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MOODY v. NETCHOICE: THE SUPREME COURT MEETS THE FREE SPEECH TRIANGLE

Concerned that large social media companies discriminated against conservative voices, Texas and Florida passed laws regulating how social media companies could moderate posts, sanction speakers, and promote or demote content. Conservative politicians in the two states were deeply suspicious of the large social media companies headquartered in the Bay Area of liberal California. They believed that these social media companies, Meta, YouTube, and Twitter, were unfairly removing conservative speech, demoting it in social media feeds, or de-platforming conservative speakers. Texas and Florida sought to restore online ideological balance and prevent what they considered censorship by the companies' progressive employees.[1]

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[1] *See* Press Release, Off. of the Tex. Governor, Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship [https://perma.cc/3U57-3BDD] (quoting Governor Greg Abbott stating that "there is a dangerous movement

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The states argued that in curating and organizing content social media companies were not actually engaged in First Amendment speech; they were only engaged in private censorship.[2] In the alternative, the states argued that they could treat social media platforms as common carriers or otherwise subject the platforms to nondiscrimination rules to promote a diversity of ideas and opinions.[3]

Because the state statutes were so broadly (and badly) drafted, the Supreme Court did not rule on the merits but instead sent the cases back to the lower courts with instructions about the First Amendment rights of social media companies. Justice Elena Kagan's majority opinion in *Moody v. NetChoice, LLC*[4] held that when social media companies curate posts, they make "editorial judgments" and create an "expressive product" protected by the First Amendment.[5]

The Supreme Court began considering internet speech cases almost three decades ago, in *Reno v. American Civil Liberties Union*.[6] But social media companies as we know them today did not exist in 1997. *Moody* was the Court's first attempt at explaining how the First Amendment applied to the business models of the social media companies that now dominate the digital public sphere. *Moody* was also the Court's first attempt at thinking through the problems of a digital public sphere in which states are no longer the only governors and regulators of free expression and must contend with powerful global corporations that shape public opinion and dominate democratic life. Finally, *Moody* also

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by social media companies to silence conservative viewpoints and ideas"); News Release, Governor of Fla., Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech [https://perma.cc/HN24-YW3K] (quoting Governor Ron DeSantis's statement that "we took action to ensure that . . . real Floridians across the Sunshine State . . . are guaranteed protection against the Silicon Valley elites. . . . If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable").

[2] NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1208 (11th Cir. 2022); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 482 (5th Cir. 2022).

[3] *See NetChoice*, 34 F.4th at 1219–20 (describing Florida's argument that platforms are either common carriers or can be treated as common carriers); *Paxton*, 49 F.4th at 445 (reciting the Texas' Legislature's findings that social media companies are common carriers); *Paxton*, 49 F.4th at 482 (describing Texas's argument that the law is a content-neutral time, place, and manner regulation).

[4] 603 U.S. 707 (2024). *Moody v. NetChoice* arose out of a challenge to Florida's statute. The companion case from Texas was *NetChoice v. Paxton*.

[5] *Id.* at 718, 731.

[6] Reno v. ACLU, 521 U.S. 844 (1997).

offered brief hints about how the First Amendment might apply to content produced by algorithms and artificial intelligence (AI).

In this Article, I explain how the digital public sphere differs from the world that produced most of the Court's First Amendment doctrine. I then explain how the Court both recognized and failed to recognize those changes. *Moody*'s reasoning displays many of the limitations of American First Amendment doctrine. It asks whether states are abridging the speech of platforms, but it does not consider the free speech interests of end users. Focusing on platforms as speakers, it plays less attention to platforms as governors. Although *Moody* does not close the door on regulations designed to check the governing power of digital platforms, it bestows significant First Amendment protections on the ways that social media platforms govern end users.

I. The Pluralist System of Speech Regulation

In the older, pre-digital world, the system of speech regulation was *dyadic*. It had two basic kinds of players: the state and private speakers, including media companies like newspapers, broadcasters, and cable providers. The digital age, by contrast, has a *pluralist* system of speech regulation.[7] By this I mean that there are many different speech regulators in addition to governments. These new regulators are the owners of private infrastructure that are situated up and down the "tech stack."[8] The tech stack includes broadband and cellular providers, domain name companies, caching services, cybersecurity and defense services, webhosting services, app stores, and applications. You can think of these companies as occupying successive layers in a stack of digital services that make digital communication possible.

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[7] Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. Davis L. Rev. 1149, 1186–87 (2018) [hereinafter Balkin, *Free Speech in the Algorithmic Society*]; Jack M. Balkin, *Free Speech Is a Triangle*, 118 Colum. L. Rev. 2011, 2013 (2018) [hereinafter Balkin, *Free Speech Is a Triangle*].

[8] Geoffrey A. Fowler & Chris Alcantara, *Gatekeepers: These Tech Firms Control What's Allowed Online*, Wash. Post (Mar. 24, 2021), https://www.washingtonpost.com/technology/2021/03/24/online-moderation-tech-stack [https://perma.cc/PKW4-GUG3] (describing how content moderation occurs up and down the various parts of the technology stack); Joan Donovan, *Navigating the Tech Stack: When, Where and How Should We Moderate Content?*, Ctr. for Int'l Governance Innovation (Oct. 28, 2019), https://www.cigionline.org/articles/navigating-tech-stack-when-where-and-how-should-we-moderate-content [https://perma.cc/U3QX-J7VC] ("At every level of the tech stack, corporations are placed in positions to make value judgments regarding the legitimacy of content, including who should have access, and when and how.").

