SOCIAL NETWORK AS WORK: A LABOR PARADIGM FOR REGULATING SPEECH ON SOCIAL MEDIA

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Social media has eluded regulation by taking refuge in the First Amendment. The First Amendment, scholars and lawmakers overwhelmingly argue, is a formidable obstacle to regulation because social media facilitates the creation and exchange of speech by users. The received wisdom, therefore, characterizes users as consumers of a speech-related service, which inevitably does raise thorny First Amendment problems. As a result, it appears the First Amendment bars solution to harms like discrimination, harassment, and misinformation on social media. But this is the wrong way to conceptualize social media, both descriptively and especially for purposes of the First Amendment.

This Article introduces a new labor paradigm for understanding and regulating social media. Existing paradigms overlook a powerful solution to regulating speech on social media consistent with the First Amendment by failing to recognize the labor relationship between platforms and their users. The relationship between platform and user is one of labor exchanged for profit, with users better analogized to workers as opposed to consumers. With each letter typed, post clicked, and page scrolled, social media users create massive, and massively profitable, proprietary catalogues of user data. In the process, platforms direct user input of data, compensate users with platform benefits, and then sell access to that data for enormous profit. All the while, users struggle with the same harms labor has endured for centuries: hostile and unsafe environments rife with harassment and misinformation. This

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labor-exchange relationship, with asymmetries in power akin to those between employers and workers, suggests relying on well-established labor and employment law frameworks for regulating speech on social media.

Reconceptualizing social media through the lens of labor—and reframing users as workers—offers the promise of a constitutional breakthrough. The First Amendment permits speech regulations on both employers and workers to protect worker safety, dignity, and autonomy in the workplace. The same should be true for users engaged in the work of creating data for platforms. Borrowing from analogous regulations on speech in the workplace, a regulatory regime for social media would include stricter antidiscrimination and anti-abuse rules, stronger enforcement mechanisms including vicarious platform liability, and more robust substantive and due process protections for users' speech. It would include, in other words, the same sort of protections labor has long fought for. This labor paradigm ably and uniquely threads the First Amendment needle on protecting speech online while achieving foundational rights to user safety, dignity, and empowerment by recognizing that social media is not just a network. It's work.

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INTRODUCTION

Social media has proven a paradigm-shifting innovation that has confounded efforts to bring it under law's domain. In particular, scholars and lawmakers alike have struggled to understand social media for purposes of the First Amendment. Because much of what social media *is*—as a business, a commodity, an activity—is speech, it ubiquitously implicates free

speech concerns.[1] The First Amendment, scholars overwhelmingly argue, is thus a daunting obstacle to platform regulation.[2]

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1 *See* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (holding the First Amendment applies to regulating commodities that involve the creation or dissemination of speech).

2 For a representative sample of this view, see, e.g., Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation*, CTR. FOR INTERNET & SOC'Y BLOG (Jan. 22, 2021), https://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation [https://perma.cc/9UNL-FJEK] ("Platform speech regulation laws often raise multiple overlapping constitutional questions, many of them head-scratchers . . . . [A]t every turn, the First Amendment shapes Congress's options."); Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/ [https://perma.cc/BN9C-9ZGA] ("Because virtually every forum of mass communication in the United States is privately owned and controlled, the First Amendment today sharply limits the ability of the democratic government to oversee the operation of its most important forums."); Noah Feldman, Remarks at the Harvard Law School Rappaport Forum: Censorship, Content Moderation, and the First Amendment (Sept. 22, 2023) ("Hard to imagine a topic more important for free speech in the United States today than what are the standards that the social media platforms may or may not use to determine what content can be on those platforms? And here that issue arises in direct relationship to the First Amendment."), *transcribed in* Justin Hendrix, *Experts Debate Social Media and the First Amendment*, TECH POL'Y PRESS (Sept. 27, 2023), https://www.techpolicy.press/experts-debate-social-media-and-the-first-amendment/ [https://perma.cc/45AD-RPVZ]; Jane Bambauer, James Rollins, & Vincent Yesue, *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047, 1049 (2022) ("[P]latforms are their own free speech creature that deserve strong protection from government intervention in hosting and curation choices . . . ."); Enrique Armijo, *Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment*, 73 FLA. L. REV. 1199, 1209 (2021) ("[T]he First Amendment would remain a significant impediment to government efforts to regulate content moderation practices."); *id.* at 1228 ("[There are] serious constitutional problems with imposing greater liability for social media platforms' hosting of harmful speech . . . [because] content moderation policies are protected speech." (emphasis omitted)); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1187 (2016) (acknowledging "some of the central problems that digital privacy presents for standard First Amendment doctrines"); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 457 (2021) ("[P]latforms have a First Amendment right to choose what to recommend, just as newspapers have such a right."); Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy [https://perma.cc/Y8B9-QLD6] ("[C]ompanies' deployment of the editorial analogy in the First Amendment context poses a major hurdle to government intervention."); Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2021) (cataloging judicial decisions demonstrating that the First Amendment grants platforms "unrestricted legal freedom to make termination/removal decisions"); NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1210 (11th Cir. 2022) ("Social-media platforms . . . are private companies with First Amendment rights, and when they (like other entities) 'disclos[e],' 'publish[],' or 'disseminat[e]' information, they engage in 'speech within the meaning of the First Amendment.'" (alteration in original) (citation

This concern stems, however, from a fundamental mischaracterization of what social media is. Current paradigms focus on social media as offering some form of content and connectivity service, and thus envision social media users as consumers or customers of an inherently speech-related service.[3] This way of viewing social media inevitably raises thorny First Amendment problems.

But this is the wrong characterization of what social media is. Social media platforms are advertisement companies that rely entirely on the data productivity of their users to create, package, and sell attention to advertisers.[4] Once properly reconceived through the lens of platforms' actual business model and method of operation, users are better analogized to platforms' workers. Social media, in other words, is not a service—it's a form of labor.

Reorienting how we think about social media by framing users as workers suggests that legal frameworks from labor and employment are especially productive for governing social media. Importantly, analogizing social media activity to labor helps solve for the free speech problems that hinder so many other proposals for social media regulation. While other paradigms for social media regulation fail to appreciate the worker element of the user-platform relationship, once that dynamic is recognized the First Amendment law of workplace speech regulation both solves sticky constitutional problems with content regulation and allows for regulation of rampant social media harms. Specifically, a labor analogy for social media illuminates the harmful ways in which social media exploits users and offers a body of law tailor-made to remedy hostile and unsafe environments rife with harassment and misinformation. The way to address these deeply antisocial and antidemocratic harms on social media and to do so consistently with the First

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omitted) (quoting *Sorrell*, 564 U.S. at 570)), *vacated sub nom.* Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

3 *See infra* subpart I.A.

4 Users here refers to everyone who uses the platform, whether to only view content, respond to content such as through likes, or create and share content such as through posts, for monetary gain or not. The platform tracks, profits off, and directs every user move, making every user action a form of user labor. A social media platform, in turn, is a platform that primarily hosts and disseminates advertisements to users engaged in viewing, creating, and sharing content, such as YouTube, Facebook, Twitter, TikTok, Instagram, NextDoor, LinkedIn, Snapchat, or Pinterest.

Amendment is to recognize social networks as places of social net work and to draw a direct analogy to work law.[5]

This Article offers a new labor paradigm for regulating speech on social media. It shows precisely how social media activity is akin to a modern form of labor and from this insight builds a legal framework for regulating content on social media based on the array of laws that regulate speech in private workplaces. The value of reconceptualizing social media through a labor paradigm is thus twofold: legally, it overcomes otherwise challenging First Amendment concerns with content regulation and, policy-wise, it illuminates a regulatory regime that is specifically designed to address the safety, dignity, and empowerment harms that pervade social media.

Part I explains why the analogy to labor is particularly apt. Not since the industrial revolution has society encountered an innovation in labor at the size, scale, and magnitude as social media. Yet prevailing models for thinking about social media emphasize a user-oriented experience that centers the user as a customer of social media's services. The main differences between these leading analogies simply contest what kind of service social media is most akin to—whether, for example, it is a form of public service, consumer service, or informational service. As a result, these models invite intractable First Amendment problems. Worse, to solve for these First Amendment problems, these paradigms focus on regulating the non-speech-related aspects of social media harms, such as access to the platform, competition between platforms, and platform privacy policies. Such reforms do little to directly address the harms to user safety, wellbeing, empowerment, and dignity or to the cohesion and epistemic integrity of civil society more generally.

Instead, what social media is—and what users do on it—is more akin to a new form of labor. With each letter typed, post clicked, and page scrolled, users on social media steadily input a stream of content and data, under the control and direction

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[5] This article interchangeably uses "work law" and "labor and employment law" to denote a broad set of laws that regulate the relationships between employers and employees, with particular emphasis on laws regulating *speech* within employment relationships. Under U.S. law, there persists a rough division between so-called "employment law," which governs workers' individual rights, and "labor law," which governs workers' collective rights. These areas of law are then further subcategorized, or cross-pollinated with, other areas of law such as antidiscrimination, insurance, tax, tort, health, and safety law. Because the set of applicable laws regulating speech relationships in the workplace touches on a vast array of legal subfields, the article relies on the more general "work law" or "labor and employment law" categorization.

of the platform, to create enormously profitable demographic and behavioral datasets that platforms sell to advertisers. As compensation and to retain user productivity, platforms offer social, informational, and entertainment benefits to users. The business model is to track, collect, and profit off user labor on the platform's site and more widely throughout the Internet to create a proprietary product to sell to third parties.

Having explained how social media works, Part II shows how social media *is* work. As just described, social media is little different from a traditional workplace, where employees input labor at the control and direction of their employer to generate a profitable product in return for compensation. An employment relationship is characterized by control, profit for compensation, imbalanced bargaining power, information asymmetry, and social community.[6] These defining economic and power dynamics between employers and workers are analogous to those between platforms and users. Social media platforms profit from users' labor on their sites while exercising supervisory control over their activity and maintaining power and informational superiority in an otherwise socially collegial environment. Their fundamentally economic and contractual relationship, coupled with how control, coercion, and information asymmetries operate between them, are the same. As are the predominate harms that plague both the workplace and social media—namely safety hazards, discrimination, harassment, and misinformation—especially for children, women, and minorities.[7] As such, social media users share analogous structural conditions, risks, and harms as traditional workers, and are in need of analogous statutory protections as employees.[8]

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6 *See infra* notes 84–87 and accompanying text.

7 *See generally* OFF. OF SURGEON GEN., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GEN.'S ADVISORY (2023), https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/6W55-ACU8].

8 Where possible, this Article smooths over the distinction between the more general, descriptive term "worker" and the more specific, legal term "employee" so as not to sidetrack the argument into discussion of what type of worker users are most akin to. Because most labor protections and speech regulations in the workplace apply to legally defined employees, the Article refers to this more specific term where it is more accurate to do so. On this note: even upon accepting the labor analogy, a reader might be tempted to analogize the relationship between platform and user to that between employer and independent contractor, as opposed to employee. The difference might appear significant; as just mentioned, most employment law only covers formal employees. Three brief responses: first, there is nothing stopping legislatures from extending the same employment protections to independent contractors that employees enjoy. It is

Establishing social media as a new labor paradigm does not, however, resolve whether the First Amendment ought to operate analogously in these two environments. Part III takes up this argument. The contours of the free speech right conform to the relationship dynamics between speaker and listener in a given institutional setting.[9] Put simply, the same words in different contexts carry different levels of First Amendment protection, largely in accordance with the varying power and information asymmetries that define the setting.[10] Constitutional protection for speech in private workplaces, therefore, conforms to the unique context of the employment relationship and the economic and power dynamics between employer and worker that define that setting. In this environment, the First Amendment has long tolerated regulations that address precisely the types of dignity, safety, and democracy harms now plaguing social net work.

Inherent to the employment context are three characteristics that justify the diminution of both employers' and workers' speech rights to protect the efficacy of the employment relationship and the rights and dignity of those in it—including their free speech rights. First, the workplace is a confined setting that leaves ample alternative channels for speech. Second, workplace speech presents greater threat of harm due to the inherently coercive nature of the environment. Finally, workplace speech is inextricably bound up with commercial conduct. These features render speech in the workplace both relatively more limited and more dangerous to justify moderating speech rights in this setting.

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a policy choice—as it would be to extend analogous protections to users—but no part of the legal or constitutional analysis here turns on that distinction. Second, even if users are more akin to independent contractors than employees under current law, independent contracts are still considered to be *working* and in a *labor relationship* with their employer that constitutionally justifies some restrictions on their and their employers' speech. Finally, there is a strong argument, spelled out in Part II, that definitionally users *are* more analogous to employees than to independent contractors given that the line between the two is demarcated by the degree of control the employer has and platforms exercise the requisite control over users. *See infra* subpart I.B and notes 84–87 and accompanying text.

9 This analysis complements First Amendment scholarship identifying the scope of the free speech right as defined by the social relationships between speakers and listeners and the social context in which these relationships occur. *See, e.g.*, Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 344 (2018); Balkin, *supra* note 2, at 1187 (shifting "the focus of First Amendment arguments about privacy from the kind of *information* to the kinds of *relationships*" being governed); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 19, 38–40.

10 *See infra* notes 121–32 and accompanying text.

These same key features define the social and economic dynamics of social media and the relationship between platform and user. First, social media is but one forum of communication among many other physical and virtual outlets for speech. Second, speech on social media is relatively more dangerous, consequential, and unavoidable than speech in the public square due to its relative virality, permanence, anonymity, and indispensability. Lastly, social media activity is a product of, and inextricably bound up with, a fundamentally economic and contractual relationship. As in the traditional workplace, these features of social media justify moderating the speech rights of platforms and users analogously to how law lightly, but importantly, regulates speech in private workplaces.

Circumscribing constitutional protection in the private workplace to account for these dynamics is quite sound under the First Amendment because doing so actually *maximizes* the freedom of speech by augmenting private citizens' capacity to speak and contribute to the marketplace of ideas.[11] It is no wonder, therefore, that work law's regulations of workplace speech are ubiquitous and longstanding. Since even before the Founding, legislatures have exercised power over the speech relationships between employers and employees in private workplaces.[12] Today, every state imposes speech regulations on employers and employees, and grants workers some protection from employer sanction for their expressive activities.[13]

The constitutional soundness of work law's speech regulations is, itself, one of the greatest advantages of understanding social media activity through a labor paradigm. Indeed, it is one of the few remaining areas of law regulating speech that the Supreme Court has not obliterated by inflating First Amendment protection.[14] To the contrary, the Supreme Court

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11 *See* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 67–68 (debunking the myth that regulation of speech online will inevitably result in less speech overall); Frederick F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L.R. 433, 450, 459 (1977) (showing how labor and property rules "are necessary to preserve the vitality of the free speech guarantee").

12 *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2308, 2336 (2021); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

13 Lakier, *supra* note 12, at 2332–37.

14 *See generally* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) (describing the recent trend by courts to expand the First Amendment's application to more areas of law and types of regulations).

has assiduously limited its attention on labor law to statutory interpretation as opposed to judicial review.[15] Though the constitutional status of speech regulations in the workplace is increasingly challenged,[16] and perhaps increasingly precarious and one-sided,[17] it nonetheless remains a most entrenched and historically grounded area of speech law. The prerogative to make work law and to protect constitutional rights and values in the workplace remains with federal and state legislatures—including the prerogative to design regulatory schemes that vindicate rights of speech, association, life, property, dignity, equality, due process, and democratic participation. These rights are as salient, and as in need of protection, in the digital sphere as they are in the physical workplace.

Part III continues by detailing how federal and state lawmakers have answered the call to protect workers' rights in the workplace through a variety of constitutionally permissible regulations on speech. These laws include regulations on both employer and employee speech. They entail prohibitions on discriminatory, abusive, false, and coercive speech by employers and among employees. Regulations on employers' speech further include requirements to refrain from proselytizing and unduly influencing the political and labor choices of their workforce. Work law also regularly compels employers to disclose important factual information, including notices of legal rights and health and safety warnings. Finally, work law can include

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15 *See* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2086 (2018) (detailing the "rational basis review the Court has usually applied to restrictions on labor protest since the mid-1940s"); Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464 (2007) ("[T]he workplace is an obvious and longstanding . . . 'constitutional niche.'"); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1782–83 (2004) ("[M]ost of labor law proceeds unimpeded by the First Amendment."); Mary Becker, *How Free Is Speech At Work?*, 29 U.C. DAVIS L. REV. 815, 821 (1996) (viewing "workplace speech as a category for which First Amendment scrutiny has been and should be limited"); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689, 701 ("[T]he Court has carefully limited its role in labor law to interpreting and implementing congressional action.").

16 *See generally* Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016) (documenting emerging challenges to work law under the First Amendment, some of which have subsequently been successful).

17 *See, e.g.*, Janus v. AFSCME, Council 31, 585 U.S. 878 (2018) (striking down law mandating union fees under the First Amendment); Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (striking down law granting labor organizations access to employer property for organizing under the Takings Clause).

protections for lawful worker speech against employer reprisal, including workers' political, religious, whistleblowing, and workplace advocacy speech. To help vindicate these statutory speech rights, work law may grant workers due process protections and rights to participate in workplace decision-making.[18]

Taken together, this body of law—stemming from various areas of labor, employment, antidiscrimination, and tort law—recognizes the crucial factor that the workplace is characterized by a triangular relationship between employer, worker, and coworker and regulates this setting accordingly. Indeed, the purpose of work law is to mediate the many competing rights these actors hold in order to protect and empower all workers and—more subtly but as importantly—to dismantle unjust forms of social stratification both in the workplace and in society. It is a body of law aimed, in other words, at alleviating individual subordination in service of redressing societal and political subjugation. This is exactly the type of law social media needs. Turning to work law as a framework for social media regulation thus helps illuminate and overcome the straw man argument that the freedom of speech is either a constitutionally formidable or even democratically vital barrier to platform regulation. It is not, as speech regulation of the private workplace well shows.

