NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

THE CONSTITUTIONALITY OF PLATFORM CONTENT MODERATION BANS FROM A HISTORICAL PERSPECTIVE

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ABSTRACT

One of the biggest open questions in First Amendment law today is whether bans on social media content moderation policies are constitutional. When the United States Supreme Court considers the issue, what will matter most is not policy but history. Yet little scholarship to date has focused on whether the Founders would have understood the First Amendment to encompass a right for social media companies to moderate content. This Essay aims to fill that gap. It finds that bans on platform content moderation policies are likely constitutional from a historical perspective.

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INTRODUCTION

Far too little attention has been given to Founding-era history in the current debate surrounding the constitutionality of platform content moderation bans. Social media companies moderate content on their platforms in many ways and for many reasons. Sometimes content is moderated to reduce spam, or to increase user engagement with ads, or even to silence certain messages.[1] Opponents of the practice want to regulate platform content moderation because they feel powerful social media companies should not be able to limit a user's ability to speak on important issues of public concern. On the other hand, platform defenders not only believe that content moderation choices shouldn't be regulated, but that the practice is also constitutionally protected under the First Amendment. Circuit

[1] *See generally* Pinar Yildirim and Z. John Zhang, *How Social Media Firms Moderate Their Content*, KNOWLEDGE AT WHARTON (Jan. 24, 2022), [https://perma.cc/9TN3-PGCP].

courts are split on the issue, and the U.S. Supreme Court just granted certiorari to address it.[2]

Missing from the fight is a set of neutral principles—derived from the Constitution's text, history, and structure—that inform how the First Amendment originally would have been understood to deal with this new technology. This Essay aims to fill that gap, and finds that content moderation bans are not facially unconstitutional from a historical perspective.[3] The United States has a history of laws that expand freedom of speech beyond the First Amendment. In many cases, those laws limit the scope of a large, powerful entity's First Amendment rights, but are still permissible because they maintain or expand free speech for the larger public.[4] In that light, restrictions on content moderation hardly seem unprecedented; if anything, they would be part of a long tradition of speech expansionism.

When platforms argue that those traditions do not apply to them, their arguments usually rest on the notion that they have a First Amendment right to editorial discretion similar to that of newspapers.[5] But that claim does not square with history. The Founders likely would have viewed the editorial discretion claim to be a free press, rather than a free speech, issue. And the Free Press Clause was enacted to ensure every person's right to express their views through the press, not to elevate the press industry's rights beyond the people's rights. Thus, it would not have been understood to protect content moderation policies, which prevent individuals from expressing themselves through the press.

In Part I, this Essay discusses the history of internet speech regulation. In Part II, this Essay explores how legislation has historically been used to expand free speech for the public, not contract it. In Part III, this Essay discusses the constitutionality of content moderation restrictions. It first identifies social media companies' asserted First Amendment right to content moderation as a form of free press. It then finds that because the First

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[2] *See* Amy Howe, *Justices take major Florida and Texas social media cases*, SCOTUSBLOG (Sep. 29, 2023), [https://perma.cc/E6LA-W8ES].

[3] This Essay considers the constitutionality of content moderation bans assuming the bans are viewpoint-neutral. If, however, the ban allowed platforms to moderate, say, liberal content but not conservative content, the ban itself would be viewpoint-based and subject to strict scrutiny.

[4] *See infra* Part IV.

[5] *See infra* Part III.

Amendment protects freedom of the press as a technology, not as an industry, content moderation restrictions would not violate social media companies' First Amendment rights. In Part IV, this Essay discusses limitations to the theory, for example, as applied to newspapers.

Before beginning, one important caveat is in order: Although this Essay finds that content moderation bans are constitutionally *permissible*, it does not find that they are constitutionally *mandatory*.

If social media companies were government-run, then it would be beyond dispute that such content moderation policies are unconstitutional. The First Amendment prohibits the government from suppressing speech based on viewpoint. But social media companies are not government-run; they are run by private companies. The free speech concerns, though, are largely the same:[6] If one subscribes to the marketplace of ideas/search for truth rationale for free speech, then the marketplace is as disturbed by powerful social media companies as it is by government limitations on free speech.[7] If one views free speech as a kind of natural right related to self-expression and self-fulfillment, then powerful social media companies can prevent that self-expression as much as the government can. [8] Political self-concepts are likewise greatly impacted by social media use.[9] Even if one subscribes to the belief that the First Amendment is just supposed to stand as a check on government, then private companies should only be treated differently if they are not coerced into spreading government orthodoxy.[10]

Given the overlap in free speech concerns with government and social media censorship, a wide body of scholarship has developed

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[6] Of course, this is a matter of degree. Government suppression affects the market more than suppression by a small private entity. The difference is that social media companies today have a lot more than a small degree of power over speech.

[7] *See* Patrick Ganninger, *Freedom of Tweets: The Role of Social Media in a Marketplace of Ideas*, SLU L. J. ONLINE (2021).

[8] *Cf.* Darko Manevski, *Half of Gen Z Admit Social Media Is Only Place They Can Truly Be Themselves*, NEWSWEEK (June 15, 2022) [https://perma.cc/3R6J-F37L].

[9] *See* Daniel S. Lane et al., *Social Media Expression and the Political Self*, 69 J. COMM. 49 (Jan. 12, 2019), [https://perma.cc/B369-86QE].

[10] Academics have recently raised alarm about "jawboning," informal coercion on social media companies by the government to moderate content in a way the government deems appropriate. *See* Genevieve Lakier, *Informal Government Coercion and The Problem of Jawboning*, LAWFARE (July 26, 2021) [https://perma.cc/PBA7-2AFK].

surrounding whether the "state action doctrine" ought to apply against social media companies, such that platforms would be considered government actors and constitutionally forbidden from moderating content based on a user's views.[11] This Essay does *not* make that argument.[12] Rather, this Essay's assertion is much milder: given that the Free Press Clause of the First Amendment was written to give the people the right to publish their opinions, it does not protect a right for social media companies to prevent people from publishing their opinions. Democratically enacted laws that protect the people's right to publish their opinions—even if at the expense of the platform's desire to moderate content—are constitutional.

I. INTERNET SPEECH REGULATION TODAY

Social media companies have significant discretion over how they moderate content on their platforms. That is not because the U.S. Supreme Court has decided that social media companies have a First Amendment right to that discretion. Rather, the platforms retain discretion because, up until Texas and Florida's recent content moderation bans,[13] platform content moderation was not unlawful: no cause of action existed to challenge a content moderation policy. Quite the contrary, Section 230 of the Communications Decency Act immunized platforms from liability stemming from their content moderation policies.[14]

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[11] For an argument that they are, see Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019), [https://perma.cc/7K4S-PJD].

