BEYOND THE EDITORIAL ANALOGY: FIRST AMENDMENT PROTECTIONS FOR PLATFORM CONTENT MODERATION AFTER *MOODY V. NETCHOICE*

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INTRODUCTION

Over the past several decades, a combination of a laissez-faire regulatory environment and Section 230's statutory protections for platform content-moderation decisions has mostly foreclosed the development of First Amendment doctrine on platform content moderation.[1] But the conventional wisdom has been that the First Amendment would protect most platform operations even if this regulatory shield were stripped away.[2] The simplest path to this conclusion follows what we call the "editorial analogy," which holds that a platform deciding what content to carry, remove, promote, or demote is in basically the same position—with the same robust First Amendment protections—as a newspaper editorial board considering which op-eds to carry.[3]

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[1] Blake E. Reid, *Section 230's Debts*, 22 FIRST AMEND. L. REV. 408 (2024) (arguing that Section 230 has accumulated "interpretive and legislative debts" by preventing the evolution of jurisprudence and laws governing platform regulation).

[2] *See, e.g.*, Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 98 (2021).

[3] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (protecting the editorial discretion of newspapers over the material that appears in their pages).

While formally appealing, this analogy operates at such a high level of abstraction that one might just as plausibly characterize platforms as more akin to governments—institutions whose power over speech requires democratic checks rather than constitutional protection. These competing analogies point in opposite directions: one treats platforms as democracy-enhancing speakers deserving autonomy; the other as institutional censors warranting regulation.

A circuit split over which analogy to follow prompted the Supreme Court's decision last Term in *Moody v. NetChoice, LLC*.[4] The Eleventh Circuit had invalidated Florida's content-moderation law as an unconstitutional interference with platforms' editorial discretion. The Fifth Circuit upheld Texas's similar law based on the traditional understanding that common carriers—in this case social platforms—are appropriately subject to anti-discrimination requirements.[5]

The Court found both of these stories too tidy. All the Justices agreed that *some* platform moderation decisions are "editorial" and speech-like in nature. Yet they also agreed that this protection might vary across platforms, services, and moderation techniques.[6] Unable to resolve these nuances on a sparse record, the Court remanded for more detailed factual development about how these laws would actually operate.[7]

While *Moody* can fairly be characterized as a punt—merely postponing hard constitutional questions—its very reluctance to embrace categorical analogies marks a significant shift. Simply by characterizing direct regulation of platform content moderation as a complex question that requires close, fact-specific analysis, *Moody* upsets tech litigants' basic strategy and suggests a more nuanced First Amendment jurisprudence than many expected. Moreover, the Justices' various opinions offer revealing glimpses of why traditional analogies fail to capture platforms' novel characteristics.

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[4] 603 U.S. 707 (2024).

[5] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022); NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[6] *See, e.g.*, *Moody*, 603 U.S. at 708 ("[I]t's not clear to what extent, if at all, [the challenged laws] affect social-media giants' other services, like direct messaging, or what they have to say about other platforms and functions.").

[7] *Id.* at 745.

This Article examines *Moody*'s implications for platform regulation. Part I traces the development of the First Amendment's protections for "editorial discretion" and the political controversies that prompted the state regulation. Part II analyzes the Justices' competing approaches. Part III explores *Moody*'s immediate impact on litigation strategy, explaining how its skepticism towards facial challenges will reshape tech-industry resistance to regulation, while arguing that the decision leaves surprising room for carefully designed rules that can withstand more focused constitutional scrutiny. Part IV proposes moving beyond editorial analogies to focus on platforms' actual effects on user speech—an approach that we have endorsed elsewhere and that we believe better serves First Amendment values in the digital age.[8]

I. THE ROAD TO *MOODY*

This Part examines the legal and political context that gave rise to *Moody*. It first traces the development of the Court's "editorial discretion" doctrine, which addresses when the First Amendment restricts government power to compel private entities to host speech. It then turns to the specific laws at issue in *Moody*: Texas's H.B. 20 and Florida's S.B. 7072, which represent the first major legislative attempts to regulate platform content-moderation practices.

A. The Doctrine of "Editorial Discretion"

The Supreme Court's "editorial discretion" doctrine addresses when the First Amendment restricts government power to compel private platforms to host speech. While both sides in content-moderation debates claim this doctrine supports their position, the case law offers limited clarity on how far platforms' First Amendment protections extend. What emerges is a spectrum: On one end are hands-on publishers with strong First Amendment rights, and on the other are passive conduits that can be more readily regulated.

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[8] *See, e.g.*, Kyle Langvardt & Alan Z. Rozenshtein, *Beyond the Editorial Analogy: The Future of the First Amendment on the Internet*, 67 COMMC'N ACM 36 (2024); Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337 (2021); Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, LAWFARE (Dec. 7, 2020, 1:47 PM), https://perma.cc/JLS7-EUUZ; Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341 (2018); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018).

The archetypal "publisher"—an entity that exerts substantial editorial control over speech on its platform and becomes associated with a distinct message it contributes to public discourse—is the newspaper, which carefully selects each story it prints and gives its imprimatur to that content as worthy of public attention. In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a "right of reply" statute that would have required newspapers to print responses from political candidates they had criticized.[9]

The Court's protection of newspaper editorial autonomy has strong normative appeal: Newspapers are foundational First Amendment institutions, and their independent, often adversarial role is reflected in constitutional text ("freedom of the press"), culture, and precedent.[10] Unlike mere intermediaries, newspapers are readily understood as speakers expressing their own viewpoints.[11] Hence the Court's conclusion in *Tornillo*: "It has yet to be demonstrated how governmental regulation of [the] crucial process [of a newspaper's exercise of editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[12]

After *Tornillo*, various entities sought to claim similar editorial protections. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, the Court held that parade organizers could not be forced to include a gay-rights group, reasoning that organizers would inevitably be identified with the parade participants' message, and thus must retain discretion over participation.[13] In *Pacific Gas & Electric Company (PG&E) v. Public Utilities Commission*, the Court barred requiring utilities to

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[9] 418 U.S. 241 (1974).

[10] *See* Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) ("The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

[11] *Tornillo*, 418 U.S. at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.").

[12] *Id.*

[13] 515 U.S. 557 (1995).

include opposing viewpoints in billing envelopes that they used to communicate with customers.[14]

While extending "editorial" rights to parades and billing envelopes requires some analogical work, three key factors justify these extensions. First, government-mandated hosting in these cases would distort public discourse by crowding out the platform's own speech due to physical constraints—newspapers have limited pages, parades have limited time and space, and envelopes can only hold so many messages.[15] Second, compelled speech might discourage platforms from speaking at all: Newspapers might avoid political coverage to escape reply obligations, organizations might cancel parades rather than include unwanted groups, and utilities might stop sending mailers to avoid amplifying opponents.[16] Third, forced inclusion risks misleading the public about the platform's views, implicating both the platform's interests in avoiding compelled speech and harm to its reputation, and listeners' interest in avoiding confusion.[17]

At the opposite end of the spectrum are passive conduits for speech—entities that merely provide a forum without exercising meaningful editorial control. Here, the Supreme Court has consistently upheld laws requiring these platforms to provide access to speakers.

The Court's decision in *PruneYard Shopping Center v. Robins* offers an intuitive example.[18] There, the Court held that a shopping mall had no First Amendment right to exclude petitioners, emphasizing that the mall could disclaim any endorsement and that "the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with

[14] 475 U.S. 1 (1986).

[15] *See, e.g.*, *Tornillo*, 418 U.S. at 257 n.22 ("[T]he amount of space a newspaper can devote to 'live news' is finite . . . .").

[16] *See, e.g.*, *id.* at 257 ("[E]ditors might well conclude that the safe course is to avoid controversy.").

[17] *See, e.g.*, *Hurley*, 515 U.S. at 559 ("[E]very participating parade unit affects the message conveyed by the private organizers . . . .").

[18] 447 U.S. 74 (1980).

those of the owner."[19] The Court dismissed the mall's attempt to characterize property management as expressive activity, finding that *Tornillo*'s concerns about editorial interference "obviously are not present here."[20]

Similarly, in *Rumsfeld v. FAIR*, the Supreme Court upheld a law that withheld federal funding from universities that banned military recruiters from campus—a policy many universities had adopted to protest the military's "don't ask, don't tell" policy on gay service members.[21] The Court characterized the regulated activity as conduct rather than speech, explaining that "the expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it."[22] Much as in *PruneYard*, the Court reasoned that universities could express their opposition to military policies and no reasonable observer would mistake a recruiter's presence for university endorsement.

PruneYard and *FAIR* present the mirror image of *Tornillo*, *Hurley*, and *PG&E*. Job fairs and shopping malls don't curate participants to advance a particular message. They probably won't self-censor to avoid hosting unwanted speech. Nor is the public likely to get confused about what kind of speech a job fair or a shopping mall supports (assuming "the public" thinks about such things at all). Both of these considerations support the Court's already intuitive choice to treat management of job fairs and shopping malls as conduct rather than speech.

Identifying a platform's "editorial discretion" rights is only the first step in the constitutional analysis. While such rights trigger First Amendment scrutiny, the level of that scrutiny varies. In theory, this depends primarily on whether the regulation targets speech content. In practice, however, the nature of the regulated medium proves inseparable from how courts evaluate both the regulation and the government's justification for it.

The Supreme Court has thus applied different levels of scrutiny across media contexts. Newspapers and utility mailers received the strongest protection in *Tornillo* and *PG&E*, with the Court applying strict scrutiny to reject compelled-

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[19] *Id.* at 87.

[20] *Id.* at 88.

[21] 547 U.S. 47 (2006).

[22] *Id.* at 66.

speech requirements.[23] At the other extreme, in *Red Lion Broadcasting v. FCC*, the Court applied only rational basis review to uphold the "fairness doctrine" for broadcast media, citing spectrum scarcity and the government's interest in managing public airwaves.[24] And between these poles, *Turner Broadcasting System, Inc. v. FCC* upheld rules requiring cable television operators to carry local stations as content-neutral provisions subject only to intermediate scrutiny.[25]

All of this is to say that the existing doctrine on editorial rights offered no shortage of plausible analogies by the time social media entered the picture. Yet it remains unclear where social platforms fit on the editorial spectrum. While platforms often present themselves as neutral conduits for user speech—digital town squares open to all—they simultaneously engage in extensive content moderation, filtering vast amounts of material through complex and evolving guidelines.[26]

The platforms' multifaceted operations further complicate the analysis. They combine public broadcast feeds, private messaging, e-commerce, and other interactive features that blur traditional boundaries between mass communication and private correspondence.[27] Their content moderation combines human judgment with AI-driven automation, the latter an attractive solution for handling unprecedented volumes of user-generated content.[28] And while the internet itself provides

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[23] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("[T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

[24] 395 U.S. 367 (1969).

