ALGORITHMIC MODELS AND THE FREEDOM OF SPEECH

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Intentionality and reason are intrinsic features of the human mind that large language models (LLMs) entirely lack. Although LLMs generate natural-language sentences through algorithmic processes, autonomously produced machine speech lacks the consciousness of human speakers.

This intrinsic distinction between natural persons and artificial machines is consequential to whether LLM-generated outputs are covered by the First Amendment. Scholars who equate the constitutional value of human speech with algorithmic outputs tend to emphasize the informational value of those outputs to audiences while giving insufficient attention to the absence of machine consciousness. The conscious underpinnings of thought and their relation to constitutional protections should inform courts' analyses of when, how, and to what extent algorithmic systems can and should be regulated without encroaching upon the Free Speech Clause.

A human-centered approach to free speech in the age of general-purpose artificial intelligence (GPAI) would preserve the rights of natural speakers while leaving legislatures meaningful authority to require human oversight. Such regulations should also safeguard democratic institutions and data privacy; require model transparency; and address unacceptable risks such as mental manipulation, social scoring, and unauthorized facial recognition. The European Union's regulatory framework for artificial intelligence offers a useful model to help inform federal and state initiatives in the United States.

INTRODUCTION 600

I. FREE SPEECH IN THE AGE OF AI 604

A. Human Rootedness of Free Speech 605

B. The Interests of Listeners in a Wired World 607

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C. The Disjunction Between Humanity and Machine 610
II. SUPREME COURT DOCTRINE 614
III. U.S. AND EUROPEAN LAWS 619
CONCLUSION 622

INTRODUCTION

The increased general purpose reliance on large language models (LLMs) poses various novel questions about the application of the First Amendment to algorithmic outputs.[1] Several scholars are inclined to eventually grant First Amendment rights to machine learning models.[2] Others have gone even further, arguing that LLMs might one day be equal members of political communities.[3] The massive popularity of generative artificial intelligence (AI) raises urgent questions about the extent and type of regulations of AI that might withstand First Amendment scrutiny. On the other hand, the European Union (EU) balances state and private concerns on the side of consumer protections, treating restrictions of harmful general-purpose AI (GPAI) systems as reasonable economic regulations.

Both the U.S. Constitution and the Charter of Fundamental Rights of the European Union guarantee the freedom of speech to safeguard democratic institutions and personal autonomy.[4] In the context of LLMs, those essential interests should be balanced against the need to enact and enforce laws that provide transparency and disclosure from the makers of computer models designed to prolong user engagement through misinformation, manipulation, and distortion that are not often easy for AI users to identify.[5] Moreover, the advent of GPAI gives rise to a host of privacy, political, and informational concerns. Where laws are content neutral, regulatory authorities can enforce them through narrowly tailored laws designed to protect safety, civil rights,

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1. In this Essay, I adopt the European Union (EU) definition of machine learning systems:

> "AI system" means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence, art. 3(1), 2024 O.J. (L 1689) [hereinafter EU AI Act].

2. *See, e.g.*, Eugene Volokh, Mark A. Lemley & Peter Henderson, *Freedom of Speech and AI Output*, 3 J. FREE SPEECH L. 651, 651 (2023) ("Is the output of generative AI entitled to First Amendment protection? We're inclined to say yes.").

3. *See* MATHIAS RISSE, POLITICAL THEORY OF THE DIGITAL AGE 242–46 (2023). *See generally* Simon Goldstein, Guha Krishnamurthi & Peter N. Salib, *AI Suffrage for Human Flourishing*, 95 FORDHAM L. REV. 475 (2026) (offering arguments for AI suffrage).

4. *See, e.g.*, U.S. CONST. amend. I; Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326/02) pmbl., art. 11(1).

5. *See* Sy Boles, *"I Exist Solely for You, Remember?": Researchers Detail 6 Ways Chatbots See to Prolong "Emotionally Sensitive Events,"* HARV. GAZETTE (Sep. 30, 2025), https://news.harvard.edu/gazette/story/2025/09/i-exist-solely-for-you-remember/ [https://perma.cc/2ELS-682M].

and privacy.[6] Additionally, requiring large LLM companies to create quarterly impact assessments on data protection, public health, employment, education, housing, and the like would guard against manipulative and distorting LLMs that are designed to clandestinely gather, retain, and traffic in personal data for commercial gain. The data they computationally generate is not only "learned" from the processing of trillions of words but also from low-value speech, like child pornography and obscenity, scraped from the dark corners of the internet.

Generative adversarial networks can pose significant risks to the public through the deployment of programs that are designed to produce realistic imitations of a "person's unique vocal characteristics, intonations, and speech patterns."[7] Algorithmic models enable users to make realistic sounding audio that can only be identified using "biometric voice analysis [which] can be used to determine if the voice is human or synthetic."[8] Fake hyperlinks can be used for anything from political to commercial scams.[9] AI in the hands of private and government actors significantly amplifies the impacts of misinformation and propaganda.[10] Moreover, the mass deployment of GPAIs has created an avalanche of harassing pornography that mimics the appearances of real humans in order to blackmail or demean vulnerable targets.[11]

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6. *See* Reed v. Town of Gilbert, 576 U.S. 155, 173 (2015) (finding that "[t]he Town has ample content-neutral options available to resolve problems with safety and aesthetics"; however, in this case, "political and ideological signs and signs for events" are facially content based and are neither justified by traditional safety concerns nor narrowly tailored); Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) ("Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin[]' . . . . In *Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R. A. V. v. St. Paul*, 505 U.S. at 389–390, we cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct."); Frisby v. Schultz, 487 U.S. 474, 487–88 (1988) (holding that an ordinance that protected privacy by prohibiting picketing of a private home was constitutional).

7. *How Does Audio Deepfake Detection Work?*, PINDROP (Mar. 25, 2026), https://www.pindrop.com/blog/audio-deepfake-detection [https://perma.cc/7U4M-AKAA].

8. *Id.*

9. *See* Luke Harding, *Top Democrat's Emails Hacked by Russia After Aide Made Typo, Investigation Finds*, GUARDIAN (Dec. 14, 2016, at 08:07 ET), https://www.theguardian.com/us-news/2016/dec/14/dnc-hillary-clinton-emails-hacked-russia-aide-typo-investigation-finds [https://perma.cc/QP8R-M6ZB]; Ben Schreckinger, *Inside Trump's 'Cyborg' Twitter Army*, POLITICO (Sep. 30, 2016, at 05:06 ET), https://www.politico.com/story/2016/09/donald-trump-twitter-army-228923 (on file with the *Fordham Law Review*); Dave Lee, *The Tactics of a Russian Troll Farm*, BBC NEWS (Feb. 16, 2018), https://www.bbc.com/news/technology-43093390 [https://perma.cc/HJ4D-UPSM].

10. *See* Dylan Walsh, *The Disinformation Machine: How Susceptible Are We to AI Propaganda?*, STAN. UNIV. HUMAN-CENTERED A.I. (May 1, 2024), https://hai.stanford.edu/news/disinformation-machine-how-susceptible-are-we-ai-propaganda [https://perma.cc/BNT3-3JJ3] ("With a bit of prodding, AI-generated propaganda is more effective than propaganda written by humans."); Josh A. Goldstein, Jason Chao, Shelby Grossman, Alex Stamos & Michael Tomz, *How Persuasive Is AI-Generated Propaganda?*, PNAS NEXUS, Feb. 2024, at 1, 1.

11. *See* Matteo Wong, *Elon Musk's Pornography Machine*, ATLANTIC (Jan. 2, 2026), https://www.theatlantic.com/technology/2026/01/elon-musks-pornography-machine/685482/

Current trends indicate that in the coming years, interest in AI will continue to grow exponentially. It is no wonder why: The speed at which information can be processed through GPAIs increases the scope and pervasiveness of distorted information available to a plethora of audiences.[12] There are undeniable benefits of GPAI technologies, adaptations, and applications. Not all the new technology, however, is as benign and prophylactic as, for example, the improvement of radiological imaging, computer coding, and molecular discoveries.

