content- and speaker-based burden on pharmaceutical manufacturers' attempts to persuade physicians.[62] The opinion warns that the First Amendment does not allow the state to burden certain speakers "to tilt public debate in a preferred direction."[63]

The result is a rule of thumb that can be summarized as "speech, not speakers." The doctrine allows courts to ask what category of speech is at issue: commercial, political, or other; and to calibrate scrutiny accordingly. It gives them far less room to accept justifications that explicitly refer to the identity, wealth, or influence of particular speakers. Concerns about corporate power, or about the cumulative effect of corporate expression on public discourse, are often recharacterized as impermissible attempts at equalization. The same formalism can be seen in the Court's preference for content-neutral regulations of time, place, and manner and in its suspicion of rationales based on "distortion."[64]

D. Editorial Autonomy-Centered Justifications

Together, the non-First Amendment corporate rights cases and the early speech cases construct a layered framework. Corporations are treated as artificial entities that can hold property, make contracts, and invoke some constitutional protections, particularly against arbitrary interference with their

61. *Id.* at 350.
62. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557–59, 565–66 (2011).
63. *Id.* at 578–79.
64. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777–78 (1978) (rejecting restrictions "simply because the speaker is a corporation"); *Citizens United*, 558 U.S. at 349–50 (2010) (rejecting "antidistortion" and "equalizing" interests as bases for limiting corporate political spending); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) (rejecting equalizing electoral influence as a compelling interest); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasizing content-neutral time, place, and manner regulation).

economic activity.[65] On top of that foundation, the Court extends First Amendment protection to corporate expression on two overlapping grounds: a functional claim that corporate speech benefits listeners by improving information and competition, and a formal claim that the state may not disfavor speakers based on identity or influence.[66]

Alongside these listener-centered and formal principles is a third, related line of cases that centers on editorial autonomy and compelled speech. Together, *Miami Herald Publishing Co. v. Tornillo*, *Pacific Gas & Electric Co. v. Public Utilities Commission*, and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* articulate an important idea: the selection, arrangement, and presentation of speech can itself be expressive, and the state may not force a speaker to alter that expressive process by including unwanted messages.[67] But the cases reach that conclusion through distinct doctrines and fact patterns, and those distinctions matter.

In *Tornillo*, the Court invalidated a Florida statute requiring newspapers to grant political candidates a right of reply.[68] The opinion emphasizes the highly selective, judgment-driven nature of newspaper editorial decision-making and warns that compelled access would intrude into the press's control over what to print and how to present it.[69] Thus, the decision stands for the proposition that the government may not force a private speaker to publish or promote another's message, because doing so alters the speaker's own expression.[70]

Pacific Gas extends the compelled-speech principle into a commercial setting but on different terms. There, a public utility objected to a state order requiring it to include a third party's newsletter in its billing envelopes.[71] The majority treated the utility's curated set of materials, which it chose to send to customers, as expressive speech and held that compelling the

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65. *See* discussion *supra* Section I.A.

66. *See* discussion *supra* Sections I.B-C.

67. *See* Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16–18 (1986); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568–70 (1995).

68. *See Tornillo*, 418 U.S. at 244–46, 253–58

69. *See id.* at 258.

70. *See id.* at 256–58.

71. *See Pac. Gas*, 475 U.S. at 4–7.

inclusion of an unwanted newsletter burdened the utility's own message.[72] Unlike *Tornillo,* which focused on editorial selection,[73] *Pacific Gas* includes an emphasis on forced association and the risk of burdening the speaker by forcing her to disclose her own viewpoint to avoid confusion, when she would rather remain silent on the matter.[74] It portrays the compelled inclusion as altering the utility's expressive identity, even though the underlying forum is commercial rather than journalistic.

Hurley expands the principle even further. Parade organizers challenged a requirement that they include a group whose message they did not wish to convey.[75] The Court held that even where a speaker does not craft a single, unified message, the act of assembling participants and presenting them in a particular order is inherently expressive.[76] Forced inclusion alters the expressive content of the parade, even absent explicit editorial statements.[77] The holding turns on the idea that expression can lie in the overall communicative content of a curated event, not just in discrete verbal or written content.

These cases share a structural concern: protecting a speaker's autonomy over what to include, exclude, or associate with. However, they do so through different mechanisms: *Tornillo* stresses editorial judgment, *Pacific Gas* stresses compelled association and the burden that it imposes, and *Hurley* stresses the expressive nature of a curated selection as an overall message. These differences in emphasis do not divide the cases into separate doctrinal silos; they illustrate how the Court has applied a shared principle of expressive control across varied contexts.[78]

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72. *See id.* at 9–12, 15–18.

73. *See Tornillo,* 418 U.S. at 258.

74. *See Pac. Gas,* 475 U.S. at 12, 18 ("[F]orced associations that burden protected speech are impermissible. . . . Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent.")

75. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559–61 (1995)

76. *See id.* at 568–70.

77. *See id.* at 572–74.

78. *See generally* Abner S. Greene, *Not in My Name: Claims of Constitutional Right,* 98 B.U. L. REV. 1475 (2018) (arguing that compelled-speech and expressive-association cases are unified by a "not in my name" injury).

