THE AGE OF CONTENT REGULATION: DO SOCIAL MEDIA GIANTS HAVE FIRST AMENDMENT RIGHTS TOO?

Molly Codeanne*

I. Introduction

The existence and prevalence of social media has created a slew of indisputably difficult constitutional and legal issues.1 When we consider First Amendment rights in connection with social media, we typically think of users’ ability to speak freely on issues about which they feel passionate.2 We rarely contemplate the social media

* J.D. Candidate, Suffolk University Law School, 2024

1 See Robert Barns & Ann E. Marimow, A Landmark Supreme Court Fight Over Social Media Now Looks Likely, WASH. POST (Sept. 19, 2022), archived at https://perma.cc/7VDZ-AG22 (stating that Justice Alito wrote that “[i]t is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies.”). While the Fifth Circuit’s decision in NetChoice, LLC v. Paxton, held that social media companies create a transposition of the First Amendment, the social media platforms argued that “somewhere in the person’s enumerated right to free speech lies a corporation’s unenumerated right to muzzle speech.” Id. See also Scott Nover, Social media laws in Texas and Florida hang in limbo as Supreme Court delays decision, QUARTZ (Jan. 23, 2023), archived at https://perma.cc/L9GQ-8DE2 (acknowledging that cases regarding complex constitutional issues in today’s “highly politicized regulatory regime…raise complex First Amendment issues, not just regarding compelled carry but also transparency obligations.”).

2 See Kelsey Reichmann, Florida asks Supreme Court to review social media censorship law, COURTHOUSE NEWS SERV. (Sept. 21, 2022), archived at https://perma.cc/R6PE-UY29 (stating that Florida’s petition challenging the ruling on the Florida law was aimed at social media companies for removing “conservative ideas”). Florida argues that social media companies have engaged in a “censorial streak” allowing them to manipulate the forum in which most people express their ideas. Id. See also Barns & Marimow, supra note 1 (stating that Oldham wrote in the Fifth Circuit’s decision “[t]hat Amendment, of course, protects every person’s
platforms’ right to regulate content, such as terrorist information and holocaust denials, in order to ensure that people have a safe space to stay connected with friends and family and keep up-to-date on daily events.\textsuperscript{3} As social media progresses and becomes ever more prevalent in our daily lives, it has created a novel issue in the realm of First Amendment jurisprudence.\textsuperscript{4}

The Fifth Circuit Court has created a stark circuit split by upholding Texas House Bill 20, which requires that social media

\textsuperscript{3} See Alan Z. Rozenshtein, \textit{The Fifth Circuit’s Social Media Decision: A Dangerous Example of First Amendment Absolutism}, LAWFARE (Sept. 20, 2022), archived at https://perma.cc/JN7Z-LYL4 (stating that laws prohibiting social media companies from regulating content reject concerns that these laws would mandate that platforms post “pro-Nazi speech, terrorist propaganda, [and] Holocaust denial[s]…”). Section 230 of the Communications Decency Act creates a liability shield for any actions that are taken to restrict access to material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,” even if it would be otherwise constitutionally protected. \textit{Id.}

\textsuperscript{4} See Barns & Marimow, \textit{supra} note 1 (stating that Justice Alito wrote that social media has changed the way that we communicate and obtain news). Legal experts following the issue of social media companies’ rights to regulate content have said that the decision of the Fifth Circuit to uphold a law prohibiting such regulation goes against long-standing court precedent. \textit{Id.}
platforms refrain from regulating or censoring its users’ content.\(^5\) One of the major questions that will be determinative of this legal issue, and whether First Amendment constraints will apply to media platforms, centers on how social media companies should be characterized and whether content regulation is categorically speech.\(^6\) The Fifth Circuit’s decision exemplifies willful ignorance on the topic of social media content regulation.\(^7\) Today’s user generated content is far more advanced than any content the court has previously addressed and as a result, effectively applying existing principles to the circuit split at hand will prove difficult due to this vast advancement in media consumption.\(^8\)

\(^5\) See Shari Claire Lewis, *Circuit Split Over States’ Right To Regulate Social Media Platforms*, 268 N.Y. L.J. 5, 6 (2022) (stating that Texas law HB 20 prohibits social media companies from “censoring a user based on the user’s viewpoint.”). See also Joel Kurtzberg, et al., *United States: Eleventh Circuit Strikes Down Florida Law Intended To Prohibit Social Media Platforms From Censoring Certain Speech On Grounds that Social Media Platforms Exercise First Amendment-Protected Editorial Judgement*, MONDAQ (Aug. 2, 2022), archived at https://perma.cc/H3RC-RP6T (stating that the Eleventh Circuit found a similar law too violative of the First Amendment by restricting the social media platform’s right to censor and moderate as the platforms saw fit).

\(^6\) See Rozenshtein, *supra* note 3 (stating that Section 230 of the Communications Decency Act sought to encourage platform moderation in the short term so that, in the long term, the internet could flourish). The court in the Fifth Circuit decision is simply wrong when they state that “platforms don’t exercise editorial discretion because they do not prescreen content.” *Id.* See also John Villasenor, *Social media companies and common carrier status: a primer*, BROOKINGS (Oct. 27, 2022), archived at https://perma.cc/JJ3U-EENY (opining that “[p]erhaps the single most important question relating to the role of government with respect to social media is this: Can the largest social media companies be regulated as common carriers?”).

\(^7\) See Rozenshtein, *supra* note 3 (explaining that the court is willfully ignorant when it applies intermediate scrutiny and simply holds that the burden that HB 20 places on speech is not more than necessary to further Texas’s interests). When applying intermediate scrutiny, the court must at least entertain the idea that the Texas law does infringe upon the platform’s speech and that, speech aside, there is no “easy switch that platforms can flip to comply with the Texas law…” *Id.*

\(^8\) See Jonathan Wareham, *Should Social Media Platforms Be Regulated?*, FORBES (Feb. 10, 2020), archived at https://perma.cc/FR6K-SH3N (stating that because social media platforms do not create their content, they are not liable for what users produce and are exempt from other laws that govern traditional media like newspapers and television); Erin Simpson & Adam Conner, *How To Regulate Tech: A Technology Policy Framework for Online Services*, CTR FOR AM. PROGRESS (Nov. 16, 2021), archived at https://perma.cc/A3A9-5BTE (stating that we must approach
Social media platforms have First Amendment rights that are violated by laws prohibiting their ability to regulate content. Content regulation is not a new concept, and has been applied widely to newspapers, magazines, and television and cable companies. Applying existing content moderation concepts and laws to social media platforms may prove difficult and the precedent addressing content moderation is far from a perfect fit for the current state of such platforms. Courts will be required to create new precedent to conform with the rapid evolution of social media and lay the groundwork for how the platforms are to function in our social media dependent society.

II. History

The First Amendment has not only provided a foundational protection on speech and the press as applied to a wide variety of issues, but it has also been at the forefront of our country’s development. Similarly, social media has had a notable impact on more recent advancements that have contributed to the development of today’s society. The rapid growth of social media prevalence in advances in technology in ways that accommodate said advances). “[A]utomated, instantaneous global amplification and surveillance-driven targeting that are used to uplift, silence, or drown out other voices begs the question of whether protecting freedom of expression requires approaches that accommodate, rather than ignore, the ways technology has changed how people communicate.” Id. See also Avalon Zoppo, Panel: GOP-Led Law on Political Social Media Likely Unconstitutional, DAILY REP. May 25, 2022, at 1 (explaining that the Eleventh Circuit held that social media platforms are private actors whose content regulation decisions are protected exercises of editorial judgement). See also, Reichmann, supra note 2 (claiming that the Fifth Circuit’s decision creates an “irreconcilable divide” that warrants review). The Florida petition “asks the court if the First Amendment bars a state from forcing social media companies to host speech and regulating how they do so.” Id.

See U.S. CONST. amend. I (protecting the right of free speech, press, assembly, and the right to petition the government for a redress of grievances); Oremus, supra note 4 (“calling on the First Amendment, which protects American citizens and companies alike from government restraints on speech, to keep states’ hands off.”).

See Everett Ehrlich, A Brief History of Internet Regulation, PPI (Mar. 13, 2014), archived at https://perma.cc/8JSK-5CDV (stating that “technology, business models and consumer behaviors change and, as they change, the meaning and effect of different regulatory proposals change as well.”). “Most of the proposals for internet regulation are the regulatory tools government applied to the telephone system during its period as a regulated, government sanctioned monopoly decades ago.” Id.
the lives of individuals worldwide has progressed beyond the scope of current law. Legal and tech experts alike have acknowledged this issue and expressed a need to adapt content regulation legislation to align with modern technology and the emergence of social media. This section will address the progression of content regulation leading up to the emergence of social media. See also Scott Bomboy, Is the Supreme Court Ready to Reshape the Social Media Landscape?, NAT'L CONST. CTR. (Dec. 23, 2022), archived at https://perma.cc/52R3-T2Q2 (declaring that “[f]ree speech has been a major factor behind the internet’s dramatic growth in the past 25 years”); Edward T. Mehrer III, Freedom of Speech in the Age of Information and Misinformation, 48 DAYTON L. REV. 65, 66 (2022) (acknowledging that “[w]ith unprecedented impact comes substantial notoriety, which gives rise to critique and optimization especially regarding whether a platform is hosting acceptable speech.”). “[A]pproximately 4.48 billion people actively use social media worldwide.” Id. at 68.

11 See Marta R. Vanegas, Regulating Social Media Content – A Primer, CONTRA COSTA CNTY. BAR ASS’N (Mar. 2022), archived at https://perma.cc/4YF7-78JU (claiming that the proposed solutions to content moderation on social media platforms appear “ill-fitting to cure the problem”); Dipayan Ghosh, Are We Entering a New Era of Social Media Regulation?, HARV. BUS. REV. (Jan. 14, 2021), archived at https://perma.cc/YRC2-PY9D (explaining that “social media is fundamentally different from traditional media…”). See also Leslie Y. Garfield Tenzer, Social Media Harms and the Common Law, 88 BROOK. L. REV. 227, 227 (2022) (stating that while “relying on existing law… reaffirms the judiciaries commitment to precedent… clinging onto court reasoning in pre-social media precedent shows a lack of appreciation for the gravity of emotional and mental harm these posts can cause and prevents courts from furthering social media norms.”).

12 See Barns & Marimow, supra note 1 (stating that legal experts have acknowledged that online platforms are distinct from other platforms such as phone companies). Director at Knight First Amendment Institute at Columbia University, Jameel Jaffer, states that “[w]e don’t have a doctrinal box to put social media platforms in. They occupy a new space, and they should occupy a new space in the law too, but what does that look like?” Id. See also Vanegas, supra note 11 (claiming that it is difficult to describe or define social media in all of its functions and glory using pre-millennium terminology). But see Brannon, supra note 2 (predicting that if platforms were seen as state actors the government would also be limited in its ability to require platforms to take down certain content). “All but the very basest speech would be explicitly allowed and protected—making current problems of online hate speech, bullying, and terrorism, with which many activists and scholars are concerned, unimaginably worse.” Id.