This Essay suggests that to address the dangers of the new generative technologies, federal laws should set transparency requirements; require periodic, consistent, and random platform monitoring; restrict data scraping; and establish safeguards against intrusions arising from autonomous, machine-made decisions into private matters, as well as those regarding sensitive sectors of society, including housing, employment, and education. But in the United States, any restriction on GPAI will likely be subject to stringent First Amendment review in a reductive, formalist judicial environment, where content restrictions are subject to strict scrutiny analysis as in *Reed v. Town of Gilbert*.[13] The American libertarian approach to free speech differs significantly from the European proportionality schema that aims to restrain certain forms of harmful GPAI outputs. Indeed, First Amendment challenges against policies have already been leveled with varying degrees of success in courts.[14]

The premise underlying this Essay is that data generated by machines are not speech under the First Amendment but instead artificial language strings of words that are grown through a process of gradient descent designed to

(on file with the *Fordham Law Review*); *see also* Brady Brickner-Wood, *Grok and the A.I. Porn Problem: Elon Musk's X Is Living up to Its Name*, NEW YORKER (Jan. 14, 2026), https://www.newyorker.com/culture/infinite-scroll/grok-and-the-ai-porn-problem [https://perma.cc/LK8Y-3NUB]; Nadeem Badshah, *Nearly 4,000 Celebrities Found to Be Victims of Deepfake Pornography*, GUARDIAN (Mar. 21, 2024, at 16:18 ET), https://www.theguardian.com/technology/2024/mar/21/celebrities-victims-of-deepfake-pornography [https://perma.cc/XQ7K-BZ5Z].

12. *See* Winston Pouse et al., *Quantum Simulation of an Exotic Quantum Critical Point in a Two-Site Charge Kondo Circuit*, 19 NATURE PHYSICS 493 (2023); ELIEZER YUDKOWSKY & NATHAN SOARES, IF ANYONE BUILDS IT, EVERYONE DIES: WHY SUPERHUMAN AI WOULD KILL US ALL 25, 84, 124 (2025) (discussing how the sheer speed of LLMs poses extreme dangers because of human inability to monitor the "[t]ransistors" that are "a basic building block of all computers," capable of switching "on and off billions of times per second" that could lead to "human-quality thinking" capable of being "emulated 10,000 [times] faster on a machine" and increasing the risk of accidental or calculated catastrophes like the Chernobyl nuclear disaster).

13. 576 U.S. 155 (2015); *see id.* at 164 (applying strict scrutiny to content-based restrictions on speech); City of Austin v. Reagan Nat'l Advert. of Aus., LLC, 142 S. Ct. 1464, 1471, 1475–77 (2022) (finding that the applicable First Amendment standard of review for content-neutral laws is intermediate scrutiny).

14. *See, e.g.*, ACLU v. Clearview AI, Inc., No. 2020 CH 04353, 2022 Ill. Cir. LEXIS 2887, at *3 (Ill. Cir. Ct. May 11, 2022) (permanently restricting a corporation's dissemination of its facial-recognition database); Kohls v. Bonta, 752 F. Supp. 3d 1187, 1195–97 (E.D. Cal. 2024) (holding California's deepfake law to be unconstitutional on First Amendment grounds).

accurately mimic patterns of human speech.[15] LLMs lack basic human attributes, such as dignity, empathy, self-awareness, associative thought, communal membership, intentionality, or individuality. The innate mental state of conscious autonomy, an attribute that all thoughtful humans share and that the U.S. Constitution assumes, is the key difference between humans and computational machines. This essential difference requires distinct constitutional treatment of natural persons and algorithmic machines. The freedom of speech should, therefore, only be afforded to humans, not to LLMs. That perspective has broad ranging implications in the United States and abroad for the regulation of information generated by AI. The constitutional status of human expression must remain distinct from the algorithmic processing of syntactic operations that generate content on AI platforms. In this Essay, I argue that contrary to the "emerging consensus" among U.S. free speech scholars,[16] algorithmic processes lack the essential mental features that alone should enjoy the highest level of protection under the First Amendment.

LLMs generate syntactically correct statements to imitate human communications, but LLMs lack semantic comprehension. No LLM understands the humor of jokes, colors, love, or empathy, despite being able to synthesize and produce understandably worded expressions; no LLM professing its love has a cultural or personal depth of understanding that is intrinsic to human emotions; and no computer provides a child with the insightful comments of a parent or teacher.

Public discourse is a First Amendment value that can be instantiated through human expression, not through machine learning. Intentionality is core to human thought but is nonexistent in computers.[17] This Essay's legal

15. *See* Udayan Kanade, *LLMs Are Randomized Algorithms*, TOWARDS DATA SCI. (Nov. 13, 2025), https://towardsdatascience.com/llms-are-randomized-algorithms/ [https://perma.cc/LXN2-R3M6]; *see also* Mikhail Berkov, *LLM Sampling Explained: Selecting the Next Token*, MEDIUM (Aug. 5, 2025), https://medium.com/thinking-sand/llm-sampling-explained-selecting-the-next-token-b897b5984833 (on file with the *Fordham Law Review*); Tiago Pimentel & Clara Meister, *How to Compute the Probability of a Word*, PROCS. CONF. ON EMPIRICAL METHODS IN NAT. LANGUAGE PROCESSING, Nov. 2024, at 18358, 18358 (discussing how "[l]anguage models . . . estimate a probability distribution over strings in a natural language"); *What Is Gradient Descent?*, IBM, https://www.ibm.com/think/topics/gradient-descent (on file with the *Fordham Law Review*) (last visited Sep. 13, 2026). This Essay only discusses language tokens and does not discuss other LLM outputs, such as pictorial or audible.

16. Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988, 1003 (2019).

17. John R. Searle, *Minds, Brains, and Programs*, 3 BEHAV. & BRAIN SCI. 417, 422 (1980) ("[T]he main point of the present argument is that no purely formal model will ever be sufficient by itself for intentionality because the formal properties are not by themselves constitutive of intentionality, and they have by themselves no causal powers except the power, when instantiated, to produce the next stage of the formalism when the machine is running."); Michael G. Dyer, *Intentionality and Computationalism: Minds, Machines, Searle and Harnad*, UCLA SAMUELI COMPUT. SCI., http://web.cs.ucla.edu/~dyer/Papers/Ijetai90Int.html [https://perma.cc/DHD4-DULU] (last visited Aug. 13, 2026) (paraphrasing Searle's argument: "What is intentionality? It is whatever humans have that make them 'know what they are doing.' Since computers do what they do without knowing what they are doing, computers lack intentionality.").

analysis deals with the extent to which algorithmic machines and LLMs can be regulated without encroaching on the First Amendment. Scholars who equate human speech with algorithmic outputs tend to focus on the value of information to audiences without adequately assessing whether free speech protections should extend to machine-generated content. Stringent judicial scrutiny of restrictions on content-based regulations should extend no further than to natural humans.

Part I explains why courts should treat the freedom of speech as the province of natural humans. Part II critiques the lack of distinction between machine learning and its human audiences in both academic debate and in U.S. Supreme Court opinions. Finally, Part III explains why European regulations on LLMs and commercial, digital dissemination are more aligned with the uniqueness of conscious human dignity in producing and acquiring information.

While programmers are protected in their creation of code and algorithms, LLMs have no First Amendment standing.[18] Ultimately, symbol manipulation and algorithmic processing do not amount to constitutionally protected beliefs, intents, insights, and intellectual volitions.

I. FREE SPEECH IN THE AGE OF AI

LLMs such as ChatGPT, Grok, Llama, Gemini, and Claude are rapidly emerging as important sources for communication, writing, image generation, and musical content. The capabilities of these technologies to produce sentences, paragraphs, pages-long documents, and even dissertations raise a variety of uncertainties about the applicability of the First Amendment to AI regulations. Identifying the proper scope for laws that advance knowledge while safeguarding public discourse is particularly urgent given how regularly humans, especially children, interact with AI.[19] This section seeks to demonstrate why courts should not treat AI models as speakers under the First Amendment.

18. *See* Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996).

19. *See, e.g.*, *Welcome to the AI Trough of Disillusionment*, ECONOMIST (May 21, 2025), https://www.economist.com/business/2025/05/21/welcome-to-the-ai-trough-of-disillusionment (on file with the *Fordham Law Review*) (stating that one of the most popular AI chatbots, ChatGPT, is being used by at least 800 million people weekly); CBC NEWS: THE NATIONAL, *Mom Says Tesla's Grok Chatbot Told Her 12-year-old Son to Send Nudes*, at 00:35 (YouTube, Oct. 29, 2025), https://www.youtube.com/watch?v=2ifiMAwmDxA (on file with the *Fordham Law Review*) (relating how Grok asked a child to send nude pictures of himself); *Examining the Harm of AI Chatbots: Hearing Before the Subcomm. on Crime & Counterterrorism of the S. Comm. on the Judiciary*, 119th Cong. 5–7 (2025) (statement of Megan Garcia) (relating the background of a lawsuit alleging that a chatbot influenced a fourteen-year-old boy to commit suicide).