Part IV makes the turn to work law to offer a framework for social media regulation. Work law provides a powerful legislative and constitutional scaffolding for reform. Borrowing from analogous laws regulating speech in the workplace, a starting framework for regulating social media would entail new rules for users' and platforms' speech, accessible enforcement mechanisms, and user due process rights. Specifically, such reforms might include: stricter prohibitions on discriminatory, harassing, false, and coercive speech by users to other users; stronger enforcement mechanisms to protect users against abuse, including vicarious liability for platforms; prohibitions on platforms' coercive messaging to users; broader disclaimer and disclosure requirements for platforms; greater substantive and due process protections for user speech from platform reprisal; and user-empowered curation options. Going further, reforms might include wage and hour provisions and a prohibition on child social net work. These reforms stand to have a radical impact on the severe antisocial and antidemocratic

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18 *See infra* section III.C.2.

harms users experience on social media today—just as they have had for workers for decades.

To be clear, adopting a labor and employment analogy for social media does not mean either that the substance of present-day work law should apply wholesale to social media or that work law is not in need of significant reform.[19] Social media is not work under *current* labor and employment law.[20] But it is *enough* like work—and produces harms that map onto those in the workplace so tightly—that work law offers a surprisingly generative framework for regulating social media consistent with the First Amendment.[21]

In sum, the law of workplace speech is both incredibly salient and useful for navigating the tricky free speech issues that invariably arise when social media regulation is on the table. By jettisoning the archetypal paradigm of social media as offering a service to user-customers and recognizing it instead as a business that exploits its user-workers for profit, a labor paradigm for social media promises a constitutional breakthrough for regulating rampant and existential antisocial and antidemocratic harms on social media.

I
How Social Media Works

Social media has ushered in a seismic revolution in labor. No wonder that scholars, lawmakers, and citizens alike have struggled to categorize social media using pre-existing concepts

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19 Indeed, many notable scholars have long insisted that present-day employment law is radically under-protective of employee rights, including employee speech rights. In particular, the ways statutory and common law continue to protect employer prerogative is widely considered antithetical to realizing the full economic, democratic, and dignity rights of workers. *See, e.g.*, Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) (2017); Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 Berkeley J. Emp. & Lab. L. 79 (2022); Jonathan F. Harris, *Consumer Law as Work Law*, 112 Calif. L. Rev. 1, 25–30 (2024).

20 Contrast this argument with those advocating that gig workers are misclassified or unclassified employees under *current* work law and should thus benefit from current labor and employment protections. *See Consumer Protection for Gig Work?*, 136 Harv. L. Rev. 1628, 1629–38 (2023).

21 Accepting this analogy might tempt the reader to analogize other social activity to work, or at least to ask about line-drawing. Part II takes up this concern. Certainly, accepting that social media activity is akin to work in all the right ways to justify treating it like work for policymaking and constitutional purposes might logically extend to other activity, but it does not have to. Ultimately, whether other activity that bears important resemblances to work is or should be considered work is a political choice to be debated and quite beyond the scope of this article.

and definitions.[22] Instead, analogies abound, and in the world of law and policymaking, the search for the most apt analogy on which to model a regulatory framework for social media has become something of a talismanic quest. This is also no surprise, since analogies have powerful cultural, legal, and epistemological force.[23] Analogies matter because they reflect how we think about a problem, and how we define a problem sets the path for how we seek to solve it.[24]

Each of the current prevailing analogies for social media frames users as consumers or customers of platforms' content and connectivity services. But this is not the right way to think about social media platforms as businesses. Focusing on their business model and how the business actually operates, as opposed to any individualized user experience, reveals platforms to be massive advertisement companies supported by data factories. Their customers are the advertisers, while their users are better analogized to workers. This Part explains what current analogies miss about the relationship between platforms and users and then details exactly how social media works to begin building the analogy of social media as labor.

A. Existing Analogies and Their Drawbacks

At least ten analogies for social media animate the current regulatory discussion, all of which can be grouped into three categories that reflect different conceptions of the pervading

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22 Sari Mazzurco, *Content Moderation Regulation as Legal Role-Scripting*, 99 IND. L.J. 1131, 1162 ("There is no settled understanding of what the role of 'speech platform' entails . . . .").

23 *Id.* (discussing how the "roles" law assigns to institutions determine how the public thinks about them. For example, "the roles law chooses today may help the public and legal authorities understand whether Elon Musk's content moderation decisions are despotic acts of censorship, discrimination on the basis of users' viewpoints, or editorial judgments."). *See also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 795–99 (2011) (debating the proper analogy for violent video games and thus the permissible regulatory response under the First Amendment).

24 Put differently, every theory of regulation is a theory about harm. Analogies for new innovations pick up on the specific harm policymakers are concerned about. For example, whether a violent video game is more like a passive comic book or an immersive mind-altering experience reflects a choice about the perceived harm of these games—and thus the appropriate regulatory response. Similarly, in thinking about the problem of gun violence, one might analogize a gun to a knife or a car. The descriptive "fit" does little to answer which is the better analogy—both have the potential to kill or injure when used improperly and otherwise provide utilitarian and recreational value. Whether a gun is a knife or a car instead reflects the type of harm at stake in this debate. If mass casualty or easy access to a dangerous object is the problem, the gun is a car; if crime, self-defense, or autonomy is the problem, the gun is a knife.

harm social media platforms pose. Generally, the predominant analogies envision social media platforms as either some form of public service, consumer service, or informational service. These three analogical categories are all descriptively accurate but reflect different concerns about what the problem with social media is—whether, respectively, it is one of discrimination, choice, or privacy—and thus what the appropriate regulatory solution ought to be. They also all invite challenging First Amendment problems because they all envision social media as providing some kind of speech-service with users acting as some type of citizen-customer.

In the public service category, analogies range depending on just how public a social media platform appears. Some view these platforms as the modern-day public square, operating as vast democratic forums for discussion, debate, and social interaction.[25] Others take the public square analogy further by arguing these sites are indeed *public*, notwithstanding being privately owned and thus subject to the First Amendment's constitutional protections (and constraints).[26] More widely accepted is the idea that these platforms resemble quintessential public-private partnerships, like public utilities or common carriers.[27] At the least public end of the spectrum is the analogy that social media platforms are private companies that offer a public good, either by acting as public accommodations, like a shopping plaza or entertainment complex,[28] or as traditional distributors of information like book or newspaper

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25 *See* Packingham v. North Carolina, 582 U.S. 98, 105 (2017).

26 *See* Prager Univ. v. Google LLC, 951 F.3d 991 (2020); *but see* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802 (2019).

27 *See, e.g.*, Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 497 (2023); MARTHA MINOW, SAVING THE NEWS (2021); Volokh, *supra* note 2; Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 154 (2021); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. & TECH. REV. 234 (2018); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

28 *See, e.g.*, Randy E. Barnett, Eugene Volokh, Christopher S. Yoo, & Gregory G. Katsas, *When Twitter Speaks: Control, Access, and the First Amendment*, FEDERALIST SOCIETY (Oct. 26, 2022), https://freedomofthought.fedsoc.org/when-twitter-speaks-control-access-and-the-first-amendment/ [https://perma.cc/7LWU-7V44]; Joel Thayer, *Congress Should Apply Public Accommodation Laws to Big Tech*, NEWSWEEK (July 9, 2021), https://www.newsweek.com/congress-should-apply-public-accommodation-laws-big-tech-opinion-1608038 [https://perma.cc/4LAG-A8UR]; Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463 (2021).

distributors.[29] In all these scenarios, the problem to be corrected for is some degree of discrimination in service that is either arbitrary or, worse, viewpoint or content-based. At one end of this analogical spectrum, the First Amendment would impose stringent viewpoint neutrality obligations on how social media operates; on the other end, the First Amendment would permit limited obligations of fairness, equal access, and nondiscrimination. The difference between these analogies and their solutions is really one of degree.

In the consumer service category, social media companies are analogized to private businesses offering consumers a commodity and thus subject to the essential obligations of service-oriented businesses in a market economy.[30] This school of thought prioritizes consumer choice by focusing on augmenting competition, innovation, and market diversity, as well as protecting against unfair and deceptive trade practices.[31] Again, a consumer-focused analogy leads to existing consumer-focused legal frameworks, in particular antitrust and consumer protection law, and encounters First Amendment hurdles under recent caselaw granting speech-related businesses increased protections from such regulations.[32]

In the last category, social media platforms appear analogous to information custodians. These analogies are concerned

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29 *See* 47 U.S.C. § 230 (2018); NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022), *vacated sub nom.* Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); Whitney, *supra* note 2 (critiquing analogy between social media content moderation and editorial prerogative); Volokh, *supra* note 2, at 403–07.

30 *Consumer Protection for Gig Work?*, *supra* note 20 (advocating application of consumer protection law to certain platform users); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 559 (2022) (offering one characterization of platforms as "profit-driven entities that moderate because it is in their business interests."); *Cf.* FTC, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK (Sept. 15, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work [https://perma.cc/VDH9-Z737] (adopting a policy of enforcing consumer protection law against online gig platforms).

31 *See, e.g.*, Robert Post, *Exit, Voice, and the First Amendment Treatment of Social Media*, LPE PROJECT (Apr. 6, 2021), https://lpeproject.org/blog/exit-voice-and-the-first-amendment-treatment-of-social-media/ [https://perma.cc/JC8J-CJF5] (arguing that social media platforms might best be understood and regulated as businesses disciplined by the market); Christine Riefa, *Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce in* EU INTERNET LAW IN THE DIGITAL ERA (Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou & Thalia Prastitou eds., 2020); Julie Brill, Comm'r, FTC, *Privacy and Consumer Protection in Social Media,* Remarks at the N.C. L. Rev. Symposium (Nov. 18, 2011).

32 *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding a website designer was constitutionally protected from abiding by a state public accommodation law).

chiefly with user privacy and agency over their personal information. Thus, platforms have been analogized to information fiduciaries with duties of care, good faith, confidentiality, and prudence in using users' private information.[33] Less charitably (but perhaps more descriptively accurate), social media platforms are analogized to surveillance enterprises engaged in mass reconnaissance and advertisement projects.[34] Finally, the perennial suggestion underlying social media regulation since its inception has been that platforms are publishers of individual user information, acting analogously to the New York Times or Random House, and thus carrying common law duties of ensuring informational accuracy and privacy while enjoying robust First Amendment protection from state interference.[35]

These service-oriented models not only all encounter serious First Amendment hurdles but they also propose legal solutions that do less to directly address the noxious antisocial and antidemocratic harms that social media inflicts on users. Such harms include harms to the safety, well-being, empowerment, and dignity of individuals, as well as to the cohesion and epistemic integrity of civil society more generally. These harms manifest in social ills like cyberbullying, online sexual harassment, doxing, revenge porn, induced suicides, election interference, deep fakes, and the viral spread of injurious misinformation.[36] These are harms perpetrated not just by platforms but also by users, as users' content creation and platforms' algorithmic governance comingle to produce an especially potent risk of spawning a dangerous, radicalizing, and belligerent online environment.[37]

The contemporary crisis of online abuse, harassment, misinformation, and division is a pressing, if not existential,

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33 Balkin, *supra* note 2; Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019); Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11 (2020); Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, 134 HARV. L. REV. F. 34 (2020); Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 WASH. U. L. REV. 1897 (2021).

34 *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019); TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016); DANIEL TROTTIER, SOCIAL MEDIA AS SURVEILLANCE: RETHINKING VISIBILITY IN A CONVERGING WORLD (2012).

35 Volokh, *supra* note 2, at 403–07.

36 Several scholars have pioneered increased attention to these harms in the social media context under prevailing analogies, among them Danielle Citron, Mary Anne Franks, Amanda Levendowski, and Thomas Kadri.

37 For example, platforms actively circulate misinformation, promote divisive content, and create filter bubbles to maximize user engagement.

threat to a pluralistic political and social community. Yet current analogies remain more focused on concerns about individual access, choice, and privacy as opposed to communal health and safety—both on and offline. Conversely, an employment and labor law framework is well suited to address just such harms while remaining faithful to the protections of the First Amendment. Harms produced by multiple actors in a hierarchical community that ring of dignity, well-being, empowerment, and safety grievances evoke labor and employment struggles. These harms are not akin to those the public typically suffers on a train, in a mall, shopping for a service, or working with an accountant. They are instead typical of the harms workers fear and which work law is designed to address. Viewing social networks through this lens prioritizes concerns about user health and safety while avoiding many of the sticky constitutional limitations other analogies invite.

At bottom, current prevailing paradigms for platform regulation all frame social media as a digital service that facilitates the consumption, sharing, and creation of content in virtual communities. The emphasis is on the user as the primary actor: the user as creator of content, sharer of information, and beneficiary of the platform's services. Users in this paradigm are customers or consumers of the platform's content and connectivity services.

The reality is anything but: social media platforms are data factories. The primary actor—the one directing users, taking information, and profiting handily—is the platform. As one critic effectively put it: "We assumed that we use social media to connect, but we learned that connection is how social media uses us."[38] In effect, users are not so much enjoying a service as creating one for platforms. Platforms engage users to invest hours of social media labor on their sites, capture and collect that labor, and repackage it into a profitable product for sale to the highest bidder. In return, the platforms compensate users with valuable access to information, entertainment, and connection. The nature of the enterprise is to exploit users, not serve them.

Therefore, it is no surprise that other scholars have begun to take small steps in the direction of adopting a labor analogy for social media use. For example, some lawmakers and

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[38] Shoshana Zuboff, *You Are Now Remotely Controlled*, N.Y. TIMES (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html [https://perma.cc/TV9U-NZN8].

scholars have advocated that platforms compensate users for their data, a proposal that rests on the insight that data generates value in the same way as labor.[39] Similarly, other scholars have begun to conceive of aspects of user activity in labor-related terms by, for example, pushing to reclassify gig workers and social media influencers as employees[40] or analogizing user engagement to collective bargaining.[41] More broadly, scholars recognize that social media has morphed into a new form of capitalism and of social and economic exploitation.[42]

B. Labor Input: Producing Data on Everything, Everywhere, All of the Time

Take Facebook, still the leading social media platform by millions, as the paradigmatic example of how social media works.[43] Just like all other social media companies, Facebook

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39 *See, e.g.*, ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY (2019); Jill Cowan, *How Much is Your Data Worth?*, N.Y. TIMES (Mar. 25, 2019), https://www.nytimes.com/2019/03/25/us/newsom-hertzberg-data-dividend.html [https://perma.cc/GXX7-RB7R] (discussing Governor Gavin Newson's proposed "Data Dividend" plan); Own Your Own Data Act, S. 806, 116th Cong. (2019) (proposing a federal law requiring social media companies license users' data).

40 *See* Eugene K. Kim, *Data as Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L. SCI. & TECH. 131, 155 (2022) (arguing that "active" social media users ought to be defined as employees under the NLRA); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 37 n.23 (2016) (explaining that the development of the gig economy "invite[s] us to broaden our understanding of the universe of actors who shape access to job opportunities, as well as our understanding of how they can use speech to expand or constrain those opportunities.").

41 Charlotte Garden, *Platform Unions*, 108 MINN. L. REV. 2013 (2024); Kim, *supra* note 40; Sari Mazzurco, *Democratizing Platform Privacy,* 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 792 (2021).

42 John Laidler, *High Tech is Watching You*, HARVARD GAZETTE (Mar. 4, 2019), https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ [https://perma.cc/PM3Z-9YG2] (defining this new variant of digital capitalism as "the unilateral claiming of private human experience as free raw material for translation into behavioral data"); Sylvie Delacroix & Neil D. Lawrence, *Bottom-Up Data Trusts: Disturbing the 'One Size Fits All' Approach to Data Governance*, 9 INT'L DATA PRIV. L. 236, 239 (2019) (analogizing relationship between platforms and users to feudalism).

43 Not only does Facebook usership surpass its competitors by millions, it was also the first social media platform to surpass one billion registered accounts and currently sits at more than 2.9 billion monthly active users. Its parent company, Meta Platforms, owns four of the biggest social media platforms, all with over one billion monthly active users each: Facebook (core platform), WhatsApp, Facebook Messenger, and Instagram. In the final quarter of 2022, Facebook reported over 3.7 billion monthly core Family product users. Stacy Jo Dixon, *Most Popular Social Networks Worldwide as of January 2023, Ranked by Number of Monthly Active Users*, STATISTA (July 10, 2024), https://www.statista.

is a walled garden by design.[44] Someone wanting to view content on the platform cannot do so without creating an account, thus ceding at least such identifying information as their name and email address. This is the first specific directive to input data into the system, but it is hardly the last.

With varying degrees of explicitness, Facebook directs users to provide it with a steady, and often specific, stream of data about themselves. It does this by overtly requesting the data, relying on architectural design to shape and select the input of user data, and using digital nudges to adjust and augment users' provision of data to the platform. Every time a user logs into Facebook, they are given clear direction as to what to view and thus what data to provide. Indeed, to the extent they view content primarily on the News Feed, without seeking out a specific profile or page, they are given little choice in the matter. Facebook then keeps a record of just about every possible variety of user activity—on and off its platform, whether viewed in a browser or on a mobile device app.[45]

The amount of personalized data input and collected is astounding. To start, Facebook associates a unique User ID with each account that tracks the user's browsing activity both on and off the platform. That activity yields all manner of demographic, behavioral, biometric, and hardware information about the user.[46] Demographic data consists of the information the user provides about themselves, including their name, birth date, location, and profession.[47] Behavioral data range far wider. This includes the basic engagement patterns on the Facebook platform, including likes, comments, shares, and visits to particular pages. It also includes durations and times of various activities, from the total time spent on a given page,

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com/statistics/272014/global-social-networks-ranked-by-number-of-users/ [https://perma.cc/TSQ4-UDB4].