13 See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 248 (1974) (recognizing that in 1974, the press was, in reality, very different from that known in the early years of our national existence). The Court explained that the “press collectively presented a broad range of options to readers.” Id. Furthermore, “[e]ntry into
A. Content Regulation as Applied to Print Sources

The First Amendment’s core objective is to protect against government infringement on speech.\(^\text{14}\) The Supreme Court has acknowledged that the First Amendment is violated by attempts to keep individuals from publishing, thus, broadly speaking, restricting one’s livelihood in publishing news is unconstitutional.\(^\text{15}\) In Associate Press v. United States, the Court held it was unconstitutional under the Sherman Act and the First Amendment for Associated Press (“AP”) to restrain trade by unlawfully setting up a system of bylaws that prohibited all AP members from selling news to non-members and blocked competitors from membership.\(^\text{16}\) However, the Court acknowledged that the decree entered by the district court did not require AP to publish any content it believed should not have been included, thus, the publisher retained its ability to regulate the content publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.” \textit{Id.} \textit{See also Moody v. NetChoice, 2022 U.S. S. Ct. Brief 4 (Oct. 21, 2022) (outlining that in seventeenth-century England officials “censored publications deemed contrary to the public good….”). On the contrary, “twenty-first century America… forbids government officials from engaging in [that] sort of censorship.” \textit{Id.} However, “[p]rivate companies operate that public square. And in doing so, they often decide who may speak, and what ideas users may discuss.” \textit{Id.} at 5.\(^\text{14}\) \textit{See} Barns & Marimow, \textit{supra} note 1 (stating that courts have applied the First Amendment to protect the right of private companies, including newspapers and broadcasters, to control the speech they publish and disseminate). \textit{See also Miami Herald, 418 U.S. at 252 (quoting Associated Press v. United States, 326 U.S. 1, 3 (1945)) (stating that a “command that the government itself shall not impede the free flow of ideas does not afford non governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.”)).\(^\text{15}\) \textit{See} Associated Press v. United States, 326 U.S. 1, at 20 (1945) (acknowledging that “[t]he First Amendment affords not the slightest support for the contention…to restrain trade in news and views has any constitutional immunity.”). \textit{See also} Mark Conrad, \textit{Fake News, Personal Attacks, and Ideological Media Run Amok – It is Time for Fairness Doctrine 2.0}, 21 VA. SPORTS & ENT. L.J., 77, 81 (2022) (stating that “the gold standard for First Amendment protection centered on print media.”).\(^\text{16}\) \textit{See} Associated Press, 326 U.S. at 20–21 (applying the Sherman Act, prohibiting any contract, combination, or conspiracy in restraint of trade, the Court states that the First Amendment relies upon the assumption the broadest dissemination of information from “diverse and antagonistic sources” is indispensable to public welfare).
Here, the Court foresaw problems with government-enforced access and expressed sensitivity towards government restrictions and requirements compelling a publisher to print what it may not otherwise print. The Supreme Court has recognized the significance of free speech, press, and assembly to public welfare. However, when cases do not involve encroachments on such rights, and do not compel the press to publish what it would otherwise withhold, the protections of the First Amendment are likely not at issue. A Florida right of reply statute required newspapers to print political candidates’ verbatim responses to criticism and the court in *Miami Herald Pub. Co. v. Tornillo* held that this statute violated the First Amendment’s guarantee of free press. This statute interfered with newspapers’

---

17 See id. at 59 (stating that the Associated Press can still “print as and how one’s reason or one’s interest dictates.”). See also *Miami Herald*, 418 U.S. at 256 (stating that “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”).

18 See *Miami Herald*, 418 U.S. at 254 (opining that “[t]he clear implication has been that any such compulsion to publish that which ‘reason’ tells them should not be published’ is unconstitutional.”). See also Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-opt the First Amendment. Courts Shouldn’t Let Them.*, NYT (Dec. 9, 2021), archived at https://perma.cc/CJS5-KVLX (explaining that social media platforms are similar to newspapers in that they occasionally make decisions about what content to post). “[T]he First Amendment should apply differently to social media companies than it does to newspapers, because social media companies and newspapers exercise editorial judgement in different ways.”

19 See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (stating that the court does not “question the significance of free speech, press, or assembly to the country’s welfare.”). “[J]ustifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.”

20 See *Branzburg*, 408 U.S. at 681 (stating that the cases discussed in the opinion do not involve intrusions “upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.”). See also Brannon, supra note 2 (stating that “[l]awsuits predicated on [social media] sites’ decisions to host or remove content have been largely unsuccessful, facing at least two significant barriers under existing federal law.”).

21 See *Miami Herald*, 418 U.S. at 258 (holding that “the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of
exercise of editorial judgement about the choice of material to be included in their respective newspapers and exacted an undue penalty on the publisher for the content they decided to include.\textsuperscript{22} Governmental regulation of editorial control and judgement has not, up to this point, been successfully exercised in accordance with the First Amendment guarantees afforded to both users and publishers.\textsuperscript{23}

\textbf{B. Content Regulation as Applied to Broadcasting}

In recognizing legislation that interferes with companies’ publication rights, the Court addresses how content regulation must evolve and be reviewed in light of changes in the ways society receives

\textsuperscript{22} See also Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating that “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”). The Court in Mills noted that First Amendment protection “includes discussions of candidates, structures, and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.” \textit{Id.}

\textsuperscript{23} See \textit{Miami Herald}, 418 U.S. at 258 (stating that “[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”). The Court noted that a penalty would result from implementation of the Florida statute because the compelled printing of a reply is exacted in terms of the cost in printing and the time, materials and space that could have been devoted to other material the newspaper may have preferred to print. \textit{Id.} at 256–57. Further, “political and electoral coverage would be blunted or reduced.” \textit{Id.} at 257. The Court continued by stating that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgement.” \textit{Id.} at 258. See also Seana V. Shiffrin, \textit{Unfit to Print: Government Speech and the First Amendment}, 69 UCLA L. Rev. 986, 1025 (2022) (suggesting that editorial decisions should be left to the social media companies). “Ethically, [a social media platform’s] editorial control should be informed by its own regularly voiced commitments to foster a robust and diverse free speech culture one that supports the constitutional guarantee of freedom of speech, exemplifies the virtues and practices associated with its exercise, and renders the protection meaningful.”). \textit{Id.}

\textsuperscript{23} See \textit{Miami Herald}, 418 U.S. at 258 (“It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”). A responsible press is an undoubtedly desirable goal, but such an objective is not mandated by the Constitution and likely many other virtues like it cannot be legislated. \textit{Id.}
their news and engages in a free flowing exchange of ideas. With the emergence of broadcast channels, followed by cable, people began receiving their news from television programming. Cable programs are entitled to the protections of the First Amendment because they are involved in transmitting speech to viewers. Additionally, broadcast channels and cable programs disseminate messages on a vast variety of issues including local news, current events, and politics, which affords them the protections of the First Amendment.

With the growing prevalence of cable technology, Congress passed the Cable Television Consumer Protection and Competition Act of 1992. This legislation required cable companies to host the

24 See Turner Broad. Sys. v. FFC, 512 U.S. 622, 663 (1994) (continuing to uphold the ideal that the public’s access to a multiplicity of information sources is a governmental purpose of the highest order, for it promoted values central to the First Amendment). See also Miami Herald, 418 U.S. at 248 (explaining that “[a] true marketplace of ideas existed in which there was relatively easy access to the channels of communication.”). But see David L. Hudson, Jr., In the Age of Social Media, Expand the Reach of the First Amendment, ABA (Nov. 20, 2022), archived at https://perma.cc/QZP8-XP5C (stating that when “Facebook engages in censorship, individuals don’t get to participate in the marketplace of ideas and are not allowed the liberty to engage in individual self-fulfillment—just like when a governmental entity engages in censorship.”). See also Rachel Allore, Truth? Social: Trump’s new platform takes advantage of the law he once criticized, FIRST AMEND. L. REV. (Feb. 20, 2023), archived at https://perma.cc/6KA2-XSBS (maintaining that “an open and diverse marketplace of ideas has taken precedence over concerns about the spread of harmful content.”).

25 See Turner, 512 U.S. at 627 (stating that “[t]he role of cable television in the Nation’s communications system had undergone dramatic change over the past 45 years.”). The cable industry in 1994 stood at the center of an “telecommunications revolution with still undefined potential to affect the way [people] communicate[d] and develop[ed] intellectual resources” due to swift technological advancements. Id. at 636 (claiming that there is no disagreement that cable companies “engage in and transmit speech” and, thus, are entitle to the protections of the First Amendment).

26 See id. (stating that “[t]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats.”) (quoting Los Angeles v. Preferred Commc’ns, Inc., 476 U.S. 488, 494 (1986)).

local broadcast channels in an attempt to promote balance between cable providers and struggling local channels.\textsuperscript{29} These provisions of the Act reduced the number of channels available for cable companies to control, complicating their ability to compete and to host more distant and extensive programming on the residual channels.\textsuperscript{30} This caused obvious grievances and compelled the Supreme Court to further address the differences in application of content neutral versus non-content neutral legislation in \textit{Turner Broadcasting Systems v. FCC}.\textsuperscript{31}

The Supreme Court has continuously held that content neutral regulations are subject to intermediate scrutiny based on the premise that they pose a diminished threat of filtering public viewpoints.\textsuperscript{32} Content neutrality often rests upon the distinction that a law does not reference specific ideas or require or disallow publishing of specific

\textsuperscript{29} See \textit{Turner}, 512 U.S. at 633 (outlining that Congress aimed to regulate the video programming market to correct the “imbalance” between broadcasters and cable companies). Congress concluded that without the “must-carry” provisions, “there is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried . . . .” \textit{Id.} at 634. The marked shift “from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, and that, as a consequence, ‘the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.’” \textit{Id.} (citing Cable Television Consumer Protection and Competition Act §§2(a)(13)–(16)).

\textsuperscript{30} See \textit{Turner}, 512 U.S. at 637 (stating that must carry rules reduce the number of channels which cable companies can control and they make it more difficult for cable programmers to “compete for carriage” on the channels remaining). \textit{See also Ward v. Rock Against Racism}, 491 U.S. 781, 791 (1989) (stating that a regulation that “serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages”).

\textsuperscript{31} See \textit{Turner}, 512 U.S. at 628 (stating that cable television is beneficial because, one, there is no signal interference, and two, it is capable of transmitting more channels). At issue in \textit{Turner} were sections four and five of the Cable Television Consumer Protection Act of 1992 requiring cable companies to carry a certain number of local broadcast television stations. \textit{Id.} at 630.

\textsuperscript{32} See \textit{id.} at 642 (citing Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)) (stating that the Supreme Court applies intermediate scrutiny to regulations that are “unrelated to the content of speech”). The Court reasoned that a diminished level of scrutiny is permitted for content-neutral regulations because more often than not, they “pose a less substantial risk of excising certain ideas of viewpoints from the public dialogue.” \textit{Id.}
views. Intermediate scrutiny requires the statute in question to further “an important or substantial governmental interest” and any subsequent restriction must not infringe upon constitutional freedoms in a manner greater than necessary for the furtherance of that governmental interest.