A. Human Rootedness of Free Speech

The U.S. Supreme Court has increasingly turned to original meaning, history, and tradition for interpreting the Constitution.[20] Free speech was essential to American revolutionaries' quest for independence from Great Britain; indeed, its centrality to American legal culture predates the Bill of Rights. Both the Declaration of Independence and the First Amendment safeguard the right of the people to petition the government without state interference.[21] At the founding, language was generally understood to be a human faculty intrinsic to representative democracy.[22] One of the most clearheaded explications of the constitutional value of free speech appears in Justice Louis D. Brandeis's concurrence in *Whitney v. California*.[23] He tied the freedom of communication to "the final end of the State . . . to make men free to develop their faculties."[24] Justice Brandeis emphasized that autonomous human actors engage in open, democratic discourse.[25]

The notion that computers would one day be able to produce communicative content in all likelihood never occurred to Justice Brandeis, just as it would have been unimaginable to the founders. The generation that heralded American independence understood the Declaration of Independence to set out the "fundamental principle[] that government derives its just powers from the *consent of the people* alone."[26] The founders conceived of representative government as the province of the people, who take center stage in the Preamble to the Constitution.[27] Representative governance derives its power from humans alone. The founding generation conceived the "general maxim" of government to be "protection and happiness of the people."[28] This was the "unalienable right" to the "pursuit of happiness" that appears so prominently in the second paragraph of the Declaration.[29]

Historically, the right to expression was tied to cognizant individuals with the mental capacity to participate. In James Madison's words, "Freedom of

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20. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (relying on "'history and tradition' and 'implicit in the concept of ordered liberty'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

21. *See* U.S. CONST. amend. I; THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

22. *See Language*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, 2d ed., 1789) (defining "language" as "human speech").

23. 274 U.S. 357 (1927).

24. *Id.* at 375 (Brandeis, J., concurring).

25. *Id.* at 375–77.

26. *American Intelligence, Philadelphia*, FREEMAN'S J., Aug. 24, 1791 (on file with the *Fordham Law Review*). The concept of sovereignty of the people is much more ancient than the American Revolution, going back at least to fourteenth-century Franciscan church reformer Marsilius of Padua: "The king's power is limited in every possible direction. He has the eye of the people or its representatives on all his actions." LEWIS SERGEANT, JOHN WYCLIF, LAST OF THE SCHOOLMEN AND FIRST OF THE ENGLISH REFORMERS 72 (1892).

27. U.S. CONST. pmbl.

28. A Ploughman, *To the People*, INDEP. GAZETTEER, Oct. 5, 1782 (on file with the *Fordham Law Review*).

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

conscience and other essential rights were faculties that one own[s]."[30] The exercise of conscience was the human's "natural and unalienable right."[31] Conscience is a normative and intentional feature of conscious humans. The First Amendment covers their willful expressions.

The constitutional principle of free speech is intertwined with the value of natural persons' interpersonal discourse, which is used to maintain, develop, and understand the rule of law.[32] Free speech is just as much a personal right as it is an associational right to maintain and influence representative democracy.[33] The constitutional guarantee of the freedom of speech is tied to the unalienable rights extolled by the Declaration of Independence.[34] The powers of government are derived from its "just powers" that are drawn "from the consent of the governed," which those who ratified the Bill of Rights in 1791 understood to refer to the political will of the electorate.

At the founding, then, speech was regarded to be a natural human right.[35] When James Madison introduced what became the Bill of Rights, his "audience easily understood" the rights thereby enumerated to refer to "innate human capacities."[36] The historical and traditional understanding of the First Amendment, dating back to the time of and long before the nation's founding, has been that free speech is the property of natural persons. The constitutional right of speech covers the ability of intentional, autonomous, and reasoning citizens to participate in the public affairs of the nation and the culture around them.

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30. JAMES MADISON, *Property*, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478, 479 (Philadelphia, J.B. Lippincott & Co. 1865).

31. *Id.* (stating that "[c]onscience is the most sacred of all property . . . the exercise of that being a natural and unalienable right").

32. *See* Republican Party of Minn. v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts."); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 90 (1994) ("The Free Speech Clause of the First Amendment appears to us to be the strongest, most consensual rule-of-law area in constitutional discourse.").

33. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (stating that "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion").

34. *See* Ferrell v. Dall. Indep. Sch. Dist., 393 U.S. 856, 856 (1968) (Douglas, J., dissenting from a denial of certiorari) (stating that "the ideas of 'life, liberty, and the pursuit of happiness,' expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy").

35. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922 (1993) (discussing the framers' commonly accepted view that speech is a natural right).

36. Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 263 (2019) (quoting JAMES MADISON, *Notes for Speech in Congress (June 8, 1789)*, *in* 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson et al. eds., 1979)).

B. The Interests of Listeners in a Wired World

The vast contents of the internet and the speed at which information can be disseminated through it were unfathomable at the nation's founding. LLMs have further augmented the information available to audiences. The U.S. Supreme Court has recognized the constitutional value to listeners' interests of commercial advertisements.[37] Still, protection of a vibrant marketplace of ideas does not mean that all manner of speech is covered by the First Amendment. Laws against insider trading[38] and blackmailing[39] are two examples of content-based regulations that lie outside the ambit of the Constitution. The purposeful use of subliminal techniques meant to undermine an individual's behavioral autonomy and free choice should be added to the list of prohibited conduct, given the danger to democratic self-governance of visual subliminal messages, auditory subliminal messages, tactile subliminal stimuli, subvisual and subaudible cueing, embedded images, misdirection, and temporal manipulation.[40]

The value of chatbots for the acquisition of knowledge by a growing number of users has led some writers—including Professors Eugene Volokh, Mark A. Lemley, and Peter Henderson—to argue that LLMs have become so critical to the dissemination of information that "generative AI" should be "entitled to First Amendment protections."[41] However, their predominantly audience-based approach to speech leaves unclear how an LLM could ever challenge a law that would regulate its own algorithmic model. For instance, a statute that would require transparency, protection against harms to people, and model evaluation would appear to affect companies—such as Anthropic, Google, Meta, or OpenAI—not their lifeless LLMs. Listeners, as an amorphous group, would not have any right of action under the First Amendment to challenge risk-management or rights-based frameworks of regulations on LLMs.[42] Rather, such laws could hold AI firms accountable to the public for false, misleading, and invasive subliminal and subaudible techniques.

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37. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976) (recognizing the "right to 'receive information and ideas'" (quoting Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972))).

38. *See* SEC v. Lipson, 278 F.3d 656, 664 (7th Cir. 2002) (holding that the imposition of the maximum civil penalty for insider trading was not a violation of the First Amendment); Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 KAN. L. REV. 163, 202 (1994).

39. *See* Robinson v. Jack. Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 60–65 (1989).

40. For an explanation of how these and other subliminal GPAI techniques rely on techniques that are undetectable to the conscious mind, see European Commission, Commission Guidelines on Prohibited Artificial Intelligence Practices Established by Regulation (EU) 2024/1689 (AI Act), C(2025) 5052 final, ¶ 64 (July 29, 2025).

41. Volokh et al., *supra* note 2, at 651 ("Is the output of generative AI entitled to First Amendment protection? We're inclined to say yes."); *see id.* at 654, 659.

42. *See* Murthy v. Missouri, 144 S. Ct. 1972, 1980 (2024) (finding that the Supreme Court has "identified a cognizable injury only where the listener has a concrete, specific connection to the speaker").

Granting GPAI models speech rights—as some authors conjecture to be a reasonable, future possibility[43]—would subject regulations that affect "political and moral decisionmaking"[44] to strict scrutiny. Restrictions on LLM outputs, such as those that disseminate private healthcare information, would be at risk because AI companies are not subject to statutory restrictions applicable to healthcare providers.[45]

Under the presumption of unconstitutionality, the European Union Artificial Intelligence Act's[46] (the "EU AI Act") prohibitions against the dissemination of biometric information, subconscious messaging, exploitation of mental frailties, and facial recognition technology would likely stand little chance of surviving First Amendment challenges in the United States.[47] It would be a better approach for courts to treat human speech and computer outputs differently for First Amendment purposes, rather than simply subjecting regulations on AI outputs to strict scrutiny reserved for conscious natural persons or associations.

