SOCIAL MEDIA CENSORSHIP: IS IT PROTECTED BY THE FIRST AMENDMENT?

By: Daniella Moretti*

INTRODUCTION

The Internet has become an indispensable tool that many rely on for information, marketing, commerce, and connections. The wide-reaching data accessible by a quick Google search retrieves information that would otherwise take days to find in a library. Society has become greatly dependent on this access to information, allowing individuals to “make quicker, more-informed decisions”1 and “connect [with] anything or anyone at any given moment.”2 However, “[o]ur greatest strength can also be our greatest weakness, and our human relationship with technology is a classic testament to that.”3

Social media platforms have grown immensely over the past decade, with many using social media as their primary source to learn about current events and breaking news.4 A study conducted in 2020, at the height of the COVID-19 Pandemic and the U.S. presidential election, revealed that a staggering 53% of adults in the United States use social media as their news source either “often” or “sometimes.”5 With Facebook being the most

---

* Senior Submissions Editor, Southern California Law Review, Volume 97; J.D. Candidate 2024, University of Southern California Gould School of Law; Bachelor of Commerce 2021, University of British Columbia Sauder School of Business.

2. Id.
3. Id.
4. The Supreme Court has acknowledged that many individuals rely on social media websites as their “principal source[] for knowing 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.” Packingham v. North Carolina, 582 U.S. 98, 107 (2017).
popular, a subset of 36% of Americans regularly use the site to learn about news, out of a total of 68% of Americans who are on Facebook generally. With X (formerly known as Twitter) closely behind, 15% of Americans regularly refer to the site as their news source, out of a total of 25% of Americans registered on X generally.

Social media platforms are owned and operated by private entities that currently have full control over the implementation of algorithms and other content-moderation policies. Due to the influential role of social media, especially with younger generations, there has been increased tension regarding a state’s ability to regulate the interaction between platforms and their users through content moderation. Platforms are resisting state intervention by asserting First Amendment claims, stating that platforms have a right to free speech and that content-moderation decisions are equivalent to protected speech. Currently, there is a circuit split between the U.S. Court of Appeals for the Fifth and Eleventh Circuits addressing this issue, in which Florida and Texas enacted statutes that placed major restrictions on social media platforms’ ability to freely censor or moderate content. Specifically, both statutes include nondiscrimination provisions, in addition to other disclosure provisions, that would prohibit platforms from censoring based on viewpoint. The key tension arises between the purported First Amendment rights of the private entities that run social media platforms and the ability for users to express and be exposed to diverse viewpoints through “one of the most important communications mediums used in...”

Both Florida and Texas argue that the statutes prohibiting viewpoint discrimination are constitutional because they do not restrict protected speech, and even further, that platforms should be subjected to common

---

6. Id.
7. Id.
8. See NetChoice, LLC v. Att’y Gen., 34 F.4th 1196, 1203 (11th Cir. 2022) (explaining that “with minor exceptions, the government can’t tell a private person or entity what to say or how to say it”).
9. Shearer & Mitchell, supra note 5 (stating that those in the age group of 18–29 make up 47% and 39% of the total users that receive news from Instagram and X, respectively).
11. Id.
carrier obligations.\textsuperscript{14} The plaintiffs, representing large social media platforms, instead argue that content-moderation decisions require the use of editorial judgment,\textsuperscript{15} which has been interpreted as protected speech in past cases.\textsuperscript{16} The importance of providing meaningful restrictions on platforms’ censorship policies has become even more evident with the recent acquisition of X, exemplifying that a change in management in such relied-on commodities could potentially be devastating to the access of information.\textsuperscript{17} Due to the increased uncertainty regarding the status of the law and the importance of providing direction and uniformity on interpreting the Constitution,\textsuperscript{18} a petition for a writ of certiorari was filed by Texas and granted by the Supreme Court. Opening briefs were filed on November 30, 2023, and oral argument occurred on February 24, 2024.\textsuperscript{19}

One of the main difficulties in resolving this issue is the continuum of control and expression that platforms exert when moderating content. This Note will argue that the ultimate determination of whether moderation decisions rise to protected speech will be fact dependent. Platforms that lack a clear target audience and only censor objectively obscene content (rather than subjective beliefs) do not convey a message through their content moderation that amounts to protected speech. Most large platforms, such as X, Facebook, Instagram, and TikTok\textsuperscript{20} would be included within this category. Conversely, this Note will argue that platforms that clearly moderate content based on political or other personal beliefs, and express these choices with their users, will have First Amendment protections as the moderation expresses a message equivalent to speech. By conveying subjective viewpoints through a platform’s content moderation, potential users can make informed decisions about whether to opt-in to the platform’s services. Groups that fall within this second category include Vegan Forum,

\textsuperscript{14} See Lewis, supra note 10. Common carriers have heightened obligations, in which certain private entities are required to serve the public.

\textsuperscript{15} Id. Editorial judgment is a term that describes an entity engaging in First Amendment–protected speech through expressive actions.


\textsuperscript{17} A critic mentioned that X’s new content-moderation policy seems “wholly dependent on what side of the bed [new owner Elon] Musk wakes up on.” Musk has chosen certain controversial users to be allowed back on the site, including Andrew Tate and Donald Trump, while disallowing others such as Alex Jones. Caleb Ecarma, We’re Officially in the Elon Musk Era of Content Moderation, VANITY FAIR (Nov. 21, 2022), https://www.vanityfair.com/news/2022/11/elon-musk-twitter-content-moderation [https://perma.cc/89GF-YTJM].


ProAmerica Only, and Democratic Hub.\textsuperscript{21}

Alternatively, with a view on consistency and the best overall policy outcome, there is an argument that Congress should designate social media platforms as common carriers in order to regulate this area similarly to the telecommunications industry.\textsuperscript{22} This Note primarily provides a doctrinal analysis of common carrier law and editorial judgment and applies the analysis to the conflicting arguments raised in the circuit-split cases. While the current debate is highly politicized, with the perceived motive of the Florida and Texas statutes to stop platforms from censoring conservative views,\textsuperscript{23} this Note argues that analyzing these issues with a neutral, doctrinal-focused lens will provide a positive long-term solution.

Part I of this Note will establish an example of a current content-moderation policy exercised by a large social media platform. Part II will provide a doctrinal analysis concerning First Amendment law, specifically referring to the development and current state of “common carriers” and “editorial judgment.” Part III will identify the state and federal statutes that underly the circuit-split litigation. Part IV will discuss the facts and the conflicting rationales of the current circuit-split cases. This Note will also highlight the most persuasive arguments and their application to the doctrinal analysis of First Amendment law provided in Part II. Then, Part V will speak to the significance of resolving this issue and how it will affect social media platforms, states, and the greater community. A conclusion will follow.

\section{I. SOCIAL MEDIA PLATFORMS’ CONTENT-MODERATION POLICIES}

Content moderation is defined as the “organized practice of screening user-generated content . . . posted to . . . social media” and other Internet sites.\textsuperscript{24} However, there is a continuum on the amount of moderation a


\textsuperscript{22} See Communications Act of 1934, 47 U.S.C. § 151.


\textsuperscript{24} Sarah T. Roberts, \textit{Content Moderation}, in \textit{ENCYCLOPEDIA OF BIG DATA} 211, 211 (Laurie A. Schintler & Connie L. McNeely eds., 2017).
platform engages in. While some platforms solely moderate objectively obscene and threatening material, others screen based on subjective viewpoints. Since the claims raised in the circuit split ask the question of whether content moderation is interpreted as First Amendment speech, the subjectivity of the moderation decisions should be a significant factor in determining whether a message is conveyed.

To better grasp the legal analysis outlined in further sections, I will begin by giving an example of a content-moderation policy currently in use by YouTube. YouTube publishes information on Google Transparency regarding the type of content that the platform moderates, how screening is completed, and other metrics concerning removal actions made by YouTube within the past quarter. Additionally, YouTube’s comprehensive “Community Guidelines” and content-moderation policies are made available to the public.

The company’s main objective is to foster a safe community by “[r]emov[ing] content that violates [its] policies, [r]educ[ing] the spread of harmful misinformation and borderline material, [r]ais[ing] up authoritative sources for news and information, and [r]eward[ing] trusted Creators.” The Community Guidelines’ policies apply to all content posted on YouTube, including videos, comments, links, and thumbnails, and is applied “equally—regardless of the subject or the creator’s background, political viewpoint, position, or affiliation.” The company promotes neutral objectivity in its moderation policies, with the primary motivation of providing a “safer community” and “giving creators the freedom to share a broad range of experiences and perspectives.”

More specifically, the platform eliminates content that displays “pornography, incitement to violence, harassment, or hate speech.” In moderating its content, the platform relies on people and technology to flag content, including its own employees and those in the greater community. However, from January 2023 to March 2023, approximately 93% of videos

29. Community Guidelines, supra note 27.
30. Id.
32. Id.
removed were flagged by technology.\textsuperscript{33} Across the same time period, the most common reasons for removal of videos were child safety (34.3%), violent or graphic material (15.6%), nudity or sexual content (10.2%), and harmful or dangerous content (20.9%). YouTube also provides data regarding appeals, with approximately 6% of removed videos appealed, and approximately 7.2% of those appealed videos reinstated, from January 2023 to March 2023.\textsuperscript{34}

Furthermore, under the header “Elections misinformation,” YouTube’s Community Guidelines warn users against posting content related to voter suppression, candidate eligibility, incitements to interfere with democratic processes, the distribution of hacked materials, and election integrity, as well as providing examples of each.\textsuperscript{35} If content is posted within these categories, YouTube will remove the content and send an email to the content-provider for the reasons of the removal.\textsuperscript{36}

The information above, while not comprehensive, provides a flavor on how platforms may censor content and circulate the information to users. Due to its “neutral objectivity” and commitment to a safe space rather than moderating content based on a particular viewpoint, there is likely no express message derived from YouTube’s content-moderation policies.