On the other hand, the dissenting justice in Turner argued that regulations requiring cable companies to carry broadcast channels are content-based and should be subject to strict scrutiny. The highest level of scrutiny requires the regulation to have a compelling government interest and the regulation must be conformed to achieve that interest. The Court has readily upheld the idea that when a regulation specifically references the press, it raises the threat of state abuse and is subject to at least some degree of “heightened First Amendment scrutiny.” However, strict scrutiny has seldom been

---

33 See id. at 643 (contrasting those laws which “confer benefits or impose burdens on speech without reference to the ideas or views expressed” and noting they “are in most instances content-neutral.”). See also Ward, 491 U.S. at 791 (opining that the “principal inquiry in determining content neutrality, in speech cases…is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

34 See Turner, 512 U.S. at 662 (agreeing with the district court that intermediate scrutiny is the appropriate standard to apply to content-neutral restrictions that “impose an incidental burden on speech.”). See also United States v. O’Brien, 391 U.S. 367, 377 (claiming that content-neutral regulations will be sustained if they “[further] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). See also Ward, 491 U.S. at 791 (1989) (stating that the government’s purpose is the controlling consideration in determining content neutrality). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” Id.

35 See Turner, 512 U.S. at 635–36 (explaining the dissenting view in the district court decision that the must-carry rules are content based).

36 See id. (stating that the dissenting Judge in O’Brien determined that the interests advanced in support of must-carry regulations are inadequate to justify the regulation). See also O’Brien, 391 U.S. at 376 (nothing that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

37 See Turner, 512 U.S. at 640–41 (recognizing the precept that “laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger
applied when platforms, such as cable operators, are forced to host speech they would otherwise omit.\textsuperscript{38}

Most recently, in \textit{Manhattan Community Access Corp. v Halleck}, the Supreme Court held that the private entity operating public access cable television channels was a private actor, not a state actor, and thus, should not be subject to First Amendment restrictions controlling its editorial discretion.\textsuperscript{39} The Court concluded when a private entity merely hosts others’ speech on its medium, it does not transform that private entity into a state actor.\textsuperscript{40} If all private actors

---

\textsuperscript{38} See id. at 636 (stating that dissenting judge in the district court decision thought that must-carry rules should be analyzed under strict scrutiny). Must-carry rules “require cable operators to carry speech they may otherwise exclude, and because Congress’ decision to grant favorable access to broadcast programmers rested ‘in part, but quite explicitly, on a finding about their content.’” \textit{Id.} The court in \textit{O’Brien} concluded that must-carry provisions are sufficiently tailored to serve that interest. \textit{Id.} at 635

\textsuperscript{39} See Manhattan Cmty. Access Corp. v Halleck, 139 S. Ct. 1921, 1921 (2019) (holding that “under the state-action doctrine, the operation of public access television channels on a cable system was not a traditional, exclusive public function,” and a private entity was not transformed into a state actor, thus, a public access cable television channel was a private actor). “The New York State Public Service Commission… requires cable operators in the State to set aside channels on their cable systems for public access.” \textit{Id.} at 1926. Manhattan Neighborhood Network (MNN) operates Time Warner’s public access channels in Manhattan. \textit{Id.} at 1927. See Barns & Marimow, \textsuperscript{supra} note 1 (stating that Justice Kavanaugh wrote for the court holding that a private cable access company “did not become a government actor subject to the First Amendment’s restrictions just because it was licensed by a government.”).

\textsuperscript{40} See Manhattan Community, 139 S. Ct. at 1926 (stating that “a private entity…who opens its property for speech by others is not transformed by that fact alone into a state actor.”). In this case, the Court concluded that MNN was a private actor, not a state actor which would be subject to First Amendment constraints. \textit{Id.} The Court noted that “[t]he text and original meaning of [the First and Fourteenth Amendments], as well as this Court’s longstanding precedents establish that the Free Speech Clause prohibits only governmental abridgement of speech.” \textit{Id.} at 1928. Private entities may only qualify as state actors in the following limited circumstances: (i) when they perform a traditional, exclusive public function; (ii) when the government compels them to take an action; or (iii) when the government acts together, jointly, with the private entity. \textit{Id.} The \textit{Manhattan Cmty.} Court held that “operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court’s cases.” \textit{Id.} at 1930.
who host speech were subject to First Amendment constraints, they would lose their ability to allocate their editorial discretion.  

C. Characterizing Platforms

The ways in which individuals receive information in today’s society has strayed from traditional sources, such as newspapers and cable television.  

Section 230 of the Communications Decency Act of 1996 was introduced to shield social media platforms from liability for content they host.  

Under Section 230, social media giants are not considered the publisher or the speaker of said content, and the Court has long upheld this Section’s provision of complete freedom to the

41 See id. at 1931 (stating that if the rule were the opposite, private actors would be constrained by the First Amendment and all private entities who “open their property for speech…would lose the ability to exercise what they deem to be appropriate editorial discretion”). See also Barns & Marimow, supra note 1 (noting the dissent’s observations with respects to the rights of private companies). Justice Sonia Sotomayor wrote that “[t]here are purely private spaces, where the First Amendment is inapplicable. The First Amendment leaves a private store owner (or homeowner), for example, free to remove a customer (or dinner guest) for expressing unwanted views.” Id.

42 See Conrad, supra 15, at 82 (acknowledging that “a vastly different communications landscape exists since the domination of over-the-air radio and television broadcasting has faded.”).

43 See Rozenshtein, supra note 3 (stating that Section 230 is a “landmark law that immunizes platforms from liability for almost all of the content they host”). It has been interpreted by most courts as providing a liability shield. Id. See also Communications Decency Act of 1996, 47 U.S.C §230 (stating the grounds for civil liability). The Communications Decency Act provides as follows:

No provider or user of an interactive computer service shall be held on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . .

Id. See also David McCabe, Supreme Court Poised to Reconsider Key Tenants of Online Speech, NYT (Jan. 19, 2023), archived at https://perma.cc/G3DL-5R8M (outlining that social media platforms operate under “two crucial tenants.”). The first tenant is platform’s “power to decide what content to keep online and what to take down, free from government oversight,” and the second is “that the websites cannot be held legally responsible for most of what their users post online, shielding the companies from lawsuits over libelous speech, extremist content and real-world harm linked to their platforms.” Id.
platforms to moderate content on a narrow set of grounds. The goal of Section 230 was to promote platform moderation so the internet could flourish in the future.45

44 See Rozenshtein, supra note 3 (stating that the dominant judicial view is that Section 230 gives platforms “carte blanche” to moderate). Platforms disclaim liability because for almost three decades courts have upheld that Section 230 provides a liability shield. Id. “Whether [the] shield is good or bad as a matter of policy is its own question, but it has nothing to do with the fact that it does indeed provide a liability shield.” Id. See also Simpson & Conner, supra note 8 (outlining that “[o]nline infrastructure services were developed under the intermediary liability protections of Section 230 of the Communications Decency Act, which allows online services and internet users to provide and moderate content from others without being held liable for third-party content or their good faith moderation decisions.”). See also Kaelan Deese, Supreme Court to hear major Big Tech cases that could reshape internet regulations, WASH. EXAM’R (Jan. 4, 2023), archived at https://perma.cc/E4TP-MV93 (claiming that if the Supreme Court did decide to “roll back Section 230 protections that have long been upheld by lower courts, it could allow a flurry of lawsuits against companies that use complex algorithms that govern the ways content is displayed to online users and could further force them to become more transparent about their systems.”). But see Shaun B. Spencer, The First Amendment and the Regulation of Speech Intermediaries, 106 MARQ. L. REV. 1, 56 (2022) (introducing the proposal to “remove social media companies’ Section 230 immunity unless an FTC audit found that the platform ‘does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint.’”).

45 See Rozenshtein, supra note 3 (explaining that Section 230 was a part of a much larger law and, as a whole, Section 230 sought to “encourage platform moderation in the short term so that, in the long term, the internet could flourish.”). See also Oremus, supra note 4 (stating that bills prohibiting any sort of regulation on the part of social media platforms would remove the liability shield these platforms enjoy under Section 230). See also Jimmy Hoover, Justices Worried About Breaking The Internet, LAW360 (Feb. 21, 2023), archived at https://perma.cc/MBA2-FCCQ (quoting Justice Kagan stating that “[t]hese are not, like, the nine greatest experts on the internet”). The Court heard oral arguments for a case regarding Section 230 and whether it shields “from claims that its algorithms actively promoted Islamic State group propaganda to vulnerable users, leading to a terrorist attack that killed an American student in Paris.” Id. The justices “expressed concerns about narrowing the scope of a law that many say has contributed immensely to the explosion of the internet industry since its passage in 1996.” Id. Justice Kavanaugh “cited amicus briefs filed in the case warning of ‘a lot of economic dislocation’ from exposing internet companies to lawsuits over recommendation-based arguments, which he said raised ‘serious concerns.’” Id.
III. Facts

Today, states are attempting to take a state-specific approach to online content regulation. By moving into the realm of modern-day content regulation, the creation and prevalence of social media has created a novel issue that, while slowly making its way into the court system, has seldom been addressed. The state of the current law surrounding social media lacks a concrete foundation on which to construct legislation that balances the rights of social media platforms to regulate content with the user’s rights to freely express their ideas. However, precedent regarding content moderation has existed for

---

46 See Kyle Langvardt, Regulating Online Content Moderation, 106 GEO. L. J. 1353, 1358 (2018) (explaining that something must be done in order to mitigate the problem of trolls, spammers, and malicious hackers). By using technology to aid in mitigating this problem, we must “adopt [the] pervasive system of prior restraints based on snap judgements.” Id. at 1358–59. “Such a system whether it is condemned as ‘censorship’ or accepted as ‘content moderation,’ sits in tension with an American free speech tradition that was founded on hostility toward ex ante administrative licensing schemes.” Id. See also Rebecca Kern, Push to rein in social media sweeps the states, POLITICO (July 1, 2022), archived at https://perma.cc/RGA7-BK5M (reiterating that “[t]he states’ efforts — in the absence of federal action — could test governments’ ability to regulate speech, while forcing some of the nation’s wealthiest tech companies to fight an array of legal battles against laws that could upend their business models.”).

47 See Biden v. Knight First Amendment Institute, 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring) (stating that the petition at hand does not allow for the opportunity to address the issue of how far social media platforms’ right to cut off speech extends). “As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions.” Id. See also Jamie Susskind, We Can Regulate Social Media Without Censorship. Here's How, TIME (July 22, 2022), archived at https://perma.cc/P473-WP3R (stating that “[b]efore 2016, online regulation was pretty low on the political agenda.”). Online regulation made its way into the political conversation “after the election of Donald Trump and the Brexit referendum.” Id.

48 See Spencer, supra note 44, at 5 (explaining that “[o]ne reason why First Amendment doctrine is so challenging to apply to platform regulation is that the doctrine developed over the course of many decades in the context of a relatively simple mass communications ecosystem.”).
After discussing the move to modern content regulation, this section will outline the circuit split at hand detailing the Florida and Texas laws and why the respective courts came out on different sides of the issue.

A. Modern Content Regulation

The Supreme Court has noted the effects of society’s reliance on social media to stay connected with current events, which has subsequently led to the diminishing use of newspaper and periodical sources. When addressing this modern media source, precedent has focused on the user’s relationship with the social media platform as opposed to the protections that are afforded to the platforms.

