NetChoice: Media, Technology, and the Future of the First Amendment

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I. INTRODUCTION 281
II. CONSTITUTIONAL LAW: WHERE DO WE STAND NOW? 283
  A. *Relevant First Amendment Doctrine and Exclusive Public Function* 283
  B. *Does Social Media Fit?* 286
    1. Filling in the Gaps 286
  C. *A Different Approach: Applying the Common Carrier Doctrine to Social Media* 289
III. NETCHOICE: A MISGUIDED ATTEMPT AT A REAL ISSUE 291
  A. *The Florida Laws* 292
  B. *The Texas Law* 294
  C. *The NetChoice Decisions* 295
  D. *NetChoice Revisited: The Circuit Rulings* 296
    1. The Eleventh Circuit Comes Down on the Side of Speech 297
    2. The Fifth Circuit Finds for Censorship 298
IV. GETTING META: WHAT'S NEXT AND WHAT DOES IT CHANGE? 300
  A. *Developments in Social Networks and Internet* 301
  B. *Greater Need for Regulation as Technology Grows* 302
V. CONCLUSION 305

I. INTRODUCTION

In the summer of 2021, Florida passed laws that, among other things, restrict certain large social media companies' abilities to delete or ban

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content and users, particularly as it pertains to political candidates.[1] That same summer, Texas passed regulatory legislation that, in relevant part, restricted social media companies with over 50 million monthly users from "censor[ing] . . . the viewpoint of the user or another person."[2] In both of these cases, the states advanced arguments that large social media platforms were more akin to common carriers than to private speakers and thus were subject to state regulations. The argument, however, was rejected for the Florida law in the Eleventh Circuit yet accepted for the Texas law in the Fifth Circuit. The differing opinions set up a contentious Circuit Split destined to be quelled, or stoked, by the Supreme Court in its next term.

The occasion for these laws seems to be inextricably political and tied to the insurrection on January 6 (and social media companies' reaction to it). However, the desire to restrict how these seemingly omnipresent corporations operate has been echoed by policymakers on both sides of the aisle. Apart from the fear that large social media companies seek to censor any views different than their apparent radical leftist ones, there is a legitimate concern that private companies are in control of an inordinate amount of communication in the nation.

This concern will only grow as computer technology continues to advance. As everyday life becomes more entrenched in such technology, much of which is being developed by the very companies managing social media, taking control out of private companies' hands and placing control into those of democratically elected officials makes more and more sense, though it need not always be aimed at restricting the platforms legitimate speech rights. The scope of Florida and Texas's legislation is clearly unconstitutional and overreaching, but legitimate attempts should be made at controlling companies like Meta and Twitter through narrow legislation or exemptions.

In Part II, this Comment addresses the current Constitutional parameters that play a role in social media platform's right to speech and the extent to which the government can regulate it. In Part III, this Comment explains the Florida and Texas legislation and the subsequent NetChoice decisions. Lastly in Part IV, this Comment analyzes where recent case law leaves us and discuss the future of social media.

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1. S.B. 7072, 123rd Reg. Sess. (Fla. 2021).
2. H.B. 20, 87th Leg. Sess. § 1201.002(a) (Tex. 2021).

II. CONSTITUTIONAL LAW: WHERE DO WE STAND NOW?

To regulate social media companies as narrowly as possible, a few key constitutional doctrines should be understood. Social media obviously involves speech, but the extent to which social media is and will continue to be a major facet of the public's ability to speak is growing. As digital media's impact on speech grows, there is a need for legitimate causes of action and recourse for infringements by private companies. Currently, Constitutional protections of speech mostly apply only to state action. However, there remain exceptions to the state action doctrine that might open paths for regulation.

A. Relevant First Amendment Doctrine and Exclusive Public Function

The state action doctrine holds that only government actors can infringe on constitutional rights.[3] The doctrine likely stems from the framer's intent to protect liberties from infringement by the federal government, which otherwise would be free to violate civil rights.[4] At that time, it was thought the Constitution need not protect individual liberties from violation by private parties because such action was controlled by common law—a state centric view of Federalism.[5] As derived from natural law, the common law dictates of civil liberties inherently controlled over statutes and private actions.[6] Thus, a specific protection from unconstrained infringement by the government was all that was thought necessary.[7] This was, of course, not the case. There simply did

3. Jackson v. Metro. Edison Co., 419 U.S. 345, 349-50 (1974); *see* Civil Rights Cases, 109 U.S. 3, 23-25 (1883) ("The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations [secured by the Fourteenth Amendment] . . . without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country [and abolished by the Thirteenth Amendment]? . . . [W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state.").

4. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 511-13 (1985).

5. Such a belief can plainly be seen in the reference to "inalienable rights" to "life, liberty and the pursuit of happiness" found in the Declaration of Independence. *Id.*; *see, e.g.*, CAL. CONST. art. I § 2 (creating a general right of free speech enforceable against even private actors); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (recognizing California's constitutional right of speech and the right of states to create more expansive rights than those in the Constitution).

6. As otherwise would be repugnant to the "Holy Writ." Chemerinsky, *supra* note 4, at 512 n.37 (citing C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-76, at 17 (1933)).

7. *Id.* at 513.

not exist common law remedies for a variety of constitutional infringements—a fact made painfully clear during and after Reconstruction.[8] While the Constitution provides the federal government as accountable for rights violations, private parties were left to discriminate at the lenience of their local governments.[9]

However, in certain limited contexts, the Supreme Court has been willing to stretch the state action doctrine. As an introductory example, *Shelley v. Kraemer* famously held that state court enforcement of racially discriminatory restrictive covenants qualified as state action under the Fourteenth Amendment.[10] Undoubtably the right decision, *Shelley v. Kraemer* demonstrated a line of reasoning that expanded the definition of state action slightly beyond what it had been.[11] Direct action by a state official on the aggrieved individual was not necessary; mere association with the infringing party by enforcement was enough to implicate the state in an unconstitutionally discriminatory scheme.[12]

Similarly, in *Marsh v. Alabama*, a Jehovah's Witness was arrested for handing out literature on a corporate city sidewalk.[13] Like the state court in *Shelley v. Kramer*, the officer who arrested Marsh was a state officer, possibly subject to the First Amendment by way of the Fourteenth Amendment.[14] However, the Court held that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it."[15] Thus, where property is left open for public use, the owner's private rights are diminished at the rate which the public uses his open property.[16] When weighed, the public's right of speech, press, and religion is greater than that of the owner's property.[17] So, because the

8. *Id.* at 515.

9. *Id.*; *cf.* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

10. 334 U.S. 1, 27-29 (1948).

11. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens.").