Social media platforms are applications that sit at the top of the tech stack in the "application layer."[9]

Each of the players in the tech stack has the ability to block, slow down, or moderate speech by end users, although their techniques and abilities differ.[10] The social media companies at the top of the tech stack have the most elaborate bureaucracies and systems for speech regulation, which is one reason why they have drawn the most attention.

In general, platform companies like social media have the ability to govern their end users by creating and enforcing rules and norms for appropriate behavior on the platform.[11] In many cases, these companies and other private infrastructure owners can surveil and regulate speech more quickly and effectively than territorial governments can.[12] There is simply too much speech and much of it is anonymous or beyond territorial governments' borders. As a result, territorial governments often try to coerce or co-opt private infrastructure owners to surveil and regulate speech for them.[13] Moreover, because some of these infrastructure owners are global corporations, territorial governments and the European Union, through their internet policies, can affect how these global companies regulate speech in other parts of the world.[14]

This pluralist system of speech regulation is far more complicated than the dyadic system that produced First Amendment law in the twentieth century. But for convenience, we can think of the new system as a kind of triangle of three different kinds of relationships. Together, these relationships form the free speech triangle.[15]

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[9] Evelyn Douek, Moderated Content, *Content Moderation in the Stack*, Stanford L. Sch. (Oct. 27, 2022), https://law.stanford.edu/podcasts/content-moderation-in-the-stack [https://perma.cc/GS3S-YRL6] ("When we talk about content moderation, we often focus on companies at the application layer of the internet, like the Facebooks and Twitters of the world.").

[10] Fowler & Alcantara, *supra* note 8.

[11] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1635–48 (2018) (describing the development of content moderation bureaucracies at Facebook, YouTube, and Twitter).

[12] Balkin, *Free Speech Is a Triangle*, *supra* note 7, at 2019–20.

[13] *Id.*

[14] Jack M. Balkin, *Free Speech Versus the First Amendment*, 70 UCLA L. Rev. 1206, 1220–21 (2023) [hereinafter Balkin, *Free Speech Versus the First Amendment*]; Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, Hoover Inst. 7 (Jan. 29, 2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [https://perma.cc/2KE7-6JUW] (describing cross-border effects of speech regulation).

[15] Balkin, *Free Speech Is a Triangle*, *supra* note 7, at 2012.

First, governments continue to regulate the speech of private individuals (or privately owned media). This is "old-school" speech regulation and it is the traditional subject of most of First Amendment speech and press law.[16]

Second, governments attempt to regulate the owners of private infrastructure up and down the tech stack in order to harness the latter's superior capacities for surveillance and speech regulation. This is "new-school" speech regulation, and it is one of the central concerns of free speech theory in the digital age.[17]

Countries often engage in new-school speech regulation because they want global platform owners to find and take down or demote content that is illegal in their jurisdiction or that they otherwise do not like. The European Union has elaborate rules of this kind, and it has effectively harnessed the largest digital media companies to act as a sort of private bureaucracy of first resort for speech regulation.[18] On the other hand, populist politicians, especially on the right, may regulate platforms in the opposite direction: They may try to prevent platforms from removing or demoting certain content.[19] That is because they fear that social media companies are biased and will discriminate against their ideological supporters and political allies. The Texas and Florida statutes at issue in *Moody* involve this kind of new-school speech regulation.

The third set of relationships in the free speech triangle is the relationship between the owners and operators of digital infrastructure and end users. This is a relationship of private governance,[20] and it is also at issue in *Moody*. By governance, I simply mean the ability to establish rules and norms and enforce them against other people in a community or an organization.[21]

Infrastructure owners govern what end users do by establishing rules and policies through a combination of contract and software

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[16] *Id.* at 2015.

[17] *Id.* at 2015–16.

[18] *Id.* at 2030; *see also* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. Rev. 27, 29 (2019) ("[P]latforms are acting as regulators or bureaucracies—implementing the favored policy solutions of executive and legislative branch actors—on a global scale.").

[19] Balkin, *Free Speech Versus the First Amendment*, *supra* note 14, at 1217.

[20] Balkin, *Free Speech in the Algorithmic Society*, *supra* note 7, at 1182–84; Balkin, *Free Speech Is a Triangle*, *supra* note 7, at 2021–25.

[21] Balkin, *Free Speech Is a Triangle*, *supra* note 7, at 2021.

code. Through a bureaucracy of content moderators, an army of programmers, and a collection of algorithms, large social media platforms can promote, demote, slow down, block, remove, or label end-user content. They can suspend end users temporarily or kick them off the platform entirely.[22] In fact, most of the companies up and down the tech stack can govern and affect access to end-user content, but social media platforms have the most methods at their disposal.

Although platforms are governors, it is important to recognize how different they are from states. The private governors of the digital public sphere have fewer and less potent sanctions than territorial governments. They can kick people off their sites but they cannot put them in jail, for example. They also lack democratic legitimacy to enforce their norms and rules. Their right to govern ultimately depends on the laws of the states in which they operate. *Moody* involves an attempt by two states to change the rules of private governance.