49 See Peter M. Ayers, Note, Social Media, Racism, and Sports: Social Media Platforms, Not Governments, Are Best Positioned To Change The Game, 21 SUFFOLK J. OF HIGH TECH. 395, 400 (2021) (noting that “[p]rior to the introduction of the internet, print sources, such as newspapers, magazines, and pamphlets, provided the most prominent avenue by which Americans were able to access this ‘uninhibited marketplace of ideas.’”). See also Oremus, supra note 4 (stating that decades of legal precedent have held that the best way to protect free speech is for governments to stay out of it).

50 See Barns & Marimow, supra note 1 (quoting Judge Southwick’s dissent in the Fifth Circuit’s opinion that “[w]e are in a new arena, a very extensive one, for speakers and for those who would moderate their speech”); McCabe, supra note 43 (stating that “[t]he cases are part of a growing global battle over how to handle harmful speech online.”). See also Paul Domer, De Facto State: Social Media and the First Amendment, 95 NOTRE DAME L. REV. 893, 893 (2020) (highlighting that “[t]he dominance of a select few social media companies on the internet raises important implications for the free flow of information and ultimately the law.”). See also Nover, supra note 1 (addressing the Supreme Court’s request that the U.S. solicitor general review the constitutionality of the Florida and Texas laws).

51 See Berisha v. Lawson, 141 S. Ct. 2424, 2427 (2021) (Thomas, J. & Gorsuch, J., dissenting) (stating that the nation’s media landscape has shifted in ways we could not have foreseen). “‘The liberty of the press’ has never been ‘confined to newspapers and periodicals’; it has always ‘comprehend[ed] every sort of publication which affords a vehicle of information and opinion.’” Id. See Domer, supra note 50, at 895 (quoting Thomas Jefferson as stating “[a] right of free correspondence between citizen [and] citizen . . . whether public or private . . . is a natural right; it is . . . one of the objects for the protection of which society is formed, [and] municipal laws established.”).

52 See Domer, supra note 50, at 909 (noting that due to advances in technology, nearly 4 billion social media users worldwide can publish almost anything for immediate consumption). See also Packingham v. North Carolina, 137 S. Ct. 1730.
Today, “cyberspace” and social media in particular, are critically important places in which people are able to exchange views. The users of these websites are provided a wide array of First Amendment protections on a multitude of activities in which they engage online such as debates, job searches, advertising, and entrepreneurial endeavors. In *Packingham v. North Carolina*, the Court held that prohibiting access to social media, even for a registered sex offender, would unreasonably prevent that user from engaging in their First Amendment, freedom of speech rights. Even if the Court

1737 (2017) (summarizing that foreclosing access to social media altogether prevents users from exercising their First Amendment rights). See also Tenzer, *supra* note 11 (stating that “while we are at the beginning of understanding social media’s vast potential for harm, courts have a duty and responsibility to change with the times.”). A failure of the court to recognize and attempt to make the requisite changes would be a disservice to society. *Id.*

53 See *Packingham*, 137 S. Ct. at 1735 (stating that while in the past there were difficulties identifying the most important places for the exchange of views, today it is cyberspace, and social media in general—the “vast democratic forums of the internet.”). Seven in ten American adults use social media, and Facebook alone has 1.79 billion users, which is three times the population of North America. *Id.* See also Sarah Ludington et al., *How Social Media Platforms Can Promote Compliance with the First Amendment*, N.Y.U. L. REV. (Sept. 30, 2022), archived at https://perma.cc/VZ2Q-CU6C (addressing the ongoing Elon Musk-Twitter saga). “While Musk has signaled a preference to protect ‘free speech’ on Twitter, stating that he opposes ‘censorship that goes far beyond the law,’ critics have expressed concern that deregulation of the platform could transform it into a haven for ‘extremist views.’” *Id.* Furthermore, “the Supreme Court recognized in 2017, social media websites like Facebook and Twitter are, for many, ‘the principal sources for knowing current events’ and ‘speaking and listening in the modern public square.’” *Id.* See also Robert C. Fellmeth et al., *Social media must balance ‘right of free speech’ with audience ‘right to know,’* THE HILL (Jan. 20, 2023), archived at https://perma.cc/PD54-JQUU (characterizing Elon Musk as a “self-proclaimed ‘free speech absolutist’”).

54 See *Packingham*, 137 S. Ct. at 1735 (stating that social media is “relatively unlimited, low-cost capacity for communication of all kinds….”).

55 See *id.* at 1737 (stating that the statute limiting sex offenders’ access to social media sites is an unprecedented prohibition in the scope of First Amendment rights). “Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind.” *Id.* By prohibiting a specific group from access to social media, even if they are criminals, this law also bars access to principal sources for “current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.* Prohibiting access to social media
assumed that the state law regulating access to social media was content neutral and applied intermediate scrutiny, the statute was not conformed to serve a governmental interest.56 The Supreme Court has established that the government may not silence lawful speech in order to attempt to silence unlawful speech because doing so would constitute an unlawful violation of protected First Amendment rights.57

B. The Laws Prohibiting Social Media Content Regulation

Florida and Texas have been at the forefront of a new legal movement surrounding the rights of social media companies.58 Both states created laws attempting to restrict social media institutions’ rights and abilities in hopes of regulating the content on their respective platforms.59 Each law places a heavy burden on the social altogether infringes upon individuals’ rights to exercise their First Amendment rights. Id.

56 See id. at 1738 (recognizing that this court has established that “the Government may not suppress lawful speech as the means to suppress unlawful speech.”). The North Carolina provision would not stand the tests of intermediate scrutiny because it is not “narrowly tailored to serve a significant governmental interest.” See Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (recognizing that while the government need not sit by and allow evil crimes to occur, “the assertion of a valid governmental interest ‘cannot, in every context, be insulated from all constitutional protections.’”).

57 See id. at 1738 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)) (stating that it is a general rule that “the Government ‘may not suppress lawful speech as a means to suppress unlawful speech.’”). See also Sanders v. Texas, 2022 U.S. S. Ct. Brief (Nov. 4, 2022) (stating that “[a] 5–4 majority of the Texas Court of Criminal Appeals held that a law punishing ‘electronic communications’ repeatedly sent with the intent to ‘harass, annoy, alarm, abuse, torment, or embarrass’ is a regulation of conduct ‘not speech,’ and does not implicate the First Amendment.”).

58 See Barns & Marimow, supra note 1 (stating that “[c]onflicting lower court rulings about removing controversial material from social media platforms point toward a landmark Supreme Court decision on whether the First Amendment protects Big Tech’s editorial discretion or forbids its censorship of unpopular views.”).

59 See Barns & Marimow, supra note 1 (noting that “[t]he stakes are high not just for government and the companies, but because of the increasingly dominant role platforms such as Twitter and Facebook play in American democracy and elections.”). But see Mark MacCarthy, Transparency is essential for effective social media regulation, BROOKINGS (Nov. 1, 2022), archived at https://perma.cc/EWN3-C8EB (analogizing how “[c]ontent moderation efforts suffer from an externality problem similar to environmental pollution.”). “The
media organizations’ power to continue operating their platforms in each particular state. Both laws were prompted, in part, by highly polarized political viewpoints and the roles that media platforms play in elections and democracy as a whole. With censorship of prominent political candidates and famous individuals on the rise, the emergence of laws attempting to contain such regulations was inevitable.

Rohingya suffered far more from the hate speech that Facebook (now, Meta) allowed on its platform than Facebook did.” Id. “It might seem sensible, then, to mandate content controls on social media companies just like we mandate pollution controls on companies.” Id.

See Jonathan Wareham, Should Social Media Platforms Be Regulated?, FORBES (Feb. 10, 2020), archived at https://perma.cc/VC7K-HGYG (stating that “[e]xceptional rules about what is or is not allowed on these platforms are implemented only when necessary, as they can constrain its expansion and are expensive to implement.”). See also Lata Nott & Brian Peters, Free Expression on Social Media, FREEDOM FORUM (Nov. 20, 2022), archived at https://perma.cc/G773-PBGU (outlining types of speech and how various platforms deal with censoring posts containing those types of speech). For example, Facebook “bans hate speech, but does allow humor, satire, or social commentary related to these topics, as well as sharing someone else’s hate speech in order to raise awareness or educate others about hate speech.” Id.

See Barns & Marimow, supra note 1 (stating that the stakes are high in the soon to be landmark Supreme Court fight regarding the current circuit split “because of the increasingly dominant role platforms such as Twitter and Facebook play in American democracy and elections.”). See also Ludington et. al., supra note 53 (outlining that “prospective clients have reached out to the Duke Law First Amendment Clinic” with the increasingly common complaint of a public official who has censored their comments on the official’s social media page or has blocked that user from the page entirely). “Such behavior by public officials effectively creates two classes of citizens—those who can communicate easily with public officials through social media and those who cannot.” Id.

See Goggin, supra note 3 (explaining that Kanye’s posts, depicting a text chain, were removed because of a reference “to a long-standing antisemitic conspiracy theory.”). See also Ghosh, supra note 11 (stating that “[a]fter years of controversy over President Trump’s use of social media to share misleading content and inflame his millions of followers, social media giants Facebook and Twitter finally took a clear stand last week, banning Trump….”). This could indicate a turning point in how platforms handle their content and insight into a new era of social media reforms. Id.
1. Florida Senate Bill 7072

The original intention of Florida Senate Bill 7072 (“S.B. 7072”) was to protect speech from social media censorship. The bill was specifically aimed at targeting social media platforms and prohibiting these companies from regulating content posted by political candidates and media sources by imposing fines and other penalties.

S.B. 7072 can be easily broken down into three categories: (1) content moderation restrictions; (2) disclosure obligations containing an explanation for the removal of any content or account; and (3) a requirement allowing “deplatformed” users access to their content.

---

63 See S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021) (prohibiting social media platforms from willfully “deplatforming” candidates or journalistic enterprises and requiring such platforms to adhere to requirements when restricting speech). Governor DeSantis approved the bill which aimed at prohibiting certain social media platforms from “deplatforming” political candidates, from prioritizing or deprioritizing candidate-related content and from censoring “journalistic enterprises” based on content. Id. See also Kurtzberg, supra note 5 (stating that although the original intention of the Bill was to protect certain speech from censorship by social media platforms, the Eleventh Circuit ultimately decided that it was violative of the First Amendment and social media companies’ right to censor and moderate their platforms).

64 See S.B. 7072 (Fla. 2021) (explaining that the purpose of the bill was to prohibit social media companies from “deplatforming” political candidates, regulating political candidates’ posts, and moderating reporting sources based on their content). See also Alan Z. Rozentshtein, The Real Takeaway From the Enjoining of the Florida Social Media Law, LAWFARE (July 9, 2021), archived at https://perma.cc/2DLH-3MR7 (stating that the bill “would levy fines and impose additional penalties against social media platforms that blocked or otherwise inhibited content from political candidates and media organizations.”). See also Lewis, supra note 5, at 5 (stating that the Florida law provides that platforms “‘may not willfully deplatform a candidate for office’ and defines ‘deplatform’ to mean ‘the action taken by social media platforms to ‘permanently delete’ or ‘temporarily delete’ or ban a user for more than 14 days.’”). See also Niam Yaraghi, Regulating free speech on social media is dangerous and futile, BROOKINGS (Sept. 21, 2018), archived at https://perma.cc/A85V-UHEK (explaining a “2014 study demonstrated that liberal users are less likely than their conservative counterparts to get exposed to news content that oppose their political views.”).