[12] Certainly, some of the positions expressed throughout this Essay may support an argument that the state action doctrine ought to apply to social media. Many of the historical points here suggest that the Founders were similarly concerned about speech suppression by powerful individuals as they were by suppression by the government. However, the text of the First Amendment specifies that it is concerned with speech restrictions imposed by Congress. In fact, for many years, the First Amendment did not even apply to the whole of government; it only applied against the federal government until it was incorporated against the states via the Fourteenth Amendment. And adopting such a state action jurisprudence in the First Amendment context may turn into a slippery slope for other areas of constitutional law. Again, this point is merely a tangential one. It is just to say that the question is unanswered by this Essay, yet it may be worth further exploration in future work.

[13] *See infra* Part I.

[14] *See* 47 U.S.C. § 230. Section 230 was an amendment to the CDA that was largely motivated by the Supreme Court's decision in Stratton-Oakmont v. Prodigy. *See* Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J. LAW & PUB. POL'Y 863, 866 (2010).

The stated policy of Section 230 was to "promote the development of the Internet," … "to preserve the vibrant and competitive free market that presently exists for the Internet …," and "to remove disincentives for the development and utilization of blocking and filtering technologies."[15] Section 230 has two relevant provisions related to content moderation. Section 230c(1) of the Act protects Internet Service Providers (ISPs) from liability as the publishers or speakers of content on their platforms.[16] Section 230c(2) of the Act protects ISPs from liability for moderating any content the companies find objectionable.[17]

Section 230 was critical to the growth and success of the internet.[18] Just 25 years ago, there were only about 12 million subscribers to online companies. Today, there are billions.[19]

Yet Section 230 remains an extremely controversial amendment, as ISPs are regularly accused of abusing the immunity they have under it.[20] By allowing ISPs to moderate content however they please, Section 230c(2) permits ISPs to moderate content in ways that many consider undesirable. For example, social media companies have been accused of discriminating against right-wing political viewpoints,[21] especially after the most prominent social media

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There, because Prodigy held itself out as a public, family-friendly ISP and moderated its website's content, it was held liable for defamatory content that third parties posted on the website. Congress found the *Prodigy* decision problematic for two key reasons. First, the ruling inherently disincentivizes ISPs from moderating content because such moderation put them at greatly increased risk of liability. Second, for those ISPs that would still choose to moderate content, they could reasonably be expected to overly censor content to avoid potential litigation and liability, consequently stifling the very diversity of discourse for which the internet is so highly valued. *See* Alexandra Lotty, *Apps Too: Modifying Interactive Computer Service Provider Immunity Under Section 230 of the Communications Decency Act in the Wake of "Me Too*," 93 S. CAL. L. REV. 885, 901 (2020).

[15] *See* 47 U.S.C. § 230.

[16] *See Id.*

[17] *See Id.*

[18] *See* Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades*, COLUM. SCI. & TECH. L. REV. 1, 2 (2016).

[19] *See* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revisiting Section 230 Immunity*, 2.2 GEORGETOWN L. TECH. REV. 453, 463 (2018).

[20] *See* Tiffany Li, *Trump's Twitter Reign of Terror Is Over. But His Impact on Social Media Isn't*., MSNBC (Jan. 8, 2021, 3:30 PM) [https://perma.cc/2QQR-N4J6].

[21] *See, e.g.*, Eli Sanders, *Court Filings Show How Amazon Web Services Is Using Section 230 as a Legal Sword Against Parler*, GEEKWIRE (Jan. 19, 2021) [https://perma.cc/2PVR-237G]; *see also* Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech*

companies banned former United States President Donald Trump from their platforms.[22] Still others contend that social media companies have used this same power in ways that disadvantage marginalized communities.[23] For example, TikTok was recently embroiled in a scandal after it acknowledged that it had purposely removed, without legal consequence, videos of disabled people.[24]

To address such viewpoint discrimination, scholars and lawmakers have proposed several regulatory changes. For instance, Florida and Texas both passed laws to ban social media content moderation to some extent.[25] But many of those proposals have been rejected outright due to First Amendment concerns. Social media companies, the argument goes, have the same First Amendment rights as individuals do, and that encompasses a right to moderate content.[26] If so, it follows that Congress has done nothing wrong in immunizing social media companies for the companies' content moderation choices, because Congress has merely codified an already existing—and vital—constitutional right. What's more, if federal or state legislatures were to do something else—such as

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Companies, N.Y. TIMES (Oct. 16, 2019) [https://perma.cc/9BRC-S3RJ]; *but see* Citron & Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, U. CHI. LEGAL F. 45, 63 (2020) ("There is no empirical basis for the claim that conservative viewpoints are being suppressed on social media").

[22] *See Social Media and Democracy: The Hard Questions*, DAILY CAL.: WEEKENDER (Feb. 27, 2021), [https://perma.cc/L4NU-22KM].

[23] *See, e.g.*, Letter from 75 Organizations to the Biden/Harris Admin. and the 117th Cong. (Jan. 27, 2021).

[24] *See* Elena Botella, *TikTok Admits It Suppressed Videos by Disabled, Queer, and Fat Creators*, SLATE (Dec. 4, 2019, 5:07 PM) (discussing how TikTok engaged in this policy to help scourge bullying, but ended up discriminating against disabled individuals) ("Social media suppression denies people economic, political, and cultural opportunities and, in that sense, really isn't that different from an employer not hiring a software engineer because they use a wheelchair") [https://perma.cc/Y7AY-V28M].

[25] *See* Greg Stohr, *Top Court Seeks US Views on Texas, Florida Social Media Laws*, BLOOMBERG LAW (Jan. 23, 2023), [perma.cc/V7H7-7ATW]. Note that the Florida and Texas laws are not identical and might have differences (e.g., speaker preferences) that render one constitutional but not the other.

[26] Some think that Justice Kavanaugh may hold this view based on a dissent he wrote in a broadcasting case while on the D.C. Circuit: U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 431-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial for rehearing en banc) (arguing that under *Turner*, "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market," but noting "the Supreme Court could always refine or reconsider … its decisions in the *Turner Broadcasting* cases").

prohibit content moderation—that would violate companies' constitutional rights.