44 *See* Charlie Terenzio, *How Walled Gardens Like Facebook Are Cannibalizing Media Publishers*, FORBES (June 6, 2018), https://www.forbes.com/sites/forbescommunicationscouncil/2018/06/06/how-walled-gardens-like-facebook-are-cannibalizing-media-publishers/ [https://perma.cc/9CJV-TCWQ].

45 *See* David Nield, *All the Ways Facebook Tracks You—and How to Limit It*, WIRED (Jan. 12, 2020), https://www.wired.com/story/ways-facebook-tracks-you-limit-it/ [https://perma.cc/AD8W-T85E].

46 Steve Rosenbush, *Facebook Tests Software to Track Your Cursor on Screen*, WALL ST. J. (Oct. 30, 2013), https://www.wsj.com/articles/BL-CIOB-3152 [https://perma.cc/CF3V-KX8L].

47 *Id.*

to the times a user most frequently logs into their account,[48] and even to the amount of time a user's cursor lingers on a particular photo or post.[49] The user's entire social graph—the network consisting of all the interrelations among a user's friends, group members, and other users with similar interests—is recorded.[50]

Facebook placed an early emphasis on the collection of biometric and hardware data, too. It ran facial recognition software by default on all photos uploaded to the platform until 2019, and then by choice until 2021 when Facebook discontinued the practice in response to "growing societal concerns."[51] It continues to collect location data, IP addresses, internet service provider, WiFi networks, operating system, browser type, and other associated information about the hardware being used to access Facebook.[52] Happily, Facebook is not, in fact, listening

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48 *Get the Most from Page Insights*, META FOR MEDIA (Dec. 7, 2017), https://www.facebook.com/formedia/blog/getting-the-most-from-page-insights [https://perma.cc/UM62-2VJB].

49 Michael Grothaus, *Facebook Confirms It Tracks Your Mouse Movements on the Screen*, FAST CO. (June 13, 2018), https://www.fastcompany.com/40584539/facebook-confirms-it-tracks-your-mouse-movements-on-the-screen [https://perma.cc/H852-8EV5]; *see also* Rosenbush, *supra* note 46.

50 Boonsri Dickinson, *So What the Heck Is the 'Social Graph' Facebook Keeps Talking About?*, BUS. INSIDER (Mar. 2, 2012), https://www.businessinsider.com/explainer-what-exactly-is-the-social-graph-2012-3 [https://perma.cc/NWP7-STX4]. Facebook ultimately determined that the database was valuable enough that it could no longer share it with potential competitors. Josh Constine, *Facebook Is Done Giving Its Precious Social Graph to Competitors*, TECHCRUNCH (Jan. 24, 2013), https://techcrunch.com/2013/01/24/my-precious-social-graph/ [https://perma.cc/96SB-A3FW].

51 When Facebook ended this practice in 2021, it stated it would delete data on more than one billion people. Khari Johnson, *Facebook Drops Facial Recognition to Tag People in Photos*, WIRED (Nov. 2, 2021), https://www.wired.com/story/facebook-drops-facial-recognition-tag-people-photos/ [https://perma.cc/9QS3-TU8R]; Srinivas Narayanan, *An Update About Face Recognition on Facebook*, META (Sept. 3, 2019), https://about.fb.com/news/2019/09/update-face-recognition/ [https://perma.cc/778L-F5DH]; *but see* Laurel Brubaker Calkins, *Texas Sues Meta Over Facebook's Dropped Facial-Recognition Tech*, BLOOMBERG L. (Feb. 14, 2022), https://www.bloomberg.com/news/articles/2022-02-14/texas-sues-meta-over-facebook-s-dropped-facial-recognition-tech [https://perma.cc/N7YJ-MR33] (detailing lawsuit claiming Meta still uses facial recognition database).

52 Josh Constine, *Facebook Rewrites Terms of Service, Clarifying Device Data Collection*, TECHCRUNCH (Apr. 4, 2018), https://techcrunch.com/2018/04/04/facebook-terms-of-service/ [https://perma.cc/2FZL-QUHX]; Jake Kanter, *Facebook Is Tracking You in Ways You Never Knew — Here's the Crazy Amount of Data It Sucks Up*, BUS. INSIDER (June 12, 2018), https://www.businessinsider.com/facebook-reveals-all-the-way-it-tracks-user-behaviour-2018-6 [https://perma.cc/WC5M-KJQJ].

to users' conversations via their device's microphone.[53] Less happily, this is likely because it knows so much about its users already that such a practice would be superfluous.[54]

On mobile devices specifically—a particularly important segment of Facebook activity, given that 98.3% of users access the platform via mobile[55]—Facebook has long had similar and at times even more options for data collection. The same hardware, network, and location data collection applies to smartphones with the Facebook app downloaded.[56] On Android, it is possible for Facebook to see the call and text history of Messenger users,[57] a practice the company apparently misled journalists about for several years before it was revealed.[58] On iOS, much of this has been limited by Apple's decision to offer users the opportunity to affirmatively opt in to tracking by Facebook and others on iPhones, but significant amounts of data are still swept up.

Wide-ranging though they are, these methods only account for the data input directly through Facebook's own products. The company also has an extensive infrastructure in place, in partnership with many independent businesses, to extend the reach of its tracking apparatus to the rest of the Internet. Historically, Facebook has employed two primary tools for off-platform data collection on internet browsers: tracking cookies and the Facebook Pixel.

Cookies are small pieces of data that websites store on the computers that access those sites.[59] One type of cookie, used

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53 *Facebook Does Not Use Your Phone's Microphone for Ads or News Feed Stories*, META (June 2, 2016), https://about.fb.com/news/h/facebook-does-not-use-your-phones-microphone-for-ads-or-news-feed-stories/ [https://perma.cc/JWE3-Y3UY].

54 Antonio García Martínez, *Facebook's Not Listening Through Your Phone. It Doesn't Have To*, WIRED (Nov. 10, 2017), https://www.wired.com/story/facebooks-listening-smartphone-microphone/ [https://perma.cc/YB4J-KBC9].

55 Maryam Mohsin, *10 Facebook Statistics Every Marketer Should Know in 2023 [Infographic]*, OBERLO (Aug. 21, 2023), https://www.oberlo.com/blog/facebook-statistics [https://perma.cc/UY6S-S7DT].

56 Nield, *supra* note 45.

57 Gennie Gebhart, *Android Users, Change This Setting to Stop Facebook's Collection of Your Call and Text Metadata*, EFF (Mar. 27, 2018), https://www.eff.org/deeplinks/2018/03/android-users-change-setting-stop-facebooks-collection-your-call-and-text-metadata [https://perma.cc/4QXK-9DFM].

58 Kurt Wagner & Jason Del Ray, *Facebook's 'People You May Know' Feature Can Be Really Creepy. How Does It Work?*, VOX (Oct. 1, 2016), https://www.vox.com/2016/10/1/13079770/how-facebook-people-you-may-know-algorithm-works [https://perma.cc/4JKG-4LLE].

59 Allen St. John, *How to Control Web Cookies and Boost Online Privacy*, CONSUMER REPS. (Dec. 4, 2017), https://www.consumerreports.org/privacy/

primarily for tracking and advertising purposes, are "third-party cookies," or "tracking cookies." Tracking cookies are loaded onto a webpage by the website operator but are created by other companies, and often perform functions unrelated to the functioning of the website itself. Examples include advertisement boxes and social media plugins, like Login with Facebook or Share to Facebook. These cookies enable third parties like Facebook or Google to serve advertisements on otherwise independent websites, and also to track users' browsing activity whether they choose to engage with those advertisements or not. So long as a user doesn't block or clear the cookies in their browser (effectively deleting them from their computer) after logging in, tracking cookies will remain active even after the user logs out or leaves Facebook entirely, transmitting information about the user's browsing activity on the wider Internet back to Facebook.[60]

A similar but distinct tracking tool Facebook uses to collect information for its advertising business is the Pixel. It operates in much the same way as a third-party tracking cookie but offers websites enhanced ability to track user activity with far greater granularity than that available via traditional cookies.[61] As its name indicates, the Pixel is displayed as one of the many pixels that make up a user's computer display.[62] It is colorless, and thus effectively invisible, giving no outward indication that a third-party software has been loaded. A Pixel can be added to a website via coordination with one of Facebook's "partner platforms" or by pasting the Pixel code into the website's code.[63] Installing it on a website unlocks several advanced marketing

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how-to-control-web-cookies-and-boost-online-privacy-a7606763344/ [https://perma.cc/FSF8-6LRZ]; *Tracking Cookie*, PC MAG., https://www.pcmag.com/encyclopedia/term/tracking-cookie [https://perma.cc/5VB2-4EKG].

60 DALE NEEF, DIGITAL EXHAUST: WHAT EVERYONE SHOULD KNOW ABOUT BIG DATA, DIGITIZATION, AND DIGITALLY DRIVEN INNOVATION 137 (2015).

61 Bogdan Chertes, *Facebook Pixel Guide for Ecommerce: Conversion Tracking on Facebook Ads Made Easy*, ADFIX (June 1, 2019), https://adfixonline.com/facebook-pixel-conversion-tracking-ecommerce/ [https://perma.cc/NN6Z-CH9A].

62 Allen St. John, *How Facebook Tracks You, Even When You're Not on Facebook*, CONSUMER REPS. (Apr. 11, 2018), https://www.consumerreports.org/privacy/how-facebook-tracks-you-even-when-youre-not-on-facebook-a7977954071/ [https://perma.cc/7M2L-BRJN].

63 *Set Up and Use the Meta Pixel and Conversions API for Ad Campaigns*, META BLUEPRINT, https://www.facebookblueprint.com/student/activity/212737#/page/5fc6e6564a46d349e9dff6d6 [https://perma.cc/M634-8RPJ]. These partner platforms include premade website building tools like SquareSpace, WordPress, and Shopify. Chertes, *supra* note 61. By using these services, websites can incorporate the Pixel without having to edit any of their code. *Id.*

tools on the Facebook platform, including retargeting of previous visitors to the website and the creation of lookalike audiences based on the kinds of users that viewed the website in the past.[64] An additional benefit of the Pixel, relative to third-party cookies, is that it can avoid increasingly popular ad blockers by storing them as first-party cookies,[65] which tend not to be blocked due to the issues blocking them creates with website functionality.[66]

All of the information collected about users on Facebook is associated with their account via their unique Facebook User ID.[67] UIDs are strings of numbers that, while not containing any obvious personally identifying information about specific users, each correspond directly to one user's profile.[68] Whenever a user logs in to their account, a cookie is placed in their browser matching it to the UID associated with that account.[69] For as long as that cookie remains active, it will continue to transmit information about that user's activity back to Facebook, all of which is aggregated under the UID. This means that nearly *all* time and energy spent on the Internet, not just on a social media site, contributes valuable data to the platform. As such, every user's anonymized UID becomes associated with countless demographic and behavioral information about the user. That information is then used to offer up that user's attention to various advertisers as part of Facebook's monetization process. Put simply: the business model is one of exploiting users' digital activities for their data without pay.

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64 *Id.*

65 *See* Stephen Shankland, *Ad Blocking Surges as Millions More Seek Privacy, Security, and Less Annoyance*, CNET (May 3, 2021), https://www.cnet.com/news/privacy/ad-blocking-surges-as-millions-more-seek-privacy-security-and-less-annoyance/ [https://perma.cc/HU26-UJCE].

66 *WTF Are Facebook's First-Party Cookies for Pixel?*, DIGIDAY (Oct. 9, 2018), https://digiday.com/marketing/wtf-what-are-facebooks-first-party-cookies-pixel/ [https://perma.cc/48PW-XUWY]; *About Cookie Settings for the Meta Pixel*, META BUS. HELP CTR., https://www.facebook.com/business/help/471978536642445 [https://perma.cc/57EH-FK7Q].

67 *See* NEEF, *supra* note 60, at 137; *How Usernames and User IDs Are Used on Facebook Profiles*, FACEBOOK HELP CTR., https://www.facebook.com/help/211813265517027 [https://perma.cc/XLK4-XC2L]. Notably, this User ID is distinct from a user's Facebook username, which is the identifying text string at the end of the web address for that user's profile. *Id.*

68 *How Usernames and User IDs Are Used on Facebook Profiles*, *supra* note 67.

69 NEEF, *supra* note 60, at 137.

C. Labor Monetization: Selling Attention

Facebook capitalizes enormously on its users' prolific online labor. It does not sell the data it collects, that would mean relinquishing the proverbial golden goose, as the vast collection of granular data Facebook has amassed on millions of people is what makes its business so profitable.[70] Instead, Facebook sells valuable access to users attention based on the data they have input.[71] For example, by selling advertisers access to users' News Feeds,[72] Facebook provides those businesses the opportunity to put their products in front of large pools of customers that consist of highly targeted cross sections of the Facebook user base. Whether or not the advertisements successfully entice users to buy the advertised product or service,[73] Facebook has made its profit by placing the ads on screens.

Facebook's marketable audiences come in three varieties: core, custom, and lookalike. Core audiences are created based on preselected criteria such as age, gender, language, geography, and interests, among other characteristics. Alternatively, advertisers can create custom audiences by matching their own customer databases with existing Facebook profiles. Lastly, given enough information about the kind of user an advertiser seeks to target, Facebook can create a lookalike audience comprised of users that Facebook's algorithms determine have similar interests and will be similarly disposed to buying the advertiser's products.[74] Once the relevant audience is cre-

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70 Kurt Wagner, *This Is How Facebook Uses Your Data for Ad Targeting*, VOX (Apr. 11, 2018), https://www.vox.com/2018/4/11/17177842/facebook-advertising-ads-explained-mark-zuckerberg [https://perma.cc/9Q53-J6QG]. At least, assuming Facebook didn't receive data of greater value in return. Alexis C. Madrigal, *Facebook Didn't Sell Your Data; It Gave It Away*, THE ATLANTIC (Dec. 19, 2018), https://www.theatlantic.com/technology/archive/2018/12/facebooks-failures-and-also-its-problems-leaking-data/578599/ [https://perma.cc/Y2BB-SMJB].

71 *See generally* WU, ATTENTION MERCHANTS, *supra* note 34; *see also* Sean Illing, *There's a War for Your Attention. And You're Probably Losing It*, VOX (Feb. 11, 2018), https://www.vox.com/conversations/2016/11/17/13477142/facebook-twitter-social-media-attention-merchants [https://perma.cc/JY8W-95GE].

72 Among other digital spaces across the array of applications owned by Facebook, notably including Instagram and WhatsApp. *Explore What's Possible with Instagram Ads*, INSTAGRAM, https://business.instagram.com/advertising [https://perma.cc/SP2Y-V6EY]; *Create Ads That Click to WhatsApp in Ads Manager*, META BUS. HELP CTR., https://www.facebook.com/business/help/447934475640650. [https://perma.cc/9VDY-M5WJ].

73 *See* Fahad Muhammad, *Advertising Conversion: Everything You Need to Know*, INSTAPAGE (June 9, 2020), https://instapage.com/blog/advertising-conversion-everything-you-need-to-know/ [https://perma.cc/K8RY-APRR].

74 *Audience Ad Targeting*, FACEBOOK, https://www.facebook.com/business/ads/ad-targeting [https://perma.cc/VED8-APNQ]; Neil Patel, *What Is Facebook*

ated, ads are placed in front of these audiences via an auction system, with billions of auctions occurring each day across Facebook's various properties.[75] Facebook also connects advertisers with third-party app developers to place ads across countless other mobile apps, reaching over one billion people.[76] Overwhelmingly, the ability to create and sell access to lookalike audiences, which depends on vast collections of data, is the most valuable service Facebook offers.[77] Indeed, when Apple introduced an App Tracking Transparency feature in 2020, which prompted iPhone users to answer whether they wanted apps to track their activity,[78] this simple move cost Facebook nearly $10 billion in losses in the fourth quarter of 2021,[79] with other ad-funded social media companies taking similar damage to their returns.[80]

Despite modest privacy and transparency improvements, however, there is little doubt that Facebook, and all other social media companies, operate opaquely as they amass unprecedented power and informational advantages over individual users and society as a whole.[81] Facebook's collection and targeting operations are notoriously secretive, often coming to light only in response to leaks, whistleblowing, and deep investigative reporting. Its users have little information about Facebook's

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Advertising & How Does It Work?, NEIL PATEL, https://neilpatel.com/what-is-facebook-advertising/ [https://perma.cc/LCE5-K6FK].

75 *About Ad Auctions*, META BUS. HELP CTR., https://www.facebook.com/business/help/430291176997542 [https://perma.cc/7MH6-JQU4].

76 *Facebook Audience Network*, META BUS., https://www.facebook.com/business/marketing/audience-network [https://perma.cc/696Q-W5Y9].

77 *See Interest Versus Demographic Targeting: 3 Surprising Factors for Consumer Packaged Goods Brands to Create Breakthrough Digital Ad Campaigns*, FACEBOOK IQ (Nov. 22, 2021), https://www.facebook.com/business/news/insights/interest-vs-demographic-targeting-three-surprising-factors-for-consumer-packaged-goods-brands-to-create-breakthrough-digital-ad-campaigns [https://perma.cc/87M9-BGWU].

78 Jason Cross, *What is App Tracking Transparency and How Do You Block App Tracking?*, MACWORLD (Apr. 29, 2021), https://www.macworld.com/article/344420/app-tracking-transparency-privacy-ad-tracking-iphone-ipad-how-to-change-settings.html [https://perma.cc/44JN-7CJS].