First Amendment law was designed for a dyadic system of speech regulation, in which the state is the central threat to freedom of expression. It was not designed for a pluralist system in which some private actors are both speakers and governors of the speech of large populations. In some cases that difference does not matter too much. Sometimes the free speech interests of end users and platforms are aligned, for example, when governments order internet service providers to filter content or hold social media companies liable for hosting speech.[23] In these cases of new-school speech regulation, courts are likely to recognize free speech rights both in end users and in private digital companies. These situations are akin to laws that pressure distributors like book stores and movie theaters not to sell or display the speech of others.[24] The existing free speech doctrines built for a dyadic model of speech regulation work tolerably well in these situations.

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[22] *See* Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1, 23–40 (2021) (cataloging the alternatives available to digital companies).

[23] *See*, *e.g.*, Woodhull Freedom Found. v. United States, 948 F.3d 363, 371–74 (D.C. Cir. 2020) (individual speakers had standing to raise challenge to modifications to Section 230 intermediary immunity rules); Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 611 (E.D. Pa. 2004) (upholding individual speakers' First Amendment challenge to a Pennsylvania state statute requiring internet service providers (ISPs) to block access to websites displaying child pornography).

[24] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (striking down informal censorship system); Smith v. California, 361 U.S. 147 (1959) (striking down law holding bookstore owner criminally liable for obscene publications).

But there are many cases in which the free speech interests of end users and digital companies are not aligned—for example, when end users complain that social media companies are censoring or demoting their content. Then the differences between the older dyadic and the newer pluralist system may matter a great deal. In fact, the free speech triangle perpetually generates conflicts between private infrastructure owners and end users.[25] In particular, social media companies and end users often assert conflicting free speech interests. The companies claim that they have a free speech right to organize and govern the content that appears on their sites. End users argue that they have a right to speak free from interference by the platforms.

Generally speaking, U.S. First Amendment law has a difficult time addressing situations in which two private parties claim conflicting free speech interests.[26] That is because it normally views free speech rights as something that private parties have against governments, and not against other private parties. By contrast, European law recognizes that constitutional provisions may have a horizontal effect that imposes certain constitutional norms on private actors.[27] Between the 1940s and 1960s, the U.S. Supreme Court flirted with a similar idea through

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[25] Balkin, *Free Speech Versus the First Amendment*, *supra* note 14, at 1221–22.

[26] An important example is *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), which produced multiple opinions. Justice Breyer's plurality opinion explained the problem that standard First Amendment doctrine faces:

> We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so ordinarily even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor."

Denver Area Ed. Telecomms. Consortium, 518 U.S. at 737 n.1.

[27] *See* András Koltay, *The Protection of Freedom of Expression From Social Media Platforms*, 73 Mercer L. Rev. 523, 564–67 (2022) (describing how German law applies free speech norms horizontally to social media companies); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387, 388 (2003) ("In recent years, the horizontal position has been adopted to varying degrees, and after systematic scholarly and judicial debate, in Ireland, Canada, Germany, South Africa, and the European Union, among others."); Giovanni De Gregorio, *From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society*, 11 Eur. J. Legal Stud. 65, 101 (2019) (arguing for horizontal effect of constitutional norms against privately owned platforms because they exercise public functions).

relaxing the doctrine of state action and applying First Amendment norms to private actors like company towns and shopping malls.[28] But the Court eventually abandoned the attempt and moved to a fairly rigid distinction between public and private action.[29]

As a result of the inflexibility of American First Amendment law, if two private parties claim conflicting speech rights, courts are likely to award First Amendment rights, if at all, only to one of them.[30] End users can communicate with each other on social media only because social media companies allow them to use the companies' property. Current First Amendment doctrine tends to identify free speech rights with the ownership of private property.[31] That means that when the free speech claims of end users and digital companies conflict, U.S. courts are likely to assign First Amendment rights to digital companies and not to end users.[32]

That is not the only possible solution, of course. Courts could hold that the property rights of digital companies do not encompass full rights to govern or exclude and award First Amendment rights against them to end users. But that has not been the tendency of U.S. courts at least since the 1960s. The one major exception has been broadcast regulation, where the Supreme Court has held that

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[28] Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 317 (1968) (holding that a private shopping mall could not prevent individuals from peacefully picketing on the premises); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that leafleters had First Amendment rights to distribute literature in a privately owned company town).

[29] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (holding that *Marsh* applies only "in the exercise by a private entity of powers traditionally exclusively reserved to the State"); Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 812 (2019) (upholding cable company's right to refuse access to speakers because a "private entity is not ordinarily constrained by the First Amendment"); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 20–21 (1986) (plurality opinion) (rejecting right of access to mailings by privately owned public utility company); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 126–28 (1973) (rejecting right of access to broadcasting networks); Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (rejecting right of access to shopping malls for protest).

[30] Balkin, *Free Speech Versus the First Amendment*, *supra* note 14, at 1222.

[31] For the classic argument against this confusion of speech and private property, see Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1414 (1986) ("The state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state. A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency.").