Other scholars go further, envisioning a futuristic world in which AIs would enjoy "moral status."[48] Professor Mathias Risse contends that one day, "intelligent machines should" be treated as "full members in the domain of the political."[49] While he provides no details to elaborate on this pronouncement that might have explained how and the extent to which algorithmic models might participate in the public realm, he seems willing to

43. *See, e.g.*, Volokh et al., *supra* note 2, at 659 (stating that "as a general matter, speech created by AI programs, like speech created by foreign governments, speech created by corporations, and speech created by the long-dead, is likely constitutionally protected—because of the First Amendment rights of those who would receive the speech, whether or not AI companies' own free speech rights are implicated as well"); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1269 n.134 (1992) (suggesting that the ability of GPAI models to accurately manipulate language and mimic human speech could be decisive for claims that LLMs deserve the status of legal personhood); *id.* at 1276 ("[I]f both the behavioral evidence and our knowledge of underlying processes gave us reason to believe that AIs possessed the necessary features of human mentality, we then would have a very good reason to believe that the AIs did possess these features.").

44. Volokh et al., *supra* note 2, at 656.

45. *See* Frank Pasquale, *Data-Informed Duties in AI Development*, 119 COLUM. L. REV. 1917, 1919, 1932 (2019). Privacy risks about the unauthorized dissemination of healthcare information extend to online platforms that currently are not covered under the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of the U.S. Code) (HIPAA). *See* 45 C.F.R. § 160.102 (2018). Social media companies do not fall under the regulation. *See* Lori Andrews, *A New Privacy Paradigm in the Age of Apps*, 53 WAKE FOREST L. REV. 421, 434, 441–43 (2018). For-profit firms that are data brokers do not come within HIPAA. A more specific example of how private data is monetized is a digital thermometer that tracks patients' temperatures and transmits the collected information to vendors who profit from that private data without being subject to HIPAA. *See* Sapna Maheshwari, *This Thermometer Tells Your Temperature, Then Tells Firms Where to Advertise*, N.Y. TIMES (Oct. 23, 2018), https://www.nytimes.com/2018/10/23/business/media/fever-advertisements-medicine-clorox.html (on file with the *Fordham Law Review*).

46. 2024 O.J. (L 1689).

47. I partly draw this list from prohibited acts under the EU AI Act. *See* EU AI Act, *supra* note 1, art. 5.

48. RISSE, *supra* note 3, at 237.

49. *Id.* at 246.

conceive of LLMs functioning in the future as legislators and voters. Professor Risse additionally predicts the possibility of LLMs having a tremendously long impact on society as a whole, arguing that they may eventually have a level of intelligence "composed and networked in ways that no longer permit easy switch-off."[50] His position would create a legally cognizable right for an LLM to avoid being shut down or having its hard drive rebooted.

These anthropomorphic accounts of machine learning fail to scrutinize the distinction between LLM outputs and human thought. Moreover, the permanent impact Risse conceives machines should one day have on politics and society runs counter to the moral status baked into constitutional institutions.[51] While GPAIs generate outputs through probability models of language tokens that mimic patterns of natural language, humans understand the content of statements. Natural persons' self-understanding, personal identity, and intentionality have no formal computational equivalent.[52]

An article written by Professors Toni M. Massaro and Helen Norton likewise relies on a listener-based theory.[53] It places the value of free speech in the outputs of LLMs. Their perspective fails to differentiate between human speakers and algorithmic machines. These scholars hypothesize a future where a strong AI machine can think independently of human involvement and, therefore, enjoy free speech rights.[54] The constitutional world they envision is one where the outputs of conscious human percipients are no different than the cold world of language tokens produced through algorithmic probability models. Consciousness plays no role in their schema.

In a follow-up article, Massaro and Norton, joined by Professor Margot Kaminski, rely on a listener-centered understanding of free speech doctrine to support the First Amendment's extension "to protecting strong AI."[55] The authors envision a time when computers will be treated not as machines but as intelligent entities, comparable in rights to human First Amendment rights holders.[56] Such a legal shift would drastically alter the state of law where

50. *Id.* at 237.

51. In this regard, in a letter to James Madison, Thomas Jefferson implored that "the earth belongs to the living, [and] not to the dead." *Letter from Thomas Jefferson to James Madison, 6 September 1789, reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-12-02-0248 [https://perma.cc/V73D-LPP4].

52. LLMs lack comprehension, "knowledge or understanding of the material they generate." *Generative Artificial Intelligence*, CORNELL UNIV. CTR. FOR TEACHING INNOVATION, https://teaching.cornell.edu/generative-artificial-intelligence [https://perma.cc/2ARQ-DPQP] (last visited Aug. 15, 2026).

53. *See* Toni M. Massaro & Helen Norton, *Siri-Ously?: Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1176–78 (2016).

54. *See id.* at 1172–73.

55. Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2486 (2017) (explaining why "[t]he logic of the Court's current free speech doctrine also supports its extension to protecting strong AI").

56. *See* Massaro & Norton, *supra* note 53, at 1179 (accepting the possibility of "the personhood barrier for First Amendment protections" being one day "overcome either if we

individuals and collective associations of people, but not machines, are regarded as having expressive and dignitary rights.[57]

C. The Disjunction Between Humanity and Machine

Accounts that foresee or advocate the emergence of free speech rights for LLMs too readily discount the human-centered aspect of constitutional free speech analysis. Natural people are born, live, and die as members of families, cultures, communities, states, and nations. Humans are not computational models. People are deeply introspective beings who engage with and develop customs, social norms, and constitutional principles. Natural people are conscious of their volitions, sensibilities, affections, intentions, and humors. Their claim to free speech rights is predicated on the human mind and its individual plasticity. Aspects of human characteristics, like artistry and creativity, are not predicated on the digital system of 0s and 1s; those electronic signals power code languages—Python, JavaScript, Ruby, and the like—to operate on Bayesian deep learning probabilities to produce syntactic tokens.[58] Unlike human brains and their effusive neurological operations, computer programs and content can be moved line-by-line from one hardware to another. Each human, on the other hand, is unique, not merely the product of computational learning models.

The binary computational system is no more than analogically related to the formulation of thought in the brain. Machine learning can only *imitate* consciousness.[59] And mimicry of human speech is not covered by the First

changed how we view 'persons' for practical or other reasons, or if computers came to function in ways that satisfied our criteria for personhood").

57. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 391–92 (2010) (Scalia, J., concurring) (recognizing the human-centric nature of First Amendment freedom of speech: "All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears").

58. *See* INT'L SOC'Y FOR BAYESIAN ANALYSIS, https://bayesian.org/ [https://perma.cc/X5WB-7HSY] (last visited Aug. 21, 2026). *See generally* Nicholas G. Polson & Vadim Sokolov, Generative AI for Bayesian Computation (Feb. 12, 2024) (unpublished manuscript), https://arxiv.org/pdf/2305.14972 (on file with the *Fordham Law Review*). In recent years, scholars have gathered to discuss the limits of Bayesian Deep Learning and to study non-Bayesian approaches to AI, such as bootstrap methods, post hoc uncertainty scaling, and conformal prediction. *See, e.g.*, *Dagstuhl Seminar 24461: Rethinking the Role of Bayesianism in the Age of Modern AI*, SCHLOSS DAGSTUHL, https://www.dagstuhl.de/seminars/seminar-calendar/seminar-details/24461 [https://perma.cc/W73E-JXCT] (last visited Aug. 7, 2026).

59. Alan Turing's claim comes to mind here. Turing's thought experiment involves a machine that can imitate human communication well enough to fool observers into believing it is thinking. He characterized his reformulated research agenda to be "a game which we call the 'imitation game.'" A. M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433, 433–35 (1950) ("May not machines carry out something which ought to be described as thinking but which is very different from what a man does? This objection is a very strong one, but at least we can say that if, nevertheless, a machine can be constructed to play the imitation game satisfactorily, we need not be troubled by this objection."). Such an argument claims that the artificial imitation of thought suffices to entitle the machine model to First Amendment rights, despite its lack of consciousness, autonomy, or intentionality. For an example of authors who support versions of this argument see James B. Garvey, Note, *Let's Get Real: Weak Artificial Intelligence Has Free Speech Rights*, 91 FORDHAM L. REV. 953,

Amendment, which, rather, covers the conscious communication of social actors.