When confronted with the issue, the 11th Circuit blocked most of Florida's law for violating the First Amendment,[27] while the 5th Circuit, relying on an originalist analysis, upheld the Texas law.[28]

II. FIRST AMENDMENT RIGHTS V. FREE SPEECH LAWS

At the Founding, First Amendment protections generally covered only two categories of common-law rules: "first, a prohibition on prior restraints and, second, a privilege of speaking in good faith on matters of public concern."[29] To provide greater protection for speech interests beyond just the First Amendment, a body of free speech laws developed through state and local constitutions, laws, and common law.[30] Postal laws, common carrier and quasi-common carrier laws, and worker speech protection laws belong to this tradition of laws that foster more speech than just the First Amendment.[31]

The latter set of laws, though, prevent some entities from fully expressing themselves. Specifically, the laws prevent those entities from limiting the speech of others in order to express themselves. For example, common carrier laws prevented telephone companies from denying services to customers based on the customers' viewpoints,[32] even though telephone companies, like ordinary individuals, have First Amendment rights and may not agree with the customers' viewpoints. The laws that belong to this tradition 1) withstand constitutional scrutiny, 2) even though they may limit the speech of some, 3) because they expand speech for the public.[33]

Section 230 is thus unlike the laws that belong to this tradition, as it is a law that "reinforce[s] the power that the social media companies already possess over those who use the platform to

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[27] NetChoice, L.L.C. v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

[28] NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[29] Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 874-57 (2022).

[30] *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2301-02 (2021).

[31] *Id.*

[32] See 47 U.S.C. § 153 (11).

[33] *See generally* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

speak."[34] When legislators want to protect free speech, they usually step in to reverse such a phenomenon, not bless it. Certainly, there are many laws that protect private power without regard for the speech consequences; but those laws, unlike Section 230, were not enacted to protect free speech. Section 230 is different because it is supposed to be a law that protects free speech on the internet, yet it does so by privileging platform over user speech.

Of course, Section 230 has certain benefits. For example, Section 230, by permitting platforms to moderate content, allows platforms to distinguish themselves from each other. Where concentrated power is a problem in social media, then it may be better to support policies that "ensure that there are a large number of different kinds of social media companies, with diverse affordances, value systems, and innovations," not policies that force uniformity.[35] One platform may have a stronger content moderation policy that prohibits a large category of what it defines as hate speech, while another may have a weak content moderation policy that permits hate speech. One platform may have content moderation policies that favor conservative posts, another may have content moderation policies that favor liberal posts, and yet another may have content moderation policies that are viewpoint neutral. Say government regulations on content moderation policies were constitutionally prohibited and platforms could moderate as they saw fit. Users, then, would ideally have all these different platform options from which to choose, and they may be more willing to contribute to public debate on a platform that has a content moderation policy they favor than a policy they dislike. If a diversity of platforms does not exist, that could ultimately cut off representation from people who won't share their views on particular platforms.

While in theory that could happen, Section 230 hardly seems to be fulfilling those goals. Indeed, massive platforms have taken over

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[34] *Id.*

[35] Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021); *see also* Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 332-334 (2021) (arguing that we should preserve "laws that give tech companies the freedom to decide what content to allow on their site over alternatives that either mandate detailed scrutiny of content or forbid that scrutiny and treat tech platforms like government actors" because "we should treat an industry as a public franchise only if we really have no other choice. A better alternative is to try to inject real competition into a tech industry that has been lacking it in recent years.").

large shares of the market. Alternatives like Mastodon,[36] which gained some traction after Elon Musk took over Twitter, and Truth Social,[37] which former President Trump developed after he was deplatformed, have failed. Twitter's most formidable competitor to date has been Threads,[38] but Threads belongs to Meta, the social media superpower that owns Facebook and Instagram. New entrants are not making a dent.

More significantly, even if all of that is true, Section 230 defies the ways that speech promotion laws in this tradition usually work, and work lawfully. Hypothetically, if laws protected employers who discriminated against employees based on the employee's viewpoints, perhaps that would give employees a choice between employers who were more tolerant and those who were less tolerant. Perhaps an employee would choose to work for an employer that was less tolerant because that employee valued benefits that the employer offered that more tolerant employers did not. But the point of speech expansionist laws is not that. Their point is to open already existing spaces to the greatest number of voices. If existing spaces only belong to the rich and powerful, for example, then ordinary people will have an inordinate hill to climb to have their voices heard. Forcing people to change culture, self-moderate, or create better platforms does not guarantee them an avenue to speak. Opening existing spaces does.

III. CONTENT MODERATION ON SOCIAL MEDIA

Some argue that Congress should prohibit ISPs from moderating content.[39] Such bans, the argument goes, would protect those who belong to marginalized groups and would otherwise be censored by

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[36] *See* Stephen L. Miller, *Journalists Learn a Lesson with Failed Mastodon Experiment*, WASHINGTON EXAMINER (Jan. 10, 2023), [https://perma.cc/459C-Z3BZ].

[37] *See* Helena Kelly, *Trump's Inconvenient Truth: Ex-President Has Lost $700M in Truth Social Which Promised 81M Users by 2026 and Currently Has Only 5M*, DAILYMAIL (April 4, 2023), [https://perma.cc/FN5W-LRDM].

[38] *See* John Herrman, *Mark Zuckerberg's Threads Is an Early Success – Thanks to Elon Musk*, NY MAGAZINE (July 13, 2023), [https://perma.cc/KBJ6-ZKNZ].

[39] *See* Alexandra Lotty, *Apps Too: Modifying Interactive Computer Service Provider Immunity Under Section 230 of the Communications Decency Act in the Wake of "Me Too,"* 93 S. CAL. L. REV. 885, 911-912 (2020).

a self-interested company.[40] But many reject such proposals because they assume ISPs have a First Amendment right to moderate their websites' content however they see fit.[41]

In this Part, I argue that restrictions on content moderation can be constitutional because the First Amendment (in particular, the Free Press Clause) was originally understood to guarantee every person the right to express themselves through the press. It did not encompass a right for private entities to limit the rights of individuals to express themselves through the press.

A. Free Speech v. Free Press

While free speech and free press rights are often conflated in today's precedents, they are hardly redundant from a historical perspective.[42] When the Founders wrote the Constitution, they understood freedom of speech as the right associated with "uttering" words, while freedom of the press was the right associated with "print[ing] and publish[ing]" them.[43] At the Founding, freedom of the press was seen as more powerful than freedom of speech alone. Only via publications could speakers effectively disseminate their messages. Freedom of the press made speech dissemination more

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[40] *Cf.* Markena Kelly, *The PACT Act Would Force Platforms to Disclose Shadowbans and Demonetization*, VERGE (Jun. 24, 2020), [https://perma.cc/K8NH-LPGU]. (The PACT Act is one proposal that would require ISPs to act in good faith. "If approved, the bill would force large tech platforms to explain how they moderate content in a way that is easily accessible to users and release quarterly reports including disaggregated statistics on what content has been removed, demonetized, or had its reach algorithmically limited. Platforms would then be required to roll out a formal complaint system for users that processes reports and explains their moderation decisions within 14 days. Users would then be allowed to appeal those moderation decisions within a company's internal reporting systems, something that already exists on platforms like Facebook"); *see also* MONIKA BICKERT, FACEBOOK, ONLINE CONTENT REGULATION: CHARTING A WAY FORWARD 10 (2020) ("People in democratic societies are accustomed to being able to hold their governments accountable for their decisions. When internet companies make decisions that have an impact on people's daily lives, those people expect the same accountability").