[32] Balkin, *Free Speech Versus the First Amendment*, *supra* note 14, at 1225–26; *see also* Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom up Check on Content Moderation*, 107 Iowa L. Rev. 987, 1013–14 (2022) (noting that American courts have so far refused to give horizontal effect to First Amendment rights against privately owned social media companies).

the rights of listeners sometimes may take precedence over the free speech and property rights of broadcasters. That is the point of the doctrine of *Red Lion v. FCC*,[33] which held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[34] But that doctrine is best justified on the grounds that broadcasters gain access to spectrum through a license with the government, and the government may, as a condition of the license, require the broadcaster to act in the interests of listeners.[35] Five years after *Red Lion*, the Court famously declined to extend that reasoning to privately owned newspapers in *Miami Herald Publishing Co. v. Tornillo*.[36] Because newspapers did not need government licenses to operate, the Court retreated to its usual conflation of speech and property rights.

Digital companies try to use the First Amendment as an anti-regulatory device.[37] This strategy is not limited to social media companies, of course. Over the past half century, more and more businesses have figured out ways to use the First Amendment to attack government regulations of their businesses.[38] But digital media companies find this strategy especially attractive. Because they are in the business of hosting and curating speech, they will try to claim that regulations of their business models violate their free speech and press rights under the First Amendment.

In response, people who want to reform social media will try to neutralize these First Amendment claims. For the reasons stated above, they are unlikely to succeed in getting courts to create European-style

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[33] 395 U.S. 367 (1969).

[34] *Id.* at 390.

[35] *See id.* at 379–80, 391, 394.

[36] 418 U.S. 241 (1974).

[37] *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 26–27 (2004) (arguing that in the Second Gilded Age, "[t]he right to speak has been recast as a right to be free from business regulation," and that "[f]reedom of speech is becoming a generalized right against economic regulation of the information industries," while "[p]roperty is becoming the right of the information industries to control how ordinary people use digital content").

[38] Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 166–67 (2015) ("Across the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation." (footnote omitted)); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L. Rev. 375, 384, 386 (predicting the "ideological drift" of the free speech principle to serve conservative and business interests).

doctrines of horizontal effect that recognize constitutional speech rights on both sides. Therefore reformers on both the left and the right will pursue a strategy of *de-constitutionalization*. That is, they will try to get the courts to adopt legal theories that turn conflicts over speech claims into non-constitutional questions of statutory or administrative law or technological design.[39] That is what Texas and Florida tried to do in *Moody*. The two states passed laws that, in effect, gave end users statutory free speech and due process rights against digital media companies. The point of de-constitutionalization is judicial restraint. It relies on the political branches to enforce free speech rights; in this case, against the private platforms that govern speech in the digital age.[40]

In its current form, American First Amendment doctrine is ill-suited to deal with many of the complexities of the new pluralist system and the free speech triangle. There is a strong tendency to try to wish away the problem by forcing speech questions into the mold of the older, dyadic system of speech regulation.

For example, *Murthy v. Missouri*,[41] decided the same Term as *Moody*, presented a fairly standard question of new-school speech regulation. The government put pressure on social media companies to take down or demote content about public health that the government found misleading, false, or otherwise problematic. The plaintiffs tried to avoid the complications of the free speech triangle by arguing that the social media companies had not acted independently but only out of government pressure.[42] This reduced the number of relevant parties to two—the state and the end users—with social media companies treated as mere instruments of the state. Plaintiffs requested an injunction against future communications between the state and social media companies to prevent the government from directing social media companies in the future.[43]

The Supreme Court held that the plaintiffs lacked standing because, among other things, social media companies were not mere puppets of the state but independent actors. They did not always accede to the government's wishes. Their own rules and norms gave

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[39] Balkin, *Free Speech Versus the First Amendment*, *supra* note 14, at 1211.

[40] *Id.*

[41] 603 U.S. 43 (2024).

[42] *Id.* at 49–50.

[43] *Id.* at 54.

social media companies independent reasons for blocking and demoting content, and there was no guarantee that they would do the state's bidding in the future.[44] Thus, the plaintiffs lacked standing because the relief they requested would not clearly redress the harms they complained of.[45] Getting an injunction against the government would not necessarily give them what they actually wanted: namely, stopping powerful privately owned social media companies from regulating their speech. The attempt to fit the case into the old dyadic model failed because the Court recognized that there were two different sets of speech regulators who sometimes cooperated and sometimes did not. That is, it recognized one of the new realities of the free speech triangle. In the process, however, the Court made it harder to sue the government for unconstitutionally pressuring social media platforms.

The problem of the free speech triangle was also front-and-center in *Moody*. It involved a conflict between the speech claims of platforms and of end users, with the states attempting to protect their citizens' speech through new-school speech regulation. But once again, the litigants tried to force the issues into the older, dyadic model. Texas and Florida sought to protect end users' free speech rights through a strategy of deconstitutionalization. They argued that the platforms were not exercising First Amendment rights at all and therefore the states could adjust private rights between the two sides.[46] In the alternative, Texas and Florida argued that their laws were content-neutral regulations of time, place, and manner or regulations of commercial speech that survived First Amendment scrutiny.[47] The platforms, by contrast, argued that their activities were fully First Amendment-protected, while the speech rights of end users had no constitutional relevance. In fact, it was unconstitutional for states to try to protect end users' speech rights.

Faced with these conflicting approaches, the Court temporized. It sent the case back to the lower courts with a series of instructions.[48] The Court's opinion gave social media companies much of what they wanted. But it left open many important questions about permissible regulation of digital platforms.

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[44] *Id.* at 73–74.

[45] *Id.*

[46] NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1208 (11th Cir. 2022); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 482 (5th Cir. 2022).