The Court's decision in *303 Creative LLC v. Elenis* reinforces this editorial-autonomy strand.[79] There, the Court held that the First Amendment prohibited Colorado from compelling a website designer to create expressive content celebrating same-sex marriage.[80] The case, which arises in a commercial context, reiterates that when the state requires a private actor to produce or include speech she does not wish to convey, it intrudes upon the speaker's control over the content and presentation of her expression.[81] *303 Creative* thus confirms that compelled alteration of expressive output, even in markets for goods and services,[82] triggers heightened constitutional concern.[83]

The broader framework emerging from combining the information and competition rationale cases,[84] the "speech, not speakers" precedents,[85] and the editorial autonomy cases[86] was built with relatively simple communication models in view. The cases assume familiar patterns of communication: corporations place advertisements in newspapers or on broadcast media; newspapers or broadcasters decide which editorials or programs to run; and voters and consumers encounter those messages against a backdrop of shared public space. In that setting, the Court's information-based decisions typically assume that more messages from more sources expand the range of options and viewpoints available for comparison, and that listener interests are served when information flows and threatened when the state suppresses or skews those flows by targeting particular speakers. The editorial-autonomy decisions fit within the same media landscape but push in a different direction: they protect the right

79. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 586–92 (2023)

80. *See id.* at 588, 601–03.

81. *See id.* at 589–92.

82. *Id.* at 594 ("Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same?"); *id.* at 600 ("First Amendment extends to all persons engaged in expressive conduct, including those who seek profit.").

83. *See id.* at 588–89 (stating that Colorado had to satisfy strict scrutiny before compelling speech from the plaintiff that she did not wish to create).

84. *See* discussion *supra* Part I.B.

85. *See* discussion *supra* Part I.C.

86. *See* discussion *supra* Part I.D.

of particular outlets to decide what to carry and resist efforts to "add voices" by compelling access or association. In both categories, however, the underlying picture is one of discrete speakers using relatively simple channels of distribution.

Algorithmic curation does not fit neatly within that picture. When platforms claim First Amendment protection for their ranking, recommendation, and moderation systems, they present those systems as exercises of editorial judgment that fall within this framework, invoking both the information-and-competition rationale and the "speech, not speakers" principle, and analogizing their choices to the editorial control protected in *Tornillo*, *Pacific Gas*, and *Hurley*.[87] Yet the systems also embody a different kind of corporate activity: large-scale behavioral optimization and the design of interfaces that structure how people encounter speech and offers. The next Part describes those systems in more concrete terms and outlines how courts and commentators have begun to treat them as protected "speech," setting the stage for the cocoon effects developed in Part III.

II. ALGORITHMIC INTERMEDIATION UNDER THE FIRST AMENDMENT

A. Components of Platform Design

Digital platforms mediate communication through a layered set of systems that can be described in relatively simple terms. At the base is content: user posts, advertisements, news articles, videos, search results, and other material supplied by individuals, firms, and institutions. This material is typically vastly more abundant than any one user can consume.

Sitting above the content layer are ranking and recommendation systems. These algorithms decide which items to show, in what order, and to whom. They use a mix of explicit signals (such as follows, likes, and clicks), implicit signals (such as dwell time or scroll behavior), and contextual information (such as device type or time of day) to predict which items will

87. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 721 (2024); Brief for Respondents, *supra* note 2, at 5–6, 35–40, Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023) (No. 22-277); TikTok Inc. v. Garland, 604 U.S. 56, 67 (2025).

elicit engagement from a given user.[88] In practice, platforms deploy different models for different surfaces: a "For You" feed, a search results page, a "People You May Know" module, or a carousel of product recommendations. Over time, these models are updated as new interaction data come in, producing feedback loops in which user behavior shapes the very systems that in turn shape user behavior.[89]

A further layer consists of monetization and allocation mechanisms. Advertising auctions determine which advertisers' messages receive prominent placement in a user's feed or search results.[90] Bidding strategies, budgets, and relevance scores interact with user-level predictions to decide which ad is shown at a given moment.[91] In commerce, dynamic pricing systems may adjust prices or discounts based on observed or inferred willingness to pay.[92] In all of these settings, the line between "organic" and "sponsored" content can be blurred if interfaces do not clearly distinguish them.[93]

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88. *See* Kai Riemer & Sandra Peter, *Algorithmic Audiencing: Why We Need to Rethink Free Speech on Social Media*, 36 J. INFO. TECH. 409 (2021) (describing how social-media platforms use engagement-driven ranking and recommendation systems to organize speech, assemble audiences, and decide "who hears what" based on behavioral data rather than chronological or follower-based feeds); *see also* Tarleton Gillespie, *The Relevance of Algorithms, in* MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY 167, 167 (MIT Press, 2014).

89. *See* Gillespie, *supra* note 88, at 172–73.

90. *See generally* Jun Wang et al., *Display Advertising with Real-Time Bidding (RTB) and Behavioural Targeting*, 11 FOUNDS. & TRENDS INFO. RETRIEVAL 297, 306–316 (2017).

91. *See generally* Ming-Hui Huang & Roland T. Rust, *A Strategic Framework for Artificial Intelligence in Marketing*, 49 J. ACAD. MKTG. SCI. 30 (2021).

92. *See id.* at 39; *see also* Jinsong Chen, Yuexin Zhang & Yumin Wu, *The Impact of Differential Pricing Subject on Consumer Behavior*, 12 BMC PSYCHOL. 1 (2024) (discussing personalized pricing that uses customer data to predict individual willingness to pay and set prices accordingly).

93. *See Native Advertising: The Blurred Lines Between Sponsored and Non-Sponsored Content and the FTC's Response*, N.Y.U. J. INTELL. PROP. & ENT. L.: BLOG (Nov. 29, 2016), https://jipel.law.nyu.edu/native-advertising-the-blurred-lines-between-sponsored-and-non-sponsored-content-and-the-ftcs-response/ [https://perma.cc/HW43-WJKF] (arguing that native advertising blurs the lines between editorial and sponsored content and may deceive readers when interfaces fail to distinguish organic and paid material).