\section*{II. BACKGROUND ON FIRST AMENDMENT LAW}

It is important to recognize that there are two possible First Amendment claims regarding social media platforms’ ability to censor content. The first is whether content creators and users of the platform have a private cause of action against the platform for restricting their freedom of speech through censorship decisions. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech,”\textsuperscript{37} which restricts government actors from limiting or prohibiting an individual’s expression “simply because society finds the idea itself offensive or disagreeable.”\textsuperscript{38} While the First Amendment expressly governs the actions of government officials, a private entity can also be held to the same standard if the company serves a

\begin{footnotesize}
\begin{itemize}
\item[33.] See id. Under the chart named “Videos removed, by source of first detection,” 6,082,092 videos were removed through automated flagging, with a total of 6,487,896 videos removed, between January 2023 and March 2023. Therefore, approximately 93% of the videos were removed based on technology flagging the content rather than user or government agency detection.
\item[36.] Id.
\item[37.] U.S. CONST. amend. I.
\end{itemize}
\end{footnotesize}
“public function.” However, the U.S. Supreme Court has consistently held that online platforms do not serve a public function, and therefore, are not subject to First Amendment scrutiny for infringing on others’ speech.

The second claim is whether private social media platforms have their own First Amendment right to moderate and censor content without government interference. Due to the lack of federal regulation on censoring content, Florida and Texas passed “first-of-kind” statutes that limit platforms’ freedom in choosing which information to display and which to censor. In an effort to enjoin the new state laws, two trade associations representing large platforms are asserting First Amendment claims, stating that platforms themselves have a right to protected speech, and consequently, that content-moderation decisions should be interpreted as speech. While most private entities are entitled to some level of constitutional protection from government actors interfering with their free speech, the remaining question is whether this protection should extend to their moderation decisions, which is the focus of the circuit split discussed in Part IV below.

To determine the level of protection social media platforms are granted, we must first analyze two questions: (1) when does the law classify a private entity as a common carrier, and what are the implications of this classification; and (2) if the entity is not classified as a common carrier, are moderation decisions considered protected speech.

Justice Thomas’s concurrence in Biden v. Knight First Amendment Institute at Columbia University highlights the difficulty in “applying old doctrine to new digital platforms,” as well as the importance of properly classifying whether social media platforms are common carriers or engage in editorial judgment because of the “unprecedented . . . concentrated control of so much speech in the hands of a few private parties.” Justice Thomas also speaks to the immediacy of this issue and that the Supreme


41. See TEX. CIV. PRAC. & REMEDIES CODE ANN. §§ 143A.001–.008 (West 2021); TEX. BUS. & COM. CODE ANN. §§ 120.001–151 (West 2021); FLA. STAT. ANN. § 501.2041 (West 2021).


SOCIAL MEDIA CENSORSHIP

The American legal system has long recognized certain businesses as common carriers, subjected to special regulations, including a requirement to serve all comers. Historically, this applied primarily to public-facing transportation companies, such as private railways. In modern times, the common carrier category has broadened to include communication companies, like telephone networks. The question of whether social media platforms are classified, or should be classified, as common carriers is important because it would allow states “to evade (or at least minimize) First Amendment scrutiny.”

While there is no clearly defined test for common carriers, Justice Thomas’s concurrence in Knight First Amendment Institute outlines certain considerations that have historically been important, including whether the company has substantial market power, whether the industry “rises from private to . . . public concern,” whether the company is within the transportation or communications industries, whether it receives countervailing benefits from the government, and whether the company holds itself out as providing indiscriminatory service to the public.

The most prevalent considerations are the “holding-out” and market-power factors. In National Ass’n of Regulatory Utility Commissioners v. FCC, the court treats holding out as offering services to the public, as compared with individualized business transactions. Additionally, it is described as the “obligation to accept applicants on a non-content oriented basis.” Holding out tends to be a “necessary but not sufficient condition.”

However, when taken literally, a company can easily get around this factor by placing restrictions on who is allowed to use their services. To better understand the effects of a holding-out requirement, it may be helpful

---

44. Id.
45. Adam Candeub, Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230, 22 YALE J.L. & TECH. 391, 398–403 (2020). In England the first common carriers were ferries, in which “a ferry operator [was] required to maintain the ferry and to operate it and repair it for the convenience of the common people.” NetChoice, LLC v. Paxton, 49 F.4th 439, 469 (5th Cir. 2022) (quoting Trespass on the Case in Regard to Certain Mills, YB 22 Hen. VI, fol. 14 (C.P. 1444)).
46. Id.
47. Id.
to analogize the rule with prescriptive easements in property law. Prescriptive easements are nonpermissive uses that ultimately ripen into a property interest. A key element is hostility: a nonowner must use the land against the property owner’s wishes to have a claim against the land. Because property owners know about the hostility element, many post signs or otherwise welcome the public to their land to defeat a claim for a prescriptive easement.\footnote{See David W. Dunlap, Closing for a Spell, Just to Prove It’s Ours, N.Y. TIMES (Oct 28, 2011), https://www.nytimes.com/2011/10/30/nyregion/lever-house-closes-once-a-year-to-maintain-its-ownership-rights.html [https://perma.cc/PS9E-TRCU].} As an example, Rockefeller Center in New York is closed for one day each year to exercise its right to exclude.\footnote{Id.} These simple actions are essentially legal loopholes that disqualify prescriptive easement claims, similar to how a platform could avoid common carrier obligations by restricting use of their services. Considering platforms like Instagram, users of the site must first accept terms and conditions. However, since the terms apply consistently to anyone using the platform, Instagram would still be holding out to the general public.\footnote{See Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co., 7 A. 809, 811 (1887) (“The law requires [common carriers] to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations.”); NetChoice, LLC v. Paxton, 49 F.4th 439, 474 (5th Cir. 2022) (“The relevant inquiry isn’t whether a company has terms and conditions; it’s whether it offers the ‘same terms and conditions [to] any and all groups.’”) (citation omitted).} Alternatively, if Instagram created limitations on who could join the site and discriminated against certain groups, then the holding-out requirement would fail. There remains uncertainty as to what level of limitations would be sufficient to combat the perception of platforms holding out to the public.

The market-power factor tends to have mixed commentary on whether it is an essential requirement of a common carrier analysis.\footnote{Yoo, supra note 52, at 466.} In America, the rise of large railroads created the opportunity for private railroad companies to allegedly inflict abusive tactics on customers, largely due to the lack of competition and the reliance of many industries on using railroads as a mode of transportation.\footnote{NetChoice, LLC v. Paxton, 49 F.4th at 470.} Often, railroad companies would use rate differentials and exclusive contracts to control industries dependent on cross-country shipping, essentially creating monopolies with their allies.\footnote{Id.; see, e.g., Everitt Messenger v. Pa. R.R. Co., 37 N.J.L. 531, 534 (1874) (refusing to enforce rate differences because of common carrier duties not to discriminate). This same logic continued with the introduction of the telegraph: legislatures grew concerned about the possibility of private entities controlling powerful new technology that could manipulate the flow of information to the public when serving their own economic or political self-interest. See Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 HARV. L. REV. 2299, 2316–17 (2021).} Therefore, imposing common carrier duties on railroad companies was necessary to prevent these abusive tactics and require the companies to serve all
indiscriminately. However, while market power appears to be a relevant factor, it is not likely conclusive nor necessary when determining whether an industry is subject to common carrier obligations. This is evidenced by the fact that many currently designated common carriers do not have a substantial market share, such as the airline industry.\footnote{Even though railway companies may have had a large market share historically, this has diminished over time with the many alternatives to travelling, such as by airplane or car. However, railway and other transportation companies are still within the category of common carriers and must serve the public indiscriminately. \textit{See Sophie Hayashi, Airlines’ Common Carrier Liability Protection: Will Proposed Hemp and Telecom Rules Weaken the Shield?}, 33 AIR & SPACE LAW., No. 4, 2020, at 4, 4.} However, market power does provide a justification that strongly supports imposing nondiscriminatory restrictions due to the immense influence and control on an industry.\footnote{As an example, when a person builds the only wharf in a port, “the wharf and crane and other conveniences are affected with a publick [sic] interest, and they cease to be juris privati only.” Lord Chief Justice Matthew Hale, \textit{De Portibus Maris, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND} 45, 77–78 (Francis Hargrave ed., 1787). Therefore, common law does not allow private individuals with such market dominance to impose discriminatory or unreasonable rates.}