[41] *See* Edwin Lee, *Conditioning Section 230 Immunity on Unbiased Content Moderation Practices as an Unconstitutional Condition*, 2 J. L., TECH, & POL'Y 457, 468 (2020).

[42] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 475 (2012).

[43] AN IMPARTIAL CITIZEN [JAMES SULLIVAN], A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 17 (Boston, David Carlisle 1801).

expeditious,[44] and it was a necessary vehicle for dialogue and spreading knowledge.[45] The Constitution thus guaranteed freedom of the press even though it came with much more power that was not inherent in freedom of speech.[46]

Similarly, the concerns surrounding First Amendment rights for social media companies are the same as those surrounding the press at the Founding. Social media companies claim to have editorial rights akin to newspapers.[47] The dangers associated with the press at the Founding are likewise raised against social media companies: they can spread mass amounts of information to countless people almost instantaneously. Thus, the First Amendment rights that social media companies raise might be better understood under the Free Press Clause rather than the Free Speech Clause.

B. Social Media Industry Rights v. User Rights

Social media companies claim that laws cannot prevent them from moderating content. This claim rests on the assumption that the First Amendment guarantees to social media companies editorial rights that they can use to censor individuals from publishing their views on the companies' platforms. But that position is unsupported by a historical understanding of the Free Press Clause.

The Founders understood the Free Press Clause to protect "everyone's use of the printing press (and its modern equivalents) as a technology."[48] They did not understand it as a special provision that "specially protects the press as an industry, which is to say

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[44] WILLIAM BOLLAN, THE FREEDOM OF SPEECH AND WRITING UPON PUBLIC AFFAIRS, CONSIDERED 137 (London, S. Baker 1766).

[45] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 89–118 (Oxford University Press, 1965); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 119 (Philadelphia, H.C. Carey & I. Lea 1825).

[46] *See* Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599-600 (1979); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 769 n.16 (1977).

[47] *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 97 (2021). Note this is an asserted right fairly unique to members of the press, as ordinary people do not have a right to edit people's views or silence their speech. *Cf.* Frank D. LoMonte, *The "Social Media Discount" and First Amendment Exceptionalism*, 50 U. MEM. L. REV. 387, 393-94 (2019) (noting that "outside the online-speech context, it is well recognized that a speaker may not be silenced merely because the speech provokes, or is expected to provoke, an extreme reaction from the audience. The Supreme Court refers to this notion as the 'heckler's veto.'").

[48] Volokh, *supra* note 42, at 460.

newspapers, television stations, and the like."[49] Legal giants like Blackstone[50] and Story[51] emphasized the freedom of the press as one belonging to "every man," "every citizen," and "every individual" to publish on any subject without prior restraint.[52] They did not elevate the rights of certain individuals above others, or the press above the people. In response to claims that "conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges,"[53] courts responded that "professional publishers of news … have the same right to give information that others have, and no more."[54]

Equality between different speakers was not the Founders' only concern. They viewed freedom of the press as the "freedom of everyone to *publish*."[55] Specifically, they saw the important power in publishing to a broad and wide audience. English barrister Francis Ludlow Holt, who wrote one of the leading treatises on libel law at the Founding, summarized the view in 1818: "[t]he liberty of the press, … properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press."[56] State constitutions at the time said "[e]very citizen may freely *speak*, *write and print* on any subject, being responsible for the abuse of that liberty."[57] Justice Story wrote that "every man shall have a right to *speak*, *write*, *and print* his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person."[58] State supreme courts held that "freedom of the press" permits "every man to *publish* his opinions."[59] Justice Iredell wrote that "[e]very freeman has an

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[49] *Id.* at 459.

[50] 4 WILLIAM BLACKSTONE, COMMENTARIES *151.

[51] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (Boston, Hilliard, Gray, & Co. 1833).

[52] *Id.*

[53] Sheckell v. Jackson, 64 Mass. (10 Cush.) 25, 26-27 (1852); *see also* Stone v. Cooper, 2 Denio 293, 304 (N.Y. 1845) (holding the press as liable for libel as individuals).

[54] Barnes v. Campbell, 59 N.H. 128, 128-29 (1879) (citing *Sheckell,* 64 Mass. (10 Cush.) 25)).

[55] Volokh, *supra* note 42, at 474 (emphasis added).

[56] FRANCIS LUDLOW HOLT, THE LAW OF LIBEL … IN THE LAW OF ENGLAND (first American edition 1818) (London, J. Butterworth and Son 1816), *excerpted in* HAROLD L. NELSON, FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 18-19 (1967).

[57] Volokh, *supra* note 42, at 466 (emphasis added).

[58] 3 STORY, *supra* note 51, at 732 (emphasis added).

[59] Respublica v. Oswald, 1 U.S. 319, 325 (Pa. 1788) (emphasis added).

undoubted right to *lay* what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press."[60]

The purpose was that the more the people published, the more knowledge could spread throughout the colonies. The Founders saw it as vital to have robust debate through the press. And that was especially so for issues that challenged government action and were of great public importance. For example, Benjamin Franklin wrote in his "Apology for Printers" that "Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being *heard* by the Publick."[61] They did not think that the people with whom they disagreed should not have their views expressed in public; they thought that when disagreement arose, more speech would ultimately provide a resolution.

William Livingston, New Jersey's first governor and one of the signers of the U.S. Constitution, more directly noted that the Founders viewed freedom of the press as a duty to publish anything "conducive of general Utility," without discriminating against writers.[62] Livingston did note that a "Printer ought not to publish every Thing that is offered him;"[63] He was concerned, for example, about libel, which is unprotected speech, and speech that harmed the state, which was part of the concern that motivated the Sedition Act. But beyond that, if the Press prohibited "printing any Thing, not repugnant to the Prosperity of the State, [that would be] an unjustifiable and tyrannical Usurpation."[64] He argued that "All those who oppose the Freedom I have contended for, — a Liberty of promoting the common Good of Society, and of publishing any Thing else not repugnant thereto, — are Enemies to the Common Wealth."[65]

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[60] *In re* Fries, 9 F. Cas. 826, 839 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5126) (grand jury charge) (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMENTARIES *151).