Finally, there is interface and architecture: the design of feeds, the placement of buttons and toggles, the availability of options to switch between chronological and personalized views, the use of infinite scroll and autoplay, the structure of notifications, and the degree to which users can see or manage the signals that drive personalization. These design choices condition how ranking and recommendation systems are experienced.[94] A user who is defaulted into a highly personalized feed and must navigate several menus to disable it effectively lives inside a different informational setting than a user who sees posts chronologically unless she opts into personalized ranking.[95]

From the perspective of this Note's argument, two features of this stack are especially important. First, much of what a user sees at any given moment is the result of behavioral mirroring: the system extrapolates from past actions and from patterns observed among similar users to predict what will capture attention now. Second, these predictions are embedded in interfaces that make some paths of exploration easier than others. Together, these features explain how platforms can produce cocoon-like environments built out of users' own inferred preferences and interactions, without ever formally forbidding access to other content or offers.

B. The Doctrinal Umbrella for Algorithmic Curation

As these systems have developed, courts and commentators have begun to assimilate them to familiar First Amendment

94. *See* Jashvini Amirthalingam & Anika Khera, *Understanding Social Media Addiction: A Deep Dive*, 16 CUREUS 1, 2–7 (2024) (describing how interface features such as infinite scrolling, algorithm-driven content personalization, and personalized notifications encourage prolonged platform use and make it easy for users to lose track of time).

95. *See* CTR. FOR DATA ETHICS & INNOVATION & BEHAV. INSIGHTS TEAM, ACTIVE ONLINE CHOICES: DESIGNING TO EMPOWER USERS 1, 10–11, 25–31 (2020), https://www.bi.team/wp-content/uploads/2020/11/CDEI-Active-Online-Choices-Desk-Research-Write-up-FOR-PUBLICATION-1.pdf [https://perma.cc/3ZQS-RUN4] (presenting experimental work on "active online choices" and showing that the way privacy and personalization controls are presented, through buttons, toggles, and different interface layouts, affects users' ability to locate settings, understand the consequences of their choices, and feel in control of how their data is used to shape online content.)

categories.[96] In the search context, lower courts have treated search-engine rankings as protected opinions or editorial judgments about the relevance and importance of websites.[97] The reasoning is that ordering results inherently expresses a view, and that judicial interference in that ordering would risk imposing content- or speaker-based preferences.

In the platform context, a growing body of scholarship debates whether and when algorithms should be treated as "speech" for First Amendment purposes, focusing on questions about code, automation, and the distinction between expressive choices and technical implementation.[98] Recent Supreme Court cases have sharpened that debate. In *Moody v. NetChoice*, the Court describes social media platforms as engaging in "selection and presentation" of content and treats their decisions about which posts to display, and how, as forms of editorial discretion.[99] Although the decision leaves important questions open, it strongly

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96. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 728–32 (2024) (treating social-media platforms' content curation and "editorial discretion in the selection and presentation" of third-party content as expressive activity, and analogizing to *Tornillo*, *Pacific Gas*, and *Hurley*); TikTok Inc. v. Garland, 604 U.S. 56, 67–69, 81 (2025) (assuming intermediate scrutiny where an Act effectively bans TikTok and that applied to the petitioners, the Act was facially content neutral and justified by a content-neutral rationale).

97. *See, e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *3, *12 (W.D. Okla. May 27, 2003) (stating that page ranks are the result of an algorithm, and are constitutionally protected "opinions of the significance of particular web sites as they correspond to a search query.")

98. *See, e.g.*, Alan M. Sears, *Algorithmic Speech and Freedom of Expression*, 53 VAND. L. REV. 1327 (2021) (developing a framework for "algorithmic speech" and asking when algorithmically generated or curated outputs should count as speech for freedom of expression purposes, including distinctions among curated, interactive, and semi-autonomous production); Mackenzie Austin & Max Levy, *Speech Certainty: Algorithmic Speech and the Limits of the First Amendment*, 77 STAN. L. REV. 1 (2025) (examining how First Amendment doctrine should apply to machine-learning systems that mediate online discourse and emphasizing how automation and opacity complicate traditional speaker- and content-based analysis); Josh Blackman, *What Happens If Data Is Speech?*, 16 U. PA. J. CONST. L. ONLINE 25 (2014) (exploring the consequences of treating data and algorithmic outputs as protected speech, including for data-privacy regulation and search-engine governance).

99. *See Moody*, 603 U.S. at 728–32.

suggests that ranking and moderation are presumptively protected expressive activities, even when implemented through automated systems.[100]

At the same time, *Moody* hints that not all aspects of platform operations are identical for First Amendment purposes. Separate opinions raise the possibility that when a platform "entirely outsources" curation, or when algorithms respond solely to users' online conduct without independent content standards, the connection to the platform's own expressive judgment may be more attenuated.[101] *TikTok v. Garland* points in a similar direction from another angle. The Court was skeptical of a state law targeting a particular platform's content and ownership structure, but it suggested that regulations framed in terms of data security, foreign influence, or other non-content-based risks can be distinguished from direct control over the platform's expressive choices.[102]

The result is a broad but not unlimited doctrinal umbrella. Platforms have strong arguments that their ranking, recommendation, and moderation systems are part of their protected editorial function, especially when those systems implement content policies and present users with a curated feed of speech. At the same time, existing doctrine leaves some room for treating certain forms of data use, system design, and infrastructural regulation as distinct from core editorial expression. The next part examines how, under the protection of this umbrella, platform architectures generate commercial and marketplace-of-ideas cocoons that strain the functional justifications for corporate speech developed in Part I.