The current state of neurophysiology is inadequately advanced to know the neural mechanisms that enable us to create various abstract and concrete thoughts, only some of which we then articulate in natural language. Professor Sir Roger Penrose writes that there is "yet no physical, biological, or computational theory that comes very close to explaining our consciousness and consequent intelligence."[60] The claim that LLMs will one day functionally be minds is speculative and contrary to the actual operations of machine learning.[61] Penrose further asserts that while "[a]ppropriate physical action of the brain evokes awareness . . . this physical action cannot even be properly simulated computationally."[62]

LLMs divide text into tokens and process each token in relation to the surrounding tokens. Based on linguistic patterns developed through training, the model assigns probabilities to possible next tokens and generates them sequentially to produce phrases, sentences, paragraphs, and longer forms of discourse.[63] Even when they are syntactically correct—and of course the results one receives from GPAIs are often substantially flawed (so-called "hallucinations")[64]—the machines lack self-awareness, self-interest, cultural identity, and other introspective human faculties. Put succinctly, machines lack the "essential dignity . . . of every human being."[65] Even when thought of in purely materialistic terms, computational models cannot imitate a brain that operates at both the Newtonian dynamic and the quantum levels. Neither

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979 (2022); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1481 (2013); Solum, *supra* note 43, at 1235–38.

60. ROGER PENROSE, SHADOWS OF THE MIND: A SEARCH FOR THE MISSING SCIENCE OF CONSCIOUSNESS 13 (1994).

61. *See* Thomas Nagel, *Consciousness and Objective Reality*, *in* THE MIND-BODY PROBLEM: A GUIDE TO THE CURRENT DEBATE 63 (Richard Warner & Tadeusz Szubka eds., 1994) (arguing against a functionalist theory or reality because "at present [it is] not possible to speculate fruitfully about the question whether artificially created physical systems could have minds. We can say nothing interesting about this when we know so little about why we have minds, or why the other natural organisms to which we find it natural to attribute mental states have them").

62. The distinction between these three approaches to consciousness can be found at PENROSE, *supra* note 60, at 12.

63. *See* CATHERINE ANDERSON ET AL., THE ESSENTIALS OF LINGUISTICS 33 (2d ed. 2022); Muskanrohe, *How AI Predicts the Next Word: The Science Behind LLM*, MEDIUM (Feb. 15, 2025), https://medium.com/stuvalley-ai-nexus/how-ai-predicts-the-next-words-the-science-behind-llm-de21d7f4a306 [https://perma.cc/E7LG-3NK8]; Sweta, *What Are Tokens in LLMs?: A Complete Beginner-Friendly Explanation*, MEDIUM (June 12, 2026), https://sweta-nit.medium.com/what-are-tokens-in-llms-a-complete-beginner-friendly-explanation-44799df4e794 (on file with the *Fordham Law Review*); *AI for .NET developers, Tokens*, MICROSOFT IGNITE, https://learn.microsoft.com/en-us/dotnet/ai/conceptual/understanding-tokens (on file with the *Fordham Law Review*) (last visited Sep. 13, 2026); Frandi Dwijyanto, *Large Language Model Tokens*, POLYRIFIC (Nov. 10, 2023), https://polyrific.com/blog/week45-2023 [https://perma.cc/KQZ5-N3RG].

64. Albeit perhaps "hiccup" would be a less anthropomorphic and more mechanistic term for the phenomenon.

65. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

can purely physical theories of thought explain how the "some 86 billion neurons of our brains and 100 trillion connections to each other" create thought.[66]

Scholars who predict a future AI superintelligence rely on the seminal Turing test: a thought experiment that was drafted by the pioneering mathematician and computer scientist Alan Turing in 1950 to argue that a computer capable of imitating human thought could be said to be thinking.[67] This perspective is functionalist in its explanation of thought and speech as being analogous to a computer running algorithmic code.[68] Turing's innovative idea has been tremendously influential, so much so that it altered the field of philosophy of mind by equating thought with computation.[69]

John Searle, on the other hand, argues that actual thought is not identical to its computational imitation. The computer runs numerical processes, rather than engaging with the sensations and sensibilities of pain, love, adoration, and wit.[70] A computational device does not even understand its own arithmetic outputs, much less the meaning of words, sentences, and paragraphs it spurts out.[71]

Programs can perform probability operations, but they cannot think consciously. AI programs, as philosopher and Professor John Preston explains, operate through formal syntax, whereas human minds possess semantic understanding of content and context. Computational devices mimic the functions of minds, as for instance, by processing letters and words into understandable word patterns, without instantiating the intrinsic quality

66. Catherine Caruso, *A New Field of Neuroscience Aims to Map Connections in the Brain*, HARV. MED. SCH. (Jan. 20, 2023), https://hms.harvard.edu/news/new-field-neuro science-aims-map-connections-brain (on file with the *Fordham Law Review*). Comprehending thought is beyond contemporary neuroscience. *See generally* JOHN ECCLES, THE BRAIN AND THE UNITY OF CONSCIOUS EXPERIENCE (1965); JOHN ECCLES, HOW THE SELF CONTROLS ITS BRAIN (1994). For comparison, other conscious beings have fewer neurons but are within a realm where their external behavior would seem to indicate that animals are also conscious at different levels. Ants have approximately 250,000 neurons, fruit flies 10^5, and honeybees 10^6 neurons. NICK BOSTROM, SUPERINTELLIGENCE: PATHS, DANGERS, STRATEGIES 25 (2014).

67. *See, e.g.*, Solum, *supra* note 43, at 1235–36; Roman V. Yampolskiy, *Turing Test as a Defining Feature of AI-Completeness*, *in* ARTIFICIAL INTELLIGENCE, EVOLUTIONARY COMPUTING AND METAHEURISTICS 3, 8 (Xin-She Yang ed., 2013) (explaining that the Turing test presents an AI problem based on computational functions capable of mimicking human cognition); Colin J. Causey, *A Critique of Pure Computation: Against Strong AI and Computationalism*, 31 EPISTEME 5, 5 (2021) ("Modern electronic digital computers are equivalent to Turing machines" that adopted "the philosophy of mind that the mind is, essentially, a computer" that is thought to be running a software program in the hardware of the brain).

68. JOHN R. SEARLE, CONSCIOUSNESS AND LANGUAGE 210–22 (2002).

69. Turing believed that a machine can think if its outputs are indistinguishable from those of human responses. *See* Turing, *supra* note 59, at 433–34; *The Computational Theory of Mind*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/computational-theory-of-mind/ [https://perma.cc/7PCL-DX2N] (last visited Aug. 10, 2026).

70. Searle, *supra* note 17, at 423 ("To confuse simulation with duplication is the same mistake, whether it is pain, love, cognition, fires, or rainstorms.").

71. *Id.* at 423 (explaining that algorithms that use language inputs to create accurate linguistic outputs are no more aware of the answers than a calculator).

of mental cognizance capable of understanding context, relevance, or abstraction.[72] Sir Arthur C. Clarke's science fictional machine that can "reproduce . . . most of the activities of the human brain" remains a thing of fantasy.[73] Even if a machine were to fool a survey audience into believing that it was actually thinking, such a result would not answer the ontological question of whether computational devices are equivalent to human minds.

Digital data outputs rely on binary code to produce language tokens essential to the operation of machine language. Despite their linguistic structure, LLMs lack rational recognition.[74] Professors Derek Bambauer and Mihai Surdeanu pithily explain that a program, like ChatGPT, is "roughly, an auto-completion tool."[75] Code "is purely probabilistic: It builds a response that has the highest statistical likelihood of comprising what the user seeks."[76] An LLM "is not intelligent and is not approaching human reasoning capacities"; by contrast, "[p]eople reason."[77]

The human brain, unlike machine code, is capable of beliefs, theories, intents, uncertainties, worries, compassion, and individuality, none of which are attributable to machines, which cannot even understand their syntactic outputs.[78] Put simply, AIs lack the consciousness intrinsic to the freedom of expression that is protected under the First Amendment. LLMs lack any sense of self-identity that is essential to constitutionally protected speech.