12. *Shelley*, 334 U.S. at 14.

13. 326 U.S. 501, 503 (1946).

14. *Id.*; *see* Paul Domer, *De Facto State: Social Media Networks and the First Amendment*, 95 NOTRE DAME L. REV. 893, 900 (2020).

15. *Marsh*, 326 U.S. at 506.

16. *Id.*

17. *Id.* at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

corporate town was held so open for the public, the rights of the private owners became subordinate to those using the town for its public purposes.

These cases also demonstrate the "exclusive public function" doctrine, whereby a private entity exercising a function "traditionally *and* exclusively" performed by the state may be constrained by constitutional provisions just as the state would.[18] However, the Court is quick and oft to note the exclusivity of this category towards such functions.[19] There are more examples of functions that do not fall into the exclusive public category (e.g., running sports leagues, administering insurance payments, operating nursing homes, representing indigent criminal defendants, supplying electricity, etc.) than there are of those that do (e.g., running elections and operating a company town).[20] Further, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court explicitly held that cable public access channels are not exclusively public because providing a forum for speech is not a function exclusively performed by state entities.[21] "[M]erely hosting speech by others," in other words, is not an exclusively public function and does not make private entities akin to state actors for First Amendment purposes.[22]

Moreso than the exclusive public function doctrine, the Court has typically decided First Amendment publication cases on compelled speech grounds.[23] In *Miami Herald v. Tornillo*, the Court invalidated a statute that compelled editors to publish replies to any criticism of a political candidate.[24] In doing so, they noted that the statute places a penalty on the basis of the content of the paper, not only by physical costs but also through the self-censorship of political coverage in the first

18. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928-30 (2019).

19. *Id.* at 1929 (citing Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978)).

20. *Id.*

21. *Id.*

22. *Id.* at 1930-31 ("If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum.").

23. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-57 (1974) (citing New York Times v. Sullivan, 376 U.S. 254, 279 (1964)) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"); *see also* Mills v. Alabama, 384 U.S. 214, 220 (1966) ("We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.").

24. 418 U.S. at 246.

place.[25] Similarly, in *Mills v. Alabama*, the Court reversed an indictment under a state statute that made it illegal to support or solicit votes for a proposition on election day.[26] The Court found that through the law, the state effectively muzzled the press at the time when its voice becomes the most important.[27] *Mills* and *Tornillo* stand for the proposition that the state cannot tell publishers what to publish; that the press does not serve an exclusively public function.[28]

B. Does Social Media Fit?

At first blush, the exclusive public function doctrine would seem to exclude social media platforms from possible constitutional constraints, just as the common carrier doctrine is inapplicable to social media platforms. However, slight differences between social media and those functions previously adjudicated may prove to be enough for a legitimate public function argument. If platforms cannot fit into an exclusive public function, then there may yet be a constitutional path for social media regulation under the Court's reasoning in *Marsh*.

1. Filling in the Gaps

The government has not "traditionally and exclusively" performed the function of opening public forums—there are those places, like parks and streets, that have immemorially been held for use by the public.[29] However, it has served at least partially the function of opening such

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25. *Id.* at 256-57.

26. *Mills*, 384 U.S. at 215-16.

27. *Id.* at 219-220 (asserting that any last-minute attacks would not be able to be answered by the paper).

28. *See generally* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through 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.") (internal quotations omitted).

29. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802-03 (1985) (providing three types of fora: traditional public fora created by "long tradition or by government fiat," limited purpose public fora created by the government for the purpose of public assembly and speech, and nonpublic forums); *see also* Hague v. Comm. For Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

forums for assembly and debate.[30] Whereas traditional public fora can be permanently opened by government fiat, traditionally nonpublic fora may also be opened for public assembly and debate by the state in a limited capacity, and may be closed off again by government decree.[31] Whatever may be said of the distinction between traditional public fora opened by "government fiat" and these designated public fora, even the latter is subject to only narrowly tailored time, place, and manner restrictions.[32]

Meanwhile, private entities, while hosting a form of speech, have never been subject to host public forums like its government counterparts.[33] Though private entities may indeed open forums, such forums differ substantially from the government equivalent public forums. Arguably, social media platforms host a forum for its users' speech in a fashion more akin to a government opened public forum than a traditional private entity forum.[34]

In *Manhattan*, Justice Kavanaugh writing for the Court acknowledged that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed."[35] It has not always been the state that has provided the forums for public discourse.[36] To be sure, private entities have often provided a forum for intense and necessary public discussion. As Kavanaugh explained, "[g]rocery stores put up community bulletin boards [and] [c]omedy clubs host open mic nights."[37] Similarly, the *New York Times* hosts various opinions on current events, and Fox News and CNN host guests to discuss topics from business to politics to entertainment. Yet these privately created forums seem to differ significantly from those created by the

30. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.").

31. *Id.*

32. *Id.*; *see* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) ("Traditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate . . . . [D]esignated public fora, in contrast, are created by purposeful governmental action. The government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.") (internal quotations omitted).

33. *Compare* Hudgens v. NLRB, 424 U.S. 507, 520 (1976), *with* United States v. Grace, 461 U.S. 171, 177 (1983).

34. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

35. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

36. *Id.*

37. *Id.*

government. Is a bulletin board in a grocery store the same as a lamppost on the street riddled with stapled-on posters, advertisements, and art?

Addressing the issue in *Manhattan*, the Court likely was correct in its assessment of public access cable television: it is more akin to a function of privately created forums than it is to one of a state created public forum.[38] However, social media platforms are definitively unique. In the same way social media platforms may not exercise a form of editorial judgment like traditional newspapers do, such platforms do not exercise the same "editorial discretion" over speech like that of private entities creating such forums.[39] Rather than a bulletin board, social media platforms are comparable to sidewalks and parks in their public function.[40] These platforms are open for users to express themselves to all other platform users. Similar to a speaker on their soapbox, these users exercise freedom to express themselves to any user who will listen. Likewise, just as those in the public sphere are limited by constitutionally unprotected speech, so too are platform users limited by speech that violates the platform's rules.[41]

As noted, grocery stores and comedy clubs, let alone the *New York Times* Opinion section or a Fox News segment, are intrinsically different from a traditional public forum, like a park or sidewalk. Such forums are created by different entities in different ways and are subject to different

38. However, Justice Sotomayor notes that the city of New York was required to obtain public access television channels from Time Warner in exchange for a cable franchise. In this way, Sotomayor argues that the City obtained the property interest in the right to send television signals over Time Warner's cables and thus has a definite property interest. As such, the channels are clearly public forums. *See Manhattan*, 139 S. Ct. at 1937 (Sotomayor, J., dissenting).