[25] 512 U.S. 622 (1994).

[26] *Compare* Elon Musk (@elonmusk), X (Oct. 27, 2022, 9:08 AM), https://perma.cc/CTA5-K48F ("The reason I acquired Twitter is because it is important to the future of civilization to have a common digital town square, where a wide range of beliefs can be debated in a healthy manner, without resorting to violence."), *with* Sarah Parvini, *X Releases Its First Transparency Report Since Elon Musk's Takeover*, AP NEWS (Sept. 25, 2024, 1:47 PM EST), https://perma.cc/J3MP-76R9 (showing that the company removed millions of posts and accounts from the site in the first half of the year.).

[27] Using Facebook as an example, in the News Feed, users share updates and broadcasts to friends or the public. Conversely, Facebook Messenger provides private communications between users. Additionally, Facebook Marketplace facilitates e-commerce of items and services.

[28] *See, e.g.*, Rozanna Latiff, *Bytedance's Tiktok Cuts Hundreds of Jobs in Shift Towards AI Content Moderation*, REUTERS (Oct. 11, 2024, 11:33 AM CDT).

unlimited bandwidth, platforms must actively curate content to manage the scarce resource of user attention.

This distinctive combination—open access, active moderation, and algorithmic curation driven by attention economics—strains traditional First Amendment categories. Platforms share features with both newspapers and shopping malls, both broadcasters and common carriers—entities legally required to serve all customers without discrimination. This hybrid nature makes it difficult to determine what level of constitutional scrutiny should apply to government regulation of platform content-moderation practices.

B. The Texas and Florida Laws

The content-moderation laws at issue in *Moody* were inspired by claims of systematic left-wing bias in social-media moderation. According to this narrative, platforms like Twitter, Facebook, and YouTube—which play an outsized role in public discourse—have used content-moderation policies to suppress conservative viewpoints while promoting progressive ideologies.

Conservatives point to several high-profile incidents to support these claims: In the wake of January 6th, major platforms suspended President Trump's accounts and removed Parler from their app stores; before that, platforms had restricted circulation of the Hunter Biden laptop story before the 2020 election and aggressively fact-checked election-fraud claims. Other controversial interventions include the "#TwitterPurge" of the late 2010s that suspended far-right figures like Alex Jones and Milo Yiannopoulos.

To be sure, this narrative of systematic bias should not be taken at face value.[29] Many prominent cases of alleged censorship involved clear violations of platform policies that would have resulted in enforcement regardless of political viewpoint.[30] More fundamentally, research suggests that social media has actually amplified

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[29] *See* PAUL M. BARRETT & J. GRANT SIMS, N.Y.U. STERN CTR. BUS. & HUM. RTS., FALSE ACCUSATION: THE UNFOUNDED CLAIM THAT SOCIAL MEDIA COMPANIES CENSOR CONSERVATIVES (Feb. 2021), https://perma.cc/D72B-WNTY.

[30] *See, e.g.*, Mohsen Mosleh, Qi Yang, Tauhid Zaman, Gordon Pennycook & David G. Rand, *Differences in Misinformation Sharing Can Lead to Politically Asymmetric Sanctions*, 634 NATURE 609 (2024) (empirical study suggesting that conservatives face more social-media moderation because they share more misinformation, even when fact-checking standards are politically balanced).

conservative voices.[31] Platform algorithms tend to promote engaging, polarizing content, which often advantages provocative conservative rhetoric. Social media has also given conservative voices access to far larger audiences than traditional media, while enabling precise targeting for conservative political messaging.

But conservatives are correct about one crucial point: If major platforms chose to, they could indeed systematically censor disfavored views and distort public discourse. And so in 2021, amid this growing conservative backlash against perceived anti-right bias in social media content moderation, Texas and Florida enacted sweeping laws to regulate how major platforms moderate user speech.[32] While differing in their specific approaches, both laws aimed to constrain platforms' ability to remove, restrict, or otherwise limit certain types of user content. Both laws also required platforms to make disclosures about their content-moderation policies and to explain individual content-moderation decisions to affected users.

1. Texas's H.B. 20

Texas's H.B. 20 centers on a sweeping viewpoint-neutrality requirement that prohibits social media platforms from censoring content based on viewpoint. Specifically, platforms cannot "censor a user, a user's expression, or a user's ability to receive the expression of another person based on (1) the viewpoint of the user or another person [or] (2) the viewpoint represented in the user's expression or another person's expression."[33] While the law doesn't define "viewpoint," it likely incorporates First Amendment jurisprudence's broad understanding of viewpoint discrimination, which would, for example, effectively prevent platforms from enforcing rules against hate speech.[34]

The law defines "censorship" expansively to encompass virtually any action that might limit content visibility. Under the statute, censorship includes blocking or banning content, removing or deplatforming users, demonetizing content, deboosting or restricting visibility, denying equal access to the platform, and any other form of discrimination against expression.[35] In all instances, the platform

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[31] *See* BARRETT & SIMS, *supra* note 29.

[32] TEX. CIV. PRAC. & REM. CODE ANN. § 143A (West 2024); FLA. STAT. § 501.2041 (2024).

[33] TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2024).

[34] *See, e.g.*, Matal v. Tam, 582 U.S. 218, 246 (2017).

[35] TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001 (West 2024).

must provide an individualized explanation to the censored user[36] and provide an appeals process.[37] The platform must also make general public disclosures about its moderation practices.[38]

The law provides only a few narrow exceptions where platforms may engage in viewpoint-discriminatory content moderation: when authorized by federal law, when the content involves child exploitation, when it contains specific violent threats or direct criminal incitement against protected groups, or when it's otherwise unlawful.[39] The law also preserves users' ability to moderate content on their own pages and leaves intellectual property law unaffected.[40]

Enforcement mechanisms are robust: Both individual users and the state attorney general can seek injunctive relief for violations of the viewpoint-neutrality mandate.[41] If successful, plaintiffs are entitled to recover their attorney's fees and costs.[42]

2. Florida's S.B. 7072

Florida's S.B. 7072 takes a more multifaceted approach to content-moderation regulation than Texas's law. Rather than imposing viewpoint neutrality, Florida requires platforms to apply their "censorship, deplatforming, and shadow banning standards in a consistent manner among its users."[43] As in Texas, platforms must give individualized explanations to those "censored" and "shadow banned"[44] while making more general public disclosures about how they moderate content.[45]

It is less than clear what it would mean to apply content rules in the undefined "consistent manner" that Florida's law requires. What is clear is that Florida does not require the rules *themselves* to treat all viewpoints in a "consistent" (that is,

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[36] *Id.* § 120.103(a)(1).

[37] *Id.* §§ 120.101, 120.103(a)(2), (a)(3)(B)–(b), 120.104.

[38] *Id.* § 120.051(a)(1)–(3).

[39] *Id.* § 143A.006.

[40] *Id.*

[41] *Id.* §§ 143A.007, 143A.008.

[42] *Id.*

[43] FLA. STAT. § 501.2041(2)(b) (2024).

[44] *Id.* § 501.2041.

[45] *Id.* § 501.2041(2)(a), (c).

viewpoint-neutral) manner. This approach leaves platforms a degree of latitude that Texas's general viewpoint-neutrality rule does not allow. For instance, a platform could maintain a rule against hate speech under Florida's law, even though such a policy would likely violate Texas's viewpoint-neutrality requirement.

The law includes two significant carve-outs that provide special additional protections for specific categories of speakers: political candidates and "journalistic enterprises."[46] For political candidates, the law establishes strict restrictions during the period between qualification and either election day or the end of candidacy.[47] During this time, platforms cannot "willfully deplatform" candidates unless otherwise permitted to do so by federal law.[48] Nor can platforms employ "post-prioritization" or "shadow banning" algorithms on content posted by or even *about* candidates, which means they cannot alter the visibility of candidate-related content through methods like reducing viewer reach, lowering news feed rankings, or blocking distribution.[49]

Notably, the law appears to prohibit even user preference-based content filtering for candidate-related content.[50] While social platforms typically customize content based on user engagement and preferences, with many users choosing to avoid political content, Florida's broad restrictions on "post-prioritization" and "shadow banning" seem to preclude even this most basic form of customization. The law does provide one exception: Platforms may amplify election-related speech when paid to do so by candidates or independent political spenders.[51]

For "journalistic enterprises," the law bars platforms from taking "any action to censor, deplatform, or shadow ban" based on content, with exceptions only for paid content and obscenity.[52] The definition of "journalistic enterprise" relies solely

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[46] *Id.* § 501.2041(2)(h), (j).

[47] *Id.* § 501.2041(2)(h).

[48] *Id.* § 106.072(2) (prohibiting "deplatforming"); *id.* § 106.072(5) (barring enforcement where consistent with other laws).

[49] *Id.* § 501.2041(2)(h).

[50] *Id.* § 501.2041(2)(f).

[51] *Id.* § 501.2041(2)(h).

[52] *Id.* § 501.2041(2)(j).

on audience size and content volume thresholds, set low enough to encompass conspiracy theorists and extremists.[53] As the Eleventh Circuit observed, this broad definition would even classify the pornographic website PornHub as a "journalistic enterprise" due to its video volume and viewership numbers.[54]

While the restrictions on moderating journalistic enterprise content apply only to content-based decisions, this limitation provides little practical flexibility. Beyond technical considerations like sound quality, it is difficult to identify non-content bases for moderation. The practical effect is that platforms cannot apply their standard content rules, except for obscenity restrictions, to any speech from qualifying journalistic enterprises.

As with the Texas law, Florida's law permits enforcement by both the government and private individuals. It provides users with a private right of action, offering remedies of up to $100,000 in statutory damages per claim, along with the possibility of punitive damages.[55] Additionally, platforms that willfully deplatform political candidates during their candidacy period would face fines of $250,000 per day for statewide candidates and $25,000 per day for other candidates, enforceable by the Florida Elections Commission.[56]

II. THE *MOODY* DECISION

NetChoice, a trade association representing major technology companies, filed facial challenges against both the Florida and Texas laws, arguing they were unconstitutional across the board rather than just as applied to specific companies.