III. ALGORITHMIC COCOONS IN COMMERCE AND PUBLIC DISCOURSE

The doctrinal framework described in Part I and the systems sketched in Part II come together in the way platforms structure users' experience of markets and public discourse. This Part develops the dual cocoon account. It shows how commercial and expressive practices built on behavioral data and algorithms can,

100. *See supra* text accompanying note 5.
101. *See supra* text accompanying note 5.
102. *See* TikTok Inc. v. Garland, 604 U.S. 56, 71–73 (2025)

in practice, produce environments in which users encounter a substantial amount of content, but within a pattern organized around what the system infers about them.

A. Commercial Marketplace Cocoon

On the major platforms that mediate consumption today, such as search engines, marketplaces, delivery apps, and ride-sharing services, the user's view of available goods and prices is heavily shaped by personalization. Product pages, restaurant lists, and search results are ranked and filtered using signals about a user's location, past purchases, browsing history, and responses to prior offers.[103] Sponsored placement and ad auctions overlay this ranking with paid priority: sellers who bid more, or whose ads are scored as more likely to produce clicks, are more likely to appear prominently.[104] Dynamic pricing systems may adjust prices, discounts, or delivery fees based on inferred willingness to pay or sensitivity to delay.[105]

From the user's perspective, this can produce a curated storefront that is both rich and partial. A delivery app will display a mix of restaurants, with some options appearing at the top of the list, others further down, and many never appearing at all in ordinary use. The set and ordering of options reflect a combination of proximity, sponsored placement, and inferences about the user's tastes and price sensitivity. A search for a product on a marketplace platform returns a ranked list in which paid promotions, algorithmic judgments about relevance, and the user's past behavior all play roles. If a dynamic pricing system is in use, the price visible on the screen may also depend on what

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103. *See generally* Huang & Rust, *supra* note 91, at 35 tbl. 2 (listing AI applications such as digital consumer profiling, targeting, and adaptive personalization systems based on individual-level data).

104. *See generally* Wang et al., *supra* note 90, at 307–09, 416 (explaining that real-time bidding auctions allocate ad impressions based on advertiser bids and predicted performance); *id.* at 413 (defining ad exchanges as selecting buyers for each impression through auctions).

105. *See* Huang & Rust, *supra* note 91, at 39; *see also* Chen et al., *supra* note 92, at 2–3 (explaining that algorithmic pricing uses consumer data to predict individuals' willingness to pay and dynamically set personalized prices).

the system has learned about how this user, and users like them, respond to different numbers and framing.

Several features of this environment are important for the later doctrinal discussion. First, opportunities for comparison can be uneven. The user is rarely told how many other options exist, how they were filtered, or whether the prices she sees are personalized. It can be difficult to know whether a higher-priced item is actually more expensive in any objective sense, or simply the product of an algorithm's belief that this user will accept that price. Second, the content of the interface is path-dependent. What appears today is influenced by what the user clicked, purchased, or hesitated over yesterday. Over time, the system may come to reflect back a particular profile: frequent orders from certain categories, responsiveness to particular promotions, and apparent tolerance for certain fees. Third, the boundary between organic and sponsored material can blur when labels are subtle and when the same ranking logic permeates both.

None of this means that users are literally trapped or unable to search more broadly. Most platforms offer search bars, filters, and other tools that allow the user to reach beyond the default view. But for many people, the default is the environment they actually inhabit. The combination of behavioral mirroring, opaque ranking, and individualized offers can create what this Note calls a commercial marketplace cocoon: a space in which users are presented with a busy but partial view of the market, organized around the system's evolving picture of their preferences and willingness to pay.

B. Marketplace-of-Ideas Cocoon

A similar pattern appears in the domain of public discourse. Social media feeds and video platforms rank and recommend news, commentary, and political content with the same kinds of systems described in Part II. The central objective is engagement: time spent, interactions generated, content shared. Posts that elicit strong reactions, like agreement, outrage, or amusement, are more likely to be promoted.[106] Political campaigns and

106. *See* Riemer & Peter, *supra* note 88, at 411–18 (explaining that social-media platforms deploy recommender systems designed to maximize user

advocacy groups make use of these infrastructures through microtargeted advertising, tailoring messages to segments of users based on demographic and behavioral data.[107] Group and channel recommendation systems, "trending" modules, and suggestion carousels steer users toward particular communities and topics.[108]

For an individual user, the result is often a feed that feels both personalized and crowded. Over time, engagement-based ranking and microtargeting tend to surface content that resonates with what the system infers about a user's identity, affiliations, and prior reactions. Posts from certain sources and positions are seen frequently; posts from other sources may appear rarely or not at all unless the user seeks them out. Disagreement appears, but often in formats that reward performative conflict, reinforce existing antagonisms, or present "the other side" in extreme or caricatured form. Less sensational but informative material may be downranked if it does not generate strong engagement signals.