39. *See* NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876, at *8-9 (N.D. Fla. June 30, 2021); *see also* Nilay Patel, *Can We Regulate Social Media Without Breaking the First Amendment?*, THE VERGE (Dec. 16, 2021, 9:00 AM), https://www.theverge.com/22838473/social-media-first-amendment-regulation-section-230-decoder-podcast [https://perma.cc/UN6P-7FU4]. Note, however, that social media platforms also exercise an editorial judgment greater than that of a common carrier. They are neither like a railroad nor a newspaper. Platforms practice discrete forms of both active editorial judgment and passive service as a vehicle for speech, *see supra* Section I.C.

40. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind . . . . [F]oreclos[ing] access to social media altogether [thus] prevents the user from engaging in the legitimate exercise of First Amendment rights.").

41. This, obviously, is where platforms begin to engage in some form of editorial discretion. A social media platform's conception of what is allowed broadly mirrors a publisher's choice of what to publish. In their choices, both develop an identity for their own speech, which itself is a practice of expression. However, social media choices are less akin to editorial discretion (choosing what to publish to build a consistent theme and view for the publication) than they are public regulation (choosing what speech to allow for the benefit of the public discourse and safety).

requirements. The Court in *Manhattan* conflates the forums offered by the state and those offered by private parties as encompassing one function.[42] But forums created by the state and those created by private parties have always served different purposes and are subject to significantly different rules. Importantly, public forums provided by the state are subject to the Constitutional rigors of the First Amendment. In this way, these forums offer protection in different degrees. Privately created forums cannot be said to serve the same public access function. If social media platforms attempt to serve the function of opening public forums in the same vein that the government has traditionally done, then social media platforms may be overtaking a function traditionally and exclusively performed by the state.[43] Social media platforms operating in such a role would, thus, be subject to constitutional scrutiny under the exclusive public function doctrine. Of course, this theoretical approach to platform speech regulation is not the only one that exists.

C. A Different Approach: Applying the Common Carrier Doctrine to Social Media

Justice Thomas, in a case stopping then-President Donald Trump from blocking users on Twitter, took the opportunity to opine and proselytize on a prominent theory for reigning in social media power.[44] His argument lays the path that both Florida and Texas later track: there seems to be something off about the ability of a private social media company to act with unrestricted authority over a platform that serves to transmit others' speech.[45] It seems, then, that there must be a way for the government to reign in that potentially destructive power for the benefit of the users thereon.[46] By comparing social media providers to the traditional common carriers of yore, an application of the same doctrine is ostensibly justified.[47]

Generally speaking, the common carrier doctrine subjects private entities to state regulation when those entities hold themselves open to the

42. *Id.* at 1732.

43. *Contra* Prager Univ. v. Google LLC, 951 F.3d 991, 998-99 (9th Cir. 2020) (quashing Prager's argument that a private entity can be converted to a public forum, and finding that "YouTube is not owned, leased, or otherwise controlled by the government").

44. *See generally* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

45. *Id.*

46. *Id.*

47. *Id.* at 1222.

public.[48] These private entities, in theory, exchange some of their private rights of exclusion for specific immunity or near monopolies.[49] The policy reasoning is clear: where a service has become vital for the public and is centralized, the service is better not left to its own financially-motivated devices but those of a democratically elected body.[50]

The reasoning behind Florida and Texas's attempted application of the common carrier doctrine to social media platforms is equally clear. Social media has become integral to the modern marketplace of ideas, akin to a street or park in public forum contexts.[51] With its ever-increasing role in keeping citizens informed and free debate flowing, social media should have some restrictions so that platforms, and the algorithms they create, do not silence select voices.[52]

The Florida legislature invoked the common carrier doctrine to justify their otherwise viewpoint-based regulations of social media platforms.[53] The District Court, however, pays little mind to the common carrier argument, wisely opting instead to grant NetChoice's injunction on more established constitutional grounds.[54] In essence, the defendant's argument relies purely on the over-simplified idea of common carriage noted above.[55] Relying on this standard, they claim they act reasonably

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48. This is a vast simplification of the otherwise entangled and largely "desultory" common carrier doctrine. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 401-13 (2020).

49. *See* W. Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921).

50. Whether or not such a distinction is ever entirely true. *See* Santa Fe, Prescott & Phx. Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 184 (1913).

51. As of 2021, 72 percent of the American public reports that they use at least one form of social media. *Social Media Use Over Time*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/CL2T-MEJH]; *see* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular.") (internal citation omitted).

52. *See* Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 1-2, NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876 (N.D. Fla. June 30, 2021) ("Such unprecedented power of censorship is especially concerning today, when most individuals use social media to obtain their news and government officials harness such mediums to reach the public.").

53. *See id.* at 23-28.

54. NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1096 (N.D. Fla. June 30, 2021) ("[A]side from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny [which] . . . [t]he legislation does not survive.").

55. Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 2, NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876, at *27-28 (N.D. Fla. June 30, 2021) ("Plaintiffs resist the notion that they should be treated as common carriers [by] . . . claiming their content moderation policies allow for individualized content decisions . . . .

and are justified in treating social media platforms as common carriers.[56] The defendants noted the court's omission and offered the same argument on appeal.[57] The Eleventh Circuit is less dismissive but more forceful in their rejection of the theory, noting that platforms do not hold themselves open ubiquitously to all users but instead require potential users to agree to their terms.[58]

These major social media providers both hold themselves open for public use and possess significant market power, the traditional telltale signs of a common carrier.[59] On its own, the policy argument carries substantial weight: it is better for a democratic society to not have its rights of speech and expression in the hands of private entities with disparate motivations.[60] As applied, though, the argument lacks serious strength, as seen in the NetChoice cases. Ultimately, the common carrier doctrine remains an important concept to understand, particularly for the analysis of cases involving the First Amendment and social media, but one that is yet unable to curtail the monopolistic power that both the right and left are skeptical of.

III. NETCHOICE: A MISGUIDED ATTEMPT AT A REAL ISSUE

On May 25, 2021, the Florida state legislature passed Senate Bill 7072, a social media act that significantly limited a company's ability to control its users' content and behavior.[61] In three sections, the Act takes aim at a perceived bias from platforms and "compels providers to host speech that violates their standards."[62] Similarly, on September 9, 2021, Texas Governor Greg Abbott signed into law House Bill 20, another social media statute that broadly prohibited platforms from censoring "a user, a user's expression, or a user's ability to receive the expression of another" due to viewpoint or location in Texas.[63]

[N]evertheless, the essential element of common carriage [is] that the carrier holds itself out as providing the services to the public at large.") (internal quotations omitted); *see* Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020).