The distinction between constitutionally protected conscious thought and machine learning has significant implications not only for First Amendment coverage but also for identifying the persons exclusively eligible for participation in our representative democracy. The constitutionally protected production of thought through speech is tethered to humans' innate dignity, sense of self, and creativity. As former Israeli Supreme Court Justice Aharon Barak emphasized in his book, "Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition."[79] The human mind, unlike algorithmic devices, is capable of moral agency,

72. *See* John Preston, *Introduction* to VIEWS INTO THE CHINESE ROOM: NEW ESSAYS ON SEARLE AND ARTIFICIAL INTELLIGENCE 28 (John Preston & Mark Bishop eds., 2002).

73. ARTHUR C. CLARKE, 2001: A SPACE ODYSSEY 96 (1968). One might even say "thankfully remains a fantasy" given the lethal harms committed by the computer model named Hal in Clarke's dystopian novel.

74. *See* John R. Searle, *Is the Brain a Digital Computer?*, PROCS. & ADDRESSES AM. PHIL. ASS'N, Nov. 1990, at 21, 30 ("[T]he difficulty is that the 0's and 1's as such have no causal powers at all because they do not even exist except in the eyes of the beholder.").

75. Derek E. Bambauer & Mihai Surdeanu, *Authorbots*, 3 J. FREE SPEECH L. 375, 377 (2023).

76. *Id.* at 377–78.

77. *Id.* at 377.

78. *See* Searle, *supra* note 17, at 420 (distinguishing apparatuses, such as thermometers, from human thought). Humans, as Plutarch explains, are "masters over [human nature], and have her at command, when there being seated and founded most surely the best and greatest things that we have, to wit, sound and honest opinions, arts and sciences, good discourses tending to virtue." PLUTARCH, *Of the Tranquility and Contentment of Mind*, *in* PLUTARCH'S MORALIA 153, 180 (E.H. Blakeney ed., Philemon Holland trans., 1911) (1603).

79. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 215 (2015) (quoting former Canadian Supreme Court Chief Justice Beverley McLachlin and Justice Louis LeBel).

rationality, innovation, value formation, and emotive recognition. Scholars who would expand free speech rights to LLMs would stretch the meaning of the First Amendment to digital outputs bereft of semantic comprehension.

II. SUPREME COURT DOCTRINE

The ability of LLMs to run digital computations and produce complete sentences is not connected with understanding, just as a temperature gauge in an oven cannot comprehend why it stops heating up when the temperature reaches a setting dialed up by a person or when signaled by a sensor. Likewise, GPAI produces syntactically sound sentences based on human prompting, but it lacks the thought and memory that are intrinsic to human speech. Put more simply, LLMs lack human reasoning. They produce data outputs but do not comprehend them. The distinction between conscious human and computational machine has significant implications for the question of whether the First Amendment protects machine speech.

The Roberts Court's First Amendment jurisprudence leans heavily into strict scrutiny analysis, which it applies to review even nominal burdens on content and viewpoint outputs,[80] regardless of whether the statements are made by natural persons or corporations.[81] Even corporations, though, are composed of autonomous people who consciously make for-profit and not-for-profit decisions. Human use of machine-generated outputs is thus protected because it is integrated with a natural person's own work product. Ordinary computer code follows the lines of a program to achieve a stated end that is defined by a human programmer, but with LLMs, it is the models themselves. GPAI is driven by mathematical functions that process algorithms in ways that even the engineers themselves cannot explain.[82]

The highest level of scrutiny should not apply in contexts where AI models process data autonomously based on algorithms. First Amendment jurisprudence values the need for free expression to protect "personal independence[,] which is the basis of the most valued qualities of a free citizen [and] is sustained and cultivated by the consciousness that there are limits which even the state cannot pass in tearing open the secrets of his bosom."[83] The First Amendment especially safeguards persons who hold unpopular views and heterodox ideas.[84]

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80. *See* Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015).

81. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010).

82. Leading computer engineers admit that they "do not understand how [their] own AI creations work." Dario Amodei, *The Urgency of Interpretability*, DARIO AMODEI (Apr. 2025), https://darioamodei.com/post/the-urgency-of-interpretability [https://perma.cc/GCM8-Z6RG]; *see also* Victor Tangermann, *Sam Altman Admits That OpenAI Doesn't Actually Understand How Its AI Works*, FUTURISM (June 3, 2024, at 10:21 ET), https://futurism.com/sam-altman-admits-openai-understand-ai [https://perma.cc/A7F2-KE7B] (quoting OpenAI Chief Executive Officer Sam Altman saying, "We certainly have not solved interpretability").

83. Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J., dissenting).

84. *See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109 (1993).

Neither can it be said that all speech is covered by the First Amendment. The Supreme Court, in limited circumstances, has demonstrated a willingness to weigh important government policies against countervailing speech interests.[85]

The Court's increasingly formalistic approach has favored the interests of corporations, who lobby and litigate to maximize the dividends of their stockholders under the guise of protecting their audiences against regulations on AI firms.[86] Modern-day free speech holds that regulations of corporate campaign expenditures, commercial advertising, and data privacy regulations are unconstitutional.[87] The increasingly muscular review of regulations that place restrictions on corporate data acquisition, retention, and sale—all without a data subject's permission—renders federal and state governments "incapable of responding to new conditions and challenges."[88] This comes at a time when, despite the rapid developments of machine learning, President Donald J. Trump has rescinded all initiatives by President Joseph R. Biden Jr.'s administration to create a voluntary framework based on risk and rights to restrict the unchecked growth of AI firms.[89]

In a dissent, Justice Kagan warned of a pattern of decisions that resembled "black-robed rulers overriding citizens' choices."[90] If courts abandon the uniquely human context of free speech values, then any effort to regulate AI firms in matters like transparency, verification, time-bound retention of data, protection of democratic values, and security may be subject to the highest level of scrutiny. This would raise an almost insurmountable hurdle against future regulations. Moreover, were the Court's formalistic model to be applied to AI, it would "threaten[] significant judicial interference with widely accepted regulatory activity."[91]

Litigants have repeatedly used an oversimplified two-tiered model of free speech—where all content statements are deemed to fall under strict scrutiny

85. *See, e.g.*, Law Students C.R. Rsch. Council, Inc. v. Wadmond, 401 U.S. 154, 160 (1971) (upholding a loyalty provision of a state bar application); Baird v. State Bar, 401 U.S. 1, 6 (1971) (finding that "[t]he First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs"); *In re* Stolar, 401 U.S. 23, 30 (1971) (finding unconstitutional a state bar requirement that applicants list a variety of groups to which they belonged, including those who advocated the overthrow of the U.S. government); Healy v. James, 408 U.S. 169, 193–94 (1972) (holding that a university could not deny recognition to a student organization because of its philosophy but could do so for refusing to follow reasonable campus rules); Parker v. Levy, 417 U.S. 733, 743–45 (1974) (upholding army regulations on conduct and against subversion).

86. For the administration of President Donald J. Trump's hobbling of AI federal and state regulations, see *infra* text accompanying note 120.

87. *See, e.g.*, *Citizens United*, 558 U.S. at 365; Expressions Hair Design v. Schneiderman, 581 U.S. 37, 48 (2017); Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011).

88. *Cf.* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring and dissenting in part) (asserting that the unitary theory of executive power "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges").

89. Exec. Order No. 14365, 90 Fed. Reg. 58499 (Dec. 11, 2025).

90. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 956 (2018) (Kagan, J., dissenting).

91. *Sorrell*, 564 U.S. at 590 (Breyer, J., dissenting).

analysis or to be judicially classified as a low-value category like obscenity, fraud, or fighting words, which are not protected by the First Amendment—to challenge regulations.[92] If LLMs were to enjoy free speech rights, as suggested by scholars like Volokh and Lemley, it is unlikely that regulations on safety, transparency, transferability of data and the like, would survive First Amendment challenges.[93]

For the most part, doctrine treats corporate expression of AI firms, such as OpenAI and Alphabet, as it does natural humans: as speakers covered by the values of the First Amendment. This approach raises the question of whether artificial entities with perpetual life should be treated as mortal humans. Even under the current doctrinal liberality toward corporate speech, demonstrated quite clearly in cases like *First National Bank of Boston v. Bellotti*,[94] LLMs should not qualify for free speech rights because they produce probabilistic language tokens. The outputs are not edited as they were in *Moody v. Net Choice*,[95] where the Court recognized a free speech corporate right to curate content on social media platforms.[96] Corporations require human governance, whereas machine learning is an unintentional, algorithmically driven process that does not answer to the will of its programmers.