Additionally, there is clear precedent for regulating the transportation and communication industries as common carriers.\footnote{Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).} However, it is important to understand the theoretical foundations to this rule, rather than comply with an “arbitrary title” that provides little “to discern the true basis for [the] prophecy.”\footnote{Oliver Wendell Holmes, \textit{The Path of the Law}, 110 HARV. L. REV. 991, 1006 (1997).} While having a bright-line test appears advantageous, the seemingly broad definition of “communications” lacks clarity when applied to novel technology. Additionally, courts have refused to apply the communications bright-line rule to broadcasters and cable operators, and instead classify these companies as private entities that are entitled to First Amendment protections.\footnote{In \textit{FCC v. Midwest Video Corp.}, the Federal Communications Commission promulgated rules that required cable television systems to make certain channels available for access by third parties, which would deprive cable operators from discretion on what content is transmitted and who may exploit these “access channels.” However, the Supreme Court held that these rules were an imposition on cable companies’ freedoms, \textit{FCC v. Midwest Video Corp.}, 440 U.S. 689, 707 (1979), and were not “reasonably ancillary to the effective performance of [the Commission’s] various responsibilities for the regulation of television broadcasting;” \textit{id.} at 708 (quoting \textit{United States v. Sw. Cable Co.}, 392 U.S. 157, 178 (1968)). Therefore, the access requirements, if upheld, would wrongfully impose common carrier obligations on cable companies, which is expressly prohibited by the Communications Act of 1934, stating that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier.” \textit{Midwest Video Corp.}, 440 U.S. at 706–07; 47 U.S.C. § 153(h).} In the case of platforms, there is uncertainty as to whether this factor applies, as platforms have an element of communicating information. However, the hosted information may also be interpreted more closely to a publisher or broadcaster, falling outside of common carrier...
precedent.\textsuperscript{64}

The remainder of Justice Thomas’ factors are less persuasive. The public interest requirement was rejected by the Supreme Court in \textit{Nebbia v. New York} on the basis that it was difficult to define and “form[ed] an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.”\textsuperscript{65} The Court affirmed this conclusion in \textit{Jackson v. Metropolitan Edison Co.}.\textsuperscript{66} The test has “long been recognized as indeterminate”\textsuperscript{67} because “most things can be described as ‘of public interest.’”\textsuperscript{68} Therefore, the public interest prong alone will provide little support in classifying an industry as a common carrier. Additionally, though common carriers have historically been given “special privileges . . . [that] place them into a . . . distinct [category] from other [private] companies,”\textsuperscript{69} these privileges are granted at the time of or after being designated as a common carrier, rather than as a justification for being designated as such. Even though it is argued that section 230 of the Communications Decency Act provides “special privileges” similar to those applied to common carriers, the motivation for enacting section 230 was to protect hosts from defamation liability rather than to establish common carrier obligations.\textsuperscript{70} Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”\textsuperscript{71} Additionally, Congress could have simultaneously established within the statute that interactive computer service providers are deemed common carriers if that was its intent.\textsuperscript{72}

Ultimately, the determination of whether social media platforms are considered common carriers will rest upon a balancing test of the above factors. If platforms are indeed classified as common carriers, there still may be First Amendment protections that sustain this classification.\textsuperscript{73} Even

\begin{footnotesize}
\begin{tabular}{|l|}
\hline
\textsuperscript{64} Yoo, \textit{supra} note 52, at 470–72. \\
\textsuperscript{65} Nebbia \textit{v.} New York, 291 U.S. 502, 536 (1934). This decision marked a break with the public interest requirement adhered to in the \textit{Lochner} era. \textit{See} Munn \textit{v.} Illinois, 94 U.S. 113, 126, 130 (1876); Yoo, \textit{supra} note 52, at 468–69. \\
\textsuperscript{67} Yoo, \textit{supra} note 52, at 468. \\
\textsuperscript{68} Biden \textit{v.} Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). \\
\textsuperscript{69} \textit{Id.} \\
\textsuperscript{70} NetChoice, LLC \textit{v.} Paxton, 49 F.4th 439, 466 (5th Cir. 2022). \\
\textsuperscript{71} 47 U.S.C. § 230(c)(1). \\
\textsuperscript{72} \textit{Compare} 47 U.S.C. § 230, \textit{with} 47 U.S.C. § 153(11) (stating that common carriers are “any person engaged . . . in interstate or foreign communication by wire or radio[,] . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier”). \\
\textsuperscript{73} \textit{See, e.g.}, Ohio \textit{ex rel.} Dave Yost \textit{v.} Google LLC, No. 21-CV-H-06-0274, 2022 Ohio Misc. LEXIS 200, at *18 (Ct. Com. Pl. May 24, 2022) (“[M]erely declaring or designating [a company as] a
\end{tabular}
\end{footnotesize}
though common carriers are not protected when discriminating amongst individuals, there are cases that support some level of First Amendment–protected speech with regard to collateral aspects of providing common carrier services, such as commercial speech. Additionally, courts have clarified that common carrier regulation is determined on an “activity-by-activity” basis, and that an entity is a common carrier “only to the extent that [it] is engaging in common carrier services.”

B. EDITORIAL JUDGMENT

If social media platforms are not classified as common carriers, then the platforms remain private entities that enjoy First Amendment protections. However, the protections only go as far as protecting “speech.” Therefore, if platforms are not conveying a message through their content moderation and censorship decisions, then there is no First Amendment cause of action to enjoin the state statutes.

In recent case law, the Supreme Court has held that the use of editorial judgment can amount to speech protected by the First Amendment. Editorial judgment is defined by one commentator as an “action that editors perform on others’ speech[,] which sometimes expresses and conveys an editor’s own message.” This message must be communicated to users and not be an invisible editorial decision. It is important to note that even when certain companies use editorial judgment to portray a message, not “every aspect of operating a communications network is protected speech.” Therefore, even if certain actions of social media platforms fall within the “editorial judgment” category, the specific action must still be scrutinized for First Amendment protection.

common carrier does not, of itself, . . . infringe on [its] constitutional speech rights . . . . It is the burdens and obligations accompanying that designation that implicate the First Amendment.”

74. See, e.g., U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016) (“Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question.”).


76. Yoo, supra note 52, at 490.

77. FTC v. AT&T Mobility LLC, 883 F.3d 848, 850 (9th Cir. 2018); see also 47 U.S.C. § 153(51) (stating that a telecommunications carrier is “treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services”).


80. Id. at 158.

The landmark Supreme Court case Miami Herald Publishing v. Tornillo provides a guideline on what constitutes editorial judgment for purposes of a First Amendment analysis. In Miami Herald, a Florida state law was deemed unconstitutional because it imposed a content-based penalty on newspaper companies, requiring newspapers to honor a free “right to reply” for any political candidate that the newspaper criticized. The right to reply was required to be of equal size and prominence as the initial critique to allow the candidate to present an opposing view. However, in practice this penalty would likely dissuade criticism, and “political and electoral coverage would be blunted or reduced.”

Due to the interference with newspaper editors’ judgment when curating material to include in an issue as well as the government’s interest in upholding the freedom of press, the Court vacated the Florida statute. The Court reasoned that limiting the exercise of editorial judgment is equivalent to “restrict[ing] and stifl[ing] [First Amendment] protected expression.”

Additionally, the Court held that newspapers are “more than a passive receptacle or conduit for news, comment, and advertising,” suggesting that a passive receptacle or conduit may not exercise editorial judgment. The Court further gave examples of editorial judgment, such as choosing which material to include in a newspaper issue, making decisions on any limitations of size and content, and deciding how to portray public and political issues. Thus, enacting a law that unduly restricts the judgement of newspaper editors essentially restricts their speech and would be unconstitutional unless the law survives the applicable scrutiny balancing test (discussed below).

Furthermore, in order to qualify as First Amendment–protected speech, the editorial judgment must be expressive and communicative. A speaker satisfies this requirement if the speaker intends to convey a message through the speech or conduct, the audience understands the message, and the speaker uses a discrete set of works or acts. Past examples of communicated messages include floats in a parade, op-ed pages in

83. Id. at 241, 243–244.
84. Id. at 244.
85. Id. at 257.
86. Id. at 258.
87. Id. at 245, 258.
88. Id. at 258.
89. Id.
90. Id.
91. Candeub, supra note 79, at 160.
92. Id.
In Pruneyard Shopping Center v. Robins, the Supreme Court affirmed the state court’s decision requiring a privately owned mall to allow petitioners on its property. The court differentiated speech of the individual petitioners from speech of the private mall, stating that the mall could “expressly disavow any connection with the [pamphleteers’] message by simply posting signs in the area where the speakers [stood].” Additionally the Supreme Court stated that since the mall is open to the public, the message of those passing out pamphlets would not be understood as the message of the owners of the private mall.

Conversely, in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, the Supreme Court held that a company organizing a parade had the right to restrict certain groups from being included, and that the state could not enforce its public accommodations law to alter the organizer’s discretion. The Court compared parade organizers with newspaper editors and held that a parade organizer similarly conveys a message through the “select[ion of] expressive units of the parade from potential participants.” The Supreme Court noted that “every participating unit affects the message conveyed by the private organizer” as “the parade’s overall message is distilled from the individual presentations along the way,” and that any alteration of that message would be attributed to the organizers. Therefore, Hurley emphasized that an important aspect of editorial judgement is whether a private entity is “intimately connected” with the expressive communication that the entity is forced to host.