The challenges initially met different fates in the courts. In Florida, both the district court and the Eleventh Circuit ruled in NetChoice's favor, enjoining Florida's content-moderation and individualized-explanation requirements on First Amendment grounds.[57] The Texas litigation took a different turn: While the district

[53] *Id.* § 501.2041(1)(d).

[54] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1229 (11th Cir. 2022). While the vast majority of content on PornHub is sexually explicit, some material likely does not meet the legal definition of obscenity established in *Miller v. California*, 413 U.S. 15 (1973), and thus would fall within the law's restrictions on content moderation.

[55] FLA. STAT. § 501.2041(6) (2024).

[56] *Id.* § 106.072(3).

[57] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021); NetChoice, LLC v. Att'y. Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

court initially enjoined the law, the Fifth Circuit reversed, reasoning that "censorship is not speech" protected by the First Amendment.[58] This circuit split on a significant constitutional question—whether content-moderation decisions by social media platforms merit First Amendment protection—led the Supreme Court to grant certiorari in both cases.

The oral arguments, which stretched nearly four hours across both cases, revealed that the Justices considered *Moody* a tougher case than many had expected.[59] They seemed troubled by basic questions about the laws' practical application—issues that advocates, lower courts, and legal commentators had largely overlooked.[60] By the argument's conclusion, it seemed likely that the Court might sidestep the constitutional questions entirely, instead remanding the cases for lower courts to conduct a more granular, case-by-case analysis of how these laws would affect different types of platforms. In the end, this is exactly what the Court decided to do in its consolidated opinion in *Moody v. NetChoice*.

The Supreme Court produced five opinions, reflecting the complexity of both the procedural and substantive issues at stake. Justice Elena Kagan wrote for the majority, which vacated and remanded both cases but also provided extensive guidance on the First Amendment issues.[61] Justice Amy Coney Barrett wrote a concurring opinion that, while joining the majority in full, raised significant questions about the scope of platforms' First Amendment protections.[62] Justice Ketanji Brown Jackson authored a brief concurrence in part and in the judgment, arguing that the Court had spoken prematurely in a portion of the majority's opinion that indicated Texas' law was unconstitutional as applied to Facebook's News Feed and

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[58] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021); NetChoice, LLC v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022).

[59] Transcript of Oral Argument, Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (No. 22-277).

[60] *See, e.g.*, *id.* at 25 ("But doesn't it depend on exactly what they're doing? I mean, I—I guess the hard part for me is really trying to understand how we apply this analysis at the broad level of generality that I think both sides seem to be taking here. . . . So don't we have to, like, drill down more in order to really figure out whether or not things are protected?") (Jackson, J.); *id.* at 79 ("Don't we have to consider these questions Justice Alito is raising about DMs and Uber and Etsy because we have to look at the statute as a whole? And, I mean, we don't have a lot of briefing on this, and this is a sprawling statute and it makes me a little bit nervous.") (Barrett, J.).

[61] *See infra* Part II.A.

[62] *See infra* Part II.B.

YouTube's homepage; in Justice Jackson's view, these issues should have been reserved for the lower court on remand.[63] Justice Samuel Alito, joined by Justices Clarence Thomas and Neil Gorsuch, wrote a lengthy concurrence in the judgment that effectively dissented from the majority's First Amendment framework.[64] Finally, Justice Thomas wrote separately primarily to argue against the use of facial challenges in First Amendment cases, an important but distinct issue that lies beyond the scope of our analysis here.[65] Below we summarize the Kagan, Barrett, and Alito opinions.

A. Justice Kagan's Majority Opinion

Justice Kagan opened her majority opinion by acknowledging both the centrality of social media platforms to modern life and the legitimate role of government regulation. She described these platforms as "inescapable" because they "structure how we relate to family and friends, as well as to businesses, civic organizations, and governments."[66] While recognizing that legislatures and agencies "will generally be better positioned than courts to respond to the emerging challenges social-media entities pose," she emphasized that "courts still have a necessary role in protecting those entities' rights of speech, as courts have historically protected traditional media's rights." Specifically, she characterized platforms' "choices about what third-party speech to display and how to display it" as "editorial choices" meriting First Amendment protection.[67]

The core holding, contained in Part II of the opinion, addressed the lower courts' flawed handling of NetChoice's facial challenges. Kagan explained that while facial challenges typically face an extremely high bar—requiring proof that "no set of circumstances exists under which the [law] would be valid" or that the law "lacks a plainly legitimate sweep"[68]—First Amendment cases employ "a less demanding though still rigorous standard": whether "the law's unconstitutional applications substantially outweigh its constitutional ones."[69]

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[63] *Moody*, 603 U.S. at 748–49 (Jackson, J., concurring in part and concurring in the judgment).

[64] *See infra* Part II.C.

[65] *Moody*, 603 U.S. at 749–66 (Thomas, J., concurring in the judgment).

[66] *Id.* at 713 (majority opinion).

[67] *Id.* at 716.

[68] *Id.* at 723.

[69] *Id.* at 724.

But even under this more permissive standard, Kagan wrote, the lower courts had erred by focusing narrowly on the laws' "heartland applications" to content moderation on major platforms' public feeds, while ignoring their potential reach to services like WhatsApp (messaging), Gmail (email), Etsy (e-commerce), Venmo (financial transactions), and Uber (transportation).[70] A proper facial challenge analysis required examining "the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets."[71] Because the lower courts had failed to do this comprehensive analysis, the cases needed to be remanded.[72]

Justice Kagan could have stopped there. Instead, she proceeded in Part III to provide extensive guidance on the First Amendment analysis to be conducted on remand, both as to general First Amendment principles and as to how they should apply to the laws at issue.[73] Although, as we argue below, this discussion should properly be understood as dicta,[74] it plausibly represents the views of a majority of the Justices on the proper constitutional framework and will likely influence lower courts, even if it establishes less than Justice Kagan might have hoped.

Part III.A, joined by Chief Justice John Roberts and Justices Sonia Sotomayor, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson, offered general First Amendment principles grounded in precedent, particularly the "seminal" case of *Miami Herald v. Tornillo* and its progeny.[75] According to Justice Kagan, these cases established that government-mandated hosting of speech triggers First Amendment scrutiny when "the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt," including "presenting a curated compilation of speech originally created by others."[76] She distinguished

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[70] *Id.*

[71] *Id.* at 726.

[72] *Id.* ("Neither the Eleventh Circuit nor the Fifth Circuit performed the facial analysis in the way just described. . . . So we vacate the decisions below and remand these cases.").

[73] *Id.* at 728–43.

[74] *See infra* Part III.B.

[75] *Id.* at 728.

[76] *Id.*

cases like *PruneYard* (a public shopping mall) and *FAIR* (a law-school job fair), where the regulated entities weren't engaged in expressive conduct.[77]

Justice Kagan distilled three core principles from these cases: First Amendment protection applies when expressive entities are forced to host unwanted messages; this protection holds even if the entity accepts most content while excluding only a few items; and the government cannot justify interference merely by claiming to balance or improve the "marketplace of ideas."[78] She particularly emphasized that the First Amendment bars forcing private speakers to present unwanted views just to "rejigger the expressive realm."[79]

In Part III.B, Justice Kagan, writing for only five Justices,[80] applied these principles to the content-moderation laws, arguing in particular that the Fifth Circuit erred in upholding the content-moderation provisions of Texas's law.[81] The law's viewpoint-neutrality requirement, Kagan argued, impermissibly forced platforms to "present and promote content on their feeds that they regard as objectionable."[82] She also rejected arguments that platforms' editorial rights were diminished either because they moderate relatively little content or because users don't attribute posts to the platforms themselves.[83]

Finally, having established that the Texas law implicated the First Amendment by infringing on platforms' editorial choices, Justice Kagan concluded that the law could not survive any level of heightened constitutional scrutiny because Texas's asserted interest—"advanc[ing] its own vision of ideological balance"—was fundamentally illegitimate. "On the spectrum of dangers to free expression," Justice

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[77] *Id.* at 730–31.

[78] *Id.* at 731–33.

[79] *Id.* at 733.

[80] Justice Jackson notably declined to join this part of the majority opinion, writing that it was inappropriate for the Court to "preview our potential ruling on the merits." *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment).

[81] *Id.* at 733. The majority mostly ignored the Texas law's individualized-explanation provisions, but it noted that such provisions may "violate the First Amendment if they unduly burden expressive activity," *id.* at 727 n.3 (citing Zauderer v. Off. of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

[82] *Moody*, 603 U.S. at 738.

[83] *Id.* at 737 ("Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.").

Kagan warned, "there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana."[84] She distinguished *Turner*'s cable-operator must-carry provisions, which were upheld because they served a content-neutral interest in preserving local broadcasting rather than attempting to balance expression.[85]

B. Justice Barrett's Concurrence

Justice Barrett, though ostensibly concurring in full with the majority, wrote separately to highlight significant unresolved questions about the scope of First Amendment protections, even for content moderation of public news feeds.[86] While she agreed that algorithms implementing human content-moderation decisions would receive First Amendment protection, she questioned whether this protection should extend to engagement-driven algorithms that "just present[] automatically to each user whatever the algorithm thinks the user will like."[87] She expressed similar skepticism about AI moderation tools that use large language models to identify "hateful" content, noting that such automated systems might not reflect an "inherently expressive choice" by "a human being with First Amendment rights."[88]

Justice Barrett also raised questions about how corporate structure and ownership might affect First Amendment protection. She emphasized that while corporations generally have First Amendment rights as assemblages of individuals, "foreign persons and corporations located abroad do not."[89] This observation clearly foreshadowed the Court's rejection of a challenge to the Protecting Americans from Foreign Adversary Controlled Applications Act, which requires TikTok's Chinese owner ByteDance to divest or face a U.S. ban.[90] More broadly, Barrett's concerns

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[84] *Id.* at 742.

[85] *Id.* at 742 n.10.

[86] *Id.* at 745–48 (Barrett, J., concurring in the judgment).

[87] *Id.* at 746.

[88] *Id.* (internal quotation marks omitted).

[89] *Id.*

[90] Pub. L. No. 118-50 div. H (2024); TikTok v. Garland, 2025 WL 222571, Nos. 24-656, 24-657 (U.S. Jan. 17, 2025).

about engagement-based algorithms and AI moderation suggest that her agreement with the majority's First Amendment framework may be quite limited in practice.