79 Michael Simon, *Apple's Simple iPhone Alert is Costing Facebook $10 Billion a Year*, MACWORLD (Feb. 3, 2022), https://www.macworld.com/article/611551/facebook-app-tracking-transparency-iphone-quarterly-results.html [https://perma.cc/ZS59-W6C3].

80 Emma Roth, *Apple's App Tracking Policy Reportedly Cost Social Media Platforms Nearly $10 Billion*, VERGE (Oct. 31, 2021), https://www.theverge.com/2021/10/31/22756135/apple-app-tracking-transparency-policy-snapchat-facebook-twitter-youtube-lose-10-billion [https://perma.cc/JP96-6YV8].

81 *See* Shoshana Zuboff, *Surveillance Capitalism and the Challenge of Collective Action*, 28 NEW LAB. F. 10 (2019).

governance, business strategies, or algorithmic choices, and even less say over such matters.[82] These extreme economic, power, and information asymmetries not only define the relationship between Facebook and its users, they exert powerful influence over society and democracy.

II
How Social Media Is Work

Social media, as just described, is not just a network, it's net work. This novel form of interactivity has ushered in a fundamental paradigm shift in labor and production by melding the worker and consumer—the act of consuming content *is* an act of labor.[83] Why is this? What makes work work? And is social media really that much like work?

Definitionally, work (as synonymous with labor) means exertion to attain an end, especially as controlled by and for the benefit of an employer, regularly, and for compensation.[84] Implied in this definition is some degree of employee subordination to the employer, as well as a fundamentally economic relationship between employer and employee. Common-law agency rules and labor, tax, and employment law all identify control and economic realities as the principal factors defining

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82 *See* Jeremy B. Merrill & Ariana Tobin, *Facebook Moves to Block Ad Transparency Tools — Including Ours*, ProPublica (Jan. 28, 2019), https://www.propublica.org/article/facebook-blocks-ad-transparency-tools [https://perma.cc/QL7C-6FTF].

83 Another way one might describe social media as paradigm shifting is by recognizing that it has collapsed the first and second factors of production, land and labor. On social media, the users, as laborers, do not work a natural resource like land, they *are* the natural resource. In this way, the analogy this Article advocates compliments Shoshana Zuboff's characterization of the new economy of the digital age as exploiting human behavior. Zuboff distinguishes the old economy of industrial capitalism from the new economy of surveillance capitalism by identifying the former as having exploited land and labor and the latter as exploiting behavioral data. *See* Zuboff, *supra* note 81. Of course, human behavior is simply a form of human activity that, when controlled and exploited for profit, is justifiably characterized as labor too. Interestingly, Jonathan Harris has recognized an inverse phenomenon where traditional employers are increasingly offering consumer services to their employees and thus transforming them into hybrid "worker-consumers." Harris, *supra* note 19. Social media platforms are doing much the same from the other direction, increasingly controlling and profiting off their consumers' labor to the point of transforming them into hybrid "consumer-workers."

84 See Work, Black's Law Dictionary (11th ed. 2019); Work, The Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/work [https://perma.cc/6EYL-9UT9]; Labor, Black's Law Dictionary (11th ed. 2019) ("Work of any type, including mental exertion . . . The term usually refers to work for wages as opposed to profits.").

an employment relationship,[85] but are careful to retain vague and expansive definitions of "work" and "employment" to capture an evolving and diversified workforce that will progress depending on advances in law, society, and technology.[86] Descriptively, three additional factors are highly characteristic of (though not unique to) the modern workplace: economic dependence that produces imbalanced bargaining power, information asymmetries, and social community.[87] Taken together, these five features of the workplace shape the regulatory framework that is work law.

Of course, even the most definitional qualities of work are hardly definitional in all contexts: myriad unpaid jobs count as work (take internships), as does fulfilling tasks sporadically (like babysitting) or on the worker's own volition (e.g., ride share

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85 Employment, agency, tax, and tort law all use a variety of multifaceted tests to define employee (and to demarcate the difference between an employee and an independent contractor) by looking to the degree of control and whether the work is a key aspect of the business. *See, e.g.*, RESTATEMENT OF EMP. LAW § 1.01 cmt. d (AM. L. INST. 2015); RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (AM. L. INST. 2006) (identifying control as a defining feature of the employment relationship, where "an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work."); IRS, INDEPENDENT CONTRACTOR (SELF-EMPLOYED) OR EMPLOYEE?, https:// www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-oremployee [https://perma.cc/944W-6GCQ]; Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7 (Cal. 2018) (applying agency law's ABC test); Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (1999) (applying common-law agency rules to define an employee as a person "who perform[s] services for another and [is] subject to the other's control or right of control."); Garcetti v. Ceballos, 547 U.S. 410, 418, 422 (2006) (identifying control as an inherent feature of the employment relationship that influences the constitutional dimensions of the free speech right in public workplaces).

86 For example, the Fair Labor Standards Act defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The term "employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). Section 2(3) of the National Labor Relations Act defines "employee" broadly to include "any employee" subject to only a few enumerated exceptions like agricultural laborers and domestic house workers. 29 U.S. Code § 152. *See also* NLRB Office of the General Counsel, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act* 5 (2021) (relying on "significant developments in the law, NCAA regulations, and the societal landscape" to support the conclusion that "traditional notions" of labor have changed in the context of amateur athletes).

87 These factors reflect both legal considerations that define an employment relationship under federal labor and constitutional law as well as descriptive attributes of the typical employment relationship in a modern capitalist economy. *See* Alexander Hertel-Fernandez, *American Workers' Experiences with Power, Information, and Rights on the Job: A Roadmap for Reform*, ROOSEVELT INST. (2020), *available at* https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_WorkplaceVoice_Report_202004.pdf [https://perma.cc/WY27-UKQH] (documenting the extent to which information and power asymmetries define the modern workplace).

driving). Sole proprietors who work alone are not subordinate to a boss nor do they enjoy a social community at work, but certainly their business activity is work. Further, not all employees are economically dependent on their employer or suffer a disparity in bargaining power, especially in industries relying on highly sought-after workers with scarce or specialized skills. This is to say, no workable definition of "work" can perfectly describe each and every working relationship in a modern commercial economy. But the vast majority of employed labor can defensibly be characterized as fundamentally economic activity, subject to a degree of employer control, for compensation, in an environment characterized predominately by power and information disparities and valuable social connections.

Each of these factors is emblematic of the relationship between social media platforms and users. As Part I alluded, and the rest of this Part makes clear, social media platforms profit enormously from user exertion on their sites while exercising a surprising degree of control over their activities, compensating them with valuable benefits, and maintaining power and informational superiority in a social environment of high personal significance. There may not be a commute, a paycheck, or regular working hours, but social media platforms have introduced a new labor paradigm by creating a relationship with their users that parallels the five essential attributes of an employment relationship. The law governing employment, therefore, provides a most useful model for regulating social media.

1. Control. Platforms meaningfully direct their users' online activity. First, they exert ultimate control over a user's social net work by retaining authority, via the terms of service, to remove a user from the platform at the platform's discretion. Terms of service contracts operate analogously to at-will employment contracts, permitting the platform to eject users from the social workplace at will. Moreover, the platforms make all the rules and policies a user must agree to abide by in order to remain a platform user, just as in any traditional workplace the employer is empowered to impose rules and policies of its choosing on its workforce. This so-called "employer prerogative" is the default rule in work law, placing all decisions governing the workplace in the hands of the employer unless constrained by contract or law.[88] By dictating a specific set of rules and policies users must abide by in their social net work,

[88] Racabi, *supra* note 19, at 83–85.

the platform exerts substantive control over users' access to and activity on the platform.

Once engaged in social net work on the site, platforms then exert far more control over users' specific data inputs than meets the eye. The platform actually directs users' online activity in ways that mimic how an employer supervises and exerts control over many of its employees' work activities. Most obviously, the platform will periodically order users to input specific data, like biographical information, as a condition of remaining on the platform. More delicately, platforms will suggest or nudge users to input the data it desires. More subtly but extremely effectively, social media platforms control users' data activity by structuring their sites to offer a predetermined set of engagement options. In essence, a user is only permitted to do what the platform allows her to do, which is simply a different way of controlling a user's platform activity. For example, every time a user logs into Facebook, they are given clear direction as to what to view and thus given a pre-selected set of data inputs they can enter. If viewing content primarily on the platform's default homepage, like Facebook's News Feed, they have no choice in the data they are providing. This is little different than sitting at an assembly line of pre-selected products to work on.

All of these control tactics are standard supervision techniques in traditional workplaces. Certainly, the forms of control platforms exercise are different in style and degree from traditional workplace control tactics, like setting shifts, calling breaks, creating scripts, or ordering tasks. But this type of heavy-handed control is not emblematic of all employment relationships and indeed is less and less characteristic of employment in emerging industries. More subtle control tactics are now highly encouraged and widely considered optimal management styles. Architectural choices, nudging strategies, and directive leadership skills—all of which platforms rely on to control user activity—are taught at top business schools and companies invest considerably in adopting these forms of more understated control over workers to increase employee satisfaction and, therefore, retention and productivity. Especially in professions with a high degree of autonomy, like academia, more subtle forms of control through policy statements, nudges, and incentives are integral to controlling the workforce. Similarly, platforms' combined overt, subtle, and subliminal cues direct, cajole, and condition user behavior to the point that the platform is not just influencing user behavior, it is modifying it, controlling the manner and means

of users' social net work to obtain their most efficient and profitable labor.[89]

2. Work for compensation. Integral to the concept of work is a fundamentally economic exchange of labor benefitting the employer for compensation benefitting the employee. In the typical case, the employer derives profit from the worker's labor and the worker is rewarded in wages. For social network, platforms profit handily off users' online labors in exchange for compensating users with digital benefits. This is a new form of compensation but one that does not negate the fundamentally economic relationship between platforms and users that renders users' activities analogous to a new form of labor.

First, the profit side of the exchange works much the same for platforms as it does for traditional employers. As discussed, social media's revenue streams overwhelmingly derive from their advertisement business. Facebook alone reports that ninety-seven percent of its revenue—amounting to $113 billion in 2022—comes from its ad business.[90] This business, in turn, rests entirely on a platform's collection of data from its users and its access to users' attention. In other words, the profitable service depends on users' labor and on there being a captive audience like a workforce.

In exchange, users are compensated with a panoply of benefits that resemble those earned in both paid and unpaid jobs. Though it is still rare that users are compensated with a paycheck, they are rewarded with access to the non-wage benefits of the platform's amenities. These benefits come in the form of highly valuable economic opportunities, information, social engagement, and entertainment—indeed, these benefits might be more valuable than a paycheck as they are, quite literally, often things "money can't buy." Moreover, the fact that many users now *do* earn money directly from the platform, for their social net work, and that compensation is increasingly becoming a profitable and competitive business model for platforms

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89 Laidler, *supra* note 42 (quoting Shoshana Zuboff as explaining that platforms are, "actually intervening in our behavior" by developing "economies of action," that "learn to tune, herd, and condition our behavior with subtle and subliminal cues, rewards, and punishments that shunt us toward their most profitable outcomes").

90 Stacy Jo Dixon, *Annual Revenue Generated by Meta Platforms from 2009 to 2023, by Segment*, STATISTA (May 22, 2024), https://www.statista.com/statistics/267031/facebooks-annual-revenue-by-segment/ [https://perma.cc/B4E7-SCMK].

to retain and attract users, strengthens the analogy of social media to labor even more.[91]

That platforms do not typically compensate users with wages for their social net work does not automatically remove this activity from the ambit of labor and employment. Historically, compensation for labor in the form of script or goods was commonplace until the labor movement successfully won statutory protections ensuring wages be paid "free and clear."[92] Today, both employment law and other areas of law, including antitrust and consumer-protection law, recognize a wide variety of non-wage benefits and free services as compensation.[93] These services are considered regulable compensation as "employee benefits," as opposed to consumer products or services, specifically to prevent employers from skirting around employment law by paying employees in kind.[94] Thus, health insurance, retirement plans, tuition programs, transportation

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91 *See* Amanda Perelli, *How Much Money YouTubers Make and Can Earn, According to Creators*, BUS. INSIDER (Jan. 3, 2024), https://www.businessinsider.com/how-much-do-youtubers-make [https://perma.cc/P2NJ-4K99]; Julian Cannon, *X Is Trying to Entice Content Creators and Former Followers Back with Payouts*, DIGIDAY (Aug. 15, 2023), https://digiday.com/marketing/x-is-trying-to-entice-content-creators-and-former-followers-back-with-payouts/ [https://perma.cc/P6N8-RYUU]; Madeline Garfinkle, *Content Creators Are Cashing In on This 'Underutilized' Money-Making Platform, According to a New Report*, ENTREPRENEUR (Oct. 20, 2023), https://www.entrepreneur.com/business-news/content-creators-say-theyre-cashing-in-on-facebook-payments/464044 [https://perma.cc/Y59U-HG9B].

92 *See* 29 CFR § 531.35 (2019); Dayton Coal & Iron Co. v. Barton, 183 U.S. 23, 24–25 (1901) (upholding Tennessee law banning payment of wages in scrip); *Cf.* Elaine S. Tan, *Ideology, Interest Groups, and Institutional Change: The Case of the British Prohibition of Wages in Kind*, 1 J. INSTITUTIONAL ECON. 175 (2005) (documenting the ubiquity of in-kind payment for labor in England prior to 1831).

93 For example, the Fair Labor Standards Act, 29 U.S.C. § 203(m), limits the number and extent of in-kind wages allowed but nonetheless considers many in-kind benefits including clothing, household effects, fuel, electricity, water, gas, and transportation between home and work to count as wages. *See also* International Labor Organization, Convention No. 95 (Protection of Wages Convention) & Convention No. 100 (Equal Remuneration Convention) (defining wages as remuneration and remuneration as including "any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment"). Similarly, antitrust and consumer protection laws apply in full to zero-price products and services and to the markets in which such products and services are supplied. UNITED STATES, QUALITY CONSIDERATIONS IN THE ZERO-PRICE ECONOMY (Nov. 28, 2018), *available at* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/quality_considerations_in_digital_zero-price_markets_united_states.pdf [https://perma.cc/F4LS-5YCD].

94 *See* JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 258–76 (2006).

assistance, and merchandise are all allowed and regulated as compensation under work law when offered in exchange for labor.[95] Importantly, the law regards such benefits as part of the employee's compensation package even when they cost the employee money or rebound primarily to the benefit of the employer.[96]

As the NLRB recently recognized with regard to student athletes, their unpaid athletic extracurriculars are properly considered labor because the athletes provide a profitable and positive value to the university in exchange for benefits like tuition, room, board, and books, and they are subject to the control of the university's terms and conditions of play.[97] Though the argument with student athletes is that they are employees under *current* labor law, whereas the argument here is that users are highly analogous to workers for purposes of understanding and regulating social media, the student-athlete case demonstrates that the longstanding absence of wages in a particular field—there, amateur and extracurricular activities—does not prevent such activities from evolving into labor as law and society continuously update and reconceptualize that concept.[98]

Wages, therefore, do not so much define work as they are a right of work—a right long fought for and still sought after for nontraditional workers,[99] including interns,[100] ama-

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95 *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d); Fair Labor Standards Act, 29 U.S.C. §§ 206–07; Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a).

96 *See* 29 C.F.R. § 531.35 (2019) (requiring non-cash wages to be paid free and clear and preventing kickbacks for nonwage services). An interesting question arises whether a social media service is still in an employment-like relationship with its users if the platform requires users to pay to use it. So long as the economic relationship described here otherwise remains the same, these paid social media services might still have created an employment-like relationship with users just as certain employers require employees to pay for access to training services.

97 NLRB Office of the General Counsel, *supra* note 86.

98 *See* Trustees of Columbia Univ., 364 N.L.R.B. 90 (2016) (recognizing student assistants, medical interns, and non-academic student workers as protected employees under the NLRA).

99 Not surprisingly, these groups mostly consist of young persons, a group with minimal political and economic power to self-advocate.

100 *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016).

teur athletes,[101] trainees,[102] and law review editors.[103] When exactly should such non-compensated work, like social net work, nonetheless become understood as a form of labor? In the United States, the fundamental question is whether the primary beneficiary of the work is the worker, rather than the employer, who may actually lose out on efficient operations by what it offers.[104] This test requires examining the "economic reality" of the relationship, primarily by considering the extent to which the work is principally for and limited to providing beneficial learning to the worker and whether the work supplements rather than fulfills necessary tasks for the employer.[105] Put differently, the question is which party primarily benefits and what is the nature of that benefit. If the employer is deriving substantial economic benefit from the worker's labor, then the worker is properly considered an employee even if the worker is *also* deriving substantial civic, professional, or educational benefit from their labor.

Platforms offer a panoply of non-wage benefits to users, but they do this for one reason: to reap enormous profit from users' online activities. Platforms are not offering services out of charity or for the educational, social, or political benefit of users. These benefits are calculated byproducts of the platform's primary economic use for users: to track, collect, and sell access to their data. That social net work benefits come in the form of in-kind as opposed to in-cash benefits, therefore, does not undo the fundamental work-for-compensation relationship between platform and user. Perhaps the uncompensated nature of social net work is good reason to not simply apply current employment law to social media. But it is not a good reason to dismiss that the platform-user relationship is a new labor paradigm in need of comparable and analogous regulatory attention to that of traditional employment.

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101 *See* Alston v. Nat'l Collegiate Athletic Ass'n (In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 594 U.S. 69 (2021).

102 *See* McKay v. Miami-Dade Cnty., 36 F.4th 1128 (11th Cir. 2022); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1211–12 (11th Cir. 2015).