Lastly, in Rumsfeld v. Forum for Academic & Institutional Rights (FAIR), a federal statute was upheld that required law schools to allow military recruiters to access students in the same capacity as other employers. If a law school chose not to comply, their federal funding would be halted. The Supreme Court held that, similar to the private mall

---

94. Id. at 87.
95. Id. at 87.
96. Id.
98. Id. at 570, 574–75.
99. Id. at 572–73, 577.
100. Id. at 577 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).
102. Id. at 51.
in *Pruneyard*, the school was not conveying a message of support when hosting interviews and receptions for military recruitment.\(^{103}\) Additionally, the Court held that denying military recruiters access was not “inherently expressive” behavior that would send a message of the school’s disagreement with the military without also being accompanied with “explanatory speech.”\(^{104}\) Rather, students would be unable to decipher whether the recruiters were disallowed from campus or whether they instead chose not to recruit at the school for other reasons.\(^{105}\)

It is important to note that a First Amendment analysis does not cease after concluding that a law restricts speech. The final step in determining whether the law will ultimately survive is whether it passes the designated scrutiny test. Therefore, even if the Supreme Court determines that platforms engage in editorial judgement and that the state statutes in question infringe on their speech, the Court may still uphold the statutes if they pass the appropriate scrutiny analysis.

The main scrutiny tests in First Amendment jurisprudence are strict scrutiny, which is a very high bar for the government to overcome, and intermediate scrutiny. To apply the lesser standard of intermediate scrutiny, the law must be content-neutral, such that it is both viewpoint neutral and subject matter neutral.\(^{106}\) The main inquiry into content neutrality is “whether the government . . . adopted a regulation of speech because of [its agreement or] disagreement with the message it conveys,”\(^{107}\) and whether the law distinguishes “favored speech from disfavored speech on the basis of the ideas or views expressed.”\(^{108}\) Conversely, laws that “confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”\(^{109}\)

Alternatively, if the law is content based, the proper test to apply is strict scrutiny, in which the government must prove that they have a compelling governmental interest for passing the law, and that the law is narrowly tailored to meet its objective.\(^{110}\)

\(^{103}\) *Id.* at 64–65.
\(^{104}\) *Id.* at 66.
\(^{105}\) *Id.* at 64–65.
\(^{109}\) *Id.*
\(^{110}\) *Id.* at 653.
III. STATE AND FEDERAL STATUTES

The main contention in the circuit split arose with the enactment of two state laws, both in 2021, that limit social media platforms’ ability to moderate and prioritize content on their sites. Not only do the statutes restrict certain actions such as discriminating based on viewpoint, but they also compel the disclosure of information.

A. TEXAS STATUTE

The Texas statute, House Bill (“HB”) 20, only applies to platforms with over 50 million active users in the United States in a calendar month and to users who reside in Texas, do business in Texas, or share or receive content on a social media platform in Texas. Platforms that meet the procedural criteria must comply with four requirements: refrain from viewpoint-based censorship, implement a complaint and appeals system, fulfill disclosure obligations, and publish an acceptable use policy.

The main provision in dispute prohibits social media platforms from “censor[ing] a user, a user’s expression, or a user’s ability to receive the expression of another person based on . . . the viewpoint of the user[,] the viewpoint of the shared content[,] or . . . a user’s geographic location.” This broad prohibition on viewpoint discrimination requires platforms to either provide all viewpoints on a topic, or conversely, refrain from allowing any content on the topic. To better understand the effects of this provision, the district court in Texas gave the example that a platform could not display content on the atrocities of the Holocaust without also allowing content that promotes Nazism. While this is an extreme example, it signifies that prohibiting viewpoint-based censorship could lead to unanticipated effects, such as protecting hate speech and promoting viewpoints that are extremely polarizing.

HB 20 also requires platforms to provide “an easily accessible
complaint system” that enables users to submit complaints and track their status.\footnote{121} Any complaints that flag illegal content must be processed within forty-eight hours.\footnote{122} Additionally, if content is deemed to violate the platform’s policy and is therefore removeable, the platform must notify the content creator, provide an explanation detailing the reason for removal, allow the user to appeal the decision, and, finally, reply with the ultimate determination within fourteen business days.\footnote{123}

HB 20 also compels “public disclosures” of information about the platforms’ content management, data management, and business practices.\footnote{124} This includes disclosing “specific information” regarding how the platform curates and targets content to its users, promotes and moderates content, and uses algorithms to determine the results of a search.\footnote{125} The disclosures must be “sufficient to enable users to make an informed choice regarding [their] . . . use of . . . the platform.”\footnote{126} There is uncertainty about how specific the information must be, but it can be inferred that certain trade secret information may have to be released to comply with these disclosures.

Finally, HB 20 requires platforms to publish an “acceptable use policy” that educates users on allowable content and explains the steps that platforms take to ensure compliance with their policy.\footnote{127} The acceptable use policy also includes the publication of a biannual transparency report outlining actions taken to enforce the policy.\footnote{128} The transparency report must document the number of alerts within the past six months, the percentage of alerted content that was ultimately removed, the countries of the users who posted removable content, the number of appeals and how many were successful, and a description of each tool used in enforcing the acceptable use policy.\footnote{129}

B. FLORIDA STATUTE\footnote{130}

The Florida statute, Senate Bill (“SB”) 7072, generally mirrors the Texas statute discussed above, also requiring platforms to publish their censorship policies, provide notice to users, refrain from discriminatory
censorship, and provide a well-functioning complaint system.\textsuperscript{131}

SB 7072 includes similar procedural criteria as well: it is only applicable to platforms doing business in the state with either gross revenue in excess of $100 million or with at least 100 million monthly users globally.\textsuperscript{132} Although the specific criteria are different in the Texas statute, which requires 50 million users in the United States alone,\textsuperscript{133} the distinction is likely not relevant because both statutes target large social media platforms with great market power.

Similar to the Texas statute, SB 7072 includes a broad prohibition on discriminatory censorship actions, requiring platforms to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users."\textsuperscript{134} In addition, the Florida statute expressly prohibits applying post-prioritization or shadow-banning algorithms on content posted by or about a candidate,\textsuperscript{135} as well as disallowing platforms to censor, deplatform, or shadow ban a journalistic enterprise.\textsuperscript{136} Deplatforming is defined as any action taken to permanently delete or ban a user from the platform, or temporarily delete or ban in excess of fourteen days.\textsuperscript{137} Post-prioritization is defined as arranging content in a more or less prominent position on a feed or in search results.\textsuperscript{138} Shadow banning is defined as limiting or eliminating exposure of content.\textsuperscript{139} Finally, censoring is defined broadly as "any action . . . to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content . . . posted by a user."\textsuperscript{140}

Furthermore, SB 7072 requires social media platforms to publish standards on how the platform censors and limits the visibility of content,\textsuperscript{141} similarly to Texas’s acceptable use policy.\textsuperscript{142} An additional requirement is for increased transparency with respect to policy changes, requiring platforms to notify their users of any changes to the rules, terms, and agreements before implementing them and forbidding platforms from

\begin{itemize}
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. § 501.2041(1)(g)(3–4).
  \item \textsuperscript{133} TEX. CIV. PRAC. & REM. CODE ANN. § 143A.004 (West 2021); BUS. & COM. § 120.002.
  \item \textsuperscript{134} FLA. STAT. ANN. § 501.2041(2)(b).
  \item \textsuperscript{135} Id. § 501.2041(2)(b).
  \item \textsuperscript{136} Id. § 501.2041(2)(j).
  \item \textsuperscript{137} Id. § 501.2041(1)(c).
  \item \textsuperscript{138} Id. § 501.2041(1)(e).
  \item \textsuperscript{139} Id. § 501.2041(1)(f).
  \item \textsuperscript{140} Id. § 501.2041(1)(b).
  \item \textsuperscript{141} Id. § 501.2041(2)(a).
  \item \textsuperscript{142} See TEX. BUS. & COM. CODE ANN. §§ 120.052–053 (West 2021).
\end{itemize}
making changes more frequently than once every thirty days.\textsuperscript{143}

SB 7072 requires that platforms, when removing content, must provide proper written notice of the removal within seven days, and the notice must be accompanied by a thorough explanation of how the platform was alerted to the content and the reasons for the removal.\textsuperscript{144} If content is ultimately removed or an individual is deplatformed, the user is able to retrieve their content for at least sixty days after receiving the notice.\textsuperscript{145}

SB 7072 also requires platforms to “categorize” algorithms used for post-prioritization and shadow banning,\textsuperscript{146} which appears to be a lesser burden than Texas’s requirement to disclose “specific information” about their algorithms.\textsuperscript{147} Not only are users able to make informed decisions about using the platform, but SB 7072 also grants the option to opt-out of the content-moderating algorithms and instead choose to view content chronologically.\textsuperscript{148} Finally, the Florida statute is aggressive with compliance, allowing the Department of Legal Affairs to investigate suspected violations and bring civil or administrative actions, as well as giving users a private cause of action against platforms and authorizing courts to award damages or injunctive relief.\textsuperscript{149}

While there are differences between the Texas and Florida statutes, the substance of limiting platforms’ ability to moderate content freely raises the same question about First Amendment protections granted to platforms. Therefore, the differences in the statutes are not likely the cause of the circuit split.