[47] *See NetChoice*, 34 F.4th at 1208; *Paxton*, 49 F.4th at 445, 482.

[48] Moody v. NetChoice, LLC, 603 U.S. 707, 717–19 (2024).

II. The Texas and Florida Statutes

To explain what the Court did and why, we have to understand the complexities of the Florida and Texas statutes.

Florida's law regulates "social media platforms," defined as those that have annual gross revenue of over $100 million or more than 100 million monthly active users.[49] Florida requires that social media platforms must apply their standards for disciplining end users and their standards for content moderation, recommendation, and prioritization "in a consistent manner among its users on the platform."[50] It also requires written notice within seven days with a "thorough rationale" for its decision whenever a social media platform censors or limits exposure to content or de-platforms a user.[51] The company must also include "a thorough explanation" of any algorithms used "to identify or flag the user's content or material as objectionable."[52] It creates a private right of action with statutory and punitive damages to enforce these provisions.[53]

Notwithstanding the requirement of consistency, Florida's law has special rules for "journalistic enterprises,"[54] which include most newspapers, cable channels, broadcast media, and popular video channels that "[p]ublish[] 100 hours of audio or video available online with at least 100 million viewers annually."[55] Social media platforms "may not take any action to censor, deplatform, or shadow ban [i.e., limit exposure to] a journalistic enterprise based on the content of its publication or broadcast."[56] However, journalistic enterprises can pay social media companies to prioritize their content, which, in effect, can give them favored exposure over other journalistic enterprises and end users.[57] Florida also has special rules for political candidates. Social media platforms may not prioritize or demote content *by* candidates or *about* candidates.[58]

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[49] Fla. Stat. § 501.2041(1)(g) (2023).

[50] *Id.* § 501.2041(2)(b).

[51] *Id.* § 501.2041(2)(d)–(3)(d). "[S]hadow-banning" is defined as any action that limits exposure to content. *Id.* § 501.2041(1)(f).

[52] *Id.* § 501.2041(3)(d).

[53] *Id.* § 501.2041(6).

[54] *Id.* § 501.2041(2)(h).

[55] *Id.* § 501.2041(1)(d).

[56] *Id.* § 501.2041(2)(j). There is an exception for moderating obscene content. *Id.*

[57] *Id.*

[58] *Id.* § 501.2041(2)(h).

Florida's law was clearly aimed at social media companies like Facebook or YouTube that provide feeds of content to end users. But the statute is very badly drafted, and so it turns out that Florida's definition of social media platforms is much broader. It includes "any information service, system, Internet search engine, or access software provider [that] [p]rovides or enables computer access by multiple users to a computer server" that has enough revenue and customers.[59] This would include email services, online stores, ride-share services like Uber, and a host of other applications.

Texas regulates "social media platform[s]" with over fifty million monthly active users.[60] It defines a "social media platform" as any "Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images."[61]

Texas's law provides that "[a] social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person" based on viewpoint.[62] To "censor" means "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."[63] When a platform removes content (as opposed to other forms of "censor[ship]"), Texas requires that "concurrently with the removal" the platform must "notify the user" and "explain the reason the content was removed."[64] Users have a right to appeal the decision, and the platform must respond to the user's appeal within fourteen days.[65]

Like Florida, Texas makes exceptions to its ban on viewpoint discrimination.[66] In addition to censoring illegal content, social media platforms are free to censor content that "directly incites criminal activity" or that "consists of specific threats of violence targeted against

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[59] *Id.* § 501.2041(1)(g).

[60] Tex. Bus. & Com. Code Ann. §§ 120.001(1), 120.002(b) (West 2023).

[61] *Id.* § 120.001(1).

[62] Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a) (West 2023).

[63] *Id.* § 143A.001(1).

[64] Tex. Bus. & Com. Code Ann. § 120.103(a)(1) (West 2023).

[65] *See id.* §§ 120.103(a)(2), 120.104. The right of appeal does not apply when a platform cannot locate a user or when the content is the basis of a law enforcement investigation. *Id.* § 120.103(b).

[66] Tex. Civ. Prac. & Rem. Code Ann. § 143A.006 (West 2023).

a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge."[67] Platforms may also censor based on referrals from organizations that seek to "prevent[] the sexual exploitation of children and protect[] survivors of sexual abuse from ongoing harassment."[68]

III. What Kind of Challenge?

Although Texas's and Florida's laws were clearly aimed at the largest social media sites like Facebook and YouTube, they defined "social media platforms" in ways that reach well beyond those companies and include a host of online applications and services.[69] This definition created a problem for the Justices in *Moody*. If, as the Justices believed, NetChoice was raising a First Amendment facial challenge, it would have to show that Texas's and Florida's laws were substantially overbroad.[70] This meant showing that "a substantial number of [the challenged law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[71] This test is more forgiving than the general rule for facial challenges that do not involve the First Amendment. The latter doctrine, as explained in *United States v. Salerno*, requires showing that there is "no set of circumstances . . . under which the [law] would be valid."[72] Even under the First Amendment test of substantial overbreadth, however, the Justices believed that there might be a large number of covered applications where a nondiscrimination rule might be constitutional.[73]

Apparently, the issue was raised for the first time in oral argument before the Court.[74] The resulting uncertainty led the Justices to vacate

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[67] *Id.*

[68] *Id.*

[69] Texas sought to limit the reach of its law by specifying that it did not cover ISPs, email providers, nor any online service, website, or app consisting "primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider." Tex. Bus. & Com. Code Ann. § 120.001(1) (West 2023). Even so, the statute covers a wide range of online applications for sending and posting messages.