56. Opening Brief of Appellants, NetChoice LLC v. Att'y Gen., Fla., No 4:21CV220RHMAF, 2021 WL 4105353, at *34-39 (11th Cir. Sept. 7, 2021).

57. *Id.* at 34.

58. NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1220 (11th Cir. 2022).

59. *Id.* at 1221.

60. *See* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43(4) HUMAN RIGHTS 2 (2018).

61. *See* S.B. 7072, 123rd Reg. Sess. (Fla. 2021).

62. NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. June 30, 2021).

63. H.B. 20, 87th Leg. Sess. § 7, sec. 143A.002(a) (Tex. 2021).

In response to the bills' passing, a trade association comprised of social media platforms subject to the regulations filed complaints in the Northern District of Florida and Western District of Texas primarily alleging the acts violate the First Amendment by compelling speech and interfering with the companies' editorial judgement.[64] In defense of their statutes, the states continuously argued that the editorial judgement practiced was viewpoint and ideologically based.[65] More important, however, were the state's arguments that social media platforms are common carriers subject to state mandates.[66] Observers argued, mainly in opposition to the laws, that they not only were blatantly odious to the First Amendment but also threatened serious instability in the law—"[y]ou cannot have a state-by-state internet."[67]

A. The Florida Laws

Spurred in part by a legitimate concern that tech companies exert too much control over public discourse, Florida eagerly touted Senate Bill 7072 as an action to promote transparency and protect speech.[68] In reality, the law was plainly viewpoint based, assuming social media platforms silence particular ideologies that run contrary to their "radical leftist narrative."[69] To accomplish their goals, the state crafted a three-sectioned instrument that would eviscerate platforms' prioritization and guideline power.[70]

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64. *NetChoice*, 2021 WL 2690876, at *1; NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1099-1101 (W.D. Tex. 2021).

65. *NetChoice*, 2021 WL 2690876, at *3, 6; *Paxton*, 573 F. Supp. 3d at 1108-09.

66. *NetChoice*, 2021 WL 2690876, at *6; *Paxton*, 573 F. Supp. 3d at 1105, 1107.

67. Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229 [https://perma.cc/DHT8-8EZJ].

68. Press Release, Executive Office of Governor Ron DeSantis, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021) [hereinafter DeSantis Press Release], https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/ [https://perma.cc/5XB7-5UT8].

69. *Id.* (commenting on the passage of Senate Bill 7072, Lieutenant Governor Jeanette Nunez noted that "Thankfully in Florida we have a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative.").

70. *See* Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-opt the First Amendment. Courts Shouldn't Let Them.*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/09/opinion/social-media-first-amendment.html [https://perma.cc/6GCC-2LGF] ("[T]hey prevent the companies from removing certain content, limit their use of algorithms and require them to publish information about their content-moderation practices. They also restrict the companies' ability to attach their own labels to users' posts.").

The first part of Senate Bill 7072 became Florida Statutes § 106.072. Section 106 prohibits a social media platform from "willfully deplatform[ing]" a known candidate for office.[71] To qualify as a candidate under Florida law, a user need only file qualification papers and take an oath, a "low bar" to be exempt from platform punishment.[72] Such a restriction is a clear violation of the platforms' private right to limit who uses their service based on what they view is appropriate. For example, Twitter's guidelines reasonably restrict the use of violence, terrorism, hate speech, targeted harassment and the incitement to do so, manipulated media likely to cause harm, and manipulation or interference with elections or other civic processes.[73] Twitter, a service offered by a private entity, is free to set out rules for its preferred conduct. Certainly, if platforms with rules like Twitter were public forums or otherwise subject to government control, their rules would be far less restrictive.

Senate Bill 7072 next introduces Florida Statutes § 287.137, the least consequential and relevant statute from the bill.[74] Section 287.137 allows for the state to block from contracting with a public entity any platform that has committed or has even just been accused of an antitrust violation.[75] Though the law invokes many other issues under federal law, it has little effect on the First Amendment ramifications of the bill.[76]

Lastly, the bill introduces § 501.2041, the most substantive portion of the bill that prohibits platforms from using algorithms for banning or "post-prioritization" on a user who is known to be a candidate.[77] Section 501.2041 further prohibits platforms from censoring or deplatforming a "journalistic enterprise," defined as a business that publishes in excess of 100,000 words monthly, 100 hours of audio or video annually, or 40 hours of cable content weekly.[78] The lengthy section also requires platforms to categorize and publish its content sorting algorithms while "allow[ing] . . . user[s] to opt out of post-prioritization and shadow banning algorithm[s]" to allow for sequential posts.[79]

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71. S.B. 7072, 123rd Reg. Sess. (Fla. 2021).
72. *NetChoice*, 2021 WL 2690876, at *1 (citing Fla. Stat. § 106.011(3)(e)).
73. *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Mar. 3, 2022) [https://perma.cc/DCF8-Y6TZ].
74. S.B. 7072, 123rd Reg. Sess. (Fla. 2021); FLA. STAT. § 287.137 (2021).
75. *NetChoice*, 2021 WL 2690876, at *1.
76. *Id.*
77. *Id.* at *1; FLA. STAT. § 501.2041(2)(h).
78. FLA. STAT. § 501.2041(2)(j).
79. FLA. STAT. § 501.2041(2)(f)(2).

B. The Texas Law

Like its Floridian foil, House Bill 20 starts from the auspicious assumption that every Texan "has a fundamental interest in the free exchange of ideas and information," and that "th[e] state has a fundamental interest in protecting the free exchange."[80] However, like Florida, the law was explicitly passed under the pretense that platforms foster "a dangerous movement . . . to silence conservative viewpoints and ideas."[81] To accomplish their goal of "allow[ing] Texans to participate on the virtual public square free from Silicon Valley censorship," the law first decries social media platforms as common carriers because of their market dominance.[82] However, Texas only includes those platforms with over 50 million active users a month as platforms dominant enough to be common carriers.[83]

For those platforms that qualify, Texas first requires them to "disclose accurate information regarding its content management, data management, and business practices" including information on how the platform curates, moderates, and uses algorithms to rank content.[84] The law also requires those platforms to create what amounts to terms of use policies that explain to the user what content is allowed and then publish biannual reports on the content that they removed, demonetized, deprioritized, or took any action on in accordance with their policy.[85]

Somewhat paradoxically, in the most relevant section of the law, Texas also prohibits platforms from censoring content for its viewpoint.[86] "Censoring," in this context, is defined as "block[ing], ban[ning] . . . demonetize[ing], de-boost[ing], restrict[ing]," or otherwise "deny[ing] equal access" to or discriminating against expression.[87] Texas, then, requires the platforms to set up content policies without regard to the viewpoint of the content with two broad exemptions: the sexual exploitation of children or ongoing harassment for survivors of abuse, and

80. H.B. 20, 87th Leg. Sess. § 1 (Tex. 2021).

81. Press Release, Office of the Texas Governor, Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship (Sept. 9, 2021) [hereinafter Abbott Press Release], https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship [https://perma.cc/2H4F-V42J].