C FEDERAL LAW—SECTION 230

In addition to state law, § 230 in title 47 of the United States Code (“section 230”) may provide guidance on how courts should interpret content moderation.\textsuperscript{150} The statute was initially enacted to ease the uncertainty with regards to defamation liability of Internet computer service providers.\textsuperscript{151} An Internet computer service provider is a system that “provides or enables computer access by multiple users to a computer server,”\textsuperscript{152} which has been

\textsuperscript{143} FLA. STAT. ANN. § 501.2041(2)(c).
\textsuperscript{144} Id. § 501.2041(2)(d), (3).
\textsuperscript{145} Id. § 501.2041(2)(i).
\textsuperscript{146} Id. § 501.2041(2)(f)(1).
\textsuperscript{147} See BUS. & COM. § 120.051.
\textsuperscript{148} FLA. STAT. ANN. § 501.2041(2)(f)(2).
\textsuperscript{149} Id. § 501.2041(5), (6).
\textsuperscript{150} 47 U.S.C. § 230.
\textsuperscript{151} NetChoice, LLC v. Paxton, 49 F.4th 439, 465–66 (5th Cir. 2022).
\textsuperscript{152} 47 U.S.C. § 230(f)(2).
interpreted to include “websites, applications, social media platforms, and other online services that host third-party content.”

Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This clause provides a safe haven that limits liability for service providers that host third-party content unless the providers are involved with the creation or development of that content.

It is important to note that section 230 is included within the Communications Decency Act under the subchapter “Common Carrier Regulation.” Within section 230, Congress outlines certain findings that have prompted the enactment of the section, such as the importance of accessing educational and informational resources and forums with diversity of discourse, and the increasing reliance of Americans “on interactive media for a variety of political, educational, cultural and entertainment services.” Congress also acknowledges that online services currently offer users a great degree of control over the information they receive and that the current system has flourished with minimal government regulation.

Furthermore, the statute expressly states the policy of the United States: to promote continued development of the Internet and other interactive computer services, to preserve the competitive free market that presently exists, to encourage development of technologies to maximize user control and reach over information, and to deter and punish trafficking in obscenity, stalking, and harassment through the use of a computer. Here, Congress acknowledges the influence of service providers on the community and recognizes the importance for users to have control over the information they receive.

In addition to the safe haven clause stated above, section 230 also grants immunity to providers that censor content in good faith to restrict access to material that is obscene, lewd, excessively violent, harassing, or otherwise objectionable, even if the speech is constitutionally protected. While this provision may support the claim that censorship of objectionable content is

---


158. Id.

159. Id. § 230(b).

160. Id. § 230(c)(2).
allowed under federal law, viewpoint discrimination extends further than simply objectionable content. Therefore, there is a reasonable argument that section 230 does not preempt a state statute that addresses viewpoint discrimination, as opposed to just lewd or harassing content. Additionally, section 230 also expressly states that “nothing in [section 230] shall be construed to prevent any State from enforcing any State law that is consistent with [section 230],” and “[n]o cause of action may be brought and no liability may be imposed . . . that is inconsistent with [section 230].”

IV. CIRCUIT SPLIT

Two trade associations, NetChoice, LLP, (“NetChoice”) and the Computer and Communications Industry Association (“CCIA”), brought suits against Texas and Florida to enjoin both state statutes, HB 20 and SB 7072. NetChoice and CCIA are nonprofit entities with a mission to promote competitive markets on the Internet and minimize government intervention. Though the circuit cases were decided only months apart, the holdings on the same issue conflict.

In this Part, I will evaluate the Fifth and Eleventh Circuits’ reasoning for their conflicting holdings, as well as conclude that the Fifth Circuit’s reasoning is more persuasive given the development of First Amendment law overviewed in Part II. When reviewing a First Amendment claim concerning social media platforms, a court must first determine whether platforms engage in a First Amendment–protected activity, and if so, what level of scrutiny to apply. Concurrently, the court must also determine whether platforms fall within a common carrier classification.

The Texas Western District Court issued a preliminary injunction after holding that HB 20 is unconstitutional on its face. The district court reasoned that platforms are not common carriers and that content moderation entails “some level of editorial discretion” by managing and arranging content. Therefore, the court held that Miami Herald is direct precedent, which requires upholding First Amendment protections on platforms’...

161. Id. § 230(e)(3).
166. Id.
168. Id. at 1108, 1115.
content-moderation decisions. Additionally, the court stated that the disclosure provisions are unjustifiably burdensome given the mass amounts of postings, and that the statute will “chill the social media platforms’ speech” by prohibiting viewpoint-based censorship. However, the Fifth Circuit disagreed with the Texas Western District Court, vacating the preliminary injunction and remanding the case for further proceedings. In the comprehensive fifty-two page opinion written by Judge Oldham, the Fifth Circuit explained that the statute only chills censorship and not speech. It is important to note that the Supreme Court has subsequently vacated the Fifth Circuit’s decision to stay the preliminary injunction while the Fifth Circuit resolves the appeal of the underlying preliminary injunction. Justice Alito in dissent, joined by both Justice Thomas and Justice Gorsuch, disagreed with the decision to vacate because they believed the plaintiffs had not demonstrated a substantial likelihood of success on the merits.

Alternatively, the Florida Northern District Court issued a preliminary injunction on SB 7072 for violating the First Amendment and failing the strict scrutiny analysis. The district court held that severing unconstitutional provisions was not an option. The Eleventh Circuit upheld the ruling based on the statute’s unlawful restriction on private platforms’ protected speech through the use of editorial judgment when moderating content. Additionally, the Eleventh Circuit upheld the injunction on the onerous disclosure requirement to provide a “thorough rationale” for each moderation decision. However, the court reversed the preliminary injunction for the remainder of the disclosure provisions, as it

169. Id. at 1106–07.
170. Id. at 1112.
172. Id. at 450.
174. Id. at 1716–18.
176. Id. at 1095.
177. The district court held that SB 7072 was unlawful because it restricted platforms’ constitutionally protected speech and was preempted by 47 U.S.C. § 230 (“section 230”). Id. at 1089–95. Section 230(c)(2) states that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable [material].” 47 U.S.C. § 230(c)(2). The Eleventh Circuit did not review the preemption challenge because it concluded that the First Amendment challenge “fully disposes of the appeal.” NetChoice, LLC v. Att’y Gen., 34 F.4th 1196, 1209 (11th Cir. 2022).
held that the unconstitutional provisions could be severed.\textsuperscript{179}

\section{Editorial Judgment}

Determining what qualifies as speech under the First Amendment has become increasingly unclear as the Constitution was drafted without modern technological advances in mind. Therefore, the Supreme Court is tasked with interpreting the Constitution,\textsuperscript{180} and lower courts must rely on precedent to determine what constitutes expressive speech. Interpreting editorial judgment as speech has been a recent expansion—appearing first in the 1970s—of the First Amendment Speech Clause.\textsuperscript{181} The leading Supreme Court precedent on editorial judgement, \textit{Miami Herald}, primarily guided both circuit courts in their analysis of the state statutes.\textsuperscript{182}

In \textit{Miami Herald}, the Supreme Court held that a newspaper’s curated selection of material constitutes editorial judgment. The Fifth Circuit distinguished \textit{Miami Herald} from the current case based on the factual differences between newspapers and social media platforms, as well as distinctions in the statutes.\textsuperscript{183} The court stated that platforms do not engage in editorial judgment by merely using algorithms to screen out “obscene and spam-related content.”\textsuperscript{184} Other than algorithms, the court claimed that platforms do not curate and make decisions about the vast majority of content posted online, unlike editors when publishing newspapers.\textsuperscript{185} However, this argument may seem unpersuasive because it minimizes the acts of censorship that many platforms engage in that surpass screening objectively obscene content. The Fifth Circuit did not address the implications of a platform engaging in subjective screening, such as censorship based on political viewpoints.

In addition, the Fifth Circuit distinguished HB 20 as only regulating conduct, as opposed to the statute in \textit{Miami Herald} regulating expressive speech.\textsuperscript{186} The Fifth Circuit reasoned that even though the government cannot force or unconstitutionally limit the speech of private entities, it can limit their conduct.\textsuperscript{187} Past examples include the government prohibiting telephone companies from “mak[ing] any unjust or unreasonable

\begin{thebibliography}{99}
\bibitem{179} NetChoice, LLC v. Att’y Gen., 34 F.4th at 1231–32.
\bibitem{180} Marbury v. Madison, 5 U.S. 137 (1803).
\bibitem{181} Candeub, \textit{supra} note 79, at 158.
\bibitem{182} See \textit{supra} text accompanying notes 82–90.
\bibitem{183} NetChoice, LLC v. Paxton, 49 F.4th 439, 459–65 (5th Cir. 2022).
\bibitem{184} Id. at 459.
\bibitem{185} Id. at 459–60.
\bibitem{186} Id. at 455–57.
\bibitem{187} Id.
\end{thebibliography}
discrimination in... practices, classifications, regulations, ... or services.”

The court also stated that there is a meaningful difference between ex ante and ex post review of content, and that the narrow holding of *Miami Herald* only applies to ex ante review.

Furthermore, the Fifth Circuit highlighted that the Supreme Court in *Miami Herald* expressly distinguished entities that are active in nature from those that are “passive receptacle[s] or conduit[s] for news, comment, and advertising.” Because newspapers have a “narrow ‘choice of material’ ” to publish, it follows that their choice of what to publish amounts to “editorial control and judgment” that conveys a message attributable to the newspapers. This clearly differs from social media platforms, which effectively have no length constraints. While one could argue that prioritizing content creates restraints, this is likely not expressive to the average user, and the lesser-prioritized material would still be accessible through direct searches.