[70] Moody v. NetChoice, LLC, 603 U.S. 707, 723–24 (2024); United States v. Hansen, 599 U.S. 762, 769–70 (2023).

[71] Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021).

[72] United States v. Salerno, 481 U.S. 739, 745 (1987).

[73] *Moody*, 603 U.S. at 724–26; *id.* at 787–88 (Alito, J., concurring in the judgment).

[74] *Id.* at 724 (majority opinion); Transcript of Oral Argument at 6, 29, 67, 125–26, 151–53, *Moody*, 603 U.S. 707 (Nos. 22-277 & 22-555).

the decisions below and send the cases back to the lower courts for clarification about which applications were covered and therefore whether a facial challenge could succeed.[75]

In fact, there was a way to dispose of the cases on the merits that avoided these problems. One can challenge a statute facially either because a large proportion of its applications are unconstitutional or because the law imposes an unconstitutional requirement on its face.[76] That is how the Court deals with laws that, on their face, make content-based, viewpoint-based, and speaker-based distinctions. The Court normally does not ask whether these laws have a significant number of constitutional applications; rather, it simply applies strict (or heightened) scrutiny and (usually) strikes the statute down.[77] A good analogy is to equal protection doctrine. If a statute on its face classifies on the basis of race or sex, the Court does not first ask whether there are a substantial number of constitutional applications. It applies strict or heightened scrutiny.[78]

The Florida statute makes content-based and speaker-based distinctions. Florida tells platforms that they must apply their content moderation and recommendation rules consistently except for posts by a political candidate (a speaker-based rule) or about a political candidate (a content-based rule). Platforms may not demote or deprioritize these posts.[79] Florida also exempts content by "journalistic enterprises" from removal, demotion, and prioritization rules entirely (a speaker-based exemption).[80]

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[75] *Moody*, 603 U.S. at 724–26. As Evelyn Douek and Genevieve Laker have pointed out, this application of the substantial overbreadth doctrine rewarded bad legislative drafting. The states avoided a facial challenge because they used such broad and unclear terms, which is normally what overbreadth doctrine is designed to prevent. Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 Harv. L. Rev. 100, 167–68 (2024).

[76] *See*, *e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 69 (2022) (finding that a regulation of speech is facially content-based under the First Amendment if it "target[s] speech based on its communicative content"—that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed" (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015))); R.A.V. v. City of St. Paul, 505 U.S. 377, 381–82 & n.3 (1992) (explaining that a showing of substantial overbreadth is not necessary for facial invalidity when a statute is invalid on its face because it makes content-based distinctions).

[77] *E.g.*, *Reed*, 576 U.S. at 163.

[78] *See* Katie Eyer, *As-Applied Equal Protection*, 59 Harv. C.R.-C.L. L. Rev. 49, 50 (2024) (noting that "the vast majority of Equal Protection claims have been brought—and decided—as facial challenges").

[79] Fla. Stat. § 501.2041(2)(h) (2023).

[80] *Id.* § 501.2041(2)(j); *see* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 621 (2020) (holding that a restriction on all robocalls except for those that attempted to collect

Texas's statute makes viewpoint-based distinctions. It prohibits social media from viewpoint-based moderation and recommendations. But it makes exceptions for threats based on certain viewpoints—"because of . . . race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge."[81] To be sure, threats are generally unprotected expression.[82] But Texas does not relax its rule for all threats, only for threats based on specified disfavored criteria. In *R.A.V. v. City of St. Paul*,[83] the Court held that similar distinctions in a ban on fighting words were viewpoint-based: "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[84]

Texas's statute also makes speaker-based distinctions. It makes an exception to the general ban on viewpoint-based moderation when a social media platform acts according to a referral from an organization that seeks to "prevent[] the sexual exploitation of children and protect[] survivors of sexual abuse from ongoing harassment."[85] This rule does not actually require that the referral be about a post that contains child sexual abuse material or harassment, only that the source of the referral comes from a favored speaker. Referrals from any other source—even about the very same content—receive no exemption.

Thus, without remanding, the Court could have applied heightened or strict scrutiny, and, if the statutes failed the test, struck them down.[86] Why didn't the Court take this path? This resolution would not have decided what for most of the Justices was the crucial question—whether social media content moderation and recommendation systems are akin to editorial judgments protected by the First Amendment. The Fifth Circuit had denied that social media companies were engaged in protected First Amendment expression at all. Rather, the Fifth Circuit argued, they were only engaged in

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government debts was content-based and subject to strict scrutiny); *Barr*, 591 U.S. at 619–20 ("'[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" (quoting *Reed*, 576 U.S. at 170)).

[81] Tex. Civ. Prac. & Rem. Code Ann. § 143A.006 (West 2023).

[82] Virginia v. Black, 538 U.S. 343, 359 (2003); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[83] 505 U.S. 377 (1992).

[84] *Id.* at 391.

[85] Tex. Civ. Prac. & Rem. Code Ann. § 143A.006 (West 2023).