Again, none of this entails outright exclusion. Users can search for specific topics, follow accounts across the spectrum, or seek out alternative platforms. But the default feed operates as an ambient environment that is difficult to avoid in ordinary use. For many users, it is the primary way of encountering news, commentary, and social information. The combination of behavioral mirroring, engagement incentives, and recommendation design can thus produce a marketplace-of-ideas cocoon: a regime in which users experience a continuous flow of

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engagement and advertising value, and arguing that these systems amplify or suppress speech based on its capacity to capture attention rather than its contribution to public discourse); *see also* Haochen Sun, *The Right to Know Social Media Algorithms*, 18 HARV. L. & POL'Y REV. 1, 9 (2023) (observing that social-media platforms are "attention economy" businesses that sell user engagement to advertisers and that algorithms that can better predict what users want to see keep users' attention longer, thereby enhancing platforms' commercial value).

107. *See* Dawn C. Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Election Interference and Misinformation*, 19 FIRST AMEND. L. REV. 32, 42–49 (2021) (describing the rise of microtargeted political advertising on platforms such as Facebook and explaining how campaigns use detailed demographic and behavioral data to segment audiences and tailor political messages to narrow groups of users).

108. *See* Riemer & Peter, *supra* note 88, at 411–18.

material that is structurally shaped around what the system takes to be their existing views, identities, and sensitivities.

C. Shared Dynamics and Structural Features

The commercial and public discourse cocoons differ in content and stakes, but they share several structural features. In both settings, the system does not impose formal bans or clear access barriers. Instead, it reorders and filters a surplus of available material according to models trained on past behavior. Visibility, rather than availability, does much of the work. Users rarely see a random or representative cross-section of what exists. They see the slice that the system predicts will maximize engagement or profitability in light of their observed and inferred characteristics.

In both domains, this dynamic generates path dependence. Early interactions shape subsequent predictions, which in turn influence what the user encounters next. A string of purchases, clicks, or pauses can pull the user deeper into a particular subset of products or content. At the same time, opacity is a salient feature. Platforms generally do not explain, in a granular way, why a particular product, price, or post appears, which features of the user's history were significant, or what alternatives were deprioritized. Users may have a general sense that "the app knows what I like" or that "the algorithm is showing me more of this," but they cannot easily see or adjust the underlying mechanisms.

Most importantly for this Note's argument, both cocoons are built on feedback from the user's own behavior. They are not simply a matter of seeing too little speech or too few offers in an abstract sense. Instead, they represent environments organized around what the system has learned about the user. In commerce, that environment is tuned to predicted responsiveness to particular products, price points, and promotions. In public discourse, it is tuned to predicted responsiveness to particular framings, tones, and identities. The system, thus, tends to stabilize an inferred profile rather than encouraging users toward broader comparisons across products, prices, or viewpoints.

D. Pressure on the Information and Competition Rationales

These dynamics raise questions for the functional justifications for corporate speech developed in Part I.B. The commercial speech cases defend protection for advertising and related corporate expression in part on the ground that it improves the flow of information to consumers and facilitates comparison and competition among lawful products and services. The political and public debate cases similarly defend corporate participation in public discourse on the ground that additional voices and arguments can benefit voters and that the state should not decide which speakers have too much influence. Both lines of precedents, though structured by speaker-centered and speaker-neutral commitments, are articulated in terms that reflect a view that, on balance, protecting corporate expression contributes to the availability of information, options, and viewpoints for listeners. At the same time, the Court rejects efforts to regulate speech on antidistortion or equalization grounds premised on the idea that corporate expression distorts or skews those informational environments. This framework also rests on the assumption that such protection supports underlying competitive processes.

Algorithmic cocoons complicate that premise. In the commercial context, personalized ranking and individualized offers can make it harder for consumers to know what alternatives exist on common terms, or to compare what they receive to what others receive. The information that reaches them is structured around their inferred profile rather than around shared reference points. In the public discourse context, engagement-driven feeds and microtargeted messages can yield informational diets that are dense but partial, organized around inferred identities and prior reactions. The availability of other perspectives remains in principle, but their effective visibility and salience are reduced.

In theory, alternative platforms could design environments oriented around shared baselines rather than individualized inference. But where a small number of dominant intermediaries structure large portions of commercial and political attention, the mere theoretical availability of alternatives does not ensure meaningful comparability or common reference points. The doctrinal question, moreover, concerns how existing corporate speech protections operate in practice, not whether market entry might someday recalibrate informational environments.

The point is not that corporate expression no longer conveys information, that listeners lack agency, or that courts have promised ideal conditions for comparison or competition. Users can and do search, compare, and seek out dissenting views. Rather, the concern is that architectures protected as corporate "speech" can systematically steer users toward patterns of exposure that sit uneasily with the functional assumptions that underlie the Court's treatment of commercial and corporate political expression; assumptions about the value of information and competition, the possibility of meaningful comparison, and the role of diverse sources in public discourse. Part IV returns to this tension and asks how it plays out once these architectures are located within the broader corporate-rights framework and the speaker-neutral constraints described in Part I.C.

IV. DOCTRINAL TENSION AND IMPLICATIONS

The picture that emerges from the preceding Parts is unstable. Corporate First Amendment doctrine protects platform control over ranking, recommendation, and moderation in part by reference to listener-centered considerations: consumers can access information and compare offers; citizens gain access to more voices and ideas; and the government is kept from skewing debate by favoring or disfavoring particular speakers. Algorithmic architectures, however, often structure exposure in ways that narrow comparison and segment public discourse. This Part will address why the current doctrine struggles to see the problem and sketch directions in which the doctrine's own commitments might point.

A. Not All Platform Conduct Fits the Same First Amendment Box

A first step is conceptual. When courts refer to platforms' "editorial judgment," they tend to treat a wide range of activities as if they were a single thing. Yet the practices that matter for cocooning are not homogeneous. At least three categories can be distinguished.