The Eleventh Circuit also referenced *Miami Herald* but instead emphasized the similarities between newspapers and platforms in order to hold the Supreme Court decision as direct precedent. The Eleventh Circuit mentioned that even though the motive behind the statute in *Miami Herald* was to ensure viewpoint diversity and counteract common media bias and manipulative reporting, the Supreme Court still held that it was unlawful to compel a private entity to publish content that they otherwise would not have. The Eleventh Circuit then noted the Court’s extension of editorial-judgment protection from newspapers, as in *Miami Herald*, to a private utility company that was subjected to an unconstitutional agency order requiring the company to include third-party advertisements that conflicted with the company’s message in its billing envelopes.

However, in both examples, the Eleventh Circuit did not address the inherent length constraints of newspapers and utility company billing envelopes. Due to the constraints, the materials included therein are more...

---

188. *Id.* at 455 (quoting 47 U.S.C. § 202(a)). This interpretation also justifies the reason common carrier obligations are constitutional. Rather than an exception to the First Amendment, common carrier obligations limit companies’ conduct and may only incidentally alter their speech. Therefore, assuming this interpretation to be true, any private entity’s conduct could be regulated as long as the conduct is not First Amendment-protected speech.


190. *Id.* at 456 (quoting *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).


192. *Id.* at 462.


194. *Id.* at 1210.

closely associated with the private entities, and many would assume that the entities endorse the speech in those materials. For example, if the utility company was required to include brochures addressing both the positives of travelling by plane and the negatives of polluting the environment, it is reasonable for customers to infer that the utility company purposefully included both brochures in the billing envelope, and therefore the agency order unlawfully compelled speech. Conversely, as platforms do not have length constraints, posted content is less likely to be associated with a message conveyed by the platform.196

Another case discussed by both circuits that further interprets what actions embody speech under the First Amendment is Pruneyard Shopping Center, in which the Supreme Court upheld a law requiring a privately owned mall to allow pamphleteers on its property.197 The Fifth Circuit claimed that the mall in Pruneyard was similar to a private platform in that users of a platform would “know the difference between sponsoring speech and allowing it.”198 Assuming this to be true, it would then follow that content posted, such as Kayne West’s antisemitic post on X, would not be associated with X but rather understood solely as the message of the third-party content creator.199 While X may still be blamed for not removing the content in a timely manner, it seems unlikely that any user would equate this delayed reaction as endorsing the content.

Alternatively, the Eleventh Circuit argued that platforms are not synonymous with the private mall in Pruneyard because the mall did not allege that its speech was hindered through the ordinance, but rather that the mall had a right “not to be forced by the State to use [its] property as a forum for the speech of others.”200 Therefore, the Eleventh Circuit outright denied the applicability of Pruneyard as it did not directly raise the issue of affecting the mall’s speech.201

196. This argument is further strengthened with section 230, as platforms are not treated as the speaker of third-party content. 47 U.S.C. § 230(c).
201. NetChoice, LLC v. Att’y Gen., 34 F. 4th. at 1215.
SOCIAL MEDIA CENSORSHIP

The Fifth and Eleventh Circuits discussed another seminal First Amendment case, *Hurley*, in which the Supreme Court held that a company organizing a parade had the right to restrict certain groups from being included because of the intimate connection between the message of each parade float and the organizer.202 The Fifth Circuit concluded that platforms are not “intimately connected” with their hosted material, unlike parade organizers with parade floats.203 The Fifth Circuit further distinguished *Hurley* by highlighting that with platforms, “virtually none of [their] content is meaningfully reviewed or edited in any way,” and that platforms permit any user to post content as long as they agree to the platform’s boilerplate terms of service.204 Removal of content is then only completed after the posted content is flagged for being contrary to the agreed terms of service. Therefore, it is reasonable to infer that a material factor in an editorial-judgement analysis may be whether the review of content is before or after it is exposed to the public.

The Eleventh Circuit instead focused on the similarities between platforms and parades, including that platforms convey a clear message through the choice of content displayed on their sites.205 The court held that a platform’s decision to exclude a message it disagrees with is enough to invoke its right as a private speaker and that a particularized message was not necessary.206 However, the Eleventh Circuit did not expressly address the required intimate connection between the hosted or excluded content with the platforms so that the message is expressive to the audience.207

Finally, both courts depended on *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, in which a federal statute was upheld that required law schools to allow military recruiters to access students in the same capacity as other employers.208 The Fifth Circuit claimed that the same reasoning in *FAIR* applies to platforms because censorship is not inherently expressive behavior without platforms clearly articulating their policies when censoring content.209 It follows that without notice, users are unable to distinguish whether content was posted but censored, or whether the content

---

204. *Id.*
206. *Id.*
207. *Id.*
was not posted at all.\textsuperscript{210} The court held that, due to the lack of expressiveness, moderating content is not an act of editorial judgment, and therefore not considered speech under the First Amendment.\textsuperscript{211} Additionally, like the statutes in \textit{Pruneyard} and \textit{FAIR}, HB 20 does not limit social media platforms’ First Amendment right to speak and share a message of disagreement, as well as disavow any perceivedassociation with third-party content.\textsuperscript{212}

Though the Eleventh Circuit tried to distinguish \textit{FAIR}, the court admitted that \textit{FAIR}’s facts “may be a bit closer” to regulating social media platforms than the mall in \textit{Pruneyard}.\textsuperscript{213} The Eleventh Circuit stated that, unlike the federal statute in \textit{FAIR}, SB 7072 interferes directly with the platform’s speech.\textsuperscript{214} The court further explained that platforms, unlike law schools, “are in the business of disseminating curated collections of speech,” and that the editorial discretion they employ in curating this content is protected speech.\textsuperscript{215} However, speech of any nature, whether it is the primary service of the business or incidental to the business, is equally protected under the First Amendment.

The Eleventh Circuit also distinguished \textit{FAIR} by arguing that, unlike the law schools’ refusal to host military recruiters, social media platforms’ content-moderation decisions are inherently expressive conduct that does not require explanatory speech to convey a message. In determining whether conduct is inherently expressive, the court highlighted that “[t]he critical question is whether the explanatory speech is necessary for the reasonable observer to perceive a message from the conduct.”\textsuperscript{216} However, when applying this statement to social media platforms, the Eleventh Circuit likely overemphasized the inherent expressiveness of censoring or deplatforming users.\textsuperscript{217} While censorship of certain popular individuals is likely noticed, the vast majority of censorship goes unnoticed by the average user unless further expressive statements are made to address the censorship and the reasoning behind it. The court acknowledged this point in a footnote.\textsuperscript{218}

\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{NetChoice, LLC v. Att’y Gen.}, 34 F.4th 1196, 1215 (11th Cir. 2022).
\textsuperscript{214} \textit{Id.} at 1215–16.
\textsuperscript{215} \textit{Id.} at 1216–17.
\textsuperscript{216} \textit{Id.} at 1217 (quoting \textit{Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale}, 901 F.3d 1235, 1244 (11th Cir. 2018)).
\textsuperscript{217} \textit{See NetChoice, LLC v. Att’y Gen.}, 34 F.4th at 1217 (11th Cir. 2022).
\textsuperscript{218} \textit{See id.} at 1217, n.15 (“It might be . . . that some content-moderation decisions—for instance, to prioritize or deprioritize individual posts—are so subtle that users wouldn’t notice them but for the platforms’ speech explaining their actions.”).
An additional distinction between the law schools in *FAIR* and social media platforms not mentioned by either circuit court is that law schools are not generally open to the public, unlike platforms and malls. This fact likely strengthens the association between a law school and any recruiters invited on campus, creating the implication that the messages conveyed by recruiters on campus are “intimately connected” with the school. Additionally, the statute did not require law schools to host military recruiters but rather made federal funding contingent on the inclusion of such recruiters. Depending on the amount and level of dependence on federal funding, the contingency may constructively resemble a requirement.\(^{219}\)

Finally, the Fifth Circuit argued that even if platforms’ content-moderation decisions were deemed First Amendment–protected speech, HB 20 would be upheld due to surviving an intermediate scrutiny review.\(^{220}\) The court determined that HB 20 is a content- and viewpoint-neutral law because the statute’s “burden in no way depends on what message a [p]latform conveys or intends to convey through its censorship.”\(^{221}\) In applying intermediate scrutiny, the court held that HB 20 advanced the substantial governmental interest of “protecting the free exchange of ideas and information in the state,” which is unrelated to the suppression of free speech.\(^{222}\) Furthermore, the court stated that HB 20 also “does not burden substantially more speech than necessary to further [Texas’s] interests,” as the barriers to entry in the social media industry disclaim any feasible alternatives.\(^{223}\)

However, even if a statute is content neutral on its face, the Supreme Court may instead apply strict scrutiny to the state statutes as it may hold that the state statutes are content based in purpose, conferring benefits to certain Republican viewpoints that have allegedly been censored in the past.\(^ {224}\) Under a strict scrutiny analysis, the statutes would likely fail as the governmental interest is not likely to raise to the level of compelling, and the statutes are not sufficiently tailored for the heightened review.