65 See Kurtzberg, supra note 5 (stating that the Florida law can easily be broken down into three categories); Lewis, supra note 5, at 5 (stating that the three principal provisions are content moderation, disclosure obligations, and user data
The disclosure requirements state that social media platforms must explain their standards for regulating content or users’ accounts. This novel bill would require the platforms to notify any user who may be subject to censorship and the user may determine if they are being censored to avoid being “shadow banned.” Furthermore, when a social media company regulates a political candidate’s content, the

requirements. See Kurtzberg, supra note 5 (stating the specific areas of regulation that Senate Bill 7072’s provisions address).

S.B. 7072’s provisions may be broken down into three categories: (1) content-moderation restrictions, including prohibitions on deplatforming and content-prioritization algorithms; (2) disclosure obligations, including a requirement that any censorship be accompanied by a “thorough rationale” explaining why the platform took the action; and (3) a user-data requirement, under which a deplatformed user may access the user’s data and content for at least 60 days following the removal.

Id. See also Rozenshtein, supra note 64 (explaining that “under the Florida law, a social media platform may not ‘censor’ any ‘journalistic enterprise based on the content of its publication or broadcast,’ where censorship includes ‘post[ing] an addendum to any content or material posted by a user’”); Lewis, supra note 5, at 5 (explaining that under S.B. 7072 social media platforms may not censor a journalistic enterprise). A journalistic enterprise is defined “broadly to include any entity doing business in Florida that publishes in excess of 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users…” among other requirements. Id.

66 See Reichmann, supra note 2 (stating that the disclosure requirements ensure that social media platforms provide their users with the standards used to censor, shadow-ban and deplatform users); Lewis, supra note 5, at 6 (stating that the disclosure obligations require a “thorough rationale” for any content regulation decision and the standards used for making regulatory decisions must be published).

67 See Reichmann, supra note 2 (stating that the Florida law would require companies to notify users “if they are being censored in any way and allow users to see how other users view their posts so they can decide for themselves if they are being censored or shadowbanned [sic].”). Senate Bill 7072 “requires disclosure about how and when the platforms censor speech and requires the platforms to host some speech that they would otherwise prefer not to host.” Id. See also Lewis, supra note 5, at 6 (explaining that the user data requirement requires companies to allow their deplatformed users access to their content for 60 days). See also Neil Patel, What is a Shadow Ban?, NEIL PATEL (Jan. 9, 2023), archived at https://perma.cc/WVW8-SP2T (defining shadow banning as posts or other account activity that is not viewable to other users, “but you haven’t received an official ban or notification.”).
company may face fines upwards of $200,000 per day if they are found to be in violation of the censorship provision.\textsuperscript{68}

2. Texas House Bill 20

Texas is also attempting to implement a law aimed at prohibiting social media platforms from regulating user’s content by passing Texas House Bill 20 ("H.B. 20").\textsuperscript{69} H.B. 20 contains two provisions that were the main source of controversy and the subject of the Fifth Circuit’s decision.\textsuperscript{70} The most controversial provision, Section 7, provides that social media platforms are prohibited from regulating a user, their expression, or their ability to receive information from other users’ content based on viewpoint, viewpoints represented in an expression, or a user’s geographic location.\textsuperscript{71} Section 2 imposes additional restrictions, including disclosure requirements as well as a system to track user complaints and appeals.\textsuperscript{72} The disclosure requirements pertain to making information

\textsuperscript{68} See Reichmann, supra note 2 (explaining that the Florida law would allow the state to fine large companies $250,000 per day if they remove the account of a statewide political candidate and $25,000 per day if they remove an account of a candidate for a local office).

\textsuperscript{69} See Oremus, supra note 4 (stating that “Texas, Florida and other Republican-led states are passing laws that prohibit tech companies from ‘censoring’ users – laws that Republican leaders say are meant to protect their constituents’ rights to free speech.”). See also H.B. 20, 87th Leg., 2d. Sess. § 1 (Tex. 2021) (providing protection from censorship and other interference with digital expression).

\textsuperscript{70} See Rozenshtein, supra note 3 (explaining the two key provisions of H.B. 20 that are the subject matter of the Fifth Circuit Court’s opinion and the controversial circuit split). See also Rebecca Kern, 5th Circuit blocks Texas social media law as parties turn to SCOTUS, POLITICO (Oct. 12, 2022), archived at https://perma.cc/Z9DJ-63J4 (exemplifying tech companies’ fears that “the Texas law would force them to carry content—like hate speech and extremist views—that violates their content moderation policies.”). 

\textsuperscript{71} See Rozenshtein, supra note 3 (stating that Section 7 is the most controversial provision and has garnered the most attention); H.B. 20, 87th Leg., 2d. Sess. § 1 (Tex. 2021) (stating, in section 7, that “a social media platform may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person…” based on three factors).

\textsuperscript{72} See Rozenshtein, supra note 3 (stating that section two is another central provision to the issue that imposes additional requirements on platforms, such as moderation disclosures); H.B. 20, 87th Leg., 2d. Sess. § 1 (Tex. 2021) (stating, in section 2, subchapter B, the public disclosure requirements inflicted upon social media platforms).
regarding bans, blocks, and suspensions publicly available.\textsuperscript{73} As a whole, H.B. 20 gives Texas residents the uninhibited right to say anything on any social media platform and gives them recourse should they feel they were wrongfully censored or removed.\textsuperscript{74}

\textbf{C. The Court Decisions}

The founding generation and the drafters of the Constitution would not have been able to imagine a society that is reliant on social media.\textsuperscript{75} The lawsuits filed in both the Eleventh and Fifth Circuit cases were brought by NetChoice, a trade association whose mission is to make the internet safe for free enterprise and expression.\textsuperscript{76} NetChoice

\begin{flushright}
73 See Peter Hunt Szpytek, \textit{A look into Texas’ controversial anti-censorship law HB 20}, DIGIT. TRENDS (May 23, 2022), archived at https://perma.cc/AW3F-DCSD (stating that the bill calls for sites with 50 million, or more, users to “publicly disclose information regarding account bans and suspensions as well as other content moderation.”).

74 See id. (stating that, “[a]t its core, HB 20 aims to give Texans the right to say whatever they please on social media sites such as Twitter, Facebook, and YouTube without fear of account bans and suspensions even if the posts violate a site’s explicitly stated terms and agreements.”). \textit{See also} Lewis, \textit{supra} note 5, at 7 (noting that two exceptions to the laws’ restrictions allow platforms to regulate sexual content, content that “directly incites criminal activity,” and any specific discriminatory threats of violence targeted at a specific person or group).

75 See NetChoice, LLC v. AG, 34 F.4th 1196, 1203 (11th Cir. 2022) (noting that “[n]ot in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok.”). Despite the complications of modern-day media and “whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” \textit{Id. See also} Gabrielle Byrd, \textit{Does Freedom of Speech Exist on Social Media}, LOYOLA UNIV. OF Md. (Feb. 20, 2023), archived at https://perma.cc/9YHN-Y3ER (contending that “[w]hen the First Amendment was put into place freedom of speech was born [and] we were all given the right to express any opinion without censorship or restraint.”). However, with the emergence of social media and online communications, it has become “important for platforms to monitor for child pornography, harassment, online bullying, and overall hate speech how do they create a perfect balance[?]” \textit{Id.}

76 See NetChoice, LLC, 34. F.4th at 1207 (explaining that NetChoice is a trade association that represents social media companies, such as Facebook, Twitter, Google and TikTok); Kurzberg, \textit{supra} note 5 (stating that NetChoice and another trade association protect the interests of social media companies); Mohammad
\end{flushright}
represents internet and social media platforms and sought to enjoin the Florida law as violative of the companies’ First Amendment rights. Similarly, NetChoice sought to enjoin various provisions of the Texas law, as it too implicated social media platforms’ and internet companies’ First Amendment rights.

1. The Eleventh Circuit’s Decision

In NetChoice, LLC v. AG, the court begins its analysis by addressing and defining what constitutes social media. Social media sites, big and small, are private, non-governmental entities. They vary from traditional sources of media in that the content is user-generated and not subject to government regulation.

Hemeida, It’s Time We Defend the First Amendment on Social Media, COLUM. UNDERGRADUATE L. REV. (Dec. 24, 2022), archived at https://perma.cc/N69J-EFHS (stating that NetChoice is a trade association which has members including Twitter, Google, TikTok, and Meta). See also About Us, NetCHOICE (Nov. 16, 2022), archived at https://perma.cc/M378-KFPF (claiming that their mission is to work to make the internet a safe space for free enterprise and free expression).

See NetChoice, LLC v. AG, 34. F.4th at 1207 (stating that NetChoice sought to enjoin the enforcement of certain provisions of the Florida state law because they violate the social media companies First Amendment right of freedom of speech and are preempted by federal law). See also McCabe, supra note 43 (quoting Chis Marchese, a counsel at NetChoice, stating that “it’s a roundabout way of punishing business for First Amendment rights that others disagree with.”).

See Lewis, supra note 5, at 7 (stating that NetChoice challenged HB 20, arguing that it violates the First Amendment). See also Stella Preston, How Free is Your Speech on Social Media? Reconciling the Circuit Split Created by the Eleventh and Fifth Circuit’s Decisions on Anti-Censorship Laws Governing Social Media Platforms, 74 MERCER L. REV. 1521, 1531 (describing how both Florida and Texas “attempted to characterize social media platforms more like "common carriers" rather than private entities, which would effectively allow more regulation on their speech and expression and afford them less First Amendment protection.”).

See NetChoice, LLC v. AG, 34. F.4th at 1204 (explaining that these sites exercise their protected right of editorial judgement when removing posts that violate guidelines and arranging content by choosing how to display and prioritize posts, thus, curating content to appeal to each individual user). Social media platforms are not just “dumb pipes” for storing or hosting information, rather they provide a “curated and edited compilation of content from the people and organizations that [a user] follows.” Id. The way in which social media is defined in SB 7072, is so broadly stated that it may apply to other sites like Wikipedia and Etsy which are not traditional social media sites. Id. at 1205.

See id. at 1203 (holding that even the biggest social media companies are “substantially likely” to be private actors whose rights are protected by the First Amendment).
created, and they do not operate solely as servers used for hosting and transmitting data.81 Except for the provision regarding user-data requirements, the Eleventh Circuit held that S.B. 7072, triggers First Amendment scrutiny because the provisions limit social media platform’s editorial judgement.82 At the core of the Eleventh Circuit’s decision, and the nexus upon which the holding depends, is whether social media companies qualify as private actors.83 The court concludes that social media platforms are private actors and specifically rejects the argument they are common carriers because of their “inherently expressive editorial judgement.”84 The Eleventh Circuit goes on to conclude that the content regulation provisions would likely satisfy neither intermediate nor strict scrutiny.85 It recognized that the content regulation provisions do not further a substantial government interest, and if they did, the state would not be able to show the burdens imposed by the provisions

81 See id. (opining that these platforms’ “‘content-moderation’ decisions constituted protected exercises of editorial judgment and the provisions of the new Florida law that restrict large platforms’ ability to engage in content moderation unconstitutionally burdened that prerogative.”).