C. Justice Alito's Concurrence in the Judgment

Justice Alito wrote a concurrence in the judgment for himself and Justices Thomas and Gorsuch that, while technically agreeing with the remand, fundamentally challenged the majority's First Amendment framework.[91] Public reporting suggests that Alito had originally been assigned the majority opinion (it still reads like one) with Justices Barrett and Jackson initially planning to join before switching sides.[92]

Though he criticizes the majority for going beyond the procedural issues and opining on the merits of the First Amendment issue, Justice Alito himself proposed a detailed framework for determining when platform content moderation merits First Amendment protection.[93] Rather than treating all content curation as inherently expressive, he would require platforms to satisfy three criteria: First, they must actually exercise meaningful editorial discretion rather than operating as "dumb pipes" that transmit nearly all content.[94] Second, their curation must express "some sort of collective point," even at an abstract level.[95] Third, they must show that the message of that curation would be "affected by the inclusion of particular third-party speech."[96]

Justice Alito also offered some surprisingly specific guidance on how several platforms might fit into the picture. He suggested that services like WhatsApp and Gmail that primarily carry rather than curate messages would not receive protection.[97] Neither would platforms advertising minimal moderation (like Parler),

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[91] *Moody*, 603 U.S. at 766–98 (Alito, J., concurring in the judgment). Justice Alito also agreed with the majority that *Zauderer* provided the appropriate framework to analyze the constitutionality of the laws' disclosure provisions. *Id.* at 796–98; *see also supra* note 81.

[92] Joan Biskupic, *Exclusive: How Samuel Alito Got Canceled from the Supreme Court Social Media Majority*, CNN (July 31, 2024, 5:40 PM EDT), https://perma.cc/T3H7-7HZS.

[93] 603 U.S. at 780 (Alito, J., concurring in the judgment).

[94] *Id.* at 782.

[95] *Id.* at 783.

[96] *Id.* at 784.

[97] *Id.* at 787.

those with decentralized moderation (like Reddit), or those focused on non-expressive activities like e-commerce (like Etsy).[98] Even for platforms that do moderate content, Alito suggested varying levels of protection based on the nature of their content—for example, decisions to moderate political speech on X might merit more protection than commercial reviews on Yelp.[99]

Alito raised two fundamental challenges to treating social media feeds as protected speech. First, he argued their massive scale—"roughly 1.3 billion times"[100] the content of a newspaper—made it impossible to discern any coherent editorial message.[101] Second, he questioned whether algorithmic and AI-driven content moderation reflected the kind of human expressive choices that the First Amendment protects.[102] The fact that these arguments found some support in Barrett's concurrence suggests that at least four Justices have serious doubts about extending full First Amendment protection to automated content moderation.

Finally, Alito showed more sympathy to Texas's regulatory interests than the majority, comparing them favorably to those approved in *Turner* and suggesting courts should consider platforms' enormous power over public discourse.[103] Here his openness to regulation found an echo in Justice Jackson's citation to *Red Lion*,[104] the 1969 case that endorsed broad government authority to regulate broadcast media—another suggestion that Alito's views might have the support of more Justices than the two who signed on to his opinion.

III. What *Moody* Does and Doesn't Establish

This Part examines *Moody*'s immediate implications and longer-term significance for platform regulation. Section A analyzes how the decision undermines technology companies' preferred litigation strategy of bringing facial challenges and also potentially encourages more nuanced First Amendment doctrine. Section B then explores the decision's substantive guidance on two key questions: when

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[98] *Id.* at 787–88.

[99] *Id.* at 789.

[100] *Id.* at 794.

[101] As Justice Alito asked during oral argument, "if YouTube were a newspaper, how much would it weigh?" Transcript of Oral Argument, *supra* note 59, at 29.

[102] *Moody*, 603 U.S. at 794–95.

[103] *Id.* at 795.

[104] *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment).

content moderation triggers First Amendment scrutiny and what government interests might justify regulation.

A. Facial Challenges to Platform Regulation

Moody's procedural holding will reshape both litigation strategy and doctrinal development in platform-regulation cases. Most immediately, it undermines technology companies' historically successful strategy of using facial challenges to defeat regulation before implementation. But beyond this tactical impact, the decision may actually advance First Amendment jurisprudence by requiring courts to engage more deeply with the nuances of platform regulation.[105]

1. The decline of facial challenges as a tech industry strategy

For decades, tech companies have relied on Section 230 to secure virtually automatic dismissal of tort claims.[106] Given this experience, combined with the facts that the Supreme Court's few First Amendment cases addressing internet regulation had all been resolved through successful facial challenges[107] and that its broader First Amendment jurisprudence displayed a business-friendly bent,[108] groups like NetChoice could be forgiven for expecting First Amendment litigation to provide similar protection against new regulations. And recent wins seemed to validate this expectation, as NetChoice and others secured preliminary injunctions against age-verification requirements,[109] attempted TikTok bans,[110] and mandates

[105] This section is adapted from Kyle Langvardt & Alan Z. Rozenshtein, Moody v. NetChoice *Is a Blow to Silicon Valley's Litigation Strategy*, LAWFARE (July 26, 2024), https://perma.cc/NRF4-FHX3.

[106] 47 U.S.C. § 230. *See generally* Alan Z. Rozenshtein, *Interpreting the Ambiguities of Section 230*, 41 YALE J. ON REG. BULL. 60 (2024).

[107] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Reno v. ACLU, 521 U.S. 844 (1997).

[108] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019); Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).

[109] Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom.* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted sub nom.* Free Speech Coal. v. Paxton, 144 S. Ct. 2714 (2024); NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924 (N.D. Cal. 2023).

[110] Alario v. Knudsen, 704 F. Supp. 3d 1061 (D. Mont. 2023); TikTok Inc. v. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020).

that online services tailor certain aspects of product design to protect children's privacy and well-being.[111]

As others have observed,[112] *Moody* fundamentally disrupts this approach by forcing tech-industry litigants to present the case for First Amendment protection in an itemized manner, detailing why it would violate the Constitution to apply the regulation under challenge to each of the platform features at issue.

This will be a heavy lift. As the Court noted, "The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection."[113] Even a single platform may offer diverse services and host various third-party activities, each requiring distinct First Amendment analysis. And as Justices Barrett and Alito pointed out in their concurring opinions, the degree of constitutional protection afforded to a platform may vary based on factors like the extent of AI involvement in its content moderation or its use of engagement-driven algorithms, making facial challenges particularly difficult to sustain.[114]

None of this means that *Moody* is fatal to facial challenges.[115] For example, district courts have endorsed, after citing the *Moody* decision, facial challenges to Internet child-safety laws—either in whole or in part—in Mississippi, Tennessee, and Texas.[116] And in *NetChoice v. Bonta*, which challenged the California Age-Appropriate Design Code Act's regulations of platforms' interactions with children, the Ninth Circuit accepted facial challenges to provisions that raised consistent

[111] NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924 (N.D. Cal. 2023).

[112] Megan Iorio, *Far From a Punt, SCOTUS's NetChoice Decision Crushes Big Tech's Big Litigation Dreams*, ELEC. PRIV. INFO. CTR. (July 16, 2024), https://perma.cc/Y4XX-VH4N.

[113] *Moody*, 603 U.S. at 725.

[114] *Id.* at 745–48 (Barrett, J., concurring); *id.* at 766–98 (Alito, J., concurring in the judgment).

[115] *See, e.g.*, X Corp. v. Bonta, 116 F.4th 888 (9th Cir. 2024); Free Speech Coal. v. Knudsen, No. CV 24-67-M-DWM, 2024 WL 4542260, at *7 (D. Mont. Oct. 22, 2024); NetChoice, LLC v. Reyes, No. 2:23-cv-00911-RJS-CMR, 2024 WL 4135626, at *9 & n.92 (D. Utah Sept. 10, 2024); CCIA v. Paxton, No. 1:24-CV-849-RP, 2024 WL 4051786, at *16 (W.D. Tex. Aug. 30, 2024) (facially enjoining monitoring and filtering requirements).

[116] Free Speech Coal., Inc. v. Skrmetti, No. 2:24-CV-02933-SHL-TMP, 2024 WL 5248104, at *17 (W.D. Tenn. Dec. 30, 2024); NetChoice, LLC v. Fitch, No. 1:24-CV-170-HSO-BWR, 2024 WL 3276409, at *14 (S.D. Miss. July 1, 2024).

First Amendment issues across all applications, like data-protection requirements.[117]

But *Moody* has clearly made facial challenges harder than they used to be. Just days after *Moody* came down, a district court rejected a First Amendment facial challenge to a state statute restricting how ad-supported digital platforms pass along a tax to consumers, citing *Moody* throughout.[118] In *Bonta* itself, the Ninth Circuit vacated parts of the district court's injunction where it had improperly treated as-applied challenges as facial ones, emphasizing the need to develop a record showing "the full range of activities the law covers."[119] Call it the *Moody* effect.

This shift away from facial challenges raises the question of whether tech companies might pivot to as-applied challenges instead. But this alternative approach presents its own significant obstacles for tech companies seeking to maintain their historically permissive regulatory environment.

First, when a law applies broadly—as do the Florida and Texas statutes—an as-applied challenge focused narrowly on a specific feature like Facebook's newsfeed provides limited protection for the platform's overall operations. Yet a broader challenge encompassing an entire platform would face the same complexity concerns that doomed NetChoice's facial-challenge strategy in *Moody*. Indeed, *Moody* creates an incentive for governments to write laws as broadly as possible, precisely to shield them from facial challenges.

Second, the inherent fluidity of internet services undermines the effectiveness of as-applied challenges. Platforms constantly evolve, rolling out new features and modifying existing ones. This kind of perpetual reinvention has traditionally helped tech companies outrun regulators and outmaneuver competitors. After *Moody*, all this shapeshifting also works against establishing stable First Amendment protection. An as-applied victory only shields the specific product features that existed at the time of the challenge. As platforms evolve, new features require

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[117] 113 F.4th 1101 (9th Cir. 2024).

[118] Chamber of Com. of U.S. v. Lierman, No. 21-CV-00410-LKG, 2024 WL 3302724 (D. Md. July 3, 2024); *see also CCIA*, No. 1:24-CV-849-RP, 2024 WL 4051786, at *13 (rejecting facial challenge to restrictions on collection of data about minors).

[119] *NetChoice v. Bonta*, 113 F.4th at 1123 (quoting Moody v. NetChoice, LLC, 603 U.S. 707, 724 (2024)).

fresh constitutional analysis, making it impossible to maintain consistent protection against broadly written regulations through as-applied litigation.