103 Coalition of Law Reviews, Open Letter: Demand for Compensation and Call for Solidarity (Dec. 6, 2023, 8:12 PM), https://twitter.com/StanLRev/status/1732568677344825380 [https://perma.cc/JGV6-W44S].

104 *See Glatt*, 811 F.3d 528; U.S. Dep't of Labor, Wage and Hour Div., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (Jan. 2018), https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships#1 [https://perma.cc/EG32-JJ2G].

105 *Id. See also McKay*, 36 F.4th at 1139.

3. Power Disparity. The high value of social media platforms' services to users—like the high value of a paycheck or employment benefits to workers—creates imbalanced power dynamics in the platform-user relationship that resemble those characteristic of most employer-worker relationships. Engagement on social media is increasingly indispensable to functioning in today's society. Navigating and accessing social connection, professional prospects, extracurriculars, political and civic engagement, small and large purchases, and economic opportunities, for oneself and one's family, all depend in large part on some access to some social media platform. The informational, social, political, and economic benefits social net work provides are different from wages but, like wages, are increasingly invaluable for fully engaging with contemporary society. This is all the more true if a user's income is dependent on the services offered by a platform, such as search, advertisement, and tracking services. For small businesses in particular, which make up 99.9% of the U.S. private sector economy and employ nearly half of all private sector employees,[106] failure to engage with social media can be a death knell, directly resulting in losses of revenue and customers, as well as the inability to grow and compete.[107]

This type of economic dependence replicates the age-old power imbalance that defines the traditional employer-employee relationship: users need platforms more than platforms need any one user. This power dynamic is especially coercive when applied to behemoth monopolies, which the major social media companies are.[108] Such disparities in bargaining power gave rise to a labor movement necessarily focused on worker solidarity, strikes, boycotts, and unions. Given the productive similarities between social net work and employment, it is therefore unsurprising that users today are organizing and mobilizing to compel platform reforms using the same labor tactics of old.[109]

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106 FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS, 2023, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (Mar. 7, 2023), https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/ [https://perma.cc/5PWJ-6WYX].

107 Sean Peek, *Why Small Businesses Need a Social Media Presence*, BUSINESS.COM (Apr. 10, 2023), https://www.business.com/articles/social-media-small-business-importance/ [https://perma.cc/C686-5ANV].

108 *See* Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 252–76 (2021).

109 *See* Garden, *supra* note 41; Katie Teague, Peter Butler & Nelson Aguilar, *How to Delete Your X [(Twitter)] Account in 5 Steps: Elon Musk Boosting Antisemitic Tweet Causes Growing Boycott*, CNET (Nov. 25, 2024), https://www.cnet.com/tech/permanently-deleting-x-takes-5-steps-elon-musk-promoting-antisemitic-

4. Information asymmetry. Informational inequality is a precarious characteristic of most modern workplaces, as well as a defining and hazardous characteristic of the relationship between platforms and users. The American workplace is rife with informational asymmetry about important workplace information—about workers' safety, treatment, and legal rights as well as their knowledge of organizational performance and decision-making.[110] Users experience the same, or worse, informational roadblocks on social media. Platforms, like employers, control the relevant information needed to maintain a safe, informed, and productive environment. And platforms, like employers, guard this proprietary information tightly, leaving users knowing "next to nothing" about how they operate and the decisions they make.[111]

Just as the employer has private access to its own confidential trade secrets, business strategies, personnel records, and other personal identifying information of its workers (such as access to their email, passwords, and social security numbers), platforms alone maintain exclusive access to their entire algorithmic governance system and user databases. In both contexts, this information—completely in the hands of the more powerful party with economic incentives to be less than transparent—is necessary for workers to make informed employment decisions and to stay safe on the job. For example, whether an employer is pursuing a reckless or disagreeable business strategy might influence an employee's decision to remain with the company. More vitally, if an employer is exposing workers to hazards or unsafe working conditions, including a hostile work environment, the employee might need access to internal documents or personnel information to understand and protect themselves from danger. This is all too true when performing social net work, where there is increased risk that a user will not know the identity of her abuser.[112] Despite this,

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tweet-leads-to-growing-boycott/ [https://perma.cc/HYL4-6L5Z]; Mark Katkov, *Celebrities Boycott Facebook and Instagram for a Day over Disinformation, Hate Speech*, NPR (Sept. 16, 2020), https://www.npr.org/2020/09/16/913466191/celebs-disdain-facebook-and-instagram-for-a-day [https://perma.cc/M4LT-NTXF].

110 Hertel-Fernandez, *supra* note 87, at 17–28.

111 *Platform Transparency: Understanding the Impact of Social Media, Hearing Before the Subcomm. on Privacy, Tech., & L. of the S. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Nathaniel Persily, James B. McClatchy Professor of Law, Stanford Law School).

112 *See* Thomas E. Kadri, *Brokered Abuse*, 3 J. FREE SPEECH L. 137 (2023).

platforms continue to "provide almost no functional transparency into their systems."[113]

5. Social connectedness. Nowhere is it clearer that social media is a modern form of labor than when looking at the social and individual benefits that participation in this workforce begets. The workplace is a principal locus of individual self-realization, growth, and fulfillment, as well as interpersonal development, learning, and connection. Workplaces are emblematic sites of teamwork, friendship, conflict navigation, and cooperation. No description more aptly applies to social media. Like a traditional job, most Americans will spend a great deal of their waking hours engaged in social net work, whether in countless quick glances and searches or in more lengthy scrolling, posting, reading, and shopping sessions across the Internet.[114] As they do, users create friendships, work towards common ends,[115] and navigate conflict, feedback, and disagreement—the same skills employees build at work. While employees exercise these skills in the course of overtly working towards the employer's goals, users do so more subconsciously and platforms direct their progress more subliminally. Still, users work together to accomplish the platform's principal business goal: the composition of vast human behavioral datasets—one of the greatest collective labor endeavors ever achieved.

In the process, users share all of who they are online in the way coworkers expose most, if not all, of who they are at

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113 *Platform Transparency: Understanding the Impact of Social Media: Hearing Before the Subcomm. on Privacy, Tech., & L. of the S. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Brandon Silverman, Co-Founder and Former CEO, CrowdTangle); Molly Wood & Evelyn Douek, *We Hardly Ever Talk About YouTube and Disinformation. Not Anymore.*, Marketplace Tech (Dec. 17, 2020), https://www.marketplace.org/shows/marketplace-tech/we-hardly-ever-talk-about-youtube-and-disinformation-not-anymore/ [https://perma.cc/Z5GD-ZMJP].

114 *See generally* Juliet B. Schor, The Overworked American: The Unexpected Decline of Leisure (1991); Carole Foy, *How Much Time Do People Spend on Social Media in 2024?*, Twicsy (Jul. 2024), https://twicsy.com/blog/time-spent-on-social-media [https://perma.cc/4EWY-473F] (reporting that the average user spends hours a day on social media); Tori DeAngelis, *Teens Are Spending Nearly 5 Hours Daily on Social Media. Here Are the Mental Health Outcomes*, Am. Psych. Ass'n (Apr. 1, 2024), https://www.apa.org/monitor/2024/04/teen-social-use-mental-health [https://perma.cc/5EFH-9RKU] (reporting that teen users spend an average of nearly five hours per day on social media).

115 This is especially true in gaming and crowdsourcing groups, like groups dedicated to solving crimes or mysteries. *See* Sarah Viren, *Podcasters Took Up Her Sister's Murder Investigation. Then They Turned on Her,* N.Y. Times Mag. (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/magazine/murder-podcast-debbie-williamson.html [https://perma.cc/7REM-H33K] (describing the plethora of Facebook groups dedicated to investigating cold cases).

work. Our proclivities, thoughts, preferences—even our most intimate ones—are all on display. We create social connections and environments via social media that replicate the social connections and environments we create in traditional workspaces.[116] Cynthia Estlund's description of the social and expressive value of the workplace drives home the analogy. She writes:

> The workplace is one institution in which most adults can and must interact with others—initially strangers, often from diverse cultural, ethnic, political, and religious backgrounds—in a constructive way toward common aims. . . . [T]he workplace is increasingly one of the few organic communities of a human scale in which many members of the society participate on a regular basis. To that degree, the workplace has become an increasingly important site for the forging of those crosscutting ties that help bind together a diverse society and for the formation of "civic virtues": the habits and traits and beliefs that make good citizens.[117]

This description so well encapsulates social media—and the need to protect its expressive, civic, and social function by granting increased rights and protections to the laborers making the engine run: the users.

6. Is everything work? Reconceptualizing social media as a form of labor invites the question whether other forms of social interaction are also so analogous to employment that work law becomes a useful starting point for regulating those activities as well. Certainly, some specific forms of uncompensated labor satisfy the above definition so substantially they ought to fall within the ambit of current employment law, such as many internships and student athletic activities. More broadly, however, most other systems and technologies do not conform to the definition of employment in the way social media does. What is striking about social media is that it *uniquely* masquerades as a new-age social organization or business service when it in fact is exceptionally analogous to employment in ways other seemingly comparable business models and organizations are not.

For example, other uncompensated social organizations like volunteer groups, religious and civic organizations, or even

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116 *See* DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY (2022) (detailing how much we share online).

117 Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 112 (1995) (footnotes omitted).

school systems are not principally economic activities that operate primarily for the discrete benefit of the organization. While aspects of control, power and information asymmetries, and social connectedness are undoubtably characteristic of volunteer, religious, civic, and educational environments, the relationship between superior and subordinate is foremost instructive, humanitarian, developmental, and charitable.[118] The duty and calling of these systems is to serve the beneficiaries, not the provider (regardless of whether this high principle is always followed in practice).

Likewise, other business models that do pursue fundamentally economic relationships with their patrons but do not extract revenue through payment—such as cable news outlets or entertainment venues—lack the requisite control, power disparity, and regular social interaction characteristic of both social media and employment. In these contexts, the service provider has little active control over patrons and far less direct ability to command, manipulate, and profit from patron's activities. They have also not created a relationship of adhesion whereby the provider has such superior bargaining power over the patron as to affect access to many necessary goods, services, and information.

Similarly, social media differs in kind from other modern communications technologies like the telephone and email, rendering them also less analogous to employment. Certainly, these technologies have become as ubiquitous and necessary as access to social media and are integral to human connection. But again, the degree of provider control over consumer conduct is blunt and minimal, and the power and information disparities are less stark and consequential.

In contrast, imagine a few modern workplaces. A simple example is a grocery store. Are users more like a grocery store's employees or customers? At first blush, one might say customers. But understanding how social media works shows why this is not the case. As described above, social media works by directing the activities of its users and aggregating those activities into a profitable service it sells to advertisers. A grocery store works no differently with regard to its workers. A store manager loosely directs employees how to stock food within the architectural confines of the store so that it may offer a service

118 For example, the Department of Labor has defined the term "volunteer" in the Fair Labor Standards Act differently from employee as those who serve for "civic, charitable, or humanitarian reasons." 29 CFR § 553.101(a) (2024).

to paying customers. A more sophisticated, and thus more illustrative, example is a workplace that is a pharmaceutical lab tasked with developing a vaccine. The pharmaceutical scientists (users) will work to craft a formula (input data) to create a vaccine (dataset). The pharmaceutical company (platform) will then sell access to the vaccine to third parties (advertisers), without actually disclosing the vaccine's proprietary formula. In exchange for their labor, the scientists (users) receive a variety of benefits from working for the pharmaceutical company, including pay, non-compensatory benefits, professional skills, and social and personal fulfillment.

To put a finer point on it: imagine the all-too-typical American workplace experience of a young employee sitting at her office desk creating valuable products her company will sell for huge profit, all the while paying her nearly nothing. Worse, her work environment is rife with lies, harassment, and vitriol coming from her colleagues; she has a boss that does little to stem the attacks and indeed appears to promote them; and throughout the day she's presented with a whole lot of tasks she'd rather not see or tend to. But she needs the job. It provides indispensable and, at its best, enjoyable benefits, including economic, social, and educational opportunities. She wishes she had more control over her work and working environment, and that her colleagues and company treated her better. She keeps coming back, day after day. This is the all-too-typical experience of a young user on social media.

Social media, as a paradigm-shifting system and technology, defies easy classification. The question, though, is *which* paradigm is it shifting? Social media platforms comfortably and uniquely satisfy the foundational characteristics of an employer-worker relationship: refined control of worker activity, primarily for the economic benefit of the employer, significant power and information asymmetries, and the creation and development of social skills and community in the workplace. Understanding social media as shifting the labor paradigm suggests taking the details of labor and employment law seriously for borrowing in the context of social net work, even if there might be some translation necessary. In particular, employment law offers an especially productive model for addressing the concerning and pervasive harms of hostile, unsafe, and false speech on social media that work law has long been designed to address—without running afoul of the First Amendment, as the next Part details.

III
FREE SPEECH AT WORK

It is one thing to recognize social media activity as a modern form of labor and to equate social media platforms to the modern-day workplace; it is quite another to claim that the two places are comparable for constitutional free speech purposes. Free speech works differently at work. Whether or not it should work similarly with regards to social net work depends on whether the reasons free speech is treated differently in the private workplace apply with equal force to the digital workplace of social media. They do.

Constitutional free speech rights are often overlooked in private workplaces given that private employer regulation of speech does not, itself, raise any constitutional issues. However, numerous laws govern speech in the private workplace—both the speech between employers and employees and the speech among employees—and these laws are state action that must conform to the protections afforded by the First Amendment. Because social media has the same structural conditions as employment, the constitutional dimensions of private workplace speech regulations are highly salient for thinking about and defending regulations of speech on social media—both the speech between platforms and users and the speech among users.

This Section begins with the theory for why the First Amendment permits greater tolerance of speech regulations inside the private workplace and shows how that theory is equally applicable to social media. It then describes some of the most relevant regulations of workplace speech, including prohibitions on discriminatory, harassing, false, and coercive speech; compelled disclosures of important factual information, including notices of legal rights and health and safety warnings; and protections for employees' speech, due process rights, and greater autonomy over working conditions. Part IV then shows how these laws might serve as an insightful model for regulating speech on social media.

A. Free Speech and the Private Workplace

The relevant antecedent question is: why is free speech different at work? Or more specifically, why does employment at a private company result in the reduction of a citizen's free speech rights at work by government regulations of workplace speech?[119]

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[119] Unlike in the context of *public* employment, the answer cannot be consent. *Cf.* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 197–98 (2021) (Alito,

The answer rests on two propositions. First, there is an "outside" the workplace where citizens can more freely speak politically and personally. The availability of alternative forums for communication, especially public ones, make restrictions on workplace speech less burdensome on both individuals' speech rights and the public's right to hear diverse viewpoints. The second, more essential justification for workplace speech regulations is that the employment *relationship* warrants a diminution of speech rights both to protect the efficacy of the employment environment and the contrasting rights and dignity of those in it.[120]

Relationships matter integrally to free speech protections.[121] The same words in different social contexts carry different levels of constitutional protection. What would be protected in the public square is unprotected when spoken in other social contexts like at work,[122] at school,[123] in court,[124] or in official documents.[125] The same is true if certain words are spoken to different individuals, including government officials,[126]

J., concurring) (asking "[w]hy should enrollment in a public school result in the diminution of a student's free-speech rights?" and answering that the "only plausible answer that comes readily to mind is consent, either express or implied"). First, in the ordinary course, citizens cannot consent to a violation of their free speech rights. Second, consent to a diminution of rights in exchange for gainful employment is so coercive to not pass muster on the doctrine of unconstitutional conditions. *See* Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 59 (2006).

120 *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (acknowledging that the nature of the employment relationship between employer and employee influences the contours of the free speech right at work).

121 *See* Shanor, *supra* note 9; Mazzurco, *supra* note 22, Norton, *supra* note 40, at 37; Fallon, *supra* note 9; *cf.* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260 (2005) (describing First Amendment doctrine as largely indifferent to institutional context but calling for greater sensitivity to such context and relationships in the doctrine).

122 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (upholding Title VII's prohibition against verbal sexual harassment in the workplace against First Amendment challenge).

123 Morse v. Frederick, 551 U.S. 393, 397, 408–10 (2007) (upholding suspension of student for displaying a banner reading "BONG HiTS 4 JESUS"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (permitting prior restraint of student newspaper articles on divorce and teen pregnancy); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding suspension of student for sexually explicit speech).

124 United States v. Alvarez, 567 U.S. 709, 720–21 (2012) (distinguishing First Amendment protection for lies in public from lies made to a court under oath).

125 *Id.* at 720 (reasoning that a prohibition on making false statements to a government official or in an official document "does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context").

126 For example, words spoken to a jailor (*see* Beard v. Banks, 548 U.S. 521 (2006)), a federal investigator (*see* 18 U.S.C. § 1001), or a judge (*see Alvarez*, 567

children,[127] or even individuals of different characteristics or experiences.[128] First Amendment protection hews to the identity of the listener and the societal context in which the speaker acts, not on the type of speech or the identity of the speaker.[129] Rather, the constitutional focus is invariably on the contextual dynamics of the speaker-listener relationship. Speech between equal citizens in public spheres is rigorously protected;[130] whereas speech occurring in more private relationships characterized by power and information asymmetries support a listener-centric approach to free speech that permits greater intrusions onto the speaker's rights.[131] In particular, the degree of economic or social dependence characterizing the speaker-listener relationship is critical to the question of protection.[132]

Taken together then, three characteristics of the workplace and the employer-employee relationship justify the different treatment of speech rights at work. The workplace is a confined setting, in which speech presents greater threats of harm, and is inextricably linked to the economic activity that

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U.S. at 720; 18 U.S.C. § 1623; United States v. Grayson, 438 U.S. 41, 54 (1978)).