The most familiar is core expressive editorial judgment. These are decisions in which platforms, or identifiable editorial teams within them, choose what to say or carry based on the meaning of content. Examples include platform-authored news and explainer products; curated "featured" sections; high-level rules that ban certain categories of content; and case-specific decisions to remove or label material because it is judged misleading, harmful, or inconsistent with the platform's self-conception. When the Court protects the right of a newspaper not to print a reply, or a utility not to include a hostile message in its billing envelope, these are the sorts of judgments it has in mind.

A second category is behavioral optimization. Here, the system's central task is to predict and maximize engagement, clicks, or time spent, using past behavior as the principal input. Personalized feeds, "For You" pages, recommendation carousels, auction-based ad placement, and many dynamic pricing systems fall into this category. The outputs of these tools are not random. They reflect design choices about which signals to measure and which outcomes to optimize. But what appears on a particular screen is driven less by a considered view about the content's contribution to public debate or consumer understanding, and more by observed correlations between similar users and profitable responses.

A third category consists of interface design and default settings: whether the default feed is chronological or algorithmic, how easy it is to switch modes, how search results are grouped, which toggles are buried several clicks deep, whether prices are displayed in ways that invite comparison, and how notification and scroll mechanics are set. These choices determine the pathways through which users encounter speech and offers. They are closely connected to data-collection practices.

There is no sharp line between these categories, and each has expressive and non-expressive aspects. However, when all of them are automatically described as "editorial judgment," it becomes difficult even to articulate which parts of platform conduct raise the specific concerns that the information-and-competition, and editorial curation as expression doctrinal justifications were supposed to address. The cocoon effects described in this Note arise mainly from the second and third categories: behavioral optimization and interface design. Core editorial judgments play a role, but they are not what primarily drives the narrowing of options and the segmentation of audiences.

B. Where the Corporate-Rights Framework Runs Out of Road

The tension becomes sharper when we put platform architectures back against the broader corporate-rights history traced in Part I. The early cases that gave corporations constitutional standing did something quite specific. *Dartmouth College* treated the college's charter as a contract protected by the Contract Clause and, in doing so, described the corporation as an "artificial being" capable of holding property and outliving its members.[109] *Bank of Augusta* and related jurisdictional and commerce cases recognized corporations as "persons" for purposes of making contracts and doing business across state lines, while refusing to treat them as "citizens" in every constitutional aspect.[110] *Allgeyer* extended the term "liberty" in the Fourteenth Amendment to include a corporation's freedom to enter lawful contracts, and limited state police power when it intruded too far into that sphere.[111] *The Railroad Commission Cases* accepted that corporations could be regulated, including through rate-setting, but insisted that such regulation could not amount to outright confiscation without due process.[112] Taken together, these decisions did not establish corporations as natural rights-bearers; instead, they treated them as artificial entities that could own property, make contracts, and invoke certain constitutional protections. However, the Court repeatedly held that they remained creatures of law and subject to public regulation.

Corporate-law scholarship then offers a second layer of interpretation. Berle and Means read this doctrinal pattern as part of a larger structural shift: by stabilizing charter rights, property interests, and contractual autonomy, law made the modern business corporation a primary vehicle for pooling capital and

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109. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 650 (1819)

110. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 590, 592 (1839); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869).

111. *See* Allgeyer v. Louisiana, 165 U.S. 578, 586 (1897).

112. *See* R.R. Comm'n Cases, 116 U.S. 307 (1886).

organizing large-scale enterprise.[113] On that view, the point of protecting corporate assets and expectations is not to honor any intrinsic dignity of the corporation, but to support a form of organization that channels private investment into production.[114] The early corporate-rights cases can then be understood as establishing a rough bargain in which corporations receive strong protection for property and contractual autonomy, not as ends in themselves, but on the understanding that they will function as the main private instruments for raising capital and supplying goods and services within an ongoing sphere of public regulation.

The later extension of robust First Amendment protection to corporate expression layered a second bargain on top of this one. In the commercial speech line, corporate promotion of products and services is protected in part on the ground that such expression informs consumers and sharpens competition. In the public discourse and campaign-finance cases, corporate participation in the marketplace of ideas is defended on the premise that additional voices and arguments can benefit voters, alongside a strong commitment to the view that the state cannot be trusted to pick which speakers are too influential or which messages "distort" debate. In this account, corporate speech rights are justified, among other considerations, by reference to their role in serving listeners and democratic processes while maintaining a speaker-neutral rule.

Algorithmic cocoons unsettle both layers of this framework. On the older bargain, platform architectures extend corporate power far beyond the protection of internal assets and contractual expectations into the basic structuring of other people's commercial and informational environments. The externalities of corporate decision-making now fall directly on consumers and citizens whose ability to compare offers and encounter a range of views is mediated by infrastructures they did not design and cannot easily inspect. On the newer speech bargain, the problem is not simply that users see less information overall or that some selection is inevitable. Behavioral optimization and interface design build informational environments out of users' own past behavior: the system infers what a person is likely to want or react

113. *See* BERLE & MEANS, *supra note* 33 at 2, 334–38.
114. *See id.* at 340–41.

to, and then continually feeds back variants of that inferred profile, while pushing other products, prices, and perspectives aside. In commerce, that means a market that increasingly reflects what the system has learned about a particular user's preferences, willingness to pay, and vulnerabilities, rather than a shared landscape of offers and reference prices. In public discourse, it means feeds dominated by content that tracks a user's inferred identities and grievances, with disagreement appearing mainly in forms that confirm prior antagonisms.