[61] Benjamin Franklin, *Apology for Printers*, PA. GAZETTE, June 10, 1731, *reprinted in* 1 THE PAPERS OF BENJAMIN FRANKLIN 194–99 (Leonard W. Labaree ed., 1959).

[62] William Livingston, *Of the Use, Abuse, and Liberty of the Press*, THE INDEP. REFLECTOR OR WKLY. ESSAYS ON SUNDRY IMPORTANT SUBJECTS, Aug. 30, 1753; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 288 (2017) (presenting freedom of the press as a natural right).

[63] Livingston, *supra* note 62; Patrick J. Charles and Kevin Francis O'Neill, *Saving the Press Clause From Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 Utah L. Rev. 1691 (2012).

[64] Livingston, *supra* note 62.

[65] *Id.*

Free press rights were thus not meant to elevate the press industry's rights beyond the people's rights. Printers, of course, did not automatically publish everything sent to them.[66] In some limited circumstances, printers refused to publish certain pieces to uphold "the tenets of impartiality and [ensure] their newspaper's contents were respectable."[67] But refusing to publish was not viewed as a free press right. Again, the Founders were concerned with printers censoring speech. Thus, the Free Press Clause was understood to protect the people's right to express their views through the press, not to protect large companies when they limit the people's right to express their views through the press.

Indeed, freedom of the press was in fact significantly motivated by the Founders' concerns that the right of an individual to use the press would hinge on the whims of one man. Today, social media content moderation receives so much attention in large part because the biggest players seem to have control over all social media speech dissemination, as compared to newspapers, where there are more players. Such a concentration of power over speech is the precise problem the Founders tried to fix, not exacerbate, with the First Amendment. As Blackstone, who two decades before the First Amendment's ratification warned of concentrated power in the press, stated:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published … To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, *is to subject all freedom of sentiment to the prejudices of one man*, and make him the

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[66] PENN. CHRON., & UNIVERSAL ADVERTISER (Phila.), Mar. 9–16, 1767, at 3, col. 1. (printers did not have to publish "all the Trash which every rancorous, illiberal, anonymous Scribbler" sends them).

[67] Jeffrey A. Smith, *Impartiality and Revolutionary Ideology: Editorial Policies of the South-Carolina Gazette*, 1732–1775, 49 J. S. HIST. 511, 511 (1983); *On the Use, Abuse, and Liberty of the Press, with a Little Salutary Advice*, NEW ENG. MAG. KNOWLEDGE & PLEASURE, Aug 1, 1758, at 33, 38; Kevin F. O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a 'Free Press' as Interface to the Present and Future*, 4 UTAH L. REV. 1691, 1731 (2012).

> arbitrary and infallible judge of all controverted points in learning, religion, and government.[68]

Relevant also is Judge Alexander Addison's grand jury charge from 1799, which stated that "the freedom of the press consists in this, that any man may, *without the consent of any other*, print any book or writing whatever, being … liable to punishment, if he injure an individual or the public."[69]

In these examples, the Founders' most immediate concern was with licensors, government officials who would restrict licenses to use the press. The Founders had significant concerns stemming from the Stationers' Company, for example, the only guild of printers/publishers that the Crown in England permitted to print books.[70]

The principles they set forth, though, speak more broadly to a concern that the people's right to use the press could be subject to the whims of a single person, whether that be a licensor or a powerful corporation. People criticized the press when it seemed to be controlled by political parties or wealthy individuals.[71] They wanted it to act like a "public officer"[72] to ensure that ordinary people could express themselves just as aristocrats could.[73] Indeed, historians have found that when the Founders enacted the Free Press Clause, they were concerned with government using powerful private parties to limit the people's right to express themselves through the press:

> The standard scenario in which Americans imagined liberty being destroyed called for an ambitious leader or 'junto' of leaders to recruit a loyal corps of helpers, men whose loyalties were to their leader rather than the community as a whole … These subverters of liberty could come in many forms: a warlord's private army, a classical dictator's Praetorian

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[68] 4 BLACKSTONE, *supra* note 50, at *151–52.

[69] ALEXANDER ADDISON, CHARGES TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT, IN THE STATE OF PENNSYLVANIA 279 (Washington, John Colerick 1800).

[70] Edward Lee, *Freedom of the Press 2.0,* 42 GA. L. REV. 309, 323 (2008).

[71] Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91, 108-109 (2018).

[72] Sidney, Editorial, FREEMAN'S J., Apr. 10, 1782, *available at* America's Historical Newspapers, 1690–1876 (NewsBank, Inc. 2017).

[73] AKHIL REED AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 10, 21 (1998).

> Guard, or the parliamentary pensioners and hireling newspaper editors of Britain.[74]

Around the Founding, some even held that freedom of the press encompassed the right to publish one's thoughts even when others might need to facilitate the publication. Holt, for example, viewed such publication as a natural right: "The free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, and to every instrument, in which, *and by whose assistance*, those faculties can be exercised."[75]

Given that the Founders enacted the Free Press Clause to protect the people from individual licensors who could restrict their access to speak through the press, they likely did not understand that it would be used instead to protect corporations that restrict the people's access to speak through the press.

C. Making Sense of Precedents

This historical approach helps explain the Court's approach toward content moderation, which to date has had an unclear framework.[76]

The U.S. Supreme Court has not decided whether bans on social media content moderation are constitutional. The Court, though, has been suspicious of content moderation policies, precisely because freedom of the press is mainly concerned with the *people's* right to express themselves through the press. Consider the Court's reasoning in *Associated Press v. United States*, where it held that the legislature's anti-monopoly laws did not infringe the free-press rights of news companies that wanted to limit the people who could distribute the news within their association:

> [The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely

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[74] JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 75 (2001).

[75] HOLT, *supra* note 56, at 18-19 (emphasis added).

[76] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring).