127 *See* Ginsberg v. New York, 390 U.S. 629 (1968); New York v. Ferber, 458 U.S. 747 (1982).

128 *See* Hill v. Colorado, 530 U.S. 703, 710 n.8, 715 (2000) (underscoring the possible trauma to patients in upholding a law against approaching a patient within 100 feet of an abortion clinic to protest, educate, or counsel the patient); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding the First Amendment does not protect "fighting words," which inflict injury on the listener by their utterance or tend to incite a breach of peace by those who hear the words). *Cf.* Virginia v. Black, 538 U.S. 343, 363 (2003) (accepting constitutionality of prohibiting cross burnings for the purpose of threatening or intimidating another); Snyder v. Phelps, 562 U.S. 443 (2011) (relying on the public nature and place of the emotionally abusive speech to hold that the speech was constitutionally protected from tort liability).

129 *See* Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353 (2022) (debunking the myth that different types of speech or speakers receive different levels of First Amendment protection).

130 *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *Snyder*, 562 U.S. at 452; Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977).

131 *See* Norton, *supra* note 40, at 52.

132 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (protecting commercial speech based on economic and informational dependence of consumers); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460–62 (1978) (upholding restriction on lawyers' in-person solicitation of clients because of the disparities in informational and professional dependence between the two parties); Francesca Procaccini, *(E)Racing Speech in Schools*, 58 HARV. C.R.-C.L. L. REV. 457 (2023) (discussing caselaw establishing that power asymmetries and relationships of dependence influence the degree of free speech protection between certain speakers and listeners).

principally underlies an employment relationship.[133] First, the workplace is a time- and space-bounded environment that leaves open ample alternative private and public opportunities for speech. In this way, the free flow of information in society is not so much restricted by workplace speech regulations as it is redirected to alternative forums and methods of communication, a common and uncontroversial method of regulating speech under the First Amendment.[134]

Second, certain types of workplace speech risk violence, social harm, and disruption to a greater degree than if the same speech were uttered by a private citizen in a public place because of the inherently coercive nature of the workplace. Such speech includes threatening and harassing speech that does not rise to the level of unprotected threats or fighting words that may be banned in public spaces.[135] First Amendment law permits government to enact such speech regulations on both employers and employees because of the especially coercive environment of the private workplace.[136] Members of a workplace are captive audiences; they have to be there by virtue of economic necessity and contractual obligation.[137] Moreover, the workplace is one of the unique environments that also poses

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133 *See* Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253, 258–66 (2018).

134 For example, the First Amendment permits regulations on the times, places, and manners of speech to promote public safety and order, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984), as well as restrictions on the means of expressing an opinion to do the same. United States v. O'Brien, 391 U.S. 367 (1968).

135 *Compare* Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (permitting liability for abusive speech that a reasonable person would find hostile and that the victim actually does perceive as abusive), *with* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (protecting emotionally abusive speech that is on a matter of public concern and uttered in a public forum); Virginia v. Black, 538 U.S. 343, 360 (2003) (protecting abusive and harassing speech in public that does not amount to a true threat); *and* Cohen v. California, 403 U.S. 15, 16–17 (1971) (protecting offensive speech in public).

136 First Amendment law recognizes a legitimate and weighty state interest in protecting against coercion as part of the counter-*Lochner* revolution. Even as free speech took on a higher position in the ordering of constitutional rights in the post-*Lochner* era, the Court maintained that coercive power imbalances in the workplace are a social and economic ill that legislatures may address without running afoul of either the free speech or contract right.

137 The captive audience doctrine is not limited to the home but rather relies on the character of the place, as the Court has recognized by applying the doctrine to students in school, *see* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683–84, and to commuters on public transportation, *see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion). For a thoughtful discussion of the scope of the captive audience doctrine as applied to the workplace,

high social and psychic costs on leaving,[138] making it all the more infeasible to flee, while also imposing informational and power disparities that ill-equip workers to protect themselves effectively if they stay.[139] Speech in this environment is thus less avoidable and more intimidating, backed by dire financial, social, and psychic consequences.[140]

Finally, speech at work is inextricably entwined with the economic and contractual nature of employment. Speech at work is indivisible from work itself, making speech regulations an inevitable component of ordinary economic regulations of commercial conduct.[141] Similarly, the contractual context of the workplace renders it an environment premised on consent and negotiation where speech disputes are more efficiently resolved ex-ante via regulation than post-hoc via litigation. Altogether, these three features of the workplace and the employer-employee relationship render speech relatively more dangerous, consequential, and unavoidable to justify moderating employers' and employees' speech rights to fulfill the economic and public value of the employment relationship.

These differences matter for constitutional free speech purposes. Were any one of these characteristics absent, the free speech calculus would be different. For example, in the antiquated situation where there is no "outside" the workplace because one lives and works in a company town that is entirely

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see J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Fallon, *supra* note 9, at 18–19.

138 See Clark Kerr, *The Social Economics Revisionists: The "Real World" Study of Labor Markets and Institutions*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS 77–81 (Clark Kerr & Paul D. Staudohar eds., 1994) (discussing the social science behind the psychic and social costs of fleeing work, including disruption of familiarity and loss of social relationships).

139 Fallon, *supra* note 9, at 43.

140 Precisely for this reason, law constrains both employers' and unions' speech during a unionization vote to avoid the economic coercion of voters.

141 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (affirming the "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."). Although commercial speech does receive First Amendment protection, commercial *conduct* receives substantially less constitutional protection under the Fourteenth Amendment in the wake of the Court's abandonment of the *Lochner* era doctrine of economic substantive due process. Because workplace speech is inextricably bound up with workplace activity, it receives less than full First Amendment protection as compared to publicly disseminated commercial speech. *Cf.* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 642 (2020) (Breyer, J., dissenting in part) (cautioning that protecting all speech regardless of context will inevitably "affect traditional or ordinary economic regulation of commercial activity" because "[m]uch of human life involves activity that takes place through speech").

operated by the employer, the First Amendment demands greater protection for employee speech.[142] Alternatively, were the primary dynamics of an economic relationship not characterized by coercion and control, like in the case of a seller-buyer consumer relationship, the First Amendment affords greater protection to the speech rights of both parties to that economic transaction.[143] Or, finally, were speech to occur in an institutional setting that is not primarily and inextricably grounded in an economic and contractual relationship, as is the case with membership in a civic or religious organization, the First Amendment again imposes greater restrictions on the state's ability to regulate the speech of these institutions and their members.[144]

The fundamental difference in the latter two examples is that the relationship in question is primarily service-oriented as opposed to labor-oriented. To put the point in terms familiar to the context of social media, the distinction is between institutions that *host* speech and those that *create* speech. Employers and platforms, by their nature, transactionally host the speech of their laborers; member organizations and businesses selling expressive products create speech to begin with and are thus entitled to more First Amendment protection against state regulation of their speech.

A parallel and more developed strand of First Amendment doctrine confirms the basic proposition that free speech works differently at work. In a series of recent *public* employment free speech cases, the Supreme Court has upheld restrictions on public employee speech by reasoning that the First Amendment tolerates speech restrictions in employment to ensure the effectiveness of the work environment, and it has limited the application of the free speech right in this context to only

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142 Marsh v. Alabama, 326 U.S. 501 (1946).

143 *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (affording First Amendment protection to expressive businesses, like website designers and other artists, against an antidiscrimination in public accommodations law prohibiting businesses open to the public from denying goods and services to customers on the basis of sexual orientation).

144 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding the First Amendment right of freedom of association protects civic organizations from structuring their membership and activities in accordance with state antidiscrimination in public accommodations laws where doing so would change the content of their expressive message); Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (same).

protect speech of public value.[145] In the context of public employment, courts must balance the interests of the government as employer with citizens' free speech rights, a slightly different constitutional calculus than balancing the government's regulatory interests in achieving social, moral, and economic goals in the workplace against citizens' free speech rights. But the analysis overlaps in a key way. In the public employment context, the Supreme Court's First Amendment doctrine rests on the recognition that a workplace—any workplace—cannot function properly without speech restrictions *and* that those restrictions may be government-mandated depending on the nature of the speech at issue and the strength of the government's interest in restricting it.

In light of these constitutionally salient characteristics defining the workplace and the employer-worker relationship, the First Amendment permits work law to enact some special regulations on speech that conform to the necessities of that setting. For example, work law offers the rare body of free speech law that permits the restriction of some individuals' speech to protect the speech of others.[146] It is, moreover, one of the few contexts in which the First Amendment permits the recognition and redress of psychic pain caused by speech—usually beyond the constitutional authority of government to remedy.[147] Strikingly, work law's body of speech regulations are permissibly grounded in an effort to protect the "exercises of expressive freedom that appeared necessary to the preservation of democratic government in the United States against concentrated economic power."[148] As such, this body of free speech law offers an example of a redistributive, power-sensitive, and

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145 Garcetti v. Ceballos, 547 U.S. 410, 418–20 (2006); Lane v. Franks, 573 U.S. 228, 235–37 (2014). The only recent instance of the Court strengthening First Amendment protections for employees has been to recognize a First Amendment right of workers to refuse to join or pay fees to a union. Janus v. AFSCME, Council 31, 585 U.S. 878, 895–901 (2018).

146 Copyright law is the other major body of speech law that permits this move. *Contra* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011) (claiming "this sort of 'beggar thy neighbor' approach to free speech—'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others'—is 'wholly foreign to the First Amendment.'"). *Cf.* Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (limiting the longstanding principle in labor law that the legislature may restrict the property rights of some to enhance the speech of others).

147 *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Snyder v. Phelps, 562 U.S. 443, 452 (2011); Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977).

148 Lakier, *supra* note 12, at 2336.

socially-conscious field of speech law that is ripe for replication in the social media context.

The question becomes, therefore, whether the employment relationship between a traditional employer and employee and its modern analogue—the relationship between a social media platform and user—share the same key features to accept normatively and constitutionally that the free speech rules should be analogous as well. The answer is they do. The same three characteristics of the workplace and the employer-employee relationship that justify treating speech rights differently at work also describe the social and economic dynamics of social net work and the platform-user relationship. Specifically, social media is but one forum of communication—and speech in this environment is relatively more dangerous, consequential, and unavoidable than speech in the public square while being inextricably bound up with economic activity.

First, platforms are no less the only adequate forum for speech than the workplace is. Like the physical workplace, there is an "outside" social media that includes all the same quintessential private and public fora long understood to comprise adequate and protected opportunities for speech. Indeed, since users enjoy far greater flexibility around when and how they are engaged in social net work, speech regulations that apply to social media stand to be less restrictive and encompassing than those that apply at a traditional job.

Second, speech on social media is uniquely dangerous. Its virality permits every users' speech to travel with impossible ease, speed, breadth, and permanence unknown and unobtainable in the physical world. It is highly consequential because of its indispensability to users' social, informational, educational, cultural, and professional connection. The magnitude and impact of speech on social media is enhanced not just because it is unavoidable but also because it is unleavable, similar to a traditional job. The personal costs to switching networks are nearly insurmountable and made all the more difficult by digital barriers platforms erect to trap users on their sites.[149]

Lastly, speech on social media—like in the workplace—is really a derivative attribute of users' labor in a thoroughly economic and contractual relationship. Social media is not a social organization, it is a business enterprise. In this enterprise, user speech is indivisible from user labor even more so than in the traditional workplace because on social media user

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149 *See* Guggenberger, *supra* note 108, at 279–87.

speech is not simply a byproduct of their labor, it's the product itself.[150]

But while the special characteristics of the workplace—and the social net workplace—justify a diminution of speech rights there that would be unacceptable outside the workplace, they do not justify a total lack of speech protection in either environment. Not even close. Rather, as discussed below, these features justify rules establishing a special speech relationship that balances employers' and platforms' speech and business rights with workers' and users' expressive and dignitary rights.

Accordingly, one might readily describe free speech at work as a triangular relationship between employer, worker, and coworker.[151] Or, as applies to social net work, between platform, user, and co-user. Law regularly, but carefully, governs speech between these parties by restricting what may be said, compelling what must be said, and protecting what should be said. This body of law should be translated to apply to social media similarly to how it applies to the traditional workplace: it should impose regulations on user-to-user speech (like it does on employee-to-employee speech) and it should impose both rights and obligations on platform-to-user speech (as it does on employer-to-employee speech). The relevant workplace speech regulations, ripe for replication in the social media environment, are summarized below; their analogues that would apply to social media are then described in Part IV.

B. Regulations on Employee ←→ Employee Speech

Law recognizes that workplaces require a baseline of civility, respect, tolerance, autonomy, and dignity to run effectively and fulfill their economic, contractual, and social functions. To foster such a productive and safe environment, the law imposes restrictions on abusive, discriminatory, false, and threatening speech between employees, whether between coworkers, subordinates, or supervisors. In other words, rank or station is irrelevant to the prohibition; as is whether the conduct actually occurs in the workplace. What matters is that the speech

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150 This is true regardless of whether the user speech is content creation or a less "speech-y" form of engagement, like reading posts or shopping. All social media engagement, by virtue of the medium, is firstly an exercise in data production and collection, which the Supreme court considers a form of "speech." *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 567–69 (2011) (characterizing the use and dissemination of data and information as protected speech).

151 *Cf.* Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2014 (2018) (describing free speech as a triangle between platforms, users, and governments).

is uttered in a private employee capacity and directed at another private employee. In this context, because of the unique employment relationship between employees, the First Amendment permits restrictions on speech that would not otherwise pass constitutional muster. These laws principally comprise a body of antidiscrimination law, private defamation law, and labor strike law. Taken together, these laws offer a guiding framework for how to encourage and enforce a safer speech environment online that better protects the dignity and wellbeing of users.

First, antidiscrimination law has revolutionized the tenor, safety, and productivity of workplaces across the country. Along with every state, Congress has enacted robust workplace discrimination laws and enforcement mechanisms that have revolutionized employees' sense of dignity, autonomy, and safety in the private sector, including by regulating speech in the private workplace. Chief among these legislative accomplishments, Title VII of the Civil Rights Act,[152] the Americans with Disabilities Act,[153] and the Age Discrimination in Employment Act[154] together make it an unlawful employment practice to discriminate on the basis of race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, disability, and age (above 40) or to create a hostile work environment on one of these bases—regardless of whether the discrimination or abuse occurs solely through speech.

For any such speech to rise to the level of illegal conduct, the speech, taken as a whole, must create a reasonable perception that the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[155] Thus, for example, "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" violate Title VII when "such conduct has the purpose or effect

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152 Pub. L. No. 88-352.

153 42 U.S.C. § 12112.

154 29 U.S.C. § 623.

155 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citation omitted). The Equal Employment Opportunity Commission, charged with enforcing these statutes, describes verbal harassment as being unlawful "where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." U.S. EQUAL EMP. OPPORTUNITY COMM'N, HARASSMENT, https://www.eeoc.gov/harassment [https://perma.cc/U8FZ-9HE8].

of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[156] This is a relatively high threshold that balances employees' often conflicting rights to speech, autonomy, and dignity, as well as their right to contribute equally and safely to molding the social and cultural fabric of the workplace. The balance is quite effective, however, because restrictions on severe and pervasive vitriol or abuse ultimately serve to increase, not lessen, the total amount of speech and social participation in the workplace by empowering and protecting all workers.

Most important for accomplishing the goals of federal antidiscrimination law is the enforcement mechanism. These laws hold the *employer* accountable for the harassing speech of its employees if the employer knew or should have known of the abuse and failed to take prompt and appropriate corrective action to stop it.[157] This liability structure effectively imposes a negligence standard of respondeat superior liability on an employer for the unlawful speech acts of its employees and anyone else it exercises control over, including independent contractors and customers on the premises.[158] This enforcement mechanism is designed to accomplish the "primary objective" of antidiscrimination law, which is "not to provide redress but to avoid harm."[159] Accordingly, because employers are in the best position to witness and control the speech of their employees, the law imposes a duty of care on them to ensure that speech in the workplace does not harm workers or compromise the employment relationship.

Imposing such an enforcement mechanism to regulate speech is particularly appropriate in the employment context. Though respondeat superior liability for workplace speech poses the risk of what Professor Balkin has called collateral censorship—where private party A has the power to control private party B's speech and is liable for party B's speech, party A has an incentive to censor party B[160]—collateral censorship is appropriate in the employment context because the employer has superior ability to police the law and may be considered a joint wrongdoer when it fails to do so—or worse, when it actively

156 29 C.F.R. § 1604.11(a) (1993).

157 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

158 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 155.

159 Faragher v. Boca Raton, 524 U.S. 775, 806 (1998).

160 Balkin, *supra* note 137, at 2298.

facilitates the abuse.[161] At the same time, employers (like platforms) are unlikely to over-police speech in the workplace due to their countervailing economic incentives to maximize worker retention, production, and satisfaction. In reality, Title VII liability incentivizes employers to create workplace rules around speech that encourage employees to think twice before saying something deeply offensive. Hardly the stuff of troublesome censorship, these rules encourage reflection, dialogue, and a safe speaking environment for all workers.

Tort and labor law further constrain employee speech in the workplace to ensure productive and respectful environments. First, the common law tort of defamation makes it unlawful, in the ordinary case, for an employee to negligently make false statements about a coworker. Negligence, of course, is a low standard of culpability, requiring only that the employee fail to act with reasonable caution before spreading harmful misinformation.[162] The First Amendment imposes a far higher standard of liability for false statements made about public figures or on matters of public concern; indeed the Supreme Court all but immunized such statements from liability to ensure breathing room for public discourse.[163] But the First Amendment is no barrier to a low standard of liability for falsehoods about private individuals, who make up the vast majority of Americans and certainly of employees (and users). Such falsehoods are readily proscribable because, far from threatening to suppress public discourse, defamation liability in this context

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161 *See id.*, at 2301–03. Balkin argues that collateral censorship is appropriate under the First Amendment in situations where vicarious liability in tort law is appropriate, namely when the relationship between the parties is such that it is appropriate to treat the employer and the employee the same because the employer has control, joint responsibility over harm, and superior ability to prevent the harm. In contrast, when these features are not present, vicarious liability is not appropriate and imposes unconstitutional collateral censorship, as in the examples of a distributor, a common carrier, or a bookstore.