When regulators attempt to respond to these structures, the vocabulary that comes most naturally, such as distortion of debate, excessive influence, manipulation of attention, and exploitation of vulnerabilities, tracks the very rationales the Court has instructed them to avoid. Requirements to disclose that prices are individualized, to offer less personalized ways of viewing offers or feeds, or to limit certain forms of microtargeting can be redescribed as burdens on speech or as efforts to diminish the influence of effective speakers and persuasive techniques. Under the current framework, arguments that sound like equalization or anti-distortion trigger heightened suspicion, even when they are motivated by concerns about listeners' ability to compare, exit, and evaluate. In this way, the same doctrinal tools that were originally justified as protecting corporate property and contractual autonomy, and later by reference in part to their role in serving listeners and democratic processes, can end up insulating designs that do not merely narrow what listeners can see, but instead build informational environments out of their own past behavior, effectively enclosing them within what the system infers to be their existing preferences and views, and making other options and perspectives harder to perceive or act upon.

C. *Where to Now?*

Before turning to possible regulatory responses, it is important to clarify what is and is not at stake. The compelled-speech and editorial-discretion cases protect a speaker's authority to determine the expressive content and presentation of its message. Nothing in this analysis challenges that principle. Where a platform is exercising judgment about what speech to include, exclude, or prioritize based on substantive criteria, the

First Amendment's protection is at its apex. The question addressed here is narrower: whether every algorithmic process that affects what a user sees necessarily constitutes such substantive editorial judgment, or whether some processes are better characterized as behavioral data-processing mechanisms that operate adjacent to, rather than at the core of, expressive choice.

Within that tension, and consistent with these limits, the doctrine's own logic points toward modest, listener-centered directions rather than a comprehensive redesign of the information environment. The taxonomy above suggests that not every intervention aimed at platforms must be read as a direct burden on core editorial expression. Some parts of what platforms do look like classic editing: humans (or human-written rules) deciding what kind of content belongs in the feed and what message the compilation as a whole should send. Other parts are closer to the back-end processing of data about users, prices, and attention. Measures targeted at how behavioral data are collected and used to optimize attention and prices, or at how defaults and interfaces structure user choice, can be understood as regulating this second category of activity; conduct that is adjacent to speech but not identical with it.

Thinking about algorithms this way helps to separate what must be treated as "speech" from what can be regulated more like infrastructure. As Stuart Minor Benjamin argues, algorithmic outputs fall under the First Amendment when they implement substantive editorial choices that a human has made about what to say or recommend; the algorithm is then just the means by which that human choice is scaled up and implemented.[115] When platforms simply loop an individual user's past clicks and scrolling back into the next round of recommendations, by contrast, there is at least a plausible argument that the platform is not really curating at all, but outsourcing curation to the user's prior behavior. In that segment of the system, the "editorial decision" is effectively: "show you more of what you have already chosen." Treating that loop-back as distinct from the platform's

115. *See* Stuart Minor Benjamin, *The First Amendment and Algorithms*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 606, 628 (Cambridge Univ. Press, 2021).

own expressive judgment opens space for regulation of the loop itself without collapsing all algorithmic processing into expressive activity.

To be sure, the decision to structure a service around personalization is itself an exercise of platform discretion: Choosing to rank content or offers based on predictive models reflects judgments about relevance, salience, and user engagement. The distinction drawn here does not deny that such design choices can have expressive dimensions. The narrower claim is that when personalization operates by feeding back a user's own behavioral data into that system, regulation may focus on the conditions under which that data is collected and used, rather than on the substantive speech or products that result. Addressing that input layer does not displace the autonomy to decide what messages to convey or what goods to promote; it targets the data-processing mechanism that mediates the relationship between speaker and listener.

This distinction maps onto the dual cocoon dynamics described in Part III. The commercial marketplace cocoon and the marketplace-of-ideas cocoon arise from similar behavioral feedback mechanisms, but they implicate different listener interests. In the commercial domain, personalization can undermine comparability and shared reference points for evaluating prices and offers. In the public discourse domain, the same feedback loops can progressively structure informational exposure around inferred preferences and past engagement, with implications for listeners' deliberative autonomy. Measures directed at behavioral inputs therefore address the structural conditions that produce these cocoons, rather than attempting to reshape expressive outputs themselves.

In the commercial sphere, the distinction between expressive judgment and behavioral loop-back points toward transparency, comparability, and meaningful control over how personal data is used. Existing commercial speech doctrine protects advertising in part by reference to its role in promoting informed consumer choice and meaningful competition, not to guarantee firms a right to construct opaque behavioral environments around individual buyers. Regulation aimed at ensuring that consumers understand when and how their behavioral data influence pricing, ranking, or recommendation systems is therefore consistent with the doctrine's own informational premises. It is thus natural to require platforms and intermediaries that personalize prices, rankings, or offers based on user behavior to disclose that fact in clear, factual terms. Such disclosure does not dictate what firms may say about their products, nor does it compel the inclusion of particular goods or viewpoints. It concerns only the conditions under which personal data is being used to shape their commercial environment.

In addition to transparency, narrowly tailored user-control mechanisms directed at data inputs can serve similar purposes. A requirement that consumers be able to limit whether and to what extent their past browsing, purchase history, or inferred preferences are used as inputs into pricing or recommendation algorithms regulates the use of behavioral data rather than the substance of advertising speech. Firms would remain free to design their advertising strategies, promote their products persuasively, and structure their marketplaces within those constraints. The regulatory intervention would operate at the level of data processing, not message composition.