[86] *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610, 619–21 (2020). Note that the offending parts of the statutes might be severable, leaving the rest in place.

censorship.[87] As is obvious from Justice Kagan's majority opinion, many of the Justices wanted to send a strong signal that this was not a correct understanding of the First Amendment.[88] Otherwise the Fifth Circuit might continue to apply the same (incorrect) views in deciding whether the statutes were substantially overbroad.[89] Conversely, Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch wanted to preserve the possibility that states could impose nondiscrimination rules on social media companies or treat them like common carriers.[90] This would greatly restrict the companies' ability to make moderation and recommendation decisions. However, the content-based, viewpoint-based, and speaker-based exemptions in the two statutes undermined the claim that they were genuine common carrier regulations.

IV. Editorial Choices and Expressive Products

Because the Fifth Circuit had held that platforms were not engaged in speech when they engaged in content moderation and recommendations,[91] Justice Kagan's majority opinion sought to clarify the relevant First Amendment principles. When governments "order[] a party to provide a forum for someone else's views,"[92] she explained, this "implicates the First Amendment . . . if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt."[93] And "expressive activity includes presenting a curated compilation of speech originally created by others."[94]

Justice Kagan argued that "[t]o the extent that social-media platforms create expressive products, they receive the First Amendment's protection."[95] When social media moderate content and recommend

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[87] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

[88] Moody v. NetChoice, LLC, 603 U.S. 707, 726–27 (2024).

[89] *Id.* at 727. Justice Ketanji Brown Jackson concurred on the basic statement of first principles but did not join in the majority's application of them to social media companies. *Id.* at 748 (Jackson, J., concurring in part and concurring in the judgment).

[90] *Id.* at 782 n.17, 785 n.19 (Alito, J., concurring in the judgment); *id.* at 794 (Thomas, J., concurring in the judgment).

[91] *Id.* at 726–27 (majority opinion) (citing *Paxton*, 49 F.4th at 482, 494).

[92] *Id.* at 728.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 716.

content to end users, are they producing an "expressive product?" Yes, Kagan held. "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 that activity results in a distinctive expressive product."[96]

Kagan repeatedly described content moderation and recommendations as "editorial choice[s]," analogizing what social media companies do to what newspaper editors do.[97] Therefore the central precedent was *Tornillo*,[98] in which the Court struck down a Florida right-of-reply requirement for newspapers because it interfered with newspapers' editorial judgments. The First Amendment, Kagan explained, "offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. '[T]he editorial function itself is an aspect of speech.'"[99]

It does not matter that "a compiler includes most items and excludes just a few."[100] Kagan pointed to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[101] which upheld the right of the organizers of a St. Patrick's Day parade to accept almost everyone as a participant except a gay and lesbian group seeking to convey a gay pride message.[102] Social media companies may want to allow the vast majority of speakers and messages on their sites—after all, their profits depend on amassing as large an audience as possible. But they still retain the right to remove content they do not like and speakers who violate their community standards. It also does not matter whether or not people "wrongly attribute to [the platforms] the views in an individual post."[103] First Amendment protection (or the lack thereof) does not turn on the risk of misattribution.[104]

Justice Alito, concurring only in the judgment that the cases should return to the lower courts, offered a narrower, three-part test

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[96] *Id.* at 731. Justice Jackson did not join in this part of the opinion.

[97] *Id.* at 717, 726, 729, 732, 739.

[98] 418 U.S. 241 (1974).

[99] *Moody*, 603 U.S. at 731 (quoting Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion)).

[100] *Id.* at 732.

[101] 515 U.S. 557 (1995).

[102] *Id.* at 561.

[103] *Moody*, 603 U.S. at 739.

[104] *Id.* at 739–40.

for First Amendment protection. "First, a claimant must establish that its practice is to exercise 'editorial discretion in the selection and presentation' of the content it hosts."[105] "Second, the host must use the compilation of speech to express 'some sort of collective point'—even if only at a fairly abstract level."[106] "Finally, a compiler must show that its "own message [is] affected by the speech it [is] forced to accommodate."[107] In short, "the First Amendment protects only those compilations that are 'inherently expressive' in their own right, meaning that they select and present speech created by other persons in order 'to spread [the compiler's] own message.'"[108]

Under Justice Alito's test, it is unclear whether social media companies would enjoy First Amendment protection for their content moderation and recommendation systems. First, because of the sheer volume of traffic that platforms must handle, much—if not most—content escapes notice and is never moderated. Second, social media platforms are not trying to send a single message; rather their goal is to allow end users to speak to each other consistent with the company's terms of service and community standards. Finally, because social media platforms are not trying to convey a single message, that message is not compromised by the inclusion of unmoderated content. Justice Alito, like Justice Thomas, wanted to keep open the possibility that states could subject large social media platforms to antidiscrimination rules or treat them like common carriers.[109] But Justice Kagan's majority opinion, which bestows First Amendment protection on content moderation and recommendation systems, rejects that possibility.

Because Facebook, YouTube, and Twitter had such an enormous impact on public opinion, Texas and Florida feared that the companies could use their power to silence people they disagreed with and elevate voices they supported. This would make them powerful and effective propagandists. Although Texas and Florida wanted to

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[105] *Id.* at 782 (Alito, J., concurring in the judgment) (first citing Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998); and then citing *Hurley*, 515 U.S. at 574).

[106] *Id.* at 783 (citing *Hurley*, 515 U.S. at 568).