82. Sen. Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), https://twitter.com/SenBryanHughes/status/1368061021609463812 [https://perma.cc/B7U5-Z8EP]; H.B. 20, 87th Leg. Sess. § 1 (Tex. 2021).

83. H.B. 20, 87th Leg. Sess. § 2, secs. 1201.002(a)-(b) (Tex. 2021).

84. Tex. Bus. & Com. § 120.051(a).

85. Tex. Bus. & Com. § 120.052-053.

86. Tex. Civ. Prac. & Rem. § 143A.002.

87. Tex. Civ. Prac. & Rem. § 143A.001(1).

incitement to criminal activity or specific threats against groups because of their race, age, sex, or status.[88]

C. *The NetChoice Decisions*

Three days after Governor Ron DeSantis signed Senate Bill 7072 into law, the plaintiff trade association (NetChoice) filed its complaint in the Northern District of Florida.[89] In relevant part, the complaint alleges that the act infringes social media companies' First Amendment Rights by compelling speech, restricting speech, and infringing on their editorial judgment.[90]

Addressing the First Amendment's application to Social Media Providers, the District Court analyzed the platforms' role in moderating content.[91] First, NetChoice argued their role in content manipulation was more akin to curation than control.[92] This content curation was an act of editorial judgment that is necessary for their services' functions.[93] The defendants, and many Florida legislators, argued that the content moderation was motivated by the ideological views of the large companies behind social media platforms.[94] By their logic, the defendants stood firmly on the side of the First Amendment.[95] Moreover, the defendants argued that the act protects social media users' right to see and share content that might otherwise be blocked from content created by bad faith actors.[96] The defendants seemed to argue that controlling the "social media behemoths' power" serves the public good and their First Amendment rights.[97]

Further, NetChoice argued that their platforms "should be treated like any other speaker," while the State put forth that the providers should

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88. Tex. Civ. Prac. & Rem. § 143A.006(a)(2)-(3).

89. Complaint for Declaratory and Injunctive Relief at 1, NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876 (N.D. Fla. June 30, 2021).

90. *Id.* at 15-19.

91. NetChoice LLC v. Moody, 546 F. Supp. 3d 1082, 1091-92 (N.D. Fla. June 30, 2021).

92. *Id.* at 1090.

93. *Id.* ("The plaintiffs call this curating or moderating the content posted by users. In the absence [of] curation, a social media site would soon become unacceptable—and indeed useless—to most users.").

94. *Id.*; *see also* DeSantis Press Release, *supra* note 68.

95. *See* Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 2, NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876 (N.D. Fla. June 30, 2021) ("[T]he Act does not suppress, but rather promotes, speech: It leaves users free to speak, to share, or to block any content they do not wish to see.").

96. *Id.*

97. *Id.* at 1.

be given the status of common carriers.[98] The State contended that the providers were "like common carriers, transporting information from one person to another much as a train transports people or products from one city to another."[99] Ultimately, the District Court agreed more with the plaintiffs, granting a preliminary injunction against the enforcement of Senate Bill 7072 while noting that the truth of platforms' editorial or carrier status lay somewhere in the middle.[100]

Six months after the Middle District of Florida handed down its decision, the Western District of Texas was faced with largely the same question.[101] NetChoice again argued the platforms were exercising editorial discretion in their content moderation and that discretion made them more akin to newspapers than a common carrier.[102] Using the same precedent as the Florida court, the Western District of Texas found that "[s]ocial media platforms have a First Amendment right to moderate content disseminated on their platforms."[103] Instead of indiscriminately transmitting all content from user to user, platforms have always exercised a screening function, explicitly (or sometimes by algorithm) choosing what content to allow to "convey a message about the type of community the platform seeks to foster."[104]

D. NetChoice Revisited: The Circuit Rulings

Both district courts came down on the side of discretion for platforms, finding them to be privately owned platforms opened for speech thus able to be moderated as seen fit, unobstructed by the content-based confines of the First Amendment.[105] Further, both courts found that, because of the editorial judgment exercised by platforms, any law regulating what may not be moderated amounts to compelled speech.[106] Both states appealed, as well, sending the question of social media platform's First Amendment rights to the Eleventh and Fifth Circuits.

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98. NetChoice LLC v. Moody, 546 F. Supp. 3d 1082, 1091 (N.D. Fla. June 30, 2021).

99. *Id.*

100. *Id.* at 1091, 1096.

101. NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1100-01 (W.D. Tex. 2021).

102. *Id.* at 1105.

103. *Id.* at 1106 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572-73 (1995); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 20-21 (1986)).

104. *Id.* at 1108.

105. *See id.* at 1106-09; *see* NetChoice LLC v. Moody, 546 F. Supp. 3d 1082, 1091-92 (N.D. Fla. June 30, 2021).

106. *Paxton*, 573 F. Supp. 3d at 1109; *NetChoice*, 546 F. Supp. 3d at 1092-93.

1. The Eleventh Circuit Comes Down on the Side of Speech

As noted, in Florida's appeal, the state makes sure to note that the lower court failed to fully consider the validity of the common carrier argument.[107] Of course, such a statement displays the state's misunderstanding of the distinction between a common carrier and an entity that exercises editorial judgment—one cannot coexist with the other.[108] The Eleventh Circuit, however, quickly dispatches with the common carrier argument as both lower courts did.[109] The court noted that platforms are in the business of disseminating specific curated collections of content to its users, an activity expressly defined as speech as under the First Amendment.[110] Indeed, such dissemination is speech because it communicates the platform's own message or goals to its users, who have presumably agreed with the message by signing up to use the platform.[111] Because of such editorial discretion, the platforms are not open to the public for the dissemination of communications of individuals' own choosing—rather, they open themselves to the public only insofar as the public agrees to their terms of use.[112] They are unlike telegram or broadcast providers and akin to newspapers or cable operators in that way.[113]

Of course, the court agreed that many platforms exercise substantial market power, but cautioned that market share alone a common carrier does not make.[114] Success in the marketplace does not cost a platform its individuality.[115] Finding that platforms do practice speech in their content moderation, the court held Senate Bill 7072 is a mixed bag of content-

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107. Opening Brief of Appellants, NetChoice LLC v. Att'y Gen., Fla., No. 4:21CV220RHMAF, 2021 WL 4105353, at *34 (11th Cir. Sept. 7, 2021).