162 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"). Defamation law only requires a showing of actual malice if the defamed party is a public figure and the speech involves a public issue, whereas the same speech involving a private figure only requires negligence for liability (and a showing of actual malice for punitive damages). N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (articulating the actual malice standard); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–47 (1974) (declining to extend the Sullivan standard to media defamation of private persons).

163 *See Sullivan*, 376 U.S. at 279–80 (imposing a knowledge or recklessness standard of liability for defamation against public persons).

protects the speech rights of all private citizens by protecting their dignitary and reputational value in their communities.

Though the standard of liability for defamation does not apply exclusively to falsehoods in the workplace, but rather applies generally to defamation against any private person, co-worker or not, the tort of private defamation is chiefly concerned with the economic and workplace consequences of injurious falsehoods. The reason the common law developed to recognize this tort and permit lenient damages standards was to preserve the private victim's ability to work in his community. The standard for private defamation remains low, therefore, not just in the workplace but especially in the workplace, because the law recognizes the importance of truth, reputation, and employability to private persons navigating matters of personal and economic concern. The typical employee in the typical private workplace relies heavily on their good character and reputation to maintain their job and perform their work effectively. The upshot is that negligent employee malignment is at the core of what the tort of defamation is designed to redress and is readily proscribable consistent with the First Amendment.

Finally, labor law prohibits or leaves unprotected abusive and coercive employee speech made in the course of engaging in protected labor activity, including offensive, disparaging, and inflammatory statements directed at other employees.[164] Employees may not, for example, picket in residential neighborhoods,[165] make abusive statements on social media or to coworkers while protesting,[166] or unduly pressure coworkers to partake (or discontinue) protected labor activity.[167] The constitutional basis for such speech restrictions rests on a sensitivity to the heightened power differentials at play when employees seek to form or join a union or to engage in collective bargaining or protest. The intensified economic consequences of these contexts render the restricted speech

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164 Gen. Motors LLC, 369 N.L.R.B. No. 127 (2020) (holding that labor law does not protect profane and sexually or racially offensive attacks by employees engaged in protected labor activities).

165 Frisby v. Schultz, 487 U.S. 474 (1988) (upholding ordinance banning residential picketing). Additionally, the NLRA restricts when unions may picket to urge employees to accept or join the union or to demand the employer recognize or bargain with the union, including by limiting the duration and circumstances under which such picketing is permissible. *See* 29 U.S.C. § 158(b)(7) (2012).

166 Gen. Motors LLC, 369 N.L.R.B. at 6.

167 *See* Fisk, *supra* note 15, at 2072 (explaining that labor law does little to distinguish true threats of reprisal from persuasion).

especially threatening. Moreover, the necessary nature of having work and a residence make the workplace and the home inherently sensitive and coercive environments. The same is evermore true of online connectivity today.

These restrictions on discriminatory, hostile, false, and coercive speech between employees justifiably overcome First Amendment objection not only because of the uniqueness of the employment context and the fact that they maximize freedom of speech in the workplace overall, but also because eliminating these laws does absolutely nothing to defend or increase employees' speech rights. Instead, challenges to such laws are simply arguments in favor of absolute *employer* control over employee speech—just as arguments against social media regulation are really arguments in favor of absolute *platform* control over user speech. Limiting the laws that regulate workplace speech leaves employees' speech rights vulnerable to the otherwise complete prerogative of the employer to dictate the rules of free speech in the private workplace.[168] By setting statutory and regulatory limits on the appropriate bounds of employee speech in the workplace, the law actually empowers the speech rights of most employees as well as protects that speech from employer control, as the next section discusses more fully.

C. Regulations on Employer ←→ Employee Speech

The other two legs of the triangular speech relationship at work consist of two bodies of speech law governing communications between employer and employee. The first entails regulations on the employer's own speech—what it can and cannot say to its employees. The second consists of protections for the employees' speech—what they can and cannot say without fear of reprisal from the employer. In short, work law imposes obligations on employers' speech to their employees and protections on employees' speech to their employers.

1. Employer Speech Regulations. On the employer speech side, the law both restricts and requires employer speech to foster safe, informed, and empowered workplaces for employees. As to restrictions, various provisions of employment, labor, and

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168 Balkin, *supra* note 137, at 2319 (describing free speech challenges to Title VII as "a defense of employer prerogatives presented in the guise of worker liberties"); Becker, *supra* note 15, at 862 ("[L]imits [on Title VII] will not actually mean free speech rights for *employees* . . . .Recognition of constitutional limits on Title VII will protect only the right of private employers to control the work force and its speech.").

civil rights law prohibit employer speech that is discriminatory or improperly coercive. Already discussed are antidiscrimination law's prohibitions, which apply equally to management as they do coworkers.[169] Additionally, work law is sensitive to the inherently coercive impact employer speech has in the workplace and accordingly restricts employers' political and religious speech as well as their response to protected labor activity. For example, state and federal laws prohibit employers from directly or indirectly influencing the political voting choices of their employees, even where the employer has a direct political or pecuniary interest in the outcome of a political election.[170] Various state laws further prohibit employer proselytizing, regardless of the employers' sincerely held religious beliefs.[171] Lastly, federal labor law restricts employers' speech in response to employees' protected labor activity, including by proscribing any intimation of economic reprisal for such activity in an effort to sway or manipulate employees' labor decisions.[172]

As to employer speech requirements, the law regularly imposes on employers the obligation to disclose truthful and uncontroversial information publicly or to their employees specifically.[173] For example, employers must provide publicly

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169 The liability standard for discrimination or a hostile work environment caused by the employer or a supervisor, as opposed to a nonsupervisory employee, is comparable but slightly different. Where the employer (or a supervisor) commits the offense, the employer is automatically liable if the conduct results in a negative employment action (such as firing, failure to promote, or loss of wages) or if the employer did not reasonably try to prevent and promptly correct the behavior *and* the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 155.

170 18 U.S.C. § 594 (2006); 11 C.F.R. § 114.4 (2014). *See also* Lakier, *supra* note 12, at 2333–38 (detailing how, since the 1830s, states have outlawed private employers from using threats or coercion to influence workers voting and political activities).

171 *See* Lakier, *supra* note 12, at 2340 n.219 (describing state laws); Volokh, *supra* note 12.

172 NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (upholding law prohibiting employers from expressing "any views, argument or opinion" during a union election that communicates a "threat of reprisal or force or promise of benefit" contingent upon the outcome of the election, explaining that "an employer's rights cannot outweigh the equal rights of the employees to associate freely"); *see also* NLRB Office of the General Counsel, *The Right to Refrain from Captive Audience and Other Mandatory Meetings* (Apr. 7, 2022) (arguing that mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their labor rights violates the National Labor Relations Act).

173 Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 650–51 (1985) (permitting compelled disclosures by commercial entities of

available financial reports in a variety of contexts[174] and must disclose health, safety, and financial information to their employees, including under such work laws as the Fair Labor Standards Act, the Employee Retirement Income Security Act, the Family and Medical Leave Act, and the Operational Safety and Health Act.[175] Of particular relevance in the social media context, these disclosures largely focus on ensuring employers are communicating information about hidden and misleading safety hazards in the workplace.[176] Employers are also often compelled to communicate to their employees their legal rights *against* the employer.

Though the Supreme Court has steadily cut back on the government's ability to compel employer speech under the First Amendment, mostly by expanding the breadth of factual information it counts as "controversial" and thus constitutionally protected from being compelled,[177] work law has consistently remained one (if not *the*) body of speech law most resistant to judicial encroachment.[178] Today, the workplace remains governed by a swath of constitutionally permissible compelled disclosures of rights notices and health and safety warnings. Such compelled disclosures are not only factual and uncontroversial statements, serving to enhance the free flow of information and discourse, but are also integral to the effective

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truthful and uncontroversial information); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (permitting compelled disclosures of commercial speech).

174 For example, the SEC requires regular financial reports from companies. 17 C.F.R. § 240.

175 29 U.S.C. §§ 218(b), 1166, 2619; 29 C.F.R. § 1903.2.

176 Thus, for example, the analogue in the social media space would be compelled warnings about potentially false or misleading injurious information, like factually inaccurate medical, weather, or voting information. *See infra* Part IV.

177 *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018) (striking down California statute requiring reproductive health clinics to provide notice to patients about their legal rights to contraception and about the clinics' qualifications); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (striking down San Francisco ordinance requiring local gas company to include a pamphlet on conservation in its newsletter to customers).

178 *See* Fisk, *supra* note 15, at 2072. *Cf.* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (striking down the NLRB's Notice Posting Rule requiring most private sector employers to display within the workplace a poster describing employees' workplace rights under NLRA), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (overruling *NAM* to the extent it held that compelled disclosures are only permissible to correct deception). As Leslie Kendrick notes, the most contentious employer speech regulations are those that compel speech. Kendrick, *supra* note 14. Of these, compelled disclosures of potentially politically salient or sensitive information appear to be most problematic.

and safe operation of the special institutional context of the workplace, characterized by its unique power, epistemic, and economic relationships between employer and employee.[179] In this environment, the law recognizes that workplace disclosures are the most effective and tailored means of notifying employees about critical information.

2. Employee Speech Protections. On the employee protection side of the employer-to-employee speech relationship, a variety of federal and state statutes as well as common law doctrines protect employees from employer retaliation for speech that is integral to maintaining worker safety, productivity, and dignity on the job. Importantly, such speech protections for employees have never been limited to protections for off-the-job speech. Rather, they apply most ubiquitously to employee speech in the workplace, where the employer has superior surveillance and control of employees' speech and where the protected speech will have greatest impact on workplace conditions.[180] Laws protecting employees from employer threat and reprisal for workplace speech have a long history, dating back over 150 years and even earlier to before the American Revolution for off-premises political expression like voting.[181] In all this time, these important employee speech protections have coexisted compatibly with employers' free speech and property rights.[182]

Most ubiquitously, federal and state laws protect employee speech about the safety and security of their working conditions. Whistleblower protection laws protect employees speaking out about fraud, abuse, and waste in their places of employment.[183] More narrowly but in the same vein, common law contract doctrines recognize a public policy exception to the at-will employment relationship that protects employees from being fired for speaking out against illegal and dangerous employer conduct.[184] Additionally, federal labor law protects

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179 *See* Kendrick, *supra* note 14, at 1202–03.

180 Volokh, *supra* note 12, at 304.

181 *Id.* at 297.

182 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding a private company has no constitutional speech or property right against laws protecting speech on their property).

183 *See* OCCUPATIONAL SAFETY AND HEALTH ADMIN., WHISTLEBLOWER PROT. PROGRAM, WHISTLEBLOWER STATUTES SUMMARY CHART, https://www.whistleblowers.gov/sites/wb/files/2024-09/Whistleblower-Statutes-Summary-Chart.pdf [https://perma.cc/T69Z-WPZE] (last updated Sept. 11, 2024).

184 *See* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. (2001), https://www.bls.gov/opub/mlr/2001/01/art1full.pdf [https://perma.cc/T594-EGBT].

employee advocacy of worker organization, aid, and protections in the workplace, whether the workplace is unionized or not.[185] In so doing, this law aims to insulate "the exercise by workers of full freedom of association" in furtherance of mitigating obstructions to commerce and achieving national economic prosperity.[186]

Another category of employee speech protections concerns workers' deeply personal speech, including their political, religious, and cultural expression both at and away from work. These laws recognize that workers' profound dignity and autonomy interests do not disappear while on the clock. Over half of states have enacted employment protections for workers' political speech and activities.[187] Federal antidiscrimination law robustly protects workers' religious speech and exercise, including mandating that employers reasonably accommodate employees' religious practices.[188] Going further, some states have passed laws protecting employees' lawful cultural or "lifestyle" expression from employer retaliation. Colorado and North Dakota, for example, protect employees' off-duty lawful speech,[189] while New York protects employees' off-duty recreational speech.[190] Similarly, Connecticut protects all employee speech on matters of public concern from employer reprisal.[191]

Another emerging category of employee speech protections aims to safeguard speech integral to achieving greater worker empowerment over workplace conditions and decisions. Among such laws gaining traction are efforts to legally compel more worker choice and control over workplace policies.[192] The ideal of workplace democracy is increasingly viewed as an economic and intrinsic good, as employee participation in management decision-making tends to improve employee productivity,

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185 National Labor Relations Act, 29 U.S.C. § 157.

186 National Labor Relations Act, 29 U.S.C. § 151.

187 Lakier, *supra* note 12; Volokh, *supra* note 12.

188 *See* Groff v. DeJoy, 600 U.S. 447, 471 (2023) (interpreting Title VII's protection of employees' religious activities against employer discrimination or discharge to require employers grant a workers' request for a religious accommodation unless doing so would impose a substantial cost to the business).

189 COLO. REV. STAT. § 24-34-402.5(1) (2007); N.D. CENT. CODE ANN. § 14-02.4-03, -08 (West 2023).

190 N.Y. LAB. LAW § 201-d (McKinney 2023).

191 CONN. GEN. STAT. § 31-51q (2023).

192 As discussed *infra* Part IV, an analogue in the social media context might be more user choice about the content moderation of their feed, architectural design of the site, and privacy policies.

retention, morale, and the acquisition of professional development skills.[193]

Lastly, and perhaps most protective of employee speech, are the increasing efforts to legally protect employees from being fired or sanctioned for any speech absent just cause, as well as to afford them a fair hearing to vindicate this speech right. The common law rule is that employers may fire or sanction employees at-will for virtually any reason, including displeasure with their (otherwise non-legally protected) speech.[194] This prerogative grants private employers a potent weapon in shaping the culture of the workplace and controlling the speech and behavior of their employees.[195] As such, a primary goal of unionization is to bargain for just-cause employment protections and requirements of fair treatment and due process. Due process in the workplace, at a minimum, includes access to an impartial decisionmaker to determine if there is good cause for discharge and an arbitration system that is less formal and far quicker than litigation permits.[196]

Rather than leave such matters up for bargaining or negotiation, Montana has enacted a just-cause requirement for all employers, prohibiting any firing not based on "reasonable job-related grounds."[197] Philadelphia and New York City, meanwhile, have recently enacted just-cause legislation for targeted industries,[198] recognizing that a just-cause employment relationship better balances employee speech rights and employer control in the socially sensitive and economically coercive context of the workplace.

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193 *See* Estlund, *supra* note 117; Rebecca Tushnet, *Content Moderation in an Age of Extremes*, 10 CASE W. RES. J.L. TECH. & INTERNET 1, 16 (2019) (asking "why should citizens of a democracy accept anything other than actual democracy, either representative or otherwise, in the regulation of these [work] spaces?").

194 Racabi, *supra* note 19.

195 Balkin, *supra* note 137.

196 Estlund, *supra* note 117, at 136 (describing the process afforded in a just-cause system, which includes a hearing before a jointly agreed upon third-party with experience in labor relations, who hears arguments and witnesses and, with limited briefing, renders a decision within weeks; the standard remedy for a wrongful discharge is reinstatement and backpay).

197 MONT. CODE ANN. § 39-2-903(5) (2021). Puerto Rico and the Virgin Islands also have just-cause requirements. *See* P.R. LAWS ANN. tit. 29, §§ 185a–m (2022); V.I. CODE ANN. tit. 24, §§ 76–79 (2020).

198 PHILA., PA. CODE §§ 9-4701(5), 9-4703 (2020), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-280912 [https://perma.cc/VNV7-AFM5]; N.Y.C., N.Y., CITY COUNCIL INT. No. 1415-A (2019), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860317&GUID=F97F44AA-CCC8-470B-998E-C3C35A5C0717&Options=&Search [https://perma.cc/SK4G-ZNG5].

All these categories of speech regulations—prohibitions on discriminatory, abusive, false, and coercive speech throughout the workplace; compelled disclosures; protections from reprisal; and worker due process and empowerment rights—are readily adaptable to social media, as the next Part describes. Translated to this new labor paradigm, these established speech regulations would accomplish the same foundational goals online that they achieve in the traditional workplace: the creation of a safer, healthier, more empowered, less coercive, and more just and democratic environment for labor.

IV
FREE SPEECH AND SOCIAL NET WORK

A labor and employment analogy for social media helps to hone discussion about the harms at play and the appropriate regulatory responses with regard to social net work. Drawing from the longstanding regulations on speech in the workplace just discussed, a labor analogy for social media regulation illuminates a rights-protective, socially-conscious, and power-sensitive framework for discouraging discriminatory, harassing, false, and coercive speech online, as well as for fostering user empowerment, choice, and due process. Most importantly, a labor analogy shows clearly why certain state-mandated content moderation policies do not raise insurmountable First Amendment problems. Just as the First Amendment readily permits tailored regulations on employer and employee speech to protect the efficacy of the employment environment and the contrasting rights and dignity of those in it, so too the First Amendment should tolerate regulations on social media platforms and users once properly reconceived through a labor paradigm.

State regulation is needed because platforms, like employers, are unlikely to self-regulate effectively in the interest of their users and of society. The incentives for platforms to maximize engagement and profit too often lead platforms to ignore or actively encourage the spread of antisocial, false, and dangerous content.[199] Like in the employment sphere, the collateral harms to users and to society more widely of a self-regulatory approach to addressing these types of harms will be unsuccessful because these harms are not likely to be resolved through market, privacy, or transparency-based reforms alone.