2. Impact on the development of First Amendment doctrine

Moody will likely have wider-ranging effects than just putting Silicon Valley in a worse litigating posture (though this by itself would be notable)—it may also serve to advance First Amendment doctrine itself.

In principle, a facial challenge under the First Amendment has always required a court to take stock of the full range of a law's applications, both constitutional and unconstitutional. But that's a hard thing for courts to do in practice, all the more so at a preliminary stage when the law has not yet gone into effect. Lawyers are trained to spot issues, not non-issues, and naturally enough, a set of hypothetical applications that would violate the Constitution can focus the judicial mind in a way that a much broader set of "nothing to see here" hypotheticals might not. So it is easy to see why a court, once it is sufficiently concerned that some substantial number of a law's applications would likely violate the First Amendment, might be tempted to condemn the whole provision without thoroughly exploring the landscape of hypothetical enforcement scenarios that would *not* violate the First Amendment.

But rushing to judgment in this manner can promote a lopsided body of case law that primarily defines what governments can't do, rather than clarifying what they can do within constitutional bounds. The resultant "negativity bias" gives a huge strategic plus to tech litigants hoping to fend off new regulation, but it has probably stunted the development of First Amendment jurisprudence. *Moody*'s insistence on more rigorously analyzing all of a law's applications may therefore lead to more nuanced and balanced First Amendment jurisprudence, particularly as it relates to the regulation of digital platforms.

By forcing courts to consider and rule on the constitutionality of specific applications, *Moody* challenges courts to develop clearer guidelines on permissible regulation in the digital sphere, potentially allowing for more effective and constitutionally sound legislation in the future. It remains to be seen how much judicial clarity will ultimately emerge. But one thing we can already say confidently after *Moody* is that tech's First Amendment stock appears to have been overvalued—and that some kind of correction is underway.

B. Moody's Substantive First Amendment Guidance

A threshold question hovers over *Moody's* extensive substantive guidance on platform regulation: What is the precedential status of the majority's First Amendment analysis?

The majority urged that its discussion of First Amendment protections for content moderation was "necessary . . . to ensure that the facial analysis proceeds on the right path in the courts below."[120] But the remand order itself was based on the lower courts' failure to apply the appropriate standard for a facial challenge. In other words, the Court would have remanded for reconsideration of the facial challenge issue no matter what framework the lower courts had used to determine when or whether content moderation is protected expression. It is for this reason that Justice Alito's concurrence characterized the majority's First Amendment discussion as "nonbinding dicta."[121] Technically, this would imply that lower courts need not treat it as controlling.[122] More practically, it would mean that neither the Court itself nor the individual Justices who joined the majority would be bound by it in future cases.

Dicta or not, however, the majority clearly intended its framework to guide lower courts on remand.[123] Multiple lower courts have already treated this portion of the opinion as controlling precedent,[124] and the Supreme Court itself has cited to

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[120] *Moody*, 603 U.S. at 726.

[121] *Id. at* 766 (Alito, J., concurring in the judgment).

[122] *See, e.g.*, State v. Meta Platforms, Inc., No. 23-CV-4453, 2024 WL 3741424, at *6 (Super. Ct. Vt. July 29, 2024) (describing the majority's categorization of curation as First Amendment-protected speech as "merely dicta").

[123] *Moody*, 603 U.S. at 727 ("The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds. Explaining why that is so will prevent the Fifth Circuit from repeating its errors as to Facebook's and YouTube's main feeds.").

[124] *See, e.g.*, Anderson v. TikTok, Inc., 116 F.4th 180, 184 (3d Cir. 2024) ("The Court [in *Moody*] held that a platform's algorithm that reflects 'editorial judgments' about 'compiling the third-party speech it wants in the way it wants' is the platform's own 'expressive product' and is therefore protected by the First Amendment.") (quoting *Moody*, 603 U.S. at 718); Child's Health Def. v. Meta Platforms, Inc., 112 F.4th 742, 759 (9th Cir. 2024) ("'When the platforms use their Standards and Guidelines to decide which third-party content [their] feeds will display, or how the display will be

the *Moody* analysis in subsequent cases.[125] Ultimately, the answer to whether *Moody* established binding precedent as to the scope of First Amendment protections for content moderation will have to wait on how the Supreme Court treats the opinion in future cases.

Whatever *Moody*'s ultimate precedential status,[126] the Justices' various opinions provide important insights into how the Court may approach platform regulation going forward. The Justices focused on two key questions: first, what kinds of content-moderation activities call for First Amendment protection, and second, what kinds of governmental interests might be adequate to overcome whatever First Amendment protection these activities enjoy. A third question—how to tailor regulations to survive constitutional scrutiny—remains largely unaddressed. We take up the tailoring question in Part IV.

1. When does the First Amendment protect content moderation?

As the six-Justice majority made clear, at least some of *Tornillo*'s editorial-discretion doctrine applies to at least some aspects of platform content moderation. The majority rejected the Fifth Circuit's holding that "Texas's restrictions on the

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ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.'") (quoting *Moody*, 603 U.S. at 740) (alteration in original); Emilee Carpenter, LLC v. James, 107 F.4th 92, 104 (2d Cir. 2024) ("The plaintiff must also demonstrate that the expressive activity is her own."); NetChoice v. Bonta, No. 5:24-CV-07885-EJD, 2024 WL 5264045, at *9 (N.D. Cal. Dec. 31, 2024) ("*Moody* stands . . . for the proposition that restrictions on a private speaker's ability to compile and organize third-party speech implicate speech rights only if those restrictions impair the speaker's own expression."); NetChoice, LLC v. Reyes, No. 2:23-cv-00911-RJS-CMR, 2024 WL 4135626, at *8 (D. Utah Sept. 10, 2024) ("And this July, in *Moody v. NetChoice, LLC*, the Court affirmed these First Amendment principles 'do not go on leave when social media are involved.'") (quoting *Moody*, 603 U.S. at 719).

[125] *See* TikTok Inc. v. Garland, No. 24-656, slip op. at 8 (U.S. Jan. 17, 2024); *id.* at 1 (Sotomayor, J., concurring in part and concurring in the judgment) (quoting *Moody*, 603 U.S. at 731, for the proposition that "TikTok engages in expressive activity by 'compiling and curating' material on its platform").

[126] As Evelyn Douek and Genevieve Lakier note, describing *Moody* and the other digital First Amendment opinions the Court issued last Term, "the practical consequences of these decisions are very hard to know, and the potential scope of the Court's rulings remains wide open. It is therefore still possible that, despite the Court's libertarian rhetoric, the platform trilogy might in fact leave a significant amount of room for legislatures and others to protect individual rights to speak and listen in the online public sphere." Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 105 (2024).

platforms' selection, ordering, and labeling of third-party posts do not interfere with expression."[127] Instead, it established two key principles: "Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own," and this remains true even when "a compiler includes most items and excludes just a few."[128]

Yet the majority's embrace of platform editorial rights proves surprisingly narrow. While these principles might suggest broad First Amendment protection for platforms' handling of third-party content, the majority only explicitly protected platforms' curation of their main feeds through content removal, demotion, or labeling. Many questions remain open: whether account suspensions or monetization decisions trigger First Amendment scrutiny, whether platform design choices like autoplay or infinite scroll implicate speech rights, and if so, at what level of protection.

Even this limited protection appears uncertain, particularly in light of Justice Barrett's concurrence. Though joining the majority in full, Barrett echoed themes from Justice Alito's concurrence that suggest deep skepticism about platform editorial rights.[129] Both Justices would require platforms to show their activities are "inherently expressive"—a formulation absent from the majority opinion—and both saw AI-driven content moderation as potentially "attenuat[ing] the connection" between platform decisions and constitutionally protected editorial judgment.[130] Alito expressed particular dismay that the majority would equate algorithmic decision-making with traditional editorial discretion when "even the researchers and programmers creating them don't really understand why the models they have built make the decisions they make."[131]

This skepticism extends beyond specific content-moderation tools to platforms' core functions. Justice Barrett questioned whether TikTok-style feeds that

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[127] *Moody*, 603 U.S. at 727.

[128] *Id.* at 731–32.

[129] *Id.* at 745–48 (Barrett, J., concurring).

[130] *Id.* at 746.

[131] *Id.* at 795 (Alito, J., concurring in the judgment). Lower courts have picked up on this observation. *See, e.g.*, NetChoice v. Bonta, No. 5:24-CV-07885-EJD, 2024 WL 5264045, at *12 (N.D. Cal. Dec. 31, 2024).

"just present automatically to each user whatever the algorithm thinks the user will like" merit First Amendment protection.[132] While Justice Kagan's majority opinion included a footnote disclaiming any view on purely engagement-driven algorithms,[133] Barrett went further, questioning whether platforms could claim speech protections for AI systems designed to identify "hateful" content—positions difficult to reconcile with the majority's protection of newsfeed curation, itself largely AI-driven.[134]

Justice Jackson's concurrence, while brief, hints at a similar skepticism toward platform editorial rights. She emphasized that courts must examine "how the regulated activities actually function," rather than relying on abstract media analogies.[135] Perhaps most provocatively, she cited Justice White's observation from *Red Lion*—long thought superseded by *Tornillo*—that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[136] While one should be cautious about reading too much into a terse concurrence, Jackson's citation to *Red Lion* suggests openness to medium-specific First Amendment analysis that could justify greater regulation of social media platforms.

It thus appears that at least five Justices—Barrett, Jackson, and the Alito bloc—are unmoved by Silicon Valley's long efforts to present computer technology as an inherently expressive phenomenon. Instead, they seem to view platform content moderation as a mixture of human speech and technologically mediated conduct that does not automatically call for strong First Amendment protection. There is a parallel here to the way courts have treated computer source code since the 1990s: While acknowledging that code can be a medium for expression, they also distin-

[132] *Moody*, 603 U.S. at 746 (Barrett, J., concurring).

[133] *Id.* at 736 n.5.

[134] *Id.* at 746 (Barrett, J., concurring).

[135] *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment).

[136] *Id.* (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969)).

guish between code's "expressive" and "functional" elements. Regulations targeting the "functional" elements are reviewed less stringently.[137] The government has prevailed in every "code is speech" challenge since 2000.[138]

To be sure, the platforms' argument that content moderation constitutes protected speech rather than conduct is more concrete—and in our view, much more serious—than the old canard that source code triggers First Amendment protection based on analogies between computer programming and natural languages. But the lesson of the source code cases still applies: If courts are open to the possibility that a law targets tech's "functional" aspects rather than its expressive aspects, then there is a path to deference in cases where the judge thinks deference is due. The upshot is that, while platforms can still win First Amendment challenges to content-moderation regulations, *Tornillo* no longer provides the categorical shield many expected.