108. *See NetChoice*, 546 F. Supp. 3d at 1091-92 (finding that platforms are like neither newspapers nor common carriers because though they do exercise some editorial discretion, and so are not mere vessels for transporting information, most of the content moderated is largely invisible to the platform).

109. NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1219-20 (11th Cir. 2022).

110. *Id.* at 1217 (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).

111. *Id.* ("Because a social-media platform itself 'spe[aks]' by curating and delivering compilations of others' speech—speech that may include messages ranging from Facebook's promotion of authenticity, safety, privacy, and dignity to ProAmericaOnly's 'No BS | No LIBERALS'—a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.").

112. *Id.* at 1220.

113. *Id.*

114. *Id.* at 1221.

115. *Id.* at 1222 ("But the Supreme Court has squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the marketplace and hits it big.").

based and content-neutral regulations, the most relevant of which do not even survive intermediate scrutiny.[116] Not only is there scarce legitimate state interest in the regulation (as the state cannot burden some speech in order to advance others' and there are ample alternative channels for communication), but the bill is almost assuredly not narrowly tailored.[117]

2. The Fifth Circuit Finds for Censorship

Unlike its sister circuit, the Fifth Circuit interpreted the Texas regulations not as impacting platforms' right to speak through moderation but rather their ability to censor speakers through it.[118] The court showed its hand and began by proffering an abstention ideal—that the standard for invalidating a law before it has even been able to be enforced is incredibly high.[119] For example, the court noted that the plaintiffs argued House Bill 20 is overbroad but pointed to no cases "applying the overbreadth doctrine to protect censorship rather than speech."[120] In this way, the court delineated the purpose of the overbreadth doctrine, to curtail the state-instigated chilling of speech, from what it defines the plaintiff's actions as mere censorship.[121] Its dismissal led to a circular explanation of why the law is not overbroad, quite literally starting and ending with "[the law] chills *censorship*."[122]

The court went on to explain their reasoning why platforms' moderation is a reframing effort of their censorship efforts to "eliminate speech."[123] The analysis used comes down to the court's opinion that "the Platforms exercise virtually no editorial control or judgment."[124] Their lack of discretion, the court believed, came from their use of algorithms in screening content such that the majority of posts are invisible to the platform.[125] This made them unlike the newspaper in *Miami Herald*, according to the court, because they function primarily as conduits for

116. *Id.* at 1227-28.

117. *Id.* at 1227-29 ("These provisions would apply, for instance, even if a candidate repeatedly posted obscenity, hate speech, and terrorist propaganda. The journalistic-enterprises provision requires platforms to allow any entity with enough content and a sufficient number of users to post *anything* it wants—other than true 'obscen[ity]'—and even prohibits platforms from adding disclaimers or warnings.").

118. NetChoice, LLC v. Paxton, 49 F.4th 439, 448 (5th Cir. 2022).

119. *Id.* at 449.

120. *Id.* at 451.

121. *Id.* at 450-52.

122. *Id.*

123. *Id.* at 455.

124. *Id.* at 459.

125. *Id.*

others' news, comment, and advertising.[126] Of course, to distinguish platforms' discretion from those held to be protected under the First Amendment, the court labeled the terms of service as "boilerplate" to diminish the expressive and evaluative value of a platform's rules.[127]

Along with attempting to establish platforms' practice as editorial-censorship, the court categorized social media platforms as common carriers in line with Thomas's concurrence in *Biden v. Knight*.[128] According to the court, the state can define platforms as common carriers because they hold themselves out to serve the public indiscriminately and are affected with a public interest, one which they have an operable monopoly over.[129]

In differentiating itself with the lower courts and the Eleventh Circuit, the Fifth Circuit found that platforms hold themselves out to the public.[130] This is because the court found that the terms of service the platforms implement are mere boilerplate, not substantive of any true platform value.[131] Further, the court also noted that, to not be a common carrier, the service needs to offer different terms to its users, which platforms do not do.[132] Lastly, the court found that social media is afflicted with a public interest, one that people now depend on.[133] In doing so, the court labeled platforms as the modern forum for political discussion and debate, so "exclusion from the Platforms amounts to exclusion from the public discourse."[134]

Finally, the court noted that even if the Texas law implicated the platforms' First Amendment rights, it only did so in a content-neutral way.[135] That is because the law applies to all platforms' "viewpoint-based censorship" regardless of message.[136] In response to the platforms' argument that the law only targets the largest social media companies for a content-based purpose, the court stated, again, that the law is "not directed at *suppressing* particular ideas or viewpoints . . . [but rather] at

126. *Id*. at 460.
127. *Id*. at 461.
128. *Id*. at 473-77 (citing Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring)).
129. *Id*.
130. *Id*. at 474.
131. *Id*. at 461.
132. *Id*. at 474.
133. *Id*. at 475.
134. *Id*.
135. *Id*. at 480.
136. *Id*.

protecting a diversity of ideas and viewpoints by focusing on the large firms that constitute the modern public square."[137]

Because the law is not content based, the court applied intermediate scrutiny and found an important government interest lies "in protecting the free exchange of ideas and information in this state."[138] Again, this reasoning is based entirely on the conception that what the platforms are practicing is not speech in the form of editorial discretion but censorship.[139]

In analyzing the Texas law, then, the Fifth Circuit made its determination clear from the outset; because the court interprets the platforms' editorial discretion as censorship instead of speech, all questions of law fall in the state's favor. And the court found that the platforms practice censorship, not speech, due to their "algorithmic magic."[140] In doing so, the court perpetuates the idea that social media regulation is thinly veiled politicking, diminishing the legitimate concerns that could arise out of inordinate market power in a few social media companies.

IV. GETTING META: WHAT'S NEXT AND WHAT DOES IT CHANGE?

Courts have been largely hesitant to stretch public forum, public function, or most First Amendment doctrines.[141] For example, in *Prager University v. Google*, the Ninth Circuit dismissed Prager's claims that YouTube served as public function because the Supreme Court had "unequivocally confined *Marsh*'s holding to the unique and rare context of 'company town[s]' and other situations where the private actor 'perform[s] the full spectrum of municipal powers.'"[142] Going further, the court refused to accept the plaintiff's argument that "a private entity can be converted into a public forum."[143] The Ninth Circuit's argument assumed that the public forum and public function doctrines are mutually exclusive. In that way, the government's opening of a public forum cannot

137. *Id.* at 481-82 (emphasis included) (internal citations omitted).