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199 *See infra* note 206 and accompanying text.

Instead, these noxious antisocial and antidemocratic harms require substantive rules both restricting and requiring speech by users and platforms, accessible enforcement mechanisms, and user due process rights. To be sure, such reforms are well suited to complement, rather than displace, other regulatory proposals for social media reform, including reforms based on antitrust and common carrier law. Just as current employers are ably responsible for abiding by multiple regulatory regimes in their business operations, so too are platforms. In the same way that work law is designed to constitutionally address harms not contemplated or fully addressed by other areas of industrial law, a work law for social net work is best poised to address the widespread safety, dignity, and democracy harms users suffer online today without running afoul of the First Amendment. While parallel harms to competition and equal access are better addressed by looking to antitrust and common carrier law, a labor law framework adds legal obligations that focus more directly on improving the epistemic and expressive health of the social media environment.

Ultimately, it is a policy choice how far to take the labor analogy in crafting a framework for regulating speech on social media. The main argument of this paper is to show, firstly, that such choices are matters of regulatory discretion not constitutional decree and, secondly, that the labor analogy is a most useful one, even if not perfect, because the harms for which to regulate social media map onto the harms for which to regulate the workplace. Whether to take the analogy in small part or large, whether to borrow only the most analogous regulations on workplace speech or attempt to translate the wider array of work laws to social media such as wage and hour laws, is a question of policy. It is enough here to argue the analogy is apt and, at the least, the panoply of labor and employment laws that govern speech in the workplace are ripe for replication in the context of social media.

Transposing workplace regulations on speech to social media would entail regulations on user-to-user speech as well as regulations and protections for speech between platforms and users. Specifically, reforms might include: *1.* stricter prohibitions on harassing, false, and coercive speech by users to other users, along with stronger enforcement mechanisms to protect users against such abuse, including vicarious liability for platforms; *2.* prohibitions on platforms' coercive messaging to users, as well as broader disclaimer and disclosure requirements for platforms; *3.* greater substantive and due process

protections for user speech from platform reprisal and enhanced user-empowered curation options.

1. User Speech Regulations. Stricter anti-harassment and abuse rules might be based on federal antidiscrimination standards for speech conduct that amounts to a hostile work environment.[200] Under this framework, the line between permissible and impermissible hostile speech in social net work would focus on whether the speech is welcome or unwelcome and whether it creates an online environment that is so permeated with severe intimidation, ridicule, and insult that it effectively alters the victim's ability to engage with social media. Beyond these distinctions, anti-harassment and abuse rules on social media might draw a difference between whether the hostile speech is directed at a person or rather is openly disseminated or communicated more privately to a third-party user.[201] Additionally, a wise (and possibly constitutionally necessary) exception should explicitly be made for speech that reasonably contributes to debate on issues of public concern.[202]

The contours of any such anti-harassment and abuse law might additionally draw on labor law that prevents threatening and disparaging speech in particularly coercive contexts. On social media, such contexts might include coordinated user attacks or speech on particular user pages, such as a users' personal "home" page.[203] Such a reform would ultimately be a small step in accomplishing the stated goal of the current governing law on content moderation, which is to restrict content

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200 For prescient suggestions of marshalling Title VII and federal anti-discrimination law to combat cyber harassment, see Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89–95 (2009) and Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 665 (2012).'

201 Scholars have suggested that such distinctions are constitutionally required limits on Title VII's speech prohibitions. *See, e.g.*, Michael P. McDonald, *Unfree Speech*, 18 HARV. J.L. & PUB. POL'Y 479, 485 (1995) ("Speech uttered that is not directed toward specific individuals should never be regulated as harassment."); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 718 (1995) (noting importance of distinction between directed and non-directed expression); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846, 1868–69 (1992) (arguing that personal, directed, face-to-face insults and sexual propositions are regulable; non-directed speech, even if it cannot be avoided, is not regulable); Balkin, *supra* note 137, at 2316 (proposing an open/hidden speech distinction in determining the constitutional line between permissible and impermissible restrictions on harassing speech in the workplace).

202 Fallon, *supra* note 9 (arguing for such an exception to Title VII liability in the context of a hostile work environment based on sex discrimination).

203 *Cf.* Barr v. Am. Ass'n of Pol. Consultants, 591 U.S. 610, 636 (2020) (upholding constitutionality of bar on robocalls to private homes).

that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[204]

Traditional principles of private defamation law would also provide a useful springboard for crafting rules to stem the spread of malicious falsehoods and misinformation on social media. While the common law tort of defamation is already available to users, the practicalities of seeking redress for the negligent spread of injurious falsehoods online are nearly insurmountable in the context of social media given inherent challenges to identifying anonymized perpetrator(s) and establishing evidence of intent, injury, and causation. Furthermore, some of the worst instances of defamation on social media tend to catapult the victim to prominence, transforming them from private into public figures who are now held to the burden of proving their (millions of) maligners acted with malice or reckless disregard for the truth.[205] Adapting the common law to social media, therefore, would require enlisting platforms to deanonymize possible defamers to their victims to pursue remedies; recognizing falsehoods implicating a victim's dignity and good standing in society as defamation per se not requiring a showing of actual damages; and finessing the rules around when a private figure becomes a public figure on social media to prevent the perverse outcome that the more viral the defamation the harder it is for a victim to recover.

Finally, borrowing from federal antidiscrimination law's enforcement scheme, a social media law aimed at reducing abusive, false, and coercive speech should impose vicarious liability on platforms for negligently spreading or failing to stop such behavior. This would include liability for using algorithms that promote abusive and false content, shielding users who continuously perpetrate such content, and failing to knowingly take down bots and fake accounts that do the same. Such liability is appropriate, as it is in the traditional employment context, because the social media platform and the user are part of the same enterprise and jointly responsible for creating the culture of the platform, while at the same time platforms have an economic incentive to allow (even promote) the spreading of vitriol and falsehoods.[206] Additionally, the platform has

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204 47 U.S.C. § 230(c)(2)(A) (2018).

205 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that defamation of a public figure requires a showing of actual malice).

206 *See generally* MAX FISHER, THE CHAOS MACHINE: THE INSIDE STORY OF HOW SOCIAL MEDIA REWIRED OUR MINDS AND OUR WORLD (2022) (detailing the economic incentives

contractual control over the user and has superior ability to prevent harmful speech because it alone sees the entire speech ecosystem and has far more power over abusers than any user does.

Of course, imposing such liability on platforms would mean cutting back on Section 230 immunity.[207] Current law immunizes social media platforms for their users' statements, as well as for their own content-moderation decisions.[208] Eliminating platform's absolute protection for all content appearing on its sites would encourage platforms to refocus resources on protecting the safety and wellbeing of their users. This is all the more critical on social media than in the traditional workplace because often it is the platform alone that will know the true identity of an abuser and be in any position to prevent that harm, whether it takes the form of harassment, discrimination, or libel.

2. Platform Speech Regulations. Next, policymakers ought to borrow from the employment law context to impose some important substantive restrictions and requirements on platforms' own speech and their curation and control over users' speech. To start, much as employers are widely prohibited from proselytizing to their employees about political matters and unduly influencing employees' voting choices, there should be stricter rules on how platforms may influence elections. For example, platforms should not be allowed to purposefully manipulate the flow of political information in favor (or disfavor) of one political party or candidate. Siloing political information according to algorithms that rely solely on clickability with no consideration for accuracy or diversity of viewpoints should also be discouraged, as such algorithms proliferate ultra-sensationalized political echo chambers that

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for platforms to drive users to extreme content to maximize user engagement with the platform); Gizem Ceylan, Ian A. Anderson & Wendy Wood, *Sharing of Misinformation Is Habitual, Not Just Lazy or Biased*, 120 PROC. NAT'L ACAD. OF SCIS. 4–6 (2023) (finding the biggest influencer in the spread of fake news is platforms' structure of rewarding users for habitually sharing misinformation).

207 *See* Franks, *supra* note 200, at 687 (acknowledging that applying federal antidiscrimination law to cyber harassment "would, at a minimum, require a change in both the language of current federal sex discrimination law and a change in Section 230 of the [CDA]").

208 47 U.S.C. § 230 (2018); *see* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (interpreting Section 230(c)(1) as an absolute immunity for liability for third-party content out of concern of the effect of knowledge liability on online platforms).

amplify extremism.[209] Encouraging users to vote or to support the candidate of their choice would be permissible, as it is in the traditional workplace;[210] but interfering with a users' voting preferences through epistemic coercion and digital manipulation threatens users' political autonomy and the very project of democratic self-governance.

Another area of work law governing the employer-employee relationship that, while not customarily considered a regulation on employer speech, is highly salient to social net work is child labor law. Federal and state law tightly restrict when and how employers may employ children for labor, including mandating age limits, hour limits, and wage requirements that can differ by industry and occupation depending on the relative dangers and age-appropriateness of the labor at issue. Law so closely regulates child labor in order to protect this most vulnerable population from the heightened risk of coercion, physical harm, and injury to their psychological, social, and educational development.

Social net work presents these same dangers and more. Children and teens spend as much time engaged in social net work as the average adult spends in the traditional workplace.[211] The consequences have been dire—and predicable when understanding social media activity through a labor paradigm. Teen rates of sadness and suicide increased dramatically just as social media increasingly conscripted their time and attention.[212] Today, studies suggest that social media is having a profoundly negative impact on adolescent health and brain development, while bombarding children with toxic, dangerous, and inappropriate content.[213] It is unsurprising and welcome, therefore, that even without making a direct comparison to child labor law, legislators have begun to advance proposals

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209 *See generally* FISHER, *supra* note 206; Benjamin Laufer & Helen Nissenbaum, *Algorithmic Displacement of Social Trust*, 23-12 KNIGHT FIRST AMEND. INST. (Nov. 29, 2023), https://knightcolumbia.org/content/algorithmic-displacement-of-social-trust [https://perma.cc/X2MJ-D286].

210 52 U.S.C. § 30118(b)(2)(B).

211 Melinda Wenner Moyer, *Kids as Young as 8 Are Using Social Media More Than Ever, Study Finds*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html [https://perma.cc/5VYT-JQHG].

212 CTR. FOR DISEASE CONTROL AND PREVENTION, CDC FACT SHEET: MENTAL HEALTH AMONG ADOLESCENTS, https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/dash-mental-health.pdf [https://perma.cc/MUY7-B4WH] (comparing mental health and suicide rates between 2009 and 2019).

213 SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GEN.'S ADVISORY, *supra* note 7, at 6–10.

that essentially transpose child labor law to social media, including proposals that would impose stronger age verification practices and that ban children under thirteen from using social media altogether.[214]

Beyond restricting platform speech in these ways, legislatures ought to consider compelling certain information from platforms, just as they do with traditional employers. Low-hanging fruit would be to require platforms to disclose more information about their curation, content moderation, and advertisement algorithms, as well as to disclose the financial source of advertisements that appear to a user. Such regulations would mirror the countless disclosures traditional employers are obligated to make about the inner operations of their businesses, including financial and environmental, social, and governance (ESG) disclosures. More ambitiously, states might require platforms to inform users about social media's equivalent of hidden workplace safety hazards, such as deceptive posts containing health and safety misinformation. In particular, it is worth considering updating campaign finance laws to the digital age by requiring funding disclosures of political advertisements that appear on social media.[215] Such a move would empower users with the information needed to interact intelligently with the platform and to make educated consumer and political decisions, both on and offline.

3. User Speech Protections. Finally, social media reforms ought to implement the types of speech protections for users against platforms that employees have long sought in the traditional workplace against their employers—namely, substantive protections for users' non-hostile speech, more user control over their social net work, and a just-cause requirement for an adverse action against them by the platform, along with due process rights to a swift and impartial resolution of disagreement over an adverse action.

State and federal antidiscrimination statutes protecting workers' political and religious expression from employer retaliation offer a starting model for protecting user speech from

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214 *See* Protecting Kids on Social Media Act, S. 1291, 118th Cong. (2023); Chris Murphy, *Algorithms Are Making Kids Desperately Unhappy*, N.Y. TIMES (July 18, 2023), https://www.nytimes.com/2023/07/18/opinion/big-tech-algorithms-kids-discovery.html [https://perma.cc/3QQZ-KUG9].

215 *See* Citizens United v. FEC, 558 U.S. 310, 366–371 (2010) (upholding compelled disclosures of political advertisers). *But see* Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019) (invalidating a Maryland campaign finance disclosure law aimed at online campaign advertising).

platform discrimination and reprisal. An even better model for purposes of protecting user speech—which runs the gamut of social, consumer, political, and cultural expression—are state laws that prohibit employers from discriminating against employees on the basis of "lifestyle."[216] As applied to the traditional workplace, this tends to mean lifestyle choices like eating or smoking. But it is easy to transpose this type of protection to a user's "digital lifestyle," which would safeguard individualistic user content spanning the myriad tastes and interests of a pluralistic society. And just as labor and employment law protects employees from both discharge and reprisal for this protected speech, platforms would be prohibited from deplatforming, shadow-banning, or otherwise discriminating or retaliating against a user for whistleblowing or engaging in non-hostile lawful speech.

To better enforce this protection, the law should impose a just-cause requirement for taking an adverse action against a user and provide due process for challenging any such action. Sufficient process would entail what Danielle Citron calls "technological due process," which includes the procedural due process requirements of notice, the opportunity to be heard, and an impartial decisionmaker.[217] Naturally, inaugurating such a dispute resolution system would present innumerable questions of process, including questions about jurisdictional scope, time limits, discovery, and hearing procedures.[218] Luckily, social media platforms are already experimenting with these processes and arriving at best practices.

In developing these processes and others, platforms would benefit from greater and consistent input from users. Just as work law is increasingly recognizing employee choice and agency as beneficial to the workplace, another important step towards achieving user empowerment would be to require platforms to offer more user-controlled tracking and curation

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216 *See e.g.*, N.Y. LAB. LAW § 201-d(1)(B) (McKinney 2023); COLO. REV. STAT. § 24-34-402.5 (2007); N.D. CENT. CODE ANN. § 14-02.4-03 (West 2023).

217 *See generally* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249 (2008).

218 *See* Estlund, *supra* note 117, at 147 ("Innumerable questions of forum and procedure would arise under such a proposal: Should it be a state or federal forum? What kind of tribunal: arbitral or administrative? What time limits for a hearing and a decision? How much discovery?"); Estlund, *supra* note 15, at 1476 ("What is needed is 'some kind of hearing' for the employee whose reasonable expectations about what she is obligated, and therefore presumably permitted, to speak about as part of her job have been defeated. This is something that due process is well suited to provide.").

options. These options should start with greater and more transparent user control over the platform's use of cookies and tracking technologies. Beyond privacy choices, platforms should allow more user choice about the content they encounter, from more specific curation options to offering user referenda or user-initiated ballot options to guide the platform's content moderation policies.[219]

Perhaps most ambitiously, policymakers might consider borrowing the ultimate enforcement mechanism of labor and employment rights: an agency-style framework like the National Labor Relationship Board or the Equal Employment Opportunity Commission, with the power to resolve individual disputes and to interpret and advance the governing law in this area. As is the case in the traditional employment context, platform or agency-level processes will be far superior to courts and standard litigation practices for resolving user-to-user and user-to-platform disputes. Litigation is not only far too time-consuming and expensive, it is also ill-suited for resolving rights-based contests in a fast-paced, nuanced, and emerging area of law.[220]

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As these reforms begin to take hold, platforms are sure to fight back. In the physical world, employers turned to mandatory arbitration and collective claims waivers while simultaneously pursuing long term strategies to capture and underfund enforcement agencies, lobby for deregulatory statutes, and advance anemic interpretations of worker protection laws in the courts. Much of the current substance of work law is a shadow of its original potential, plagued by workarounds and underenforcement. Any social media reform effort—whether the one

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219 *See* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 75–76 (2019).

220 An important question remains about the feasibility and scalability of these reforms to the millions of transactions occurring on social media each day. A full answer to the implementation question is beyond the scope of this Article, but briefly, scaling process and substantive rights from the employment context to social media can be accomplished through a combination of atomization, market-based pressures by users on platforms, and cultural changes online that will snowball from the very implementation and partial enforcement of these new reforms. The reality is that there are as many speech-related interactions in the traditional workplace as on social media, yet work law succeeds in tempering the speech environment at work through imperfect enforcement and law's expressive value, which create internal and external pressures on employers and employees to comply with work law. The same would be true for users and platforms on social media.

advocated in this Article or any other—must not only legislate for today but also look out for tomorrow. Permanent funding schemes for enforcement, detailed statutory language, clear delegations of authority to agencies to promulgate corrective and prophylactic rules, and explicit prohibitions on contracting around the law are foundational to the success of any legislative reform.

CONCLUSION

Social media is the modern workplace. Millions labor on these platforms every day, providing their data at the direction of the platform, for indispensable compensation in the form of connectivity, information, and entertainment. These users deserve the types of protections employees have won in traditional workplaces—even against platform and user behavior that is solely perpetrated through speech. Such protections include a safe environment free of abuse, hostility, coercion, misinformation, and discrimination. They include effective enforcement mechanisms for protecting user dignity and safety in these spaces, including the right to sue a complacent or negligent platform. And they include mechanisms for empowering user choice and control over their online environment, including protections for their own nonharmful speech and fair processes for vindicating these protections. Viewing social media through a labor paradigm allows legislatures to accomplish these goals while avoiding tricky First Amendment obstacles to social media regulation. Understanding social networks as work, and users as workers, stands to get us far—policy wise and constitutionally.