2. What governmental interests can justify regulating content moderation?

The majority opinion sends mixed signals about what counts as a legitimate state interest that can justify regulating platform content moderation. At its broadest, the opinion appears to foreclose almost any government effort to structure online discourse. The six-Justice majority read cases like *Tornillo*, *PG&E*, and *Hurley* as establishing a general prohibition on government attempts to "rejigger the expressive realm" or counter "disproportionate influence of a few speakers."[139] Later, applying this framework to Texas's law, five Justices declared that "[o]n the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana,"[140] even invoking *Buckley v. Valeo*'s (in)famous assertion that government cannot "restrict the speech of some elements of our society in order to enhance the relative voice of others."[141]

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[137] *See, e.g.*, Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1141 (9th Cir.), *reh'g granted, op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999) (finding encryption-software source code to be expressive).

[138] Kyle Langvardt, *Crypto's First Amendment Hustle*, 16 YALE J.L. & TECH. 130, 146 (2023).

[139] *Moody*, 603 U.S. at 733.

[140] *Id.* at 741–42.

[141] *Id.* at 742 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

Yet elsewhere the majority appeared to focus more narrowly on Texas's specific goal of enforcing "ideological balance."[142] The law's legislative history made it an especially easy target: Its sponsor decried "West Coast oligarchs" for "silencing conservative viewpoints," while Texas's governor accused platforms of fomenting a "dangerous movement" to "silence conservatives."[143] The Court's treatment of *Turner* reinforces this narrower reading of the majority opinion. While *Turner* upheld a requirement that cable channels carry local broadcasters, the majority in *Moody* says, "the interest there advanced was not to balance expressive content; rather, the interest was to save the local-broadcast industry."[144] This distinction suggests the Court's core concern may be government attempts to enforce viewpoint neutrality specifically, rather than content-neutral access requirements in general.

This reading could distinguish Texas's law from Florida's. While Texas explicitly sought ideological balance, Florida's law could be characterized as promoting access for specific speakers—politicians and journalists—rather than enforcing viewpoint neutrality across platform content.[145]

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Moody follows a pattern seen in landmark First Amendment cases involving digital technology. Cases like *Reno v. ACLU*,[146] *Bernstein v. Department of Justice*,[147]

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[142] *Id.* at 741.

[143] *Id.*

[144] *Id.* at 742 n.10.

[145] *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 143A (West 2024), *with* FLA. STAT. § 501.2041 (2024).

[146] 521 U.S. 844 (1997) (striking down provisions of the Communications Decency Act as unconstitutional under the First Amendment for being overly broad and vague in regulating indecent content on the internet).

[147] 176 F.3d 1132, 1141 (9th Cir.), *reh'g granted, op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999) (finding encryption-software source code to be expressive).

Brown v. Entertainment Merchants Association,[148] and *Packingham v. North Carolina*[149]—often celebrated as victories by Silicon Valley—did not create special privileges for technology companies. Rather, they prevented technology from being treated as a reason to reduce First Amendment protection that would otherwise clearly exist: *Reno* prevented websites from receiving less protection than print media, *Bernstein* preserved scientists' right to use code in teaching, *Entertainment Merchants* ensured video games received the same protection as other media, and *Packingham* recognized that social-media bans implicate traditional overbreadth concerns.

Moody fits this pattern. The Texas law, like the regulations in those earlier cases, presented a direct attack on established First Amendment interests—here, by imposing viewpoint neutrality requirements that mirror the "right of reply" statute struck down in *Tornillo*.[150] The law not only required platforms to publish content they opposed but, like the statute in *Tornillo*, effectively taxed them for engaging with controversial topics. Yet even facing such a direct challenge to editorial autonomy, the Court offered only limited protection, confined to platform functions most analogous to traditional newspaper editing. In short, *Moody* is proof of life, but not proof of scope, for *Tornillo*.

The fragility of even this limited protection is evident from the Court's internal dynamics. As noted above, the majority opinion appears to have initially been assigned to Justice Alito, with Justices Jackson and Barrett prepared to join an opinion more sympathetic to the Fifth Circuit's rejection of platform editorial rights. Only when Alito's draft "questioned whether any of the platforms' content-moderation could be considered 'expressive' activity" did Justice Barrett defect to join Justice Kagan's more moderate approach.[151]

That a basic question about platform speech rights remained in play—even in a case involving explicit viewpoint regulation—suggests how far we are from the

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[148] 564 U.S. 786 (2011) (invalidating a California law that restricted the sale or rental of violent video games to minors, holding that video games are a form of expression protected by the First Amendment).

[149] 582 U.S. 98 (2017) (striking down a North Carolina law that prohibited registered sex offenders from accessing social media websites, holding that it impermissibly restricted lawful speech under the First Amendment).

[150] Moody v. NetChoice, LLC, 603 U.S. 707, 721 (2024).

[151] *See* Biskupic, *supra* note 92.

categorical protection many scholars once predicted. Indeed, five Justices—Alito, Thomas, and Gorsuch in concurrence, and Barrett and Jackson writing separately—ultimately signed opinions either rejecting or expressing serious reservations about extending categorical First Amendment protections to social-media content moderation.

Given this fragile and provisional resolution, NetChoice and the tech industry should be wary of treating the First Amendment issues as settled. Years may pass before the Supreme Court squarely addresses these questions again, during which time platform controversies, Court composition, or judicial views could shift dramatically. It is therefore crucial to move beyond *Moody*'s dicta and develop, from first principles, a theory of how the First Amendment should apply to platform regulation—a task we take up next.

IV. MOVING BEYOND THE EDITORIAL ANALOGY

The opinions in *Moody* center on a seemingly straightforward question: Are platforms acting as "editors" when they moderate content? This focus reflects decades of precedent treating editorial status as decisive in must-carry cases.[152] But framing the issue this way risks inverting the constitutional analysis. The First Amendment does not protect platform decisions because platforms are "editors"; rather, it designates platforms as "editors" when protecting their choices advances First Amendment values. To lose track of this distinction leads to an unhelpfully formalistic exercise in analogy:[153] Is Facebook more like a small-town parade or a shopping mall? Is content moderation expressive speech or merely non-expressive conduct?

Such analogical reasoning works well enough when the comparison is obvious, as in *Tornillo* or *PruneYard*. When everyone agrees that managing mall property

[152] *See supra* Part I.A.

[153] *Cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935) ("If we say that a court acts in a certain way 'because a labor union is a person,' we appear to justify the court's action, and to justify that action, moreover, in transcendental terms, by asserting something that sounds like a proposition but which can not be confirmed or refuted by positive evidence or by ethical argument. If, on the other hand, we say that a labor union is a person 'because the courts allow it to be sued,' we recognize that the action of the courts has not been justified at all, and that the question of whether the action of the courts is justifiable calls for an answer in non-legal terms.") (emphasis omitted).

differs fundamentally from editing a newspaper, precise theoretical justification becomes unnecessary. But platform content moderation defies such easy categorization. The *Moody* majority deemed algorithmic curation to be protected speech, while at least four Justices worried that AI mediation and industrial-scale moderation "attenuate" platforms from the hands-on editorial discretion celebrated in *Tornillo*. Where tech companies see editorial judgment throughout, critics see only automated censorship.

Given this fundamental ambiguity, we propose treating platform regulation like other complex First Amendment problems: by carefully examining both the burden on expression and the government's justification for regulation. Rather than asking categorically whether platforms are "editors," courts should assess how specific regulatory requirements affect the speech interests of all stakeholders—platforms, users, and society—and whether government interests justify those burdens. This Part develops this approach by identifying when must-carry requirements actually harm the speech environment and what countervailing benefits might justify such harms.

A. Whose Speech Is at Stake?

Laws regulating platform content moderation implicate three distinct sets of First Amendment interests: those of the platforms that host content, the users who create it, and the broader public that consumes and benefits from it. While these interests sometimes align—all stakeholders benefit from a vibrant speech environment—they can also conflict, particularly when regulation designed to protect one group's expression risks undermining another's. Understanding these complex interactions is essential to evaluating platform regulation under the First Amendment.

1. Platform interests

Traditional First Amendment cases present a straightforward conflict between government regulation and individual expression. But as Jack Balkin observes, platform regulation creates a more complex dynamic: Government rules limiting platform discretion may actually enhance user speech.[154] This three-way relationship—

[154] Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2032 (2018).

between regulators, platforms, and users—requires careful analysis of each party's distinct interests.[155]

Platforms themselves, as artificial entities, have no inherent expressive interests deserving constitutional protection. Their First Amendment rights must instead derive from the flesh-and-blood humans—owners, executives, and employees—whose expressive interests are actually at stake. These individuals clearly have legitimate interests in expressing their views about content on their platforms. When Facebook labels posts as misleading or X decorates Trump-related searches with American flags, these are unmistakably acts of platform expression.[156]

The harder question is whether requiring platforms to host third-party content meaningfully infringes on these individuals' expressive interests. In our view, the answer should depend on whether reasonable observers would interpret such hosting as platform endorsement. Several factors shape this analysis: the platform's size, its approach to content moderation, and whether it presents itself as a neutral forum or as a curated space. A niche platform cultivating a particular viewpoint may have stronger expressive interests than a massive platform advertising itself as a public square.

While platform operators may sometimes face genuine expressive harm from must-carry requirements, their interest in avoiding compelled speech typically pales against the speech interests of millions of users.[157] As *Red Lion* reminds us, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[158]

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[155] *Id.* at 2014–15.

[156] *See, e.g.*, Griffin Eckstein, *Elon Musk's X Pushes Trump Tags on All US Users*, YAHOO! NEWS (July 19, 2024, 5:49 PM CDT), https://perma.cc/JA7T-WT7N.

[157] Moran Yemini, *Missing in "State Action": Toward a Pluralist Conception of the First Amendment*, 23 LEWIS & CLARK L. REV. 1149, 1216 (2020) ("[I]f . . . autonomy were to be wrongly ascribed to online intermediaries, the autonomy of millions of users (and billions globally) to speak should nevertheless (generally) prevail over the autonomy of a few online intermediaries to suppress or otherwise interfere with users' speech.").