82 See id. at 1210 (stating that laws that restrict platforms’ ability to speak through content moderation trigger First Amendment scrutiny). “The Supreme Court has repeatedly held that a private entity’s choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute ‘editorial judgements’ protected by the First Amendment.” Id.

83 See id. at 1210 (stating that “social-media platforms like Facebook, twitter, YouTube and TikTok are private companies with First Amendment rights”). When social media companies, “(like other entities) ‘disclose,’ ‘publish,’ or ‘disseminate’ information, they engage in ‘speech within the meaning of the First Amendment.’” Id.

84 See id. at 1222 (summarizing that, in short, “because social-media platforms exercise—and have historically exercised—inherrently expressive editorial judgement, they are not common carriers, and a state law can’t force them to act as such unless it survives First Amendment Scrutiny.”). See also Ashutosh Bhagwat, Why Social Media Platforms are Not Common Carriers, 2 J. FREE SPEECH L. 127, 156 (2022) (concluding that “social media platforms, in short, are not common carriers, and cannot be forced to become ones by legislative fiat so long as the First Amendment remains in force.”).

85 See Kurtzberg, supra note 5, at 4 (explaining the court’s decision that “S.B. 7072’s content-moderation provisions triggered either intermediate or strict scrutiny, neither of which would be satisfied in this case.”). See also NetChoice, LLC v. AG, 34. F.4th at 1226 (stating that some of the provisions in S.B. 7072 are “self-evidently content-based and thus subject to strict scrutiny.”). The court expressed that they need not specifically categorize each provision as being content-based or content-neutral. Id.
were no greater than is necessary to further the governmental interest. While the disclosure provisions are not substantially likely to be unconstitutional, and the state has a notable interest, the thorough rational provision requiring notice of any moderation decision within seven days, would be unconstitutional due to the excessively burdensome nature of the provision.

2. The Fifth Circuit’s Decision

The primary motive for the Fifth Circuit’s decision to uphold H.B. 20 was to prohibit big technology companies from silencing viewpoints, in particular, conservative viewpoints. The court first

86 See NetChoice, LLC v. AG, 34. F.4th at 1228 (stating that it is “substantially likely that S.B. 7072’s content-moderation restrictions do not further any substantial governmental interest—much less any compelling one.”). The court claims that while some of these provisions may in fact be subject to heightened scrutiny, it is likely that they will not survive the tests for intermediate scrutiny. Id. at 1227. Furthermore, the court cannot identify any “substantial or compelling interest that would justify the Act’s significant restrictions on platforms’ editorial judgement.” Id. at 1228. While the state may argue that they have an interest in “counteracting ‘unfair’ private ‘censorship’ that privileges some viewpoints over others on social-media” and there is no legitimate governmental interest in leveling the expressive playing field. Id.

87 See id. at 1230 (stating that, “[u]nder the Zauderer standard: A commercial disclosure requirement must be ‘reasonably related to the State’s interest in preventing deception of consumers’ and must not be ‘unjustified or unduly burdensome’ such that it would ‘chill protected speech.’”). The state’s interest is “in ensuring that users . . . are fully informed about the terms of that transaction and aren’t misled about platforms’ content-moderation policies.” Id. at 1230. However, requiring these platforms “to provide written notice delivered within seven days, including a ‘thorough rational’” is unduly burdensome because these platforms remove millions of posts per day and YouTube alone removed “more than a billion comments in a single quarter of 2021.” Id.

88 See Barns & Marimow, supra note 1 (quoting Texas Attorney General, Ken Paxton, as stating “Big Tech’s reign of endless censorship and their suppression of conservative viewpoints is coming to an end” after the Fifth circuit’s decision). See also Howard M. Wasserman & Charles W. Rhodes, Solving the Procedural Puzzles of the Texas Heartbeat Act and its Imitators: New York Times v. Sullivan as Historical Analogue, 60 Hous. L. Rev. 93, 99 (2022) (stating that states restricted certain speech through private litigation, such as the “laws prohibiting private social media providers from moderating speech and speakers on their sites.”). See also Aja Romano, Kicking people off social media isn’t about free speech, Vox (Jan. 21, 2021), archived at https://perma.cc/3R7Y-5ZYD (exemplifying that “[m]any
rejects the social media companies’ argument that the bill is overbroad by finding that H.B. 20 does not chill speech, rather, it chills censorship. The Fifth Circuit held that the First Amendment does not protect social media companies’ right to censor or regulate content, and recognizes that precedent, such as Miami Herald v. Tornillo, does not apply because there is no “intimate connection” between user and platform. The court explains that social media platforms should not be viewed as First Amendment speakers and rejects the widely accepted view that social media platforms are afforded complete freedom to act under Section 230 of the Communications Decency

89 See NetChoice LLC. v. Paxton, 49 F.4th 439, 447–48 (5th Cir. 2022) (disagreeing with the platforms’ contention that Section of HB 20 is facially unconstitutional and overboard claiming that “Section 7 does not chill speech; if anything, it chills censorship.”). The court argues that “the Platforms at this early stage may not use borderline hypotheticals involving vile expression to pretermit consideration of what is actually at stake—namely, the suppression of domestic political, religious, and scientific dissent.” Id. at 452. See also Nithin Venkatraman, Netchoice, L.L.C. v. Paxton: 5th Circuit Sets Up Supreme Court Battle Over Content Moderation Authority of Social Media Giants, JOLT DIG. (Oct. 21, 2022), archived at https://perma.cc/N9TS-MQHB (synthesizing that NetChoice argued that “H.B. 20’s prohibition on viewpoint-based censorship was facially unconstitutional.”).

90 See Rozenshtein, supra note 3 (stating that “[t]he Fifth Circuit held that the Tornillo line of cases did not apply, because there is no “intimate connection” between user content and the platforms themselves, the latter of which, the court claims, “exercise virtually no editorial control or judgement.”). See also NetChoice v. Paxton, 49 F.4th at 457 (stating that in Hurley, the court reasoned that the parade sponsors were “intimately connected” and this connection was crucial because forcing the sponsors to include a particular float was tantamount to forcing the sponsors to speak). In Hurley, a parade, organized by a private council refused to admit an organization of Irish-American gay, lesbian, and bisexual and the court in that case concluded that the parade “was a form of expression that receives First Amendment protection.” Id. at 457–58. “[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” Id. at 458.
Act.\textsuperscript{91} Subsequently, the court characterizes social media platforms as common carriers, and limits their ability to censor content.\textsuperscript{92}

Furthermore, the court concludes that H.B. 20 is content neutral and satisfies intermediate scrutiny because it furthers the government’s interest of protecting the free trade of ideas.\textsuperscript{93} Therefore, the court upholds Section 7 of the bill prohibiting platforms from regulating user content.\textsuperscript{94} Unlike the Eleventh Circuit, the Fifth Circuit continues its analysis by concluding Section 2 of the bill satisfies the test set forth in \textit{Zauderer v. Office of Disciplinary Counsel}.\textsuperscript{95} This precedent allows the government to implement disclosure requirements with respect to factual information, so long as they are not overly burdensome.\textsuperscript{96}

\textsuperscript{91} See \textit{NetChoice v. Paxton}, 49 F.4th at 459–62 (stating that Section 7 does not compel the platforms to speak, nor does it restrict the hosts own speech). The court explains that “Section 230 provides that [p]latforms “shall [not] be treated as the publisher or speaker” of content developed by other users.” \textit{Id.} at 465. Furthermore, they state that “Section 230 reflects Congress’s judgement that Platforms do not operate like traditional publishers and are not “speak[ing]” when they host user-submitted content.” \textit{Id.} at 466.

\textsuperscript{92} See \textit{id.} at 473 (stating that “Texas permissibly determined that the Platforms are common carriers subject to nondiscrimination regulation.”). “[T]he Platforms are communications firms, hold themselves out to serve the public . . . and are affected with a public interest.” \textit{Id.}

\textsuperscript{93} See \textit{id.} at 480 (stating that “[e]ven if Section 7 burdens the Platforms’ First Amendment rights, it does so in a content-neutral way” and is thus subject to intermediate scrutiny). “[T]he burden Section 7 imposes on that speech does not depend on “the ideas or views [it] express[e].” \textit{Id.} “Texas ‘has a fundamental interest in protecting the free exchange of ideas and information in this state.’” \textit{Id.} at 482.

\textsuperscript{94} See \textit{id.} at 484–85 (holding that Section 7 severs “Texas’s important interest in protecting the widespread dissemination of information, is unrelated to the suppression of free expression, and does not burden substantially more speech than necessary to advance Texas’s interest.”).

\textsuperscript{95} See \textit{id.} at 485 (explaining that the \textit{Zauderer} establishes that states may require commercial enterprises to disclose factual information so long as it is not unduly burdensome). “Section 2 advances the State’s interest ‘in enable[ing] users to make an informed choice.’” \textit{Id.}

\textsuperscript{96} See \textit{id.} at 485 (stating that “Section 2 requires the Platforms to make certain disclosures that consist of ‘purely factual and uncontroversial information’” about their services and, therefore, satisfy the \textit{Zauderer} test prohibiting platforms from receiving facial relief against Section 2).
IV. Analysis

The Supreme Court has not yet addressed the extent to which social media platforms may exercise their First Amendment rights to regulate the content users post. Courts have recognized this as an emerging issue, yet have failed to explore new ways to integrate social media platforms’ rights within established precedent regarding content regulation. The traditional approaches to regulation have failed to fully encompass the complexities of social media, which include infinite bandwidth, content produced without editorial oversight, and users who are occasionally unable to choose what content they wish to consume.

Social media is fundamentally different from traditional sources of media and many users today are faced with potentially harmful content involving hate speech, politically charged ideals, and extremist views. Each individual user has the right to speak freely

---

97 See Rozenshtein, supra note 3 (emphasizing the rarity of a legal issue reaching the Supreme Court as a “true loose ball.”). “These moments are exciting because they hold open the promise of creative legal problem solving across the traditional liberal-conservative divides.” Id. See also Chung, supra note 3 (explaining a case to be heard by the Supreme Court regarding the scope of Section 230). If the Supreme Court were to decide to weaken the standard, allowing media companies to be held accountable for the posts on their platforms, the “decision could alter how the internet works, making it less useful, undermining free speech and hurting the economy…..” Id.

98 See Biden, 141 S. Ct. at 1227 (2021) (Thomas, C., concurring) (stating that the petition at hand does not allow for the opportunity to address the issue of how far social media platforms’ right to cut off speech extends). See also Simpson & Conner, supra note 8 (stating also that “Congress has never passed a comprehensive framework for regulating online services”). Due to a lack of comprehensive framework, federal oversight on this issue is “fragmented, incomplete, under-resourced, and unable to respond to emerging or even established harms in a timely manner.” Id.

99 See Ghosh, supra note 11 (stating that there are a few reasons why applying traditional approaches to social media have fallen short). Id. First, traditional cable news (and other traditional news media) only has a limited bandwidth. Id. Second, traditional news is produced with editorial oversight and a group of individuals determining the personalities and viewpoints to be broadcast. Id. Finally, viewers, and readers, of traditional media “proactively choose” the content they consume. Id.