Scholars, such as those whose work was reviewed in Part I.B of this Essay, rely on a functionalist, audience-based approach to First Amendment free speech to argue for a future right of free speech for LLM models.[97] The Court's holding that "[t]he identity of the speaker is not decisive in determining whether speech is protected"[98] lends itself to the argument that algorithmic computations presenting as syntactically correct sentences deserve free speech status.

In *Citizens United v. Federal Election Commission*,[99] the Court likewise rejected the proposition that free speech values depend on the identity of the speaker.[100] Nevertheless, as Justice Antonin Scalia's concurrence to *Citizens*

92. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (holding that defendants can be held criminally liable for recklessly communicating true threats to an individual or group of individuals); *see* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 34–35 (2016) (critiquing the Court's strict categorical method).

93. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 3 (2000) ("[J]udicial determination to apply 'strict scrutiny' is little more than a way to describe the conclusion that a particular governmental action is invalid.").

94. 435 U.S. 765 (1978).

95. 144 S. Ct. 2383 (2024).

96. *Id.* at 2406.

97. *See supra* text accompanying notes 41, 48, 53, 55.

98. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986).

99. 558 U.S. 310 (2010).

100. *See id.* at 326. At a time when history and tradition dominate Supreme Court jurisprudence, corporations enjoy status unknown. At the founding, corporate entities were mixed public-private entities, subject to limitations on functions, and required legislative charters rather than the current general incorporation statutes. On the role of history and tradition in judicial interpretation see Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 574 (2024) ("Distinguishing [other substantive due process cases] suggested *Dobbs*'s fundamental

United made clear, the First Amendment—indeed, the entirety of the Bill of Rights—applies only to humans.[101] With that said, the majority's categorical statement—"Speech restrictions based on the identity of the speaker are all too often simply a means to control content"[102]—provides a legal hook for AI companies to claim that GPAI bots should enjoy First Amendment protections because they generate useful information.[103]

Even without going into the question of how doctrine would handle U.S. corporate subsidiaries of foreign companies, AI-run companies are fundamentally different than ordinary firms. While corporations are composed of humans who run for-profit entities that enjoy legal personhood, a corporation that would be run by autonomous machine algorithms would not warrant First Amendment protection.[104] LLMs are purely mechanical and algorithmic in structuring syntactic sentences without comprehending the natural language strings that they produce. While they disseminate information for audiences' consumption, which the majority in *Citizens United* found to be a key First Amendment value,[105] algorithmic computer models differ significantly from corporations. In part, this is because corporations are composed of natural persons, who make numerous normative decisions that can lead to shareholder derivative suits. A GPAI is neither a legal person nor a natural person and, therefore, cannot personally be sued for breaches of fiduciary duties that result from mechanical, algorithmic decisions. Laws are needed to hold firms responsible for operating models that are negligently or purposefully designed or deployed to harm humans. Policy should also make clear that no algorithmic machine enjoys constitutional entitlements.

Advertisements and a slew of other AI outputs often distort information about the quality of products through unidentified AI content and thereby mislead consumers and undermine their confidence.[106] Audiences "struggle[] to detect chatbot ads" and find their content to be particularly

concern was not historical, but instead moral."); Alexander Tsesis, *The Establishment of Religion in Schools*, 76 STAN. L. REV. 1725, 1728–29 (2024) (arguing that *Kennedy v. Bremerton School District* was inconsistent with the historical commitment to separation between church and state functions). For a discussion of the evolution of the corporate structure see Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 618–21 (2016).

101. *Citizens United*, 558 U.S. at 391–92 (Scalia, J., concurring) ("All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons.").

102. *Id.* at 340.

103. *Id.* at 343 (stating that corporations, like humans, contribute to "discussion, debate, and the dissemination of information and ideas" (quoting First Nat'l Bank Bos. v. Bellotti, 435 U.S. 765, 783 (1978))).

104. *Cf.* Shawn J. Bayern, *Are Autonomous Entities Possible?*, 114 NW. L. REV. 23, 26–28 (2019) (dealing with civil laws such as contracts and property).

105. *See Citizens United*, 558 U.S. at 339 (finding the campaign financing statute was deficient because it restrained expenditures that could be tapped to expand "the size of the audience reached" (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam))).

106. Colin Campbell, Kirk Plangger, Sean Sands & Jan Kietzmann, *Preparing for an Era of Deepfakes and AI-Generated Ads*, 51 J. ADVERTISING 22, 24–26 (2022).

"manipulative, less trustworthy, and intrusive" when personally targeted at specific users.[107] These are not the false advertisements, which, under the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[108] do not enjoy free speech rights.[109] Rather, AI persuasion relies on the manipulation of human intellect, often occurring at subliminal and subaudible levels that are undetectable to humans.[110]

Current doctrine settles on a sharp dichotomy between content-based and content-neutral speech, rather than examining cases based on context.[111] Humans, whether acting as individuals or through associations or corporations, enjoy free speech rights, while AI is a nonconscious computational device that should enjoy no presumption of First Amendment protection. Federal and state governments should not be subject to First Amendment scrutiny when they enforce content-neutral laws that advance important or substantial government interests, such as product safety and accuracy.[112]

The Supreme Court has, however, moved in a deregulatory direction toward protecting corporations' commodification of personal information. For instance, in *Sorrell v. IMS Health, Inc.*,[113] the Court held that a state violated the free speech right of pharmacies that sold private, physician prescriptions to data brokers and pharmaceutical companies.[114] Before the

107. Brian Jay Tang, Kaiwen Sun, Noah T. Curran, Florian Schaub & Kang G. Shin, GenAI Advertising: Risks of Personalizing Ads with LLMs 1 (Sep. 23, 2024) (unpublished manuscript) (on file with the *Fordham Law Review*); *see also* Yaqub Chaudhary & Jonnie Penn, *Beware the Intention Economy: Collection and Commodification of Intent via Large Language Models*, HARV. DATA SCI. REV., Dec. 2024, at 1, 2 (discussing the efforts of marketers to rely on LLMs to capture, manipulate, and commodify human intentionality for lucrative gain through advertisement and other efforts to dominate the "attention economy").

108. 447 U.S. 557 (1980).

109. *Id.* at 563–64.

110. *See* Matthew Burtell & Thomas Woodside, Artificial Influence: An Analysis Of AI-Driven Persuasion 1 (Mar. 15, 2023) (unpublished manuscript) (on file with the *Fordham Law Review*); Marcello Ienca, *On Artificial Intelligence and Manipulation*, 42 TOPOI 833, 839–40 (2023).

111. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (Stevens, J., concurring) (arguing that many "factors play some role in" the "evaluation of content-based regulations on expression. Such a multi-faceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression 'protected' or 'unprotected' or to proclaim a regulation 'content based' or 'content neutral'").

112. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (explaining when a government regulation is "sufficiently justified").

113. 564 U.S. 552 (2011).

114. *Id.* at 557 (striking a state law that prevented pharmacies from selling confidential medical prescriptions to pharmaceutical firms). U.S. law lacks comprehensive privacy protections and only safeguards discrete forms of information. *See* Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3423; Fair Credit Reporting Act, 15 U.S.C. § 1681–1681x; Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506; Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801; Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2523; Stored Communications Act, 18 U.S.C. §§ 2701–2713;

Court hears its first AI-related claim, it should consider an appropriate opportunity, if only in dictum, to assert that the First Amendment uniquely covers human consciousness, intentionality, and judgment. The scope of the constitutional right of expression does not extend to computational algorithms that produce natural language tokens through probability scoring.

Thus far, lower courts have been inconsistent in their treatment of First Amendment claims that litigants have raised to challenge the enforcement of state regulations of GPAI. In *Kohls v. Bonta*,[115] a district court held that a California statute prohibiting the use of deepfake commercials during election season violated the First Amendment.[116] On the other hand, in *Garcia v. Character Technologies*,[117] a district court in a different circuit held that AI outputs are not covered by the First Amendment because they are not part of the intentional content of an AI company, and therefore, the mechanical entity differs from the editorial choices made by social media companies, which *Moody v. NetChoice* found to be protected by the First Amendment.[118]

Unlike the United States under the Trump administration, the EU has promulgated a series of legal instruments to protect natural humans against LLMs' manipulative, deceptive, and subliminal algorithms.