While the Eleventh Circuit acknowledged the content-based-in-purpose argument, it held that the statute would not even survive the lower standard of intermediate scrutiny because there is no legitimate governmental interest in leveling the expressive playing field and the statute is grossly

\(^{219}\) The federal government used its power under the Spending Clause. U.S. Const. art. I, § 8, cl. 1.
\(^{220}\) *NetChoice*, LLC v. Paxton, 49 F.4th 439, 480 (5th Cir. 2022).
\(^{221}\) *Id.* at 480.
\(^{222}\) *Id.* at 482.
\(^{223}\) *Id.* at 483–84.
\(^{224}\) See *supra* note 23 and accompanying text.
overinclusive.\footnote{NetChoice, LLC v. Att’y Gen., 34 F.4th 1196, 1223–30 (11th Cir. 2022).}

\section*{B. Common Carriers}

In addition to assessing whether platforms use editorial judgment, the Fifth and Eleventh Circuit courts also evaluated whether social media platforms are or should be common carriers, which would automatically impose nondiscriminatory obligations on the platforms.

The Fifth Circuit argued that since “[p]latforms are communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining,” the ban on viewpoint discrimination is permissible as states are “vested” with the power to impose nondiscrimination common carrier obligations.\footnote{NetChoice, LLC v. Paxton, 49 F.4th 439, 469 (5th Cir. 2022).} The court went further to state that invalidating the Texas statute would be a “derogation of core principles of federalism,” and that it would be the “first time [since the eras of racial segregation and \textit{Lochner}] . . . that federal courts have prevented a [s]tate from requiring interstate transportation and communications firms to serve customers without discrimination.”\footnote{Id. at 470.} However, these statements should be taken skeptically. Stating that it would be the first time since racial segregation and the \textit{Lochner} era directly contradicts \textit{Miami Herald, Turner}, and any other newspaper, broadcaster, or cable operator case.\footnote{Mia. Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 257 (1974); Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 185 (1997).} Additionally, the Fifth Circuit relied on previous decisions that imposed common carrier obligations and reaffirmed the power of state legislatures to do the same by statute.\footnote{NetChoice, LLC v. Paxton, 49 F.4th at 471.} For example, in \textit{Fitchburg Railroad Co. v. Gage}, the Massachusetts Supreme Court noted that since railroads are common carriers, unequal rates are “very fully, and reasonably, subjected to legislative supervision and control.”\footnote{Fitchburg R.R. Co. v. Gage, 78 Mass. (12 Gray) 393, 398 (1859).} However, the Fifth Circuit did not address the distinction between regulating an already designated common carrier industry compared with an industry, such as social media platforms, with no preexisting common carrier obligations.

When analyzing whether platforms should be treated as common carriers, the Fifth Circuit relied on two factors: (1) whether the carrier holds itself out to the public without individualized bargaining,\footnote{Id. at 474 (citing Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co. v. Gage, 78 Mass. (12 Gray) 393, 398 (1859).) NetChoice, LLC v. Paxton, 49 F.4th at 471. However, reasonable rules and regulations applied generally to all customers as a prerequisite for service do not allow a communications firm to evade common carrier requirements. Id. at 474 (citing Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co. v. Gage, 78 Mass. (12 Gray) 393, 398 (1859).) NetChoice, LLC v. Paxton, 49 F.4th at 471. However, reasonable rules and regulations applied generally to all customers as a prerequisite for service do not allow a communications firm to evade common carrier requirements. Id. at 474 (citing Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co. v. Gage, 78 Mass. (12 Gray) 393, 398 (1859).) NetChoice, LLC v. Paxton, 49 F.4th at 471. However, reasonable rules and regulations applied generally to all customers as a prerequisite for service do not allow a communications firm to evade common carrier requirements. Id. at 474 (citing Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co. v. Gage, 78 Mass. (12 Gray) 393, 398 (1859).)} and (2) whether
the service is affected with public interest and plays a “central economic and social role in society.” Furthermore, in determining whether a service is affected with public interest, the company’s market share is a relevant factor. The Fifth Circuit gave an example of the test as applied in a landmark Supreme Court case: fourteen grain elevators in Chicago, owned by nine firms, were affected with public interest and subjected to common carrier obligations because “the market was small and interconnected enough to be ripe for abuse,” and grain elevators were “enormously important to the agriculture and shipping industries” and stood as a “gateway of commerce.”

The Fifth Circuit then applied the two factors to social media platforms and concluded that they are both met. However, as mentioned in Part III of this Note, the Supreme Court has not established a definitive test to designate an entity as a common carrier. The Fifth Circuit omitted any discussion on communications entities that meet the two-factor test but have consistently been excluded from the classification of a common carrier. It is reasonable to argue that newspapers and broadcasters would fit within the two-factor test as they are both within the communications industry, have great public importance due to the necessary dissemination of information, and hold themselves out to anyone who purchases their services. Additionally, certain large newspaper and cable companies have national coverage and great market power. Therefore, this indicates that the two-factor test the Fifth Circuit applies, while providing support, is not conclusive in determining whether an entity is a common carrier.

Even though the test is not conclusive, the Fifth Circuit does raise reasonable arguments for holding platforms as common carriers in the future, including the significant public interest. The court highlighted that many rely on platforms for information and discussion as a “modern public square,” as well as being the “most effective way to disseminate news,” and that any exclusion from platforms amount to “exclusion from the public discourse.” Social media platforms have supported many jobs, including those in journalism, entertainment, and marketing. Platforms have allowed young businesses to flourish by creating a brand and presenting it to the public at a low cost. Similar to the telephone, platforms have become a key

Co., 7 A. 809, 811 (Md. 1887)).
233. Id. at 472.
234. Id. at 472–73 (discussing Munn v. Illinois, 94 U.S. 113 (1876)).
238. Id. at 475–76.
element in the commerce of a nation.

On the opposite side, the Eleventh Circuit’s main objections with classifying platforms as common carriers were that terms of service restrict platforms from truly holding themselves out to the public and that Congress has expressly held that platforms are not common carriers.\textsuperscript{239} The court relied on a federal statute designating telecommunications companies as common carriers and stating that “[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.”\textsuperscript{240} While this argument addresses current federal law—that Congress has not imposed common carrier obligations on social media platforms—it does not provide guidance on whether they should be imposed in the future. Additionally, it does not preclude another section from imposing common carrier duties on platforms.

C. SECTION 230

In addition to case law, the Fifth Circuit addressed whether section 230 of the Communications Decency Act is applicable in resolving the issues central in the circuit split. The Fifth Circuit interpreted the language of the statute—platforms “shall [not] be treated as the publisher or speaker” of content posted by third parties\textsuperscript{241}—as Congress implying that platforms do not operate as traditional publishers and do “not act[] as speakers . . . when they host user-submitted content.”\textsuperscript{242} Though this statute was originally enacted to ease uncertainty regarding exposure to defamation liability for internet service providers,\textsuperscript{243} it has become a broad shield to liability that “promotes the free exchange of information . . . and prevents the inevitable chill of speech that would occur if interactive service providers could be held liable merely for serving as conduits for other parties’ speech.”\textsuperscript{244}

The Fifth Circuit noted that one of the main reasons for enacting section 230 was to overrule \textit{Stratton-Oakmont v. Prodigy}, in which an online platform was held liable for defamation because the online platform used editorial judgment, “akin to a newspaper,” through its moderation and censorship policies.\textsuperscript{245} The platform had guidelines prohibiting certain

\begin{itemize}
  \item \textsuperscript{239} NetChoice, LLC v. Att’y Gen., 34 F.4th 1196, 1120–21 (11th Cir. 2022).
  \item \textsuperscript{240} 47 U.S.C. § 230(c)(6).
  \item \textsuperscript{241} 47 U.S.C. § 230(c)(1).
  \item \textsuperscript{242} NetChoice, LLC v. Paxton, 49 F.4th at 468.
  \item \textsuperscript{243} \textit{Id.} at 466.
  \item \textsuperscript{244} \textit{Id.} at 467 (citing Brief for Appellees at 1, Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014) (No. 13-7017)).
  \item \textsuperscript{245} NetChoice, LLC v. Paxton, 49 F.4th at 466; \textit{see also} Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *10 (Sup. Ct. May 24, 1995).
\end{itemize}
content, as well as an automatic software screening program.\textsuperscript{246} It was held that these procedures were enough control to subject the platform to defamation liability.\textsuperscript{247} Specifically, Congress overruled this case because it disagreed with treating providers as speakers of third-party content simply because “they have restricted access to objectionable material.”\textsuperscript{248} Therefore, section 230 explicitly states that online platforms are immune from defamation liability for hosted content unless they play a role in the “creation or development” of such content.\textsuperscript{249} Additionally, the Fifth Circuit stated that even though section 230 grants immunity for the removal of objectionable content,\textsuperscript{250} it does not provide an unqualified right to viewpoint-based censorship.\textsuperscript{251}

While section 230 provides support for the Fifth Circuit’s argument, there is still an area of uncertainty not otherwise addressed—what level of moderation would rise to “creation or development?” Additionally, even though section 230(c)(1) provides that platforms will not be treated as speakers or publishers of third-party content for purposes of civil liability, it does not necessarily follow that platforms are not speakers for purposes of the First Amendment.\textsuperscript{252}