100 See id. (acknowledging that “[o]ne of the key reasons that these issues are so difficult to untangle is that social media is fundamentally different from traditional media (that is, newspapers, radio, and broadcast networks) — and so traditional
and express their ideas devoid of government interference, however, social media platforms do not qualify as government actors. Many individuals utilize social media in order to receive their daily news, stay in contact with distant relatives or scroll through posts that spark their interest, and social media companies retain the ability to sensor the content which does not conform to the purposes of their platforms. Furthermore, impressionable children and young adults spend a majority of their time on social media and hate speech in particular has proven to have a detrimental effect.

A. Social Media Platforms are not Common Carriers

Critics of social media giants’ rights to regulate content produced by its users have relied upon the argument that these platforms are common carriers — like telephone companies and railroads that are open to the public — and thus, there are no legal or approaches to regulation have largely fallen short.”). See also Byrd, supra note 75 (indicating that “[a]lthough we are free to say what we want, we are not allowed to express any opinion that offends, threatens, or insults groups, based on race, color, religion, national orientation, or disability,” as such things typically amount to hate speech).

See Ghosh, supra note 11 (noting that “the First Amendment only protects individuals’ speech from U.S. governmental oppression — there is nothing illegal about a private firm censoring people on its platform.”). See also Preston, supra note 78, at 1522 (“From the outside looking in, it appears that a social media platform is just that—a platform.”). Social media platforms are “neutral forum[s] where private actors and third parties can post their thoughts, feelings, and concerns.” Id. See Ghosh, supra note 11 (explaining that “[s]ocial media users . . . have almost no control over the content they see.”). “Instead, platforms use complex algorithms to serve content they think will keep users scrolling, often exposing them to more radical posts that they may never have sought out on their own.” Id. See MacCarthy, supra note 59 (opining that “[w]e know what the problems of social media content moderation are: hate speech, disinformation, amplification of terrorist material, and material that harms minors.”). If we do not have “information about what remedies are effective . . . policymakers are shooting in the dark in setting rules to control these problems.” Id. This is why transparency on the part of social media companies is essential and “can reveal further steps that policymakers can take to improve social media content moderation.” Id. See also Fellmeth et al., supra note 53 (addressing that the viewpoint that “[f]ree speech is the right way to say whatever social media owners or their monied influencers want you to say” is disastrous). “In our radically evolved communications world, where it is possible to instantly communicate with millions of people (children included), this viewpoint could be disastrous, resulting in increased abuse, as well as deliberate efforts to addict our young people to a profit-seeking messaging source.” Id.
constitutional “barriers” requiring them to refrain from content regulation.\textsuperscript{104} Traditionally, common carriers were obligated to ensure customers had access to that company’s services on a non-discriminatory basis.\textsuperscript{105} In an attempt to define common carriers, courts have considered factors such as market power, whether a company holds themselves out as serving the public, whether a company is involved with public interest, whether the service is in the business of transportation or communication, and whether the business has secured governmental favors.\textsuperscript{106} At large, many of these factors

\textsuperscript{104} See Bhagwat, supra note 84, at 128–29 (asserting that “[c]onservative critics therefore needed a theory to justify regulatory interference with the control that these companies exert over their own private property.”). The theory was created on the basis of common carriage: “the idea that, because social media platforms are common carriers like telephone companies and railroads, there are no constitutional or legal barriers around mandating equal access to their services and property.” \textit{Id.} See also Venkatraman, supra note 89 (addressing the Eleventh Circuit’s decision rejecting “the argument that social media platforms were ‘common carriers,’ citing the Telecommunications Act of 1996’s explicit differentiation between ‘interactive computer services’ and ‘common carriers or telecommunications services,’ and the unique protections Section 230 provides to social media companies that are not available to any ‘common carrier.’”). Furthermore, “[t]he Court also held Florida did not have the authority to proclaim Platforms were ‘common carriers’ and strip them of First Amendment protections.” \textit{Id.}

\textsuperscript{105} See Bhagwat, supra note 84, at 132 (explaining that “[a]t its heart, common carriage imposed obligations to serve customers on a nondiscriminatory basis (and imposed liability for negligence) on certain forms of transportation as well as related professions such as innkeepers and ware-housers.”). One set of definitions states that a common carrier “hold oneself out indiscriminately to the clientele” or “the carrier undertakes to carry all people indifferently.” \textit{Id.} at 134–35.

\textsuperscript{106} See id. at 133–34 (outlining that “[i]n \textit{Knight}, Justice Thomas identifies a number of considerations that scholars and courts have associated with common carrier status”). The Supreme Court has rejected the idea that television broadcasters and cable-television operators are common carriers, despite the idea that they are engaged in the communications business. \textit{Id.} at 139. See also Villasenor, supra note 6 (explaining that while railroads are common carriers because they “can’t refuse to sell a ticket to a prospective passenger,” there is a universal understanding that newspapers are not common carriers because the “. . . editors are free to decide the topics and tone of articles, and are free to accept or decline article and op-ed proposals based on factors including the viewpoints expressed.”).
have no foundation in historical concepts. Common carriers typically do not choose what kind of content they carry and who receives that content. Critics of social media companies’ rights to regulate content argue these platforms are common carriers because they often refuse to carry certain types of harmful content, thus, choosing what content to host.

As a matter of policy, it would be detrimental to qualify social media platforms as common carriers and implement the ideas proposed in the Florida and Texas legislation. Deeming social media

107 See Bhagwat, supra note 84, at 134 (claiming that most of the “considerations have little historical basis.”). The FCC’s definition in response to the 1934 Communications Act adopts a “holding out” approach. Id. at 135. [T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the system of other carriers connecting to it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier. Id.

108 See id. at 140 (stating generally that common carriers do not decide “what content to carry and where to send it.”). “Social media platforms are privately owned expressive mediums that . . . enjoy First Amendment editorial rights.” Id. at 143. See also Villasenor, supra note 6 (explaining that while railroads are common carriers newspapers are not). While railroads “can’t refuse to sell a ticket to a prospective passenger,” there is a universal understanding that newspapers are not common carriers because the “. . . editors are free to decide the topics and tone of articles, and are free to accept or decline article and op-ed proposals based on factors including the viewpoints expressed.” Id.

109 See Bhagwat, supra note 84, at 140 (synthesizing the argument “that social media platforms are or should be common carriers because they do precisely what a common carrier does not, which is having the service itself decide what content to carry and where to send it.”). See also Chung, supra note 3 (stating that “a coalition of 26 states stated that social media firms ‘do not just publish’ user content anymore, they ‘actively exploit it.’”).

110 See Bhagwat, supra note 84, at 152 (stating that Texas and Florida’s steps towards treating platforms as common carriers is “terrible public policy.”). See also Villasenor, supra note 6 (reiterating that “the First Amendment should prevent government attempts to regulate social media companies as common carriers.”).
platforms as common carriers would require platforms to carry all content posted by any user and may provide platforms leeway in regulating illegal content. While we, as users of social media, hope platforms would continue to regulate illegal or harmful content, it is possible platforms will not bother with the expenses and controversy associated with the burdensome restrictions on content moderation. Additional complications arise when attempting to draw the line between requiring platforms to block illegal content and allowing all legal content without any restriction. There are many online posts exhibiting ideas, pictures, or videos that are often forms of hate speech and are insensitive, yet do not reach the level of illegality, thus,

111 See Bhagwat, supra note 84 (explaining the flawed assumption that social media platforms would continue to regulate and refuse to host illegal content). However, there is no clear assumption for this basis. Id. “After all, when terrorists use telephone calls to plan an attack, or insurrectionists travel by airplane or railroad to attack the Capitol, no one holds the telephone company, airline, or railroad responsible for the resulting violence, even if they had reason to know that illegal activities were afoot.” Id. See also Villasenor, supra note 6 (maintaining that “[s]ome users might argue that racist speech is merely expressing a ‘viewpoint,’ and that as a common carrier subject (in Texas) to Texas law, the social media company therefore cannot remove it or take steps to impede its propagation.”).

112 See Bhagwat, supra note 84, at 152–53 (addressing the “expensive and controversial process, so if platform’s ability to engage in such moderation is severely restricted, they will surely not bother with the expense.”). “But once the content-moderation machinery is dismantled, how and why would platforms suppress illegal content? Left to their own devices, one strongly suspects that they would not.” Id. Perhaps, the only way to respond to this argument would be to bind platforms to a “legal obligation to block illegal content, while carrying all legal content.” Id. at 153.

113 See id. at 153 (stating that “the line between protected and unprotected content is often very blurry.”). “When a communication crosses the line from hyperbole to a ‘true threat,’ for example, is often unclear.” Id.
platforms would not be allowed to censor these posts under the common carrier framework.114

B. Regulating Social Media Companies vs. Prohibiting Social Media Companies from Regulating

Allowing state governments to create laws that prohibit the censorship of any content on social media platforms introduces a slippery slope towards the government’s unrestricted access to interfere with private companies’ First Amendment rights.115 It is not advisable to allow laws with such broad prohibitions.116 While social media companies have become platforms for free expression and are oftentimes tasked with determining the extent to which free expression is appropriate, the answer to keeping them in check is likely not prohibiting them from all content regulation in a fatal attempt to create the perfect place for individuals to share and receive information.117

114 See Bhagwat, supra note 84, at 153 (introducing the idea that “the world is full of content that is ‘lawful-but-awful,’ and the internet may be particularly likely to be used to spread such content.”). “Such content includes non-obscene pornography, hate speech, bullying that does not rise to the level of harassment or threats, and of course lies galore about just about anything, including dangerous lies such as medical misinformation.” Id. See also Domer, supra note 50, at 913 (explaining that Facebook’s “standards are meant to be as comprehensive and far reaching as possible; Facebook states that even ‘content that might not be considered hateful may still be removed for violating a different policy.’”).

115 See Susskind, supra note 47 (stating that there “is a deep and justifiable concern about governments becoming too closely involved in the regulation of speech.”). “History shows that even democratic regimes can be tempted to over-censor—in the name of religious orthodoxy, moral propriety, political correctness, national security, public order, or even (with the connivance of their supporters) political expediency.” Id. See also Hemeida, supra note 76 (articulating that “[t]he regulation of communications on [social media] platforms was labeled by Columbia Law School Professor Timothy Wu a ‘de facto First Amendment tradition.’”).

116 See Susskind, supra note 47 (outlining that avoiding providing too much “arbitrary power” to the state is a “core constitutional precept.”). See also Deese, supra note 44 (quoting Google’s pushback regarding adopting a new reading of Section 230). Google argued that “[t]his Court should not lightly adopt a reading of section 230 that would threaten the basic organizational decisions of the modern internet.” Id.

117 See Susskind, supra note 47 (stating that “the basic case for legislative intervention is, in fact, non-partisan.”). It is important to recognize that “as more and more of our discourse migrates online, social media platforms are increasingly
Instead, regulations should target the social media companies’ systems as a whole and be tailored to the goal of reducing imperfections. Internet accuracy and safety may be more easily achieved through specific regulations at the system level, such as legislation requiring measures within the companies’ systems to reduce harassment and control these types of posts, with a focus on the results. Platforms should not, as the broader H.B. 20 and 5th Circuit Court attempts to argue, be completely prohibited from regulating posts altogether.

trusted to draw the boarders of free expression.” Id. Social media companies “order, filter and present the world’s information […] they set rules about what may be said and who may say it […] and [t]hey approve, and ban speakers and ideas.” Id. When social media platforms partake in these regulatory actions, they “apply their own rules, principles, biases, and philosophies.” Id.