138. *Id.* at 482

139. *Id.* at 483 ("Section 7 is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship—which they call speech—and only to the extent necessary to allow Texans to speak without suffering viewpoint discrimination.").

140. *See id.* at 495 (Jones, J. concurring).

141. *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 998 (9th Cir. 2020) ("To characterize YouTube as a public forum would be a paradigm shift."); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930-31 (2019).

142. *Prager Univ.*, 951 F.3d at 998.

143. *Id.* at 998-99.

serve as a function for the latter doctrine. Such an assumption, however, may not be tenable in the near future.

A. Developments in Social Networks and Internet

After a temporary global shutdown in early 2020, the world's inhabitants became significantly more isolated. As a result, time spent alone and at home increased dramatically.[144] At least partially as a result, the sale of virtual reality (VR) headsets increased by more than seventy percent between 2020 and 2021.[145] This shift towards a more isolated world, exacerbated by the COVID-19 pandemic, offered a glimpse at potential pitfalls the current regulatory system.

The world's largest social media platform, Facebook, recently rebranded to Meta, which is particularly focused on building a virtual reality world in the mold of *Snow Crash*.[146] Meta's signature virtual world, "Horizon," saw a growth in its user base to over 300,000.[147] Horizon users can now invest in virtual real estate, buy virtual Coca-Cola, attend school or meetings, and interact with other users in a nearly infinite world without leaving their homes. As the Metaverse continues to grow, its centralized control should remain in the minds of its users and skeptics. With nearly seventy percent of the adult population using its platform, Meta possesses tools needed to reorient society.[148] In a world where many adults spend increasing time in a virtual headset or in a virtual public forum, a totally dominant social network that intertwines with the virtual world becomes easy to imagine. Thus, the ever-increasing reliance on social media platforms signals the importance of the platform's centralized control.

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144. Ben Casselman & Ella Koeze, *The Pandemic Changed How We Spent Our Time*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/interactive/2021/07/27/business/economy/covid-parenting-work-time.html (finding time spent alone increased and time spent with others outside the home decreased. Further, texting, video chats, computer use, streaming, and gaming all increased).

145. Renée Onque, *Why Homes of the Future Will Have Spaces for the Metaverse*, WALL ST. J. (Apr. 8, 2022, 10:10 AM), https://www.wsj.com/articles/why-homes-of-the-future-will-have-spaces-for-the-metaverse-11649427017 [https://perma.cc/SSD8-JAUN].

146. *See generally* NEIL STEPHENSON, SNOW CRASH (1992); *see* Thomas Martin Pflock et al., *Antitrust: Into the Metaverse*, WILSON SONSINI ALERTS (Mar. 18, 2022), https://www.wsgr.com/en/insights/antitrust-into-the-metaverse.html [https://perma.cc/8QPW-WXXW].

147. Alex Heath, *Meta's Social VR Platform Horizon Hits 300,000 Users*, THE VERGE (Feb. 17, 2022, 5:00 PM), https://www.theverge.com/2022/2/17/22939297/meta-social-vr-platform-horizon-300000-users [https://perma.cc/P7YV-V5BL].

148. *See* PEW RSCH. CTR., *supra* note 51.

Further, social media platforms are undoubtably engaging in an increasing amount of "algorithmic magic," curating content by using algorithms developed by artificial intelligence.[149] In doing so, the platforms, in the eyes of some, seem to be moving away from the editorial discretion that has defined their First Amendment rights so far.[150] Though those algorithms are designed by individuals and are partially afflicted with their dispositions, both good and bad, their use of them signals some disconnect from what may be the typical idea of speech.[151] In an online world where AI programs are writing essays, creating artwork, and arguing in court, the line between what is a protected expression of editorial discretion and a computer-generated idea is never more thin—and dangerous.[152]

B. Greater Need for Regulation as Technology Grows

As reliance on and use of social networks continues to grow, speech on such platforms is less and less likely to be considered anything but public. Currently, speech is not limited to virtual reality and specific social networks. Traditional public forums remain relevant and generate reasonable competition with social media companies, both large and relatively insignificant; there is no true monopoly over the forums for speech.[153] Yet, this is a future not difficult to imagine and one whose signs have already shown themselves.[154] Moreover, the harm that comes from

149. *See* Brieanna Nicker, *@elonmusk and @twitter: The Problem with Social Media is Misaligned Recommendation Systems, Not Free Speech*, BROOKINGS (May 18, 2022), https://www.brookings.edu/research/elonmusk-and-twitter-the-problem-with-social-media-is-misaligned-recommendation-systems-not-free-speech/ [https://perma.cc/2ADE-5AA2].

150. *See* Section II(D)(ii), *supra*.

151. *See* Avijit Ghosh, et al., *Algorithms that "Don't See Color": Measuring Biases in Lookalike and Special Ad Audiences*, AIES '22: PROCEEDINGS OF THE 2022 AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY (July 27, 2022).

152. *See* Nikolas Guggenberger & Peter N. Salib, *From Fake News to Fake Views: New Challenges Posed by ChatGPT-Like AI*, LAWFARE: ARTIFICIAL INTEL. (Jan. 20, 2023, 8:16 AM), https://www.lawfareblog.com/fake-news-fake-views-new-challenges-posed-chatgpt-ai [https://perma.cc/U5CT-2YEF].

153. Traditional public forums are still used, albeit to a much lesser extent than they were in the heyday of First Amendment doctrine under the Warren Court. The most significant effects from traditional public forums like parks and sidewalks may be their ability to be shared over social media and via other electronic communication. This simply reinforces the current shift toward the internet and social media as a new public forum. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

154. *See supra* Section III.a; *see also* James Currier, *Network Effects Predict the Future of Facebook*, NFX (July 2019) https://www.nfx.com/post/network-effects-facebook [https://perma.cc/H5MT-9GVF].

monopolized communication platforms can be avoided by recognizing the dangers it presents both currently and in the future.