V. SIGNIFICANCE

The significance of resolving this question of law is heightened through the recent acquisition of X by Elon Musk. While mergers and acquisitions are common, Musk’s decision to take X private and his subsequent actions after gaining control have emphasized that a change in power of a social media platform can have drastic effects on the community.\textsuperscript{253} The key reason for taking a company private is for control, allowing a buyer to impose their vision without restrictions from opposing shareholders.\textsuperscript{254} Once the acquisition was finalized, X was officially “Musk’s to do with as he pleas[ed].”\textsuperscript{255} Since then, Musk has already laid off approximately fifty

\textsuperscript{246} See Staton Oakmont, 1995 N.Y. Misc. LEXIS 229, at *10.
\textsuperscript{247} Id.
\textsuperscript{248} NetChoice, LLC v. Paxton, 49 F.4th at 466 (quoting H.R. REP. NO. 104-458, at 194 (1996)).
\textsuperscript{250} 47 U.S.C. § 230(c)(2).
\textsuperscript{251} NetChoice, LLC v. Paxton, 49 F.4th at 468.
\textsuperscript{252} Dori et al., supra note 153.
\textsuperscript{254} Id.
\textsuperscript{255} Id.; see also Dan Milmo, What Changes Has Elon Musk Made at Twitter and What Might He Do Next?, GUARDIAN (Nov. 4, 2022, 8:43 AM), https://www.theguardian.com/technology/2022/nov/04
percent of X’s workforce, including key executives such as CEO Parag Agrawal, CFO Ned Segal, and head of legal Vijaya Gadde.\textsuperscript{256}

Additionally, there have been changes to verifications, which are the blue checkmarks next to a user’s name that signals the account is legitimate.\textsuperscript{257} Verification status confirms that an account of public interest, such as a celebrity or other influential individual, is run by its true owner.\textsuperscript{258} This feature protects the public by ensuring that the alleged identity of the individual posting content is the authentic person. However, Musk has decided to change the process of becoming verified by charging eight dollars each month for the privilege of verification status.\textsuperscript{259}

Additionally, Musk has been vocal about his vision for the site. As a “self-described free speech absolutist,” Musk is determined to “make [X] a global digital town square.”\textsuperscript{260} However, there has been a lack of execution in determining the line between allowing all proper viewpoints in the discussion while also eliminating obscene and hateful content not welcomed in a town square.\textsuperscript{261} Many critics are pressuring Musk to correct X’s moderation policies, as the site has been harshly scrutinized for the recent increase in misinformation and hate speech.\textsuperscript{262} Musk has since commented that he is developing a “content moderation council,” and that each major decision about content moderation will first be approved by the council.\textsuperscript{263} However, shortly after the announcement, Musk decided to reinstate many previously banned users, such as lifting the permanent suspension on former President Donald Trump and reinstating the account of Andrew Anglin, the founder of an infamous neo-Nazi website.\textsuperscript{264} Alternatively, Musk banned Kayne West from X after the rapper posted a swastika with a star of David in it.\textsuperscript{265} Users are questioning what moderation policies are being followed,
and many believe the decisions are based on Musk’s personal opinion without adhering to any guidelines.\textsuperscript{266}

Musk is the sole director of X after he dissolved the prior board of directors.\textsuperscript{267} The purpose of a board of directors is to have a centralized governing body in a corporation, with the board having heightened fiduciary duties to its shareholders.\textsuperscript{268} In a publicly held company, such as Twitter before the acquisition, there could be thousands of shareholders that the board would have to consider when making decisions.\textsuperscript{269} The board of directors and executives have a duty of care and a duty of loyalty, and dominant shareholders have a duty to the minority shareholders in certain conflict scenarios.\textsuperscript{270} With such a large company, having a great number of shareholders can better align the board’s decisions with the interests of the community at large. However, as in the case of X, with the sole shareholder and sole director being a single person, the board only has fiduciary duties to that sole individual. Therefore, the new structure of the corporation proposes risks of heightened power in one individual’s hands, without the normal checks and balances of a publicly owned company.\textsuperscript{271}

The new corporate structure and Musk’s vision for changing X’s moderation policies exemplify that a change in control is possible and could have wide-reaching effects on the community. While Europe has imposed rules requiring platforms to create policies on moderating hate speech, the United States’ “loose regulations allow Musk to run [X] as he sees fit.”\textsuperscript{272} Therefore, there may be undesirable implications if the Supreme Court holds that private platforms have a First Amendment right to moderate as they choose without government intervention.

The current state of First Amendment law indicates that there is a strong argument that the government should be able to regulate large platforms’ moderation policies, largely due to the lack of editorial judgement in making moderation decisions. When large platforms moderate content, the decisions tend to lack an expressive message without accompanying speech, the censored content is typically objective in nature, and there tends to be little association between hosted content and the platform’s perceived message due to unlimited virtual space. Finally, platforms do not review content

\textsuperscript{266} \textit{See id.}
\textsuperscript{267} Milmo, \textit{supra} note 255.
\textsuperscript{268} Michael A. Chasalow, \textit{Experiencing Business Organizations} 259 (2d ed. 2018).
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{See id.} at 462–63.
\textsuperscript{271} Other checks include proxy fights, with insurgents petitioning to remove the board for poor decision-making in a shareholder vote. \textit{Id} at 500.
\textsuperscript{272} Klepper & O’Brien, \textit{supra} note 260.
before it is posted, which further distances the intimate connection between the hosted content and the platforms as there is no curated set of content.

It is important to note that the above analysis is specific to large social media platforms covered by the Texas and Florida state statutes. However, there is likely a key distinction between evaluating editorial judgment for small platforms compared with large platforms. The distinction is factual in nature and depends on the amount of control that a platform exerts when moderating content, including whether the platform is expressive in its subjective moderation policies and whether there is a broad or limited target audience. Generally, large platforms, such as Instagram, X, and Facebook, are universal communication platforms that host many different discussions. The moderation is more likely objective in nature. Conversely, many smaller platforms are expressive about their target audience and subjective moderation policies, in addition to the removal of obscene and hateful content. This allows users to decide whether their interests align with the site, or whether they choose to avoid it. Examples include Vegan Forum, ProAmerica Only, and Democratic Hub. Therefore, rather than a clear rule that states that all platforms do not exercise editorial judgment, it would be more accurate to require a factual determination of whether sufficient control exists over the content on the platform and whether the moderation decisions express a clear message.

Additionally, the federal government has not expressly determined that social media platforms are common carriers. While there may be strong arguments to justify imposing common carrier duties on platforms, this would likely have to be established by Congress before courts could impose nondiscriminatory obligations on private entities.

As mentioned in Part III, there is no conclusive common carrier test. However, there are many factors that are deciphered from currently designated common carriers, and platforms meet many of these factors. Platforms hold themselves out to the greater public without private transactions. Even though many have terms of service, as long as they are applied consistently, platforms are still considered as “holding out” to the public. Additionally, the significant market share of platforms such as X, Facebook, and Instagram provide barriers to entry and a lack of competition. Users are unable to choose a different platform solely based on policy choices because of the lack of alternatives. In addition, platforms are of great public importance because many rely on them as “principal sources for

---

knowing [about] 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.”\textsuperscript{274} Finally, platforms have closely resembled past technological advances that have since been classified as common carriers, such as the telecommunications industry. As the telephone gained importance, it became an indispensable tool that society greatly relied on, which prompted the enactment of common carrier obligations.\textsuperscript{275}

Therefore, there are many factors that would justify classifying social media platforms as common carriers. With power in the hands of a few private parties and with the community’s great reliance on social media platforms, a change in management has the ability to be “ripe for abuse if state regulation was wholly prohibited.”\textsuperscript{276} With a view towards consistency, declaring social media platforms as common carriers may be the most advisable approach, as it would allow the federal government to apply nondiscriminatory obligations consistently to all platforms.

CONCLUSION

The question of whether social media platforms have a protected First Amendment right to censor content is a pressing issue given the interdependence that society has with platforms. A change in power of these private entities, exemplified by the recent acquisition of X, can threaten the use of the commodity that many have come to rely on for news, commerce, and communication.

Based on current precedent, there is a strong argument that large social media platforms do not exercise editorial judgment in moderating content. There is a lack of close association between the platforms and third-party content posted on their sites and a lack of expressiveness in their moderation decisions because platforms review content ex post. However, this Note argues that the ultimate determination of whether a platform engages in editorial judgement will be fact dependent, which would depend on whether there is sufficient control that derives an explicit message from moderation decisions. If the Supreme Court determines that platforms do not engage in editorial judgment, then states and the federal government would be able to regulate as they would not be infringing on speech.

Extending beyond current precedent, there is also an argument that

\textsuperscript{275} Hockett v. Indiana, 5 N.E. 178, 182 (Ind. 1886) (“The relations which [the telephone] has assumed towards the public make it a common carrier of news,—a common carrier in the sense in which the telegraph is a common carrier,—and impose upon it certain well-defined obligations of a public character.”).
\textsuperscript{276} NetChoice, LLC v. Paxton, 49 F.4th 439, 473 (5th Cir. 2022).
platforms should be deemed common carriers because of their extreme influence on society and because they hold out to the public. With a common carrier designation, platforms would be subjected to even greater obligations, restricting platforms from discriminating against users’ viewpoints. However, it is likely that imposing common carrier obligations on platforms will be reserved for Congress to officially enact.