118 See id. (arguing that instead of aiming for “regulatory perfection,” a more modest approach is to aim for a “reduction in imperfection.”). “Instead of aiming to prevent all online harm, we can aim for a reduction in the risk of harm[…] and if we can make incremental gains without causing new harm in the process, that would be progress.” Id. See also Cusumano, supra note 4 (postulating that in order to reduce the amount of extreme content, we should urge these companies to self-regulate).

A better alternative would be to combine government regulations that alter incentives and put more pressure on social media companies to do more self-regulation . . . Any additional government regulation should be administered in a way that promotes more effective self-regulation, as occurred with movie ratings and advertisements for tobacco, alcohol, pornography, terrorist recruitment, or self-preferencing in airline flight listings during the 1960s and 1970s.

Id.

119 See Susskind, supra note 47 (proposing that “lawmakers might… decide that platforms should have reasonable or proportionate systems in place to reduce the risk of online harassment.”). Id. Discipline for violating system requirements may include sanctions, serious fines and if platforms were qualified as adequate, they would “enjoy a high degree of immunity from lawsuits.” Id. The most important aspect of this kind of “system-level oversight, graded according to social risk, with emphasis on outcomes—[would mean that] the regulator would not be expected to interfere with on-the-ground operational decisions.” Id.

120 See id. (stating that implementing the system-level regulation system would ensure that there would be no “government ‘censor’ scrutinizing individual moderation decisions or pieces of content.”). See also Rozenshtein, supra note 3 (“Both Big Tech–skeptical conservatives and pro-regulatory liberals may find common cause in upholding some government regulation, though almost certainly not to the extent that the Fifth Circuit has.”).
Some government or legislative regulation is to be expected sometime in the near future and may even be beneficial.\textsuperscript{121} “System-level oversight” may be a helpful tool to hold these tech giants accountable for ensuring that their systems are aimed at reducing harassment or other violence inciting content.\textsuperscript{122} By implementing this type of “regulation,” the government would not be censoring “individual moderation decisions” or actual posts, and such decisions would still be left up to the platforms themselves.\textsuperscript{123}

A hugely diverse community of ideas exist online today and trying to create a space where every user is pleased with every piece of content they come across one hundred percent of the time is nearly impossible.\textsuperscript{124} Conversely, users whose posts are deemed hate speech

\textsuperscript{121} See Susskind, supra note 47 (claiming that “[l]awmakers might, for example, decide that platforms should have reasonable or proportionate systems in place to reduce the risk of online harassment.”). See also Preston, supra note 78, at 1545 (stating that the Supreme Court “should decide similarly to the Eleventh Circuit and acknowledge that social media platforms engage in First Amendment-protected activity when it exercises editorial control and judgment over the content it puts out.”).

\textsuperscript{122} See Susskind, supra note 47 (explaining that “[t]his brand of regulation—system-level oversight, graded according to social risk, with emphasis on outcomes—means the regulator would not be expected to interfere with on-the-ground operational decisions.”). There would be no government “censor” scrutinizing individual moderation decisions or pieces of content. Platforms would be entitled to make mistakes, as long as their overall systems were adequate. And the creative burden would be on the platforms themselves to work out how best to meet the aims that have been democratically set for them.

\textit{Id.}

\textsuperscript{123} See id. (stating that implementing the system-level regulation system would ensure that there would be no “government ‘censor’ scrutinizing individual moderation decisions or pieces of content.”). But see Preston, supra note 78, at 1545 (reiterating that “for the courts to allow states to start enacting laws dictating what privately-owned companies can and cannot say” introduces a myriad of problems).

\textsuperscript{124} See Susskind, supra note 47 (stating that one of the many issues of practicability of regulating social media platforms is that “[p]eople cannot agree on what an ‘ideal’ online speech environment would look like.”). See also Yaraghi, supra note 64 (acknowledging that, even in 2018, that “measuring and mandating ideological diversity is impossible.”). Yaraghi states that he believes in “the value of ideological and intellectual diversity.” \textit{Id.}
and removed will be displeased at such regulation. However, hopefully this displeasure is a small sacrifice aimed at bettering the online community as a whole and ensuring the existence of a safe online space.

C. Future of Social Media Use in States Banning Content Moderation

The Fifth Circuit’s decision to enforce a law such as H.B. 20, has a disproportionate effect on platforms of different sizes. Upholding the legislation would discourage social media platforms from continuing to conduct business in the states that chose to take a similar approach to H.B. 20 because of the substantial risks of operating their platforms in fear of strict consequences. If the

---

125 See Yaraghi, supra note 64 (explaining that “[i]deology is a spectrum, not binary.). “Rarely anyone agrees with all positions of a single party even if they are a member of it. Although in an extremely polarized political environment, Americans are increasingly favoring the more extreme ends of the political ideologies in both parties…” Id. “Despite these concerns, I believe that we should accept such bias as a fact and refrain from regulating social media platforms…..” Id.

126 See Susskind, supra note 47 (stating that reasonable people will disagree on how best to regulate problems such as disinformation or incendiary speech).

The realm of speech is inherently chaotic. There will always be controversy. There will always be tumult. There will always be lies and slanders. Especially on social media, where conflict gets more clicks than consensus. Every word of moral outrage is said to increase the rate of retweets by 17 per cent.

Id. “Platforms are better-placed than regulators to understand the workings of their own systems, and we would all benefit if more of their considerable genius was refocused on reducing social harms rather than amplifying them.” Id.

127 See id. (stating that “[p]latforms come in different sizes. For modest ones, burdensome regulation would make survival impossible. For larger ones, the challenge lies in their mind-boggling scale.”). See also Hemeida, supra note 76 (acknowledging that while social media users “are concerned about their right to free speech on platforms,” social media companies are also “concerned about their right to not allow certain speech on their privately owned platforms.”) (emphasis added).

128 See Rozenshtein, supra note 3 (recognizing that platforms would have to, at a minimum, disable their moderation systems and could implement measures where users could opt into moderation).

[T]he platforms could comply with the law by disabling moderation by default, and then allowing users, who will suddenly
Supreme Court decides social media companies should be prohibited from regulating content and enforces strict disclosure requirements, the platforms’ current regulation practices will be upended. Platforms will be required to operate a whole separate system in the states subject to such legislation, while continuing their current content moderation system for the rest of the world. Additionally, the cost of creating a new system to comply with each states’ moderation laws would impose an undue and expensive burden.

If major platforms decide to cease operation in Texas, individuals would lack access to a main stream of information and smaller local social media companies may pop up or become more prevalent. This introduces the risk of Texas or Florida citizens only being able to have access to an extremely narrowly tailored set of information. Other states would likely follow suit and implement

\[129\] See id. (stressing that “[c]omplying with the law would upend platforms’ already fragile content moderation practices and running two different systems, one for Texas and one for the rest of the world, has its own obvious challenges….”). Implementation of H.B. 20, “[f]ar from promoting free expression, the law may well lead the platforms to geoblock Texas and its users in the entirety in order to avoid Texas’s jurisdiction.” \[130\] See Bhagwat, supra note 84 (stating that “the fact that Trump continues to post on his new social media platform, Truth Social, also demonstrates beyond doubt that Twitter, or for that matter Facebook, are not the sorts of non-bypassable networks or services that have historically triggered common carrier treatment.”). See also Allore, supra note 24 (mentioning that “on August 30, 2022, Google stopped Truth Social from becoming available on the Google play store for violating ‘standard policies’ involving content moderation…”). Truth Social’s “promise to be a haven for free speech may be unfulfilled, especially with its selective moderation and access to 44% of smartphone users being curtailed on major platforms.” \[131\] See Bhagwat, supra note 84 (stating that “content moderation is a fraught, expensive, and controversial process….”).

\[132\] See Rozenshtein, supra note 3 (arguing that “[i]f the State were truly interested in providing a viewpoint-neutral public forum, the State could have created its own government-run social-media platform.”). “It’s almost as absurd to tell Texas to just make its own Twitter as it would have been to tell broadcasters to just make their own cable systems.” \[133\] See id. (claiming that “[t]he same network effects that make the Platforms so useful to their users mean that Texas (or even a private competitor) is unlikely to be
their own rules and regulations, which may require each major social media platform to have a separate content moderation operating system in each state.\textsuperscript{134} A practice that is likely unsustainable even for the social media “giants.”\textsuperscript{135} This issue requires a creative resolution and a balancing of the integrity of constitutional rights of private social media companies and users’ access to content.\textsuperscript{136}

V. Conclusion

Social media companies are private actors. Thus, strict government regulations upon their content moderation practices constitutes a violation of platforms’ First Amendment rights. This issue has garnered bipartisan support as any decision made going able to reproduce that network and create a similarly valuable communications medium.

\textsuperscript{134} See id. (arguing that “[i]f the State were truly interested in providing a viewpoint-neutral public forum, the State could have created its own government-run social-media platform.”). See Kern, supra note 46 (stating that “[e]fforts to police speech on social media are spreading across the country, with lawmakers in 34 states pushing bills that are already setting up court battles with tech giants over the First Amendment.”). While only three bills have been introduced as laws, including the Florida and Texas laws, “[s]tate legislators have introduced more than 100 bills in the past year aiming to regulate how social media companies such as Facebook and Twitter handle their users’ posts, according to POLITICO’s analysis of data from the National Conference of State Legislatures.” Id. Jeff Kosseff, a cyber security law professor at the U.S. Naval Academy, stated that “[y]ou cannot have a state-by-state internet.” Id. “When you step back and look at the possibility of having 50 different state laws on content moderation — some of which might differ or might conflict — that becomes a complete disaster.” Id.

\textsuperscript{135} See Susskind, supra note 47 (stressing that the number of users on a platform varies). “For modest ones, burdensome regulation would make survival impossible [and] [f]or larger ones, the challenge lies in their mind-boggling scale.” Id. See also Bomboy, supra note 10 (acknowledging that “[a]t stake in the social media cases could be the core business models of massive companies that depend on user engagement to generate interest and revenue.”). It is also notable that “[t]hese services have over a billion regular visits each month….“ Id.

\textsuperscript{136} See Rozenshtein, supra note 3 (realizing that “[t]hese moments are exciting because they hold open the promise of creative legal problem solving across the traditional liberal-conservative divides.”). On the other hand, “they require humility, pragmatism, and a willingness to see all sides of a difficult issue. The Eleventh Circuit tried but struggled; the Fifth Circuit didn’t even try. Here’s hoping that the Supreme Court does a better job.” Id.
forward could have significant effects on how individuals engage on social media throughout their day-to-day lives. Some oversight of social media companies’ moderation decisions may be warranted to ensure proper exercise of their First Amendment right to regulate content and to verify their moderation policies are reducing violence or harassment. However, blanket legislation, such as those proposed in Florida and Texas, dictating what content social media platforms are or are not allowed to moderate goes well beyond the proper scope of government regulation.