> a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[77]

The Court has also recognized the importance of increasing access for people to communicate through the press as it has decreased liability for publishers. In *New York Times v. Sullivan*, which raised the bar to actual malice in order to find newspapers liable for libel (still a lower standard than the one social media companies have under Section 230), the Court emphasized that the actual malice liability standard was critical to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[78] Whereas strong libel laws are also central to the Founders' notion of free speech, libel protections against publishers of third-party speech have progressively weakened in order to fulfill the Founders' grander concern for access to the press.[79]

The Founders' concerns have been muddled in recent years, however, because some recent precedents suggest the First Amendment protects platform content moderation. For example, in *Miami Herald*, the Supreme Court held that a state law that required newspapers to provide a "right-of-reply" to candidates whom they criticize violated the newspaper's First Amendment rights.[80] In another case, *PG&E*, the Supreme Court held that a public utility commission could not require a private company to distribute opposing messages in its billing envelopes where the company included a pamphlet that expressed its own views on public

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[77] Associated Press v. United States, 326 U. S. 1, 20 (1945).
[78] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[79] *Id.* at 301-302.
[80] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

policies.[81] And in *Hurley*, the Supreme Court held that state public accommodations laws could not force parade organizers to permit a float for an organization of Irish-American LGBT individuals when the float violated the parade organizers' "traditional religious and social values."[82]

On the other hand, in *PruneYard*, the Supreme Court upheld a law that required malls to allow individuals to pamphleteer at their shopping centers. [83] In *Rumsfeld*, the Supreme Court held that requiring universities to host military recruiters in exchange for federal funding was not an unconstitutional condition, even when the schools opposed the military's policies on sexual orientation.[84] And in *CBS*, the Supreme Court held that an FCC law required broadcasters to sell airtime to political candidates, and the broadcasters did not have a First Amendment right to refuse to sell such airtime to the candidates.[85] In coming to its decision, the court reasoned that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[86]

At first blush, these cases seem hard to reconcile. The first set of cases seems to promote a laissez-faire approach to the First Amendment, which encompasses a strong right to editorial discretion. But this view falls apart when looking at the second set of cases, where, for example, the broadcasters in *CBS* similarly argued that they wanted to exercise editorial discretion.

One could argue that the court was protecting property interests (although it's unclear why that would be a First Amendment concern[87]). But again, the second set of cases defies that theory as well. Specifically, with *PruneYard*, the mall lost even though it, too, wanted to control the kind of expressive activity that happened on its premises.

Instead, if we look to the history, the cases begin to make sense. The history shows that the people have a right to express their views

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[81] Pacific Gas and Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1, 20-21 (1986).

[82] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559, 562 (1995).

[83] PruneYard Shopping Ctr. V. Robins, 447 U.S. 74, 74 (1980).

[84] Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 69-70 (2006).

[85] CBS, Inc. v. F.C.C., 453 U.S. 367, 397 (1981).

[86] *Id.* (quoting *Red Lion Broadcasting Co. v. FCC,* 395 U. S. 367).

[87] *See generally* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1243 (2020).

through the press. The government can generally pass laws that maximize speech dissemination, so long as they don't favor particular speakers over others.[88] Merely hosting content does not alter speech.[89] Usually, hosts serve as conduits for other people's speech. It would be "unreasonable" to argue that they, like "Printers ought not to print any Thing but what they approve; since if all of that Business should make such a Resolution, and abide by it, an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers."[90]

In *PruneYard*, *Rumsfeld*, and *CBS*, the hosts were mere conduits for other people's speech; they did not have a message they were expressing themselves. In those cases, they were claiming a right to limit other people from expressing their messages, but the Founders envisioned the Free Press Clause to operate in the opposite way.

CBS, of course, is a broadcasting case, which the Court has suggested ought to receive special First Amendment scrutiny.[91] But many of the reasons that broadcasting gets different First Amendment treatment apply to platforms as well.[92] Broadcasting was treated differently because the airwaves were a scarce, public resource, and Congress felt it necessary to regulate to ensure that all people, not just those with concentrated power, could disseminate messages through broadcasting. Likewise, a few social media companies today control significant power over a highly potent public messaging mechanism.

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[88] *See* Eugene Volokh, *Treating Social Media Companies Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 445 (2021); *see also* 303 Creative LLC v. Elenis, 600 U.S. ____n.5 (2023) (Gorsuch, J., majority) (noting in dicta that public accommodations laws are more likely to be constitutional when applied to "an ordinary, non-expressive business"); *see also* 303 Creative LLC v. Elenis, 600 U.S. ____ (2023) (Sotomayor, J., dissenting) (arguing that a company may not "escape" a public accommodations law "by claiming an expressive interest in discrimination"). The Court has long recognized that in order to receive First Amendment protection for their conduct, a person must show "[a]n intent to convey a particularized message … and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 410-411 (1974).

[89] *See* Volokh, *supra* note 88, at 416.

[90] Benjamin Franklin, *Apology for Printers*, PA. GAZETTE, June 10, 1731, *reprinted in* 1 THE PAPERS OF BENJAMIN FRANKLIN 194–99 (Leonard W. Labaree ed., 1959).

[91] F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978).

[92] *But see* Reno v. ACLU, 521 U.S. 844, 870 (1997) (holding that Congress cannot constitutionally regulate obscene content on the internet in the same way it can regulate it on broadcast).

If a law forces another speaker to alter its message to accommodate the law, then the law may be unconstitutional. In *Miami Herald*, *PG&E*, and *Hurley*, the broadcasters and publishers were not mere hosts to other people's speech; they had "common themes" they were promoting. If they hosted additional speech, it would interfere with their own speech.[93] But not hosting it would in turn limit that barred speaker from expressing their message through the press, which violates the original understanding of First Amendment rights.[94]

Social media platforms are designed to be conduits for third-party speech. Their owners have little responsibility—and liability—over the content that appears on their platforms. As such, laws that are designed to maximize access to such conduits for speech do not violate the First Amendment.

IV. LIMITS

A. Newspaper Content Moderation

Banning social media content moderation would not necessarily affect a newspaper's right to select which pieces it chooses to publish. Even accepting a broad definition of the press, social media companies do not qualify.[95] Newspapers do not publish as much content as the major social media platforms produce. And even if they could, they likely would not. Critically, newspapers take responsibility over the content they publish, while social media companies do not:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public

[93] Eugene Volokh, *Treating Social Media Companies Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 423 (2021).

[94] For further discussion, *see infra* Part IV.A.

[95] One broad view defines the press by the following factors: "(1) recognition by others as the press; (2) holding oneself out as the press; (3) training, education, or experience in journalism; and (4) regularity of publication and established audience." Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2456 (2014).

> issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment.[96]

Newspapers form their brands around which pieces they publish. They claim those brands and those pieces as their own. As a result, they can be sued for the content they produce. On the other hand, social media platforms are conduits for third-party content.