[158] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). While *Red Lion* arose in the context of broadcast spectrum scarcity, its core principle—that "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" is paramount—remains relevant in an era where attention, rather than spectrum, has become the scarce resource. *Id. See*

2. User interests

Unlike government censorship, private content-moderation decisions do not directly implicate the First Amendment. Yet when dominant platforms control access to the modern public sphere, their decisions profoundly affect the free expression values—dignity, autonomy, and self-actualization—that the First Amendment protects.

This relationship between private moderation and constitutional values creates a seeming paradox: While the First Amendment restricts only government action, laws requiring platforms to host speech might actually advance First Amendment interests. As Tim Wu argues, to avoid rendering the First Amendment "obsolete" and preserve meaningful free expression in the digital age, the government may need to ensure access to privately owned channels of communication.[159] The sheer scale of platform content moderation—millions of removals and billions of curation decisions daily, all of which are unconstrained by the First Amendment—gives these private actors a degree of practical control over expression that rivals or exceeds government power.

Government interventions to protect user speech rights on platforms could thus promote First Amendment values by enabling individual expression in today's dominant forums for communication. This does not mean that the First Amendment requires or authorizes such intervention—that authority would come from Congress's Commerce Clause power or state police powers. Rather, the argument is that well-designed platform regulation could advance the same interests in autonomy, dignity, and self-actualization that animate traditional First Amendment protections against government censorship.

This argument comes with crucial caveats. Poorly crafted speech mandates could backfire by degrading the speech environment—flooding platforms with spam, chilling legitimate expression through vague rules, or driving away users en-

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also Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 578 (2018) (arguing that it "seems implausible that the First Amendment stands for the proposition that [the government] cannot try to cultivate more bipartisanship or nonpartisanship online" and that the "justification for such a law would turn on . . . the increasing scarcity of human attention, the rise to dominance of a few major platforms, and the pervasive evidence of negative effects on our democratic life").

[159] Wu, *supra* note 158; *see also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

tirely. Some speech-protective regulations might also perversely incentivize platforms to remove more content overall. As we discuss below, courts must carefully guard against these unintended consequences when evaluating platform regulation.

3. Listener and society interests

The First Amendment protects not only speakers but also listeners—a particularly important consideration for social media, where most users primarily consume rather than create content. Just as speaking freely promotes individual dignity and autonomy, exposure to diverse views and ideas shapes how people understand themselves and their world. Yet listeners also have legitimate interests in avoiding certain content, particularly when low-quality or offensive speech would crowd out more valuable expression.

These individual listener interests connect to broader societal goals that the First Amendment serves: advancing knowledge and enabling democratic self-government. While First Amendment theorists may emphasize different aspects of these twin objectives, both point toward the same basic principle: Constitutional protection for free expression exists largely to foster a robust marketplace of ideas and meaningful public discourse.

But, as above, not every policy claiming to advance these goals actually does so. Regulations purporting to promote diverse expression on platforms can backfire, whether through poor drafting that chills speech or through mechanisms that enable government distortion of public discourse—both through censorship and through amplification of favored viewpoints. As we explore below, these pathologies make it crucial to examine how platform regulations affect the speech environment in practice, not just in theory.

4. Balancing the interests

Our analysis of platform, user, and societal interests points toward a more nuanced framework than simply asking whether regulation promotes or inhibits "free expression." Three principles emerge for evaluating platform regulation under the First Amendment:

First, viewpoint-neutral (and certainly content-neutral) regulations ensuring access to major private communication channels presumptively advance constitutional values. By enabling more voices to participate in modern public discourse,

such policies can promote individual autonomy and dignity while furthering societal interests in knowledge-seeking and democratic deliberation.

Second, while platform operators may suffer expressive injury when forced to host content, this harm varies significantly based on context. A small, curated platform might face genuine First Amendment injury if required to host content that conflicts with its mission. But for large platforms that already host diverse content without implied endorsement, the societal benefits of well-crafted access requirements likely outweigh any expressive burden on their operators.[160]

Third, and most critically, poorly designed regulations risk harming the very speech interests they aim to protect. As we explore in the next Part, must-carry requirements can backfire by degrading platform quality, driving away users, or perversely incentivizing more aggressive content removal.

B. Common Pathologies in Platform Regulation

While *Moody* correctly identified constitutional problems with the Texas and Florida laws, its focus on abstract editorial rights missed the opportunity to provide concrete guidance for future regulation. Rather than asking whether platforms qualify as "editors," courts should follow *Turner*'s more practical approach: examining how regulation actually affects the speech interests of platforms, users, and society. In *Turner*, the Court looked beyond cable operators' editorial discretion and analyzed how must-carry rules for local broadcasters affected the actual speech environment—considering not just the burden on cable companies but also the government's interest in preserving local television and the public's access to diverse sources of information.[161]

The Texas and Florida laws offer valuable lessons about how content-moderation regulation can backfire. Texas's neutrality mandate illustrates how seemingly

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[160] Consider TikTok's reported practice of algorithmically demoting videos made by "ugly" people. Sam Biddle, Paulo Victor Ribeiro & Tatiana Dias, *Invisible Censorship: TikTok Told Moderators to Suppress Posts by "Ugly" People and the Poor to Attract New Users*, INTERCEPT (Mar. 16, 2020, 12:02 AM), https://perma.cc/74RC-V2L5. One could certainly construct a First Amendment argument that this represents TikTok's "editorial judgment" about what content to promote—effectively expressing an "opinion" about user preferences. But this legal rationalization seems divorced from the business reality: Platform operators likely view such choices as engagement optimization rather than expression, framing these practices in First Amendment terms only after being advised by counsel.

[161] Turner Broad. Sys. v. FCC, 520 U.S. 180, 213 (1997).

speech-protective requirements can perversely incentivize platforms to suppress controversial content entirely. Florida's must-carry rules demonstrate how access requirements, well-intentioned or not, can degrade platform quality and ultimately reduce meaningful expression. Understanding these pathologies—and how they might be avoided—is essential for designing constitutionally sound regulation.

This Part analyzes these two regulatory approaches and their unintended consequences, then identifies specific safeguards that could help future legislation better serve free-expression values while avoiding First Amendment pitfalls.

1. The neutrality trap: lessons from Texas

The most direct way government regulation can reduce online speech comes through outright content removal—as the plaintiffs alleged in *Murthy v. Missouri* when claiming that government pressure led platforms to remove anti-vaccine content.[162] But neutrality requirements can suppress speech more subtly, through the same dynamic the Court identified in *Tornillo*: Just as newspapers might avoid covering political candidates to escape right-of-reply obligations, platforms subject to viewpoint-neutrality mandates have strong incentives to avoid controversial topics entirely.

This risk arises from the broad scope of "viewpoint" in First Amendment law, which protects even highly offensive speech. As Justice Alito has written, "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[163]

The problem for platform businesses is that users and advertisers also hate this kind of content. When platforms must maintain viewpoint neutrality, they therefore face an unappealing choice: either carry content that alienates users and advertisers, or avoid whole categories of controversial speech. The economic calculus typically favors the latter because ad-driven platforms depend on maximizing user engagement and advertiser comfort. "Brand unsafe" content threatens the business model directly. Even platforms that retain advertisers lose revenue when forced to

[162] Murthy v. Missouri, 603 U.S. 43, 54 (2024).

[163] Matal v. Tam, 582 U.S. 218, 246 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

place ads next to controversial content rather than more advertiser-friendly material.[164]

The result, as illustrated by Texas's law, is economic pressure to suppress entire debates rather than risk viewpoint-discrimination claims. A platform covering ethnic violence, for example, would need to carry both factual reporting and false denials, both condemnations and endorsements. Unable to differentiate between these viewpoints without violating neutrality requirements, and barred from even using "demonetization" to preserve brand safety, a platform that depends on ad revenues is likely to avoid such topics completely. This incentive to steer away from political controversy—and indeed politics itself—is particularly concerning because platforms' advertisement-market incentives to carry news and controversial content are already quite weak.[165] Meta's response to Canadian news licensing requirements—simply banning news content entirely[166]—shows how readily a platform focused on ad revenues will abandon journalistic content when regulation makes it costly to carry.

We note that Texas-style neutrality mandates may play out differently on platforms that do not depend on advertising revenue, or on platforms that are willing to sacrifice such revenue in pursuit of other goals. Certainly brand-safety issues at

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[164] *See* Rachel Griffin, *From Brand Safety to Suitability: Advertisers in Platform Governance*, 12 INTERNET POL'Y REV. 1 (2023).

[165] Adam Mosseri (@mosseri), THREADS (Oct. 10, 2023), https://perma.cc/F4AU-6M7L ("We're not anti-news. News is clearly already on Threads. People can share news; people can follow accounts that share news. We're not going to get in the way of any either. But, we're also not going go to amplify news on the platform. To do so would be too risky given the maturity of the platform, the downsides of over-promising, and the stakes."); *see also* Kyle Chayka, *How Social Media Abdicated Responsibility for the News*, NEW YORKER (Oct. 17, 2023) ("A recent study published by the journal *New Media & Society* concluded that the platform gives news-related posts less algorithmic promotion than other kinds of content. The study's authors wrote, 'The For You Page algorithm surfaces virtually no news content, even when primed with active engagement signals.' (According to a representative for TikTok, its algorithm treats all vetted content the same way.)"); Mike Isaac, Katie Robertson & Nico Grant, *Silicon Valley Ditches News, Shaking an Unstable Industry*, N.Y. TIMES (Oct. 19, 2023) ("Some executives of the largest tech companies, like Adam Mosseri at Instagram, have said in no uncertain terms that hosting news on their sites can often be more trouble than it is worth because it generates polarized debates.").

[166] Chayka, *supra* note 165.

X following Elon Musk's content-moderation rollback seem to have cost the platform a great deal of advertising revenue.[167] But maybe the fiscal costs associated with running an "unsafe" platform are better understood as investments in a broader plan to build—or at least gain access to those who wield—political power. Platforms like X and Meta—which, at least as of the time of this writing, have loosened restrictions on certain forms of right-coded speech[168]—may be willing to drive advertisers away in exchange for better treatment from political elites. But even these platforms might feel pressured by a viewpoint-neutrality requirement to censor political controversy to preserve brand safety.

2. The access problem: lessons from Florida

Must-carry laws can degrade the speech environment even when they don't directly suppress content. Florida's law illustrates two distinct mechanisms for this harm.