A user who has been searching for candy, for example, might wish to decide whether her recent searches will heavily weight the ads and offers she sees, or whether she prefers that such behavioral signals be attenuated. Similarly, if delivery services or marketplaces adjust prices using her data, she should have a practical way of knowing that and of limiting how intensively her own conduct is fed back into the system. These kinds of obligations do not prohibit persuasive advertising or alter the firm's expressive message. They aim instead at clarifying the informational structure of the transaction and at giving the individual some say in how tightly her commercial environment tracks her own behavioral past. These measures respond directly to the commercial marketplace cocoon described in Part III.A by limiting the extent to which a user's past behavior silently structures the set of offers and prices she encounters, and by restoring the possibility of meaningful comparison across a shared marketplace baseline.

In the public discourse sphere, analogous steps would not focus on dictating what content may circulate, nor on engineering a balanced marketplace of ideas. The Court has consistently rejected such equalization rationales. The core idea here is narrower: individuals should be able to understand and exercise meaningful control over how their own behavioral data shapes what they see. Where ranking systems rely heavily on signals derived from a user's prior clicks, scrolling, dwell time, or inferred preferences, regulation can focus on that behavioral input layer rather than on the expressive outputs of the platform. Basic options allowing users to decide whether and how their past engagement data is used as an input into recommendation systems would give them a real opportunity to opt in or out of cocooned exposure. A platform would remain free to design its ranking architecture and editorial standards as it sees fit. The regulatory concern would be limited to whether the user's behavioral profile is automatically fed back into that architecture without her knowledge or control.

Clear, factual information about the principal signals that drive ranking and recommendation, together with carefully drawn limits on the most opaque or granular forms of microtargeting, would preserve space for individuals to decide how heavily their own behavior should shape their future information environment. Framed this way, regulation does not require exposure to particular viewpoints or compel the inclusion of unwanted speech. It does not dictate how content must be arranged. Instead, it addresses the terms under which personal data is used in structuring the informational environment. These interventions target the marketplace-of-ideas cocoon by addressing the feedback mechanisms through which users' own behavioral history progressively structures their informational exposure, with implications for listeners' autonomy over their deliberative environments rather than for any mandated balance of viewpoints.

Jack Balkin's post-*Moody* framework helps to locate these measures in a broader regulatory map. He emphasizes that platforms sit in a "tech stack" as both speakers and governors: they curate content, but they also set the rules and technical structures through which everyone else speaks.[116] Within that

116. *See generally* Jack M. Balkin, Moody v. NetChoice: *The Supreme Court Meets the Free Speech Triangle*, 2024 SUP. CT. REV. 129, 136 (2025) (describing the shift from a "dyadic" system of speech regulation, state versus private speakers, to a "pluralist system" in which owners of digital infrastructure situated up and down the "tech stack" act as regulators, and explaining how this produces a "free

pluralist system, he argues that the First Amendment still leaves room for structural regulation that is not aimed at suppressing any particular message; rules about privacy and data use, competition and interoperability, or user control over curation. Requirements that platforms limit certain forms of data collection, or that they make their services interoperable with third-party "middleware" that can offer alternative ranking and moderation, are examples of such structural tools. So are disclosure duties that ask platforms to provide factual, not unduly burdensome information about the grounds for content moderation and the basic logic of their recommendation systems.[117] These approaches treat platforms less as fragile speakers and more as powerful infrastructure owners whose commercial relationships with end-users can support duties of explanation and informed choice.

This Note's proposal fits within that space. Once we recognize that algorithms and interfaces are central to what corporate "speech" is in contemporary markets for goods and ideas, there is no reason, within the Court's own framework, to treat every component of algorithmic processing as equally insulated from listener-centered, structurally oriented regulation. Where platforms are truly exercising their own editorial judgment, deciding what kind of content belongs in their feeds and what values their brand will promote, *Moody* rightly treats that activity as expressive and triggers familiar First Amendment limits. But where they simply channel a user's past behavior back into the next round of content, or quietly use that behavior to structure her exposure without meaningful awareness or control, the case for treating that loop-back as core editorial speech is weaker. In that zone, it is plausible to view regulation that enhances transparency and user control not as burdening expression, but as protecting the user's own autonomy within the informational environment.

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speech triangle" of relationships between governments, infrastructure owners, and end users).

117. *See id.* at 149–51 (arguing that, even after Moody, governments may adopt structural regulations, such as mandating user controls, third-party "middleware" recommendation services, and interoperability requirements, that give end users more choice over content moderation and recommendation while leaving platforms' editorial judgments formally intact).

Developing these directions in detail would require more than this Note can do. It would involve specifying thresholds, tailoring rules to different kinds of platforms, and grappling with difficult questions of administrability, privacy, and innovation. The claim advanced here is narrower. Corporate First Amendment doctrine, shaped by overlapping commitments to speaker neutrality, editorial autonomy, and the informational and competitive benefits of robust expression, already contains the conceptual resources needed to distinguish between core editorial judgment and the infrastructural mechanisms through which that judgment is operationalized. Drawing that boundary with greater precision strengthens the coherence of corporate speech protection in an era where expression is mediated through behavioral optimization and interface design. It also helps prevent commercial and expressive environments from hardening into behavioral cocoons that narrow comparison and constrain listeners' autonomy over their deliberative environments in ways the doctrine's own listener-centered justifications were designed to avoid.