By contrast, although they can moderate content, platform content moderation policies do not define the platform's identity in the same way they define a newspaper's identity. The moderation policies are not even applied consistently enough to be clearly ascertainable.[97] Take Facebook's content moderation policy as an example.[98] With some content, Facebook draws a bright line and says the content at issue is not allowed. For example, threats that could lead to death are prohibited. But with other content, Facebook requires "additional information or context to enforce on." This applies, for example, to veiled or implicit threats of violence. That provides Facebook with significant, amorphous discretion. What's more, despite those rules, Facebook will at times "allow content—which would otherwise go against [their] standards—if it's newsworthy and in the public interest." Newsworthiness determinations depend on the Facebook Content Policy team's consideration of "a number of factors." Facebook does not define what it means to be "in the public interest." In practice, Facebook seems to apply those practices inconsistently.[99] For example, the site left up some messages related to COVID-19 conspiracy theories, but marked some accurate health information as spam.[100]

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[96] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[97] Whitney Chavez, *Disputable Content and Freedom of Expression on the Internet*, HOMELAND SECURITY DIGITAL LIBRARY (March 31, 2023) [https://perma.cc/9VDY-XW43] (finding that "the most challenging issue related to disputable content is the lack of a universal definition").

[98] *Facebook Community Standards*, FACEBOOK (2023) [https://perma.cc/RSY6-XWBU].

[99] Faiza Patel and Laura Hecht-Felella, *Facebook's Content Moderation Rules Are a Mess,* BRENNAN CENTER (Feb. 22, 2021) [https://perma.cc/ML34-R7D6].

[100] *Id.*; Emma Graham Harrison and Alex Hern, *Facebook Funneling Readers Toward Covid Misinformation*, GUARDIAN (Aug. 19, 2020) [https://perma.cc/N65H-YYFT]; Jay Peters, *Facebook Was Marking Legitimate News Articles About the Coronavirus as Spam Due to a Software Bug*, VERGE (Mar. 17, 2020), [https://perma.cc/PC5E-KPJM].

More significantly, Congress has recognized that third-party content on social media platforms is user speech, not platform speech. For that reason, Congress has statutorily protected platforms, via Section 230(c)(1), from liability surrounding third-party content.[101] Platforms have embraced that protection. In litigation throughout the United States, platforms have disclaimed the idea that their users' posts represent their own views, even as those platforms have expanded their content moderation policies and received increased scrutiny for those policies.[102]

Bookstores function in an illustratively similar way. They serve a critical role for speech dissemination, even though the speech is not their own.[103] The speech interest between a bookstore and its consumers should generally align because both are interested in a free distribution of books, as with social media companies and their users.[104] If a regulation penalized a bookstore for carrying certain books, the bookstore may stop carrying those books.[105] That may limit the availability of the books to consumers, resulting in a chilling effect.[106] With social media, Congress prohibits regulations that would penalize social media companies for hosting user content because they want the platforms to continue hosting that content. By contrast, if a regulation required a bookstore to carry books, that would increase the free distribution of books;[107] there would be no chilling effect. So long as the store did not censor its own speech to distribute the books, it increases the amount of speech, and does not lessen it.[108] Similarly, if a law required social media companies to carry user posts, that would not chill the companies' speech, but would instead expand the speech of users.

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[101] 47 U.S.C. § 230(c)(1).

[102] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 467-468 (5th Cir. 2022).

[103] Smith v. California, 361 U.S. 147, 149 (1959).

[104] *Cf.* Shaun B. Spencer, *The First Amendment and the Regulation of Speech Intermediaries*, 106 MARQUETTE L. REV. 1, 35 (2022).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 35-36.

[108] *Id.* at 36; *see also* Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 501 (2016) (noting must-carry regulations limit "private sovereigns" from censoring speech to fill a gap left by the First Amendment, which only applies against governmental sovereigns).

The distinction between newspapers and social media can also track with history, loosely based on the differences between how newspapers and printers operated at the Founding. At the Founding, many newspapers were very partisan.[109] Some have called the Founding "the era of the party press," referencing how many newspapers were tied to political parties. The Federalists and Antifederalists, for example, each had their own newspapers. Such politicization was not uniformly praised,[110] but it was a reality of newspapers at the time.

Still, though, the press was celebrated when it presented multiple points of view:[111] the Press should be "open to all Parties, one as well as the other."[112] People had trust in the press because "at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving."[113] Despite newspaper partisanship, "the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas, and often treated events and expressed views not covered by conventional newspapers."[114] When newspapers would not publish a particular piece, those present at the Founding had substantial alternatives to publish their pieces to similar audiences through printers. Thus, the same concerns that today motivate bans on content moderation have likewise influenced newspaper operations throughout history.

B. Other Press Rights

Some criticize the press-as-technology perspective because they believe it limits press privileges that are central to the press's operation as a "fourth estate."[115] The degree to which those press-

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[109] Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 332 (2008).

[110] *See* JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 75 (2001); West, *supra* note 71, at 109.

[111] *Id.*

[112] JOHN TOLAND, A LETTER TO A MEMBER OF PARLIAMENT, SHEWING, THAT A RESTRAINT ON THE PRESS IS INCONSISTENT WITH THE PROTESTANT RELIGION, AND DANGEROUS TO THE LIBERTIES OF THE NATION 10 (London, F. Darby 1698).

[113] Miami Herald Pub. Co., 418 U.S. at 248 (1974).

[114] *Id.*

[115] Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 634 (1975).

exclusive rights fit within a historical model are difficult to gauge because the organized press did not exist at the Founding the way it does today. Journalism had not yet developed into a formal profession. [116] Newspapers usually were not their own newsgatherers or investigators.[117] Writers who published material at the time "were akin to a modern businessman writing and distributing a book or funding a video program: they rented facilities and services from printers, but they were not in the printing business themselves." [118] Dictionaries did not even equate "press" with the agents who report the news. Rather, for example, Samuel Johnson's *Dictionary of the English Language* described "press" as "[t]he instrument by which books are printed." [119]

In any event, those concerns fall outside the scope of the press-as-technology perspective. The press-as-technology model sees a difference between "restrictions based on the identity of the speaker" and "benefits for certain classes of speakers,"[120] and laws that involve "publication of opinion" and those that "focus on the newsgathering function."[121] A law that limits a journalist's need to keep her sources anonymous may limit her speech. The reason protecting a source's anonymity is important is that without it, the number of sources who would come forward to tell their stories would plummet. A court may protect the journalist's right here because the ability to keep her sources anonymous is central to her capability to function as a journalist. The reason those protections may exist for journalists but not others is because anonymous sources confide in journalists and trust them—because it's the journalist's job—to bring the information to the public. Those sources wouldn't necessarily do the same with others.

By contrast, a platform's right to moderate content privileges the platform's rights over those of its users. It limits the public's

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[116] David Anderson, *Freedom of the Press*, 80 TEX L. REV. 429, 446-47 (2002).