First, absolute carriage requirements can flood platforms with low-quality content that drowns out meaningful speech. While a total ban on content moderation would be extreme—effectively destroying platforms' core function of curating content, which, as media scholar Tarleton Gillespie notes, "is, in many ways, *the* commodity that platforms offer"[169]—even targeted must-carry rules can significantly degrade platform quality. Florida's requirement to carry all content "posted by or about" political candidates, for instance, creates incredible opportunities for what Steve Bannon memorably called "flood[ing] the zone with shit"[170]—overwhelming legitimate political discourse with misinformation and noise.

Second, by forcing platforms to carry objectionable content, must-carry laws can drive away users and thus shrink the audience for many or most speakers.

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[167] Aisha Counts & Eari Nakano, *Twitter's Surge in Harmful Content a Barrier to Advertiser Return*, BLOOMBERG (July 19, 2023, 6:00 AM EDT).

[168] *See, e.g.*, Kate Conger, *Meta Drops Rules Protecting L.G.B.T.Q. Community as Part of Content Moderation Overhaul*, N.Y. TIMES (Jan. 7, 2025).

[169] TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 13 (2018).

[170] Brian Stelter, *This Infamous Steve Bannon Quote Is Key to Understanding America's Crazy Politics*, CNN BUS. (Nov. 16, 2021, 11:09 AM ET), https://perma.cc/Z4AU-79L5.

Meta's investment of $5 billion annually in and hiring 40,000 employees for content moderation reflects this reality,[171] as does the user exodus from platforms, like X, that reduce moderation.[172]

Florida's definition of "journalistic enterprises"—which would protect not just legitimate news organizations but also conspiracy theorists and, as the Eleventh Circuit noted, even PornHub—illustrates this risk.[173] The law not only requires platforms to carry such content but also restricts their ability to label it or allow users to filter it, since "censorship" includes even "posting an addendum" to user content.[174]

The resulting audience loss harms the speech interests of all users, not just the platforms' bottom line. While not every reduction in engagement impairs expression to such an extent as to constitute a First Amendment violation, laws that mandate what amounts to poor content moderation warrant careful scrutiny for their practical effect on users' ability to reach and engage with audiences.

3. Designing better regulation

While our analysis highlights significant problems with both neutrality mandates and must-carry requirements, these flaws do not necessarily doom all attempts at platform regulation. Thoughtfully designed rules could address legitimate concerns about platform access and viewpoint diversity while avoiding the pitfalls evident in the Texas and Florida laws.

Any effective regulatory framework must begin with well-defined substantive safeguards. Platform obligations should be articulated with precision, avoiding vague mandates for "neutrality" or "consistency" that lead to overcautious content removal. The limited exceptions in the Texas law—for federally mandated removal, direct incitement of crime, and illegal content—underscore the insufficiency of minimal carve-outs. A more comprehensive safe harbor would aim to provide platforms breathing room to protect brand safety, and public safety, without incurring any obligation to engage in "even-handed" censorship. Such a safe

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[171] Nick Clegg, *Meta Launches New Content Moderation Tool as It Takes Chair of Counter-Terrorism NGO*, META (Dec. 13, 2022), https://perma.cc/U8QE-FWY7.

[172] *See, e.g.*, Raphael Boyd, *From X to Bluesky: Why Are People Fleeing Elon Musk's 'Digital Town Square?'*, GUARDIAN (Dec. 11, 2024, 5:00 GMT), https://perma.cc/RE6F-CW55.

[173] *See supra* note 54 and accompanying text.

[174] FLA. STAT. § 501.2041(1)(b) (2024).

harbor might include clear permission to remove demonstrably false information, clear instances of hate speech, nonconsensual intimate images (revenge porn and deepfakes), and coordinated manipulation campaigns.[175]

It will be equally important to grant platforms explicit authority to provide context through labeling and fact-checking. These measures not only preserve the platforms' own expressive rights but also—and in our view much more importantly—ensure that obligations to host false content do not deter platforms from supporting truthful reporting on controversial subjects.

Finally, policymakers must take care in designing enforcement mechanisms. Given the vast scale at which platforms operate—moderating millions of pieces of content daily—regulatory schemes should not penalize isolated inconsistencies. Liability should require evidence of systematic bias, and fault standards must be clear to avoid chilling legitimate moderation efforts. Texas's approach, which enables individual users to sue over single moderation decisions while awarding costs and attorney's fees only to successful plaintiffs, creates excessive pressure to remove all controversial content rather than risk litigation. Similarly, Florida's law permits users to recover up to $100,000 in statutory damages per claim for moderation decisions and imposes fines of $250,000 per day for the deplatforming of statewide candidates—penalties that risk incentivizing platforms to overcorrect or disengage entirely from political content.

To counterbalance this, fee-shifting provisions and venue rules should be structured to promote good-faith moderation rather than encourage platforms to adopt overly cautious removal practices. Platforms should also be protected by safeguards similar to anti-SLAPP laws, shielding them from lawsuits that aim to coerce censorship of disfavored views, whether brought by private actors or government officials.

At the same time, effective regulation must safeguard platforms' ability to serve users through content customization. While access mandates inherently redistrib-

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[175] While these subject-matter carveouts admittedly diverge from established First Amendment doctrine—particularly its general prohibition on viewpoint discrimination—this departure serves a greater constitutional purpose. Safe harbors that permit content moderation are essential to the commercial viability of must-carry regulations, which in turn protect the public's access to modern forums for expression. We thus view this limited doctrinal exception as justified by its role in preserving meaningful public discourse in digital spaces.

ute user attention, they should allow for both explicit user controls—such as content blocking—and algorithmic systems that help users find relevant content. As written, the Florida law seems to require platforms to override the preferences of users who tap the "block" button when content about political candidates appears in their feed.[176] Such a policy impairs platform functionality while also facilitating zone-flooding and sabotage.

Simple user controls like a "block" button are insufficient on their own. Platforms must retain the flexibility to use algorithmic tools to infer user preferences and adjust content visibility accordingly. For instance, they might need the capacity to limit the prominence of must-carry content in user feeds, much like cable operators manage local broadcasting quotas. Similarly, regulators should distinguish between outright removal and personalized distribution of content. We grant that the line between personalization and suppression is not always clear: When overwhelming majorities of users express a preference to avoid certain content, does honoring those preferences equate to censorship? Any regulatory framework must grapple with such nuances rather than imposing rigid, absolute access requirements.

Although these principles will not resolve every conflict inherent in platform regulation, they provide a foundation for rules that balance legitimate regulatory interests with the need to avoid the unintended consequences of poorly conceived mandates. Above all, they prioritize platforms' role in facilitating meaningful communication, while safeguarding against both excessive private censorship and regulatory overreach.

Conclusion: Are Any Infringements of Platform Editorial Rights Constitutional?

While this Article has largely focused on how content-moderation laws can violate the First Amendment—as illustrated by the serious flaws in the Texas and Florida statutes—the more pressing question is what kinds of platform regulation might actually be constitutional. The Florida and Texas laws are too flawed to clear the bar either under *Moody*'s formalistic "editorial" approach or under our own more user-centric approach. But we still see significant room for meaningful regulation.

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[176] *See supra* notes 49–51 and accompanying text.

Over the long term, the shape of that regulation will depend heavily on First Amendment doctrine that has yet to be developed. Today's First Amendment doctrine was developed in settings that presume a less volatile physics of speech—speech that was more costly, that moved more slowly, that was not so personalized—than the physics that prevail on a twenty-first-century social media platform. The physics of censorship have changed as well: No entity until recently, public or private, could control speech in quite the same way that today's content moderators do. It is not even clear that courts have the adjudicative capacity to apply First Amendment principles meaningfully in an area of policy where the volume and variety of speech under moderation every day is so large.[177] Any First Amendment doctrine that vindicates *user* speech, and not just the "editorial" interest of platform owners, will need special adaptations for this new and challenging operating environment.[178]

In the short term, however, we already see three particularly promising avenues for regulation that could potentially survive First Amendment scrutiny.

First, content-neutral design mandates could shape how platforms distribute and amplify content without directly restricting moderation decisions. WhatsApp's limits on bulk message forwarding and X's "read before sharing" prompts illustrate how technical constraints can reduce harmful virality without discriminating on the basis of content or viewpoint. These digital "time, place, and manner" regulations, subject only to intermediate scrutiny, could serve substantial government interests in preventing manipulation while maintaining robust discourse.[179]

Second, procedural requirements drawn from due process principles could promote transparency and accountability without compromising platforms' substantive moderation choices. Requirements for clear policies, meaningful notice, appeal rights, and human review of automated decisions—as outlined in the Santa

[177] Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 298–99 (2021) ("Between the staggering case volume, the range and complexity of the substantive issues, and the technical and managerial challenges involved with improving decisional accuracy, it should be clear that courts are in no position to oversee large-scale platform content governance practices without a very thick layer of administrative support.").

[178] For an attempt to derive some of these adaptations, see Langvardt, *Platform Speech Governance*, *supra* note 8.

[179] *See* Brett Frischmann & Susan Benesch, *Friction-in-Design Regulation as 21st Century Time, Place, and Manner Restriction*, 25 YALE J.L. & TECH. 376, 420 (2023).

Clara Principles[180]—would help prevent arbitrary censorship while respecting platforms' need to moderate at scale.

Third, narrowly targeted access rights might survive scrutiny where broader neutrality mandates would fail—an approach that Florida's law attempts but fails to pull off because it prevents virtually all moderation of speech "by or about" political candidates and thus invites a flood of Bannonian shitposting "about" whoever is running for office. But a more carefully drawn protection for speech "by" the candidates themselves could serve a legitimate government interest in avoiding election manipulation that, in our view, is distinguishable from the "ideological balance" interest that the *Moody* majority condemns. While such protections may allow a limited amount of low-value or irrelevant content to persist, we think the tradeoff could be justified to ensure that political candidates can communicate directly with voters. The key will be to protect specific speech rights rather than imposing crude neutrality requirements that incentivize widespread content removal.

Identifying constitutionally permissible approaches to platform regulation represents a crucial research agenda going forward, and we hope our analysis of *Moody*—both what it permits and what it forecloses—helps enable this vital work. Whatever approach prevails, courts must move beyond abstract, absolutist analogies to newspapers or shopping malls and instead examine how regulation actually affects the speech environment. Does a particular rule enhance or degrade users' ability to speak and be heard? Does it promote or inhibit robust public discourse? Only by grounding doctrine in these concrete impacts can courts ensure First Amendment protections meaningfully serve their essential purpose: fostering vibrant discourse in our increasingly digital public sphere.

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[180] *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, SANTA CLARA PRINCIPLES, https://perma.cc/7EAU-RRDA.