Market competition remains a powerful force in the context of social media, allowing for exit and user network effects to informally regulate social media platforms. For example, market competition allows the public to reject a platform when its speech standards do not reflect the users' sentiments.[155] Yet market pressure alone may not be an efficient remedy against the erosion of social media platforms' control. As noted, no platform or company currently holds such a monopoly over social media. Until that point, regulation of these platforms has been wrangled to fit within preconceived walls of doctrine. In the United States, courts remain hesitant to stretch constitutional restraints to these private companies. To courts, platforms may be considered comedy clubs and grocery stores rather than parks and sidewalks.[156] However, courts may be forced to confront the issue of speech occurring on social platforms as Meta and others may soon exercise a level of control on a public sphere necessitating regulatory guidelines.[157]

In the international arena, the threat of social media platforms has already been recognized. In early 2022, the European Union agreed to the Digital Markets Act, a wide piece of legislation aimed at breaking down barriers for entry for emerging tech companies.[158] The law clearly identifies a target, applying to "gatekeeper[s]" which include those companies with a market value of at least 7.5 billion euros or $83 billion.[159]

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155. *See* Robert E.G. Beens, *The Network Effect is Shifting Audiences to Privacy-Friendly Products*, FORBES: INNOVATION (Mar. 16, 2021), https://www.forbes.com/sites/forbestechcouncil/2021/03/16/the-network-effect-is-shifting-audiences-to-privacy-friendly-products/?sh=3163615f4ebf [https://perma.cc/2DGZ-XFEN].

156. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928-30 (2019); *see* United States v. Grace, 461 U.S. 171, 177 (1983); *see* Prager Univ. v. Google LLC, 951 F.3d 991, 998-99 (9th Cir. 2020).

157. *Cf.* Robert Post, *Exit, Voice, and the First Amendment Treatment of Social Media*, LPE PROJECT (Apr. 6, 2021), https://lpeproject.org/blog/exit-voice-and-the-first-amendment-treatment-of-social-media/ [https://perma.cc/Q47B-6CXZ] (using the antitrust framework of voice and exit, Post hypothesizes a social network that does not exist in a well-functioning market and so has no suitable alternatives upon exit. Such a network would be characterized as a common carrier and thus be subject to constitutional restraints, but it could also ensure the possibility of an exit by ensuring alternatives by legislation).

158. Press Release, Council of the EU, Digital Markets Act (DMA): Agreement between the Council and the European Parliament (Mar. 25, 2022).

159. This would include Google, Amazon, Apple, Microsoft, and Meta, of course. *Id.*; *see also* Adam Satariano, *E.U. Takes Aim at Big Tech's Power With Landmark Digital Act*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html [https://perma.cc/GDW5-48KX].

While the Digital Markets Act focuses on markets for digital services, the law's passage validates the concern of a company's total control over a market that so heavily focuses on speech. Where a platform can become so dominant such that there is no viable replacement upon exit, their speech (via their limited editorial discretion) dictates the speech of the entirety of their users. This run-away network effect is the basis for the need for social media platform regulation.

As a starting point, laws like the Digital Markets Act go a long way to preventing complete domination by one platform. The United States should consider similar legislation.[160] Securing as far as possible the chance for competition in the social media market allows for exit and further user network effects, rejecting a platform when its speech standards do not reflect the users' sentiments.[161]

When considering regulation in the United States, platforms' most relevant aspect is their unique editorial discretion. Though some deference must be given to the user's speech, platforms retain significant discretion in the content on their platforms. Yet, platforms exercising editorial discretion likely curate content at the expense of a user's speech.

Platforms seem to practice this discretion in a way that is unique from newspapers. As such, perhaps there is less leeway afforded to their editorial discretion. For example, the effect on users could be considered a silencing of speech subject to First Amendment constraints. Alternatively, the rights of the two parties could be weighed. If a platform's decision is not substantially related to one of its significant editorial goals, then the user's speech should be allowed.[162] Not quite common carriers yet not quite newspapers, social media platforms operate in a middle ground, albeit perhaps closer to Western Union Telegraph Company than the *Atlantic*.[163] Therein lies the distinction that can lead to legislation crafted to avoid constitutional scrutiny. Future regulation could be crafted around the silencing of users by a private actor acting with the authority of platform; such platforms are capable of reaching more people than any public forum ever could before.

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160. There has not been a shortage of digital regulation bills considered recently. *See* Corin Faife, *New Social Media Transparency Bill Would Force Facebook to Open Up to Researchers*, THE VERGE (Dec. 10, 2021, 11:25 AM), https://www.theverge.com/2021/12/10/22827957/senators-bipartisan-pata-act-social-media-transparency-section-230 [https://perma.cc/Y3N4-ANXS].

161. *See* Beens, *supra* note 155.

162. It will likely be the case that most of the platform's interests are significant; they lay them out to form their communities. *See, e.g.*, *The Twitter Rules*, *supra* note 73.

163. *See* NetChoice, LLC v. Moody, No. 4:21CV220, 2021 WL 2690876, at *7 (N.D. Fla. June 30, 2021) (NetChoice argues "that they should be treated like any other speaker," and Florida argues "that social media providers are more like common carriers…The truth is in the middle.").

More practical, and more clearly constitutional, would be market regulations in line with the EU Digital Markets Act that prevent the biggest players in the social media sphere from exerting their power over competing networks and using the pre-existing network effects to further their advantage.[164] Such laws would solve the real issue that states like those targeted by Texas and Florida. Rather than the constitutional rights and speech (or censorship, depending on your slant) of the platforms in question, legislators should focus on ensuring a competitive social marketplace. Such a marketplace would allow competitors to offer restrictions and terms different from those offered by Twitter or Facebook—and perhaps realistically compete with the established brands. Users could choose the terms that best suit their content preferences, driving established platforms to adapt or fall behind. Giving the market the decision of success rather than the companies is the quintessential characteristic of free markets, a characteristic Florida, Texas, and all states would be wise to appreciate.

V. CONCLUSION

Florida's social media law attempts to curb the power social media platforms have over modern speech in the United States. However, the attempted regulation floundered, in large part due to its viewpoint-based policy reasoning.[165] This is not to say that all attempts at curbing platforms' power are motivated by the inherent distrust of the platforms' motivations. Rather, there is a legitimate concern for the future of speech echoed on both sides of the aisle.[166] The path to quelling this concern may be to recognize the unique structure and capability of social media platforms and enact regulations that reflect the distinction between platforms, newspapers, and common carriers. If not, the companies may continue to grow such that most speech literally occurs on a single platform. Even if the path to constitutional regulation of these platforms' speech is murky, betting on antitrust law to account for speech may be a very real alternative.

There is now an opportunity to curb platforms' power over speech while retaining the essence of their communities, which enables them to

164. *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, EUR. COMM., https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited Jan. 20, 2023) [https://perma.cc/XAS7-6X8A].

165. *See* DeSantis Press Release, *supra* note 68.

166. *See* Faife, *supra* note 160 (noting the social media transparency bill was announced by senators Chris Coons (D-DE), Amy Klobuchar (D-MN), and Rob Portman (R-OH)).

create such strong platforms. The split produced by the *NetChoice* decisions in the Fifth and Eleventh Circuits presents the Supreme Court with the chance to define social media and First Amendment law. Its response will undoubtedly shape the world's speech for the next generation.