[117] HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 18-19 (1989).

[118] Volokh, *supra* note 42, at 479.

[119] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 2d ed. 1756); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 9th ed. 1790).

[120] Eugene Volokh, *Unradical: "Freedom of the Press" as the Freedom of All to Use Mass Communications Technology*, 97 IOWA L. REV. 1275, 1279 (2012).

[121] Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 441 (2013).

capability to express their views through platforms, which is precisely what the Free Press Clause is meant to protect. A law that prohibits content moderation does not impinge on a journalist's ability to gather news. Rather, it expands the accessibility of platform publication for journalists and non-journalists alike.

In fact, advocates for the press-as-industry viewpoint accept that "courts can and should police government regulations that favor the press for content-based discrimination. Laws that favored certain press speakers by burdening other press speakers, moreover, would also raise heightened concerns because specialized press protections, absent some special justification, logically should extend to the press as a whole."[122]

C. 230(c)(2) Preemption

When platforms challenge state content moderation bans, they do so not only by claiming that the bans would violate their First Amendment rights, but also by claiming that federal law[123] and Section 230(c)(2)[124] would preempt the state bans.

But it is unclear to what degree Section 230(c)(2) would preempt such bans. Section 230(c)(2) immunizes platforms for blocking material they "consider[] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[125] Some view the term "otherwise objectionable" as a catch-all to protect all platform content moderation policies. More recent scholarship, however, argues that the statute could be better read using the

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[122] West, *supra* note 71, at 131-132.

[123] Whether the Dormant Commerce Clause prevents state regulation of the internet is another open question. *Compare* Jack L. Goldsmith and Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEXAS L. REV. 1083, 1120 (2023) *with* David G. Post, *The Internet and the Dormant Commerce Clause: A Reply to Goldsmith and Volokh*, 101 TEXAS L. REV. ONLINE 157, 162 (2023).

[124] Although platforms have raised these concerns in the Eleventh and Fifth Circuit cases, neither has considered the preemption question on the merits. The Eleventh Circuit did not consider it because it held that the content moderation bans were unconstitutional, so the court did not need to decide whether the bans were preempted. The Fifth Circuit said the issue was not properly preserved for appeal. Should the cases go to the Supreme Court, however, the issue may be up for grabs either as an argument in the alternative of the First Amendment arguments or on a potential remand. NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022); NetChoice, L.L.C. v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

[125] 47 U.S.C. § 230(c)(2).

ejusdem generis interpretive canon.[126] Under that canon, "otherwise objectionable" referred to "material that was traditionally viewed as regulable in electronic communications media … [R]estrictions on speech on 'the basis of its political or religious content' were *not* viewed as generally permissible, even in electronic communications."[127]

If platforms retain a First Amendment right to moderate content, then the *ejusdem generis* interpretation raises constitutional avoidance concerns. But as the historical findings throughout this Essay show, such constitutional avoidance concerns should not motivate Section 230(c)(2)'s interpretation. Again, the First Amendment was meant to protect the people's right to express their views through the press. It was not meant to protect the rights of individuals who wanted to limit the people's capabilities to express their views through the press. The Constitution therefore does not require an expansive reading of 230(c)(2).

Whatever the best reading of 230(c)(2) is, that should govern. If the best reading is indeed an expansive one, then 230(c)(2) poses a preemption problem for state content moderation bans. But if the better reading is more limited, like the *ejusdem generis* interpretation, then neither the Constitution nor federal law would preempt a state's content moderation ban.

CONCLUSION

This Essay finds that, under a historical framework, laws prohibiting content moderation by social media companies would not be unconstitutional.

It takes no position on whether such laws would be wise.[128] As discussed in Part III, one major issue with internet content moderation is the concentrated power social media companies possess. In some ways, bans on content moderation may strengthen the power social media companies have. They would force many platforms to have substantially the same content moderation policies. That would necessarily make it difficult for platforms to be distinguishable from one another, and could make it harder for new

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[126] Adam Candeub and Eugene Volokh, *Interpreting 47 U.S.C. §230(C)(2)*, 1 J. FREE SPEECH L. 175, 178 (2021).

[127] *Id.* at 175.

[128] Volokh, *supra* note 88, at 412 (2021).

entrants to bring something new to the platform market. Of course, it is already difficult for new entrants to take over platform market share as things stand with content moderation policies. But if the better way to ensure that people have the right to use the press is to maximize the number of platforms, then perhaps other interventions would achieve that goal better than content moderation bans.[129]

Furthermore, the scope of the constitutionality of such content moderation may change depending on whether the Court adjusts the extent to which Section 230(c)(1) provides platforms with a liability shield.[130] If the Court imposes a low liability bar, such that platforms will face more lawsuits for third-party content that they promote through their algorithms, the platforms may then choose to change their model. They may, in turn, moderate more content—not to discriminate based on viewpoint, but to shift away from a third-party model that has so far distinguished them from newspapers.[131]

If they do, much of the analysis in this paper may shift, both for historical and practical reasons. First, as discussed above, social media platforms in their current form operate as conduits for other people's speech. Thus, given that the Freedom of the Press Clause is specifically designed to protect the people's right to use such conduits for their speech, it does not follow that the Freedom of the Press Clause should function to prevent people from using those same conduits by protecting social media content moderation. But if social media platforms begin to face liability for the content posted on their websites, they may no longer be pure conduits for others' speech.

Second, if the Court determines that social media companies will face liability if certain content appears on their platforms, then it would be unfair for a law to simultaneously require the platform to carry that content. If that were the case, then the platform would face

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[129] "Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 671 (1970).

[130] The Court was expected to decide the extent to which Section 230(c)(1) provides platforms with a liability shield when their algorithms promote terrorism in Gonzalez v. Google LLC, 598 U.S. _____ (2023), but ultimately did not reach the issue because it found the platforms would not be liable according to the underlying statutes, regardless of Section 230. Twitter, Inc. v. Taamneh, 598 U.S. _____ (2023).

[131] James Romoser, *Elon Musk, Internet Freedom, and How the Supreme Court Might Force Big Tech Into a Catch-22*, SCOTUSBLOG (Nov. 6, 2022) [https://perma.cc/4Z5A-9YT7].

some type of liability whether or not it carries the content. Of course, all of this depends on how the cases are decided. But any content moderation bans may need to be tweaked based on the Court's decisions in order to remain constitutional.

When the Founders enacted the First Amendment, they aimed to maximize the people's ability to voice their views through the press. Content moderation policies limit the people's ability to voice their views through the press. The First Amendment thus does not protect such practices.