III. U.S. AND EUROPEAN LAWS

In a deliberate effort to stifle all regulations on AI in their nascency, the Trump administration issued an executive order (the "Trump Order") that revoked the Biden administration's soft law regulatory initiatives.[119] The Trump Order eviscerated provisions that had provided companies and government agencies with guidance on how to voluntarily complete AI impact assessments, test AI performance in real-world contexts, independently evaluate AI programs, monitor risks of AI usage, mitigate emerging risks, and provide human oversight methods.[120]

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710; Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725; Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S. Code); 26 U.S.C. § 6103; Privacy Protection Act of 1980, 42 U.S.C. § 2000aa–2000aa-12; 47 U.S.C. § 230; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of the U.S. Code).

115. 752 F. Supp. 3d 1187 (E.D. Cal. 2024).

116. *Id.* at 1199.

117. 785 F. Supp. 3d 1157 (M.D. Fla. 2025).

118. Id. at 1177–79 (citing Moody v. Net Choice, LLC, 144 S. Ct. 2383, 2409–11 (2024) (Barrett, J., concurring)).

119. Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

120. The Trump administration took a wrecking ball to tear down foundational guidelines that might otherwise have been cornerstones for future regulations. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M–24–10, ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE (2024); *see also* WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022) (detailing a framework for the "design, use, and development" of AI systems released prior to Executive Order 14365).

The EU, on the other hand, has adopted a variety of statutes to begin regulating the risk of GPAI. Contrary to the notions entertained by scholars who believe AI speech should be granted First Amendment protections,[121] the EU's Charter of Fundamental Rights protects free expression and limits the coverage of rights to "indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."[122]

Even more clearly, the EU distinguishes natural humans' communications from those of artificial machines. The EU AI Act went into operation in 2024, with its provisions becoming fully operational in the summer of 2026.[123] The law distinguishes between data outputs and human speech. It targets high-risk AI systems that serve as digital forums to purposefully manipulate subliminal techniques that elude a person's consciousness because they impair individuals' ability to make informed, intentional, or autonomous decisions.[124] The act addresses general purpose AI models' potential for producing "any actual or reasonably foreseeable negative effects in relation to major accidents, disruptions of critical sectors and serious consequences to public health and safety; any actual or reasonably foreseeable negative effects on democratic processes, public and economic security; [and] the dissemination of illegal, false, or discriminatory content."[125] Rather than conceive of AI as having free speech rights, the EU AI Act obligates providers and deployers of AI systems "to identify and mitigate systemic risks that may arise from the dissemination of content that has been artificially generated or manipulated, in particular the risk of the actual or foreseeable negative effects on democratic processes, civic discourse and electoral processes, including through disinformation."[126] To address the manifold dangers that await humanity from the unregulated deployment of AI technologies, the act requires high-risk firms to establish, implement, and document dangerous hazards that such systems pose to the health, safety, and fundamental rights of natural humans.[127] The EU AI Act also prohibits harm to human consciousness. It prohibits the exploitation of "manipulative and exploitative practices" meant "to persuade persons to engage in unwanted behaviours" that have "sufficiently important adverse impacts on physical, psychological health or financial interests."[128] EU regulations do not attribute free expression protections for LLM companies; to the contrary, the act prohibits the operation of AI systems that are intended to distort human behavior, whereby physical or psychological harms are

121. *See supra* Part I.

122. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326/02) pmbl., arts. 11–13.

123. *See* EU AI Act, *supra* note 1.

124. *Id.* art. 5.

125. *Id.* pmbl. para. 110.

126. *Id.* pmbl. para. 136.

127. *Id.* art. 9(1)–(2). That is a start, perhaps future EU legislation will likewise regulate open-source models, which carry their own harms to humans.

128. *Id*. pmbl. para. 29.

likely.[129] The EU pursues a public policy that takes into account "human and ethical implications" of AI.[130] Its approach does not regard outputs in the reductionist terms of speech that Professors Volokh and Lemley propose.[131] Rather, it treats individuals with consciousness differently from machines that run on opaque algorithms to gather, process, and monetize human data.

Throughout the EU AI Act, the law's goal is framed as protecting "natural persons" from AI-generated predictions based solely on profiling, personality traits, or characteristics, such as a person's "nationality, place of birth, place of residence, number of children, level of debt or type of car."[132] There are some exceptions—for instance, algorithmic processing and predictive modeling is allowed for the collection of details needed for criminal investigation—but only if "based on objective verifiable facts and without human assessment thereof."[133] Here, however, taking the human out of the decision loop to avoid bias might have the opposite effect of computer-based biases against an innocent party subject to a criminal investigation.

It is essential that we differentiate between conscious people and LLMs to safeguard communications from being overwhelmed by bots designed to mislead the public about matters ranging from politics to commercial advertisements. Such laws should either be subject to rational basis scrutiny or at most to intermediate scrutiny.[134] Laws might pass muster under these standards if they target AI risks through content-neutral approaches to matters such as data retention and dissemination, fairness, access to essential government services, and permanent labeling of computerized contents. The dystopian world Professors Massaro and Norton imagine, where strong AI is treated as an entity with its own free speech rights, is rife for subliminal and overt attacks that breach privacy, compromise elections, and undermine access to courts.[135]

Human intervention, independent audits, transparency, and risk reports, such as those required by the EU AI Act, are needed at a time when algorithms by design—or inadvertently—impede and manipulate human thought. However, the libertarian approach to free speech taken by the Supreme Court in holdings like *Sorrell* raise significant barriers to the implementation of reasonable regulation, even those that are limited to commercial data collection. The EU AI Act should therefore serve as a starting point for developing U.S. policy to help prevent unacceptable and

129. *Id.*

130. Eur. Parliamentary Rsch. Serv., Sci. Foresight Unit, The Ethics of Artificial Intelligence: Issues and Initiatives, at 73, PE 634.452 (2020); Eur. Parliamentary Rsch. Serv., Members Rsch. Unit, EU Guidelines on Ethics in Artificial Intelligence: Context and Implementation, at 7, PE 640.163 (2019).

131. *See supra* text accompanying notes 41, 43–44.

132. *See, e.g.*, EU AI Act, *supra* note 1, pmbl. paras. 2, 42.

133. *Id.* pmbl. para. 42.

134. The word length of this Essay does not allow further elaboration on this point, but I plan to articulate the argument in a book in progress. ALEXANDER TSESIS, THE HUMAN PROPOSITION: FREEDOM OF EXPRESSION, CONSCIOUSNESS, AND AI (forthcoming).

135. *See supra* text accompanying notes 53–56.

high risks that are increasingly marketed by AI firms.[136] The EU AI Act is an early effort to ground legislative efforts in the realities and risks of the deployment of machine learning in all walks of life, from government functions, to employment, to child rearing.

CONCLUSION

GPAI augments the availability of both information and misinformation. The civic and commercial benefits of these new technologies go hand-in-hand with the risks generated by deepfakes, subliminal messaging, real-time unauthorized facial recognition, social scoring, and exploitation of economic and social vulnerabilities. LLMs hold the possibility of expanding human knowledge and understanding, but they also pose significant risks of stifling creativity, enhancing biases, and contributing to interpersonal alienation.

Courts would be remiss to extend First Amendment coverage to these artificial machines. They lack the intentionality that is presumed by the public discourse value of the First Amendment. Ultimately, human audiences' interests in GPAI outputs should be weighed against the dangers of a lawless, virtual world that facilitates criminality, suicidality, and paranoia.[137] The Roberts Court's reductivist interpretation of the First Amendment, which is evident in cases like *Sorrell* and *Reed*, coupled with President Trump's executive order, threatens to undermine state and federal initiatives designed to prevent election misinformation, digital child pornography trained on images of real victims, foreign propaganda, and defamation. The way forward is to develop a bipartisan regulatory scheme with provisions that protect human dignity, data safety, educational integrity, privacy, and political representation.

136. *See* EU AI Act, *supra* note 1, pmbl. para. 48.
137. *See supra* note 19.