[107] *Id.* at 784 (citing Rumsfeld v. F. for Acad. & Institutional Rights, Inc. (*FAIR*), 547 U.S. 47, 63 (2006)).

[108] *Id.* at 781 (first citing *FAIR*, 547 U.S. at 66; and then citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 10 (1986) (plurality opinion)).

[109] *Id.* at 782 n.17, 785 n.19; *id.* at 794 (Thomas, J., concurring in the judgment).

protect conservative voices from liberal domination, these fears were soon realized in the opposite ideological direction. In 2022, while the NetChoice litigation was ongoing, one of the world's richest people, Elon Musk, purchased Twitter and eventually renamed it X. Although he claimed that he would defend freedom of speech against the "woke mind virus," he soon abandoned any pretense of neutrality and used his control over the platform to favor conservative voices and promote Donald Trump in the 2024 election.[110] He also throttled traffic to news media he disliked.[111]

Justice Kagan emphasized that concerns about the power of social media companies to skew public opinion and throttle access to speech by disfavored voices could not justify regulating how social media moderated and prioritized content. She explained that social media companies are private actors who enjoy the same First Amendment rights as all other private parties. "[A] State may not interfere with private actors' speech to advance its own vision of ideological balance."[112] That issue was settled long ago, Kagan explained. In *Tornillo*, the "Court devoted six pages of its opinion to recounting a critique of the then-current media environment—in particular, the disproportionate 'influen[ce]' of a few speakers—similar to one heard today. It made no difference."[113] Today's social media companies may be far more wealthy and powerful than earlier media barons could have dreamed of. But greater power does not allow government to impose a greater responsibility.

"On the spectrum of dangers to free expression," Kagan insisted, "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. That is why we have said in so many contexts that the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"[114] Here

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[110] Philip Bump, *The Demise of the 'Public Square' Argument for X*, Wash. Post (Nov. 27, 2024), https://www.washingtonpost.com/politics/2024/11/27/musk-twitter-bluesky-trump [https://archive.ph/HBHxU]; Tim Higgins, *Why Elon Musk Won't Stop Talking About a 'Woke Mind Virus,'* Wall St. J. (Dec. 23, 2023, 5:30 AM ET), https://www.wsj.com/tech/elon-musk-woke-mind-virus-41576aa6 [https://archive.ph/WfLaa].

[111] Jeremy B. Merrill & Drew Harwell, *Elon Musk's X Is Throttling Traffic to Websites He Dislikes*, Wash. Post (Aug. 16, 2023), https://www.washingtonpost.com/technology/2023/08/15/twitter-x-links-delayed [https://archive.ph/qlQBZ].

[112] *Moody*, 603 U.S. at 741.

[113] *Id.* at 733.

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

Kagan quoted *Buckley v. Valeo*, a 1976 campaign finance decision that symbolizes the Court's conflation of freedom of speech with property rights.

V. Structural Regulation of Digital Media

Although *Moody* holds that social media recommendations and content moderation are First Amendment protected activities, it did not hold that all regulations that affect these activities are unconstitutional, much less that strict scrutiny always applies.

In particular, Justice Kagan distinguished the two *Turner Broadcasting System, Inc., v. FCC* decisions,[115] in which the Court held that Congress could require cable operators to carry local broadcast channels. These "must-carry" rules "interfere[d]" with the cable operators' "editorial discretion over which stations or programs to include in [their] repertoire."[116] But the Court applied intermediate scrutiny and upheld the rules even though they required cable operators to include channels they did not wish to carry. Congress's purpose, the Court explained, was not to interfere with editorial discretion—that would have been a content-based regulation that triggered strict scrutiny. Rather, Congress's goals were to "(1) preserv[e] the benefits of free, over the air local broadcast television, (2) promot[e] the widespread dissemination of information from a multiplicity of sources, and (3) promot[e] fair competition in the television programming market."[117] As Justice Kagan explained in *Moody*, Congress sought "to save the local-broadcast industry, so that it could continue to serve households without cable."[118] The loss of this industry would rob the public of important sources of information. But because cable companies held a "'monopolistic,' gatekeeping position," they could refuse to provide local broadcasting content to cable subscribers, threatening broadcasters' financial survival.[119] Congress's interest in preserving the benefits of free local broadcasting "was 'unrelated to

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[115] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

[116] *Turner I*, 512 U.S. at 636, 643–44.

[117] *Id.* at 662; *Turner II*, 520 U.S. at 189.

[118] *Moody*, 603 U.S. at 742 n.10.

[119] *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 577 (1995)).

the content of expression' disseminated by either cable or broadcast speakers."[120] Because "the Government's interest was 'not the alteration of speech' . . . the prospects of permissible regulation are entirely different."[121]

Moody thus leaves available structural regulation of digital media for reasons unrelated to the direct regulation of content and editorial judgment.[122] First, it preserves regulations designed to protect end-user privacy. Second, it preserves regulations designed to open up the market for social media services and promote competition and innovation.

The power that social media companies have over the digital public sphere is connected to their collection and control of data. They have collected and continue to collect enormous amounts of end-user data, which they can use to attract advertisers and employ in other applications and services. Most if not all of Google's and Meta's free services and applications are designed to collect data from end users. It is not too much of a stretch to say that Alphabet (Google's parent company) and Meta (which owns Facebook and Instagram) are actually global data collection and surveillance companies that offer social media products on the side. Congress can protect consumer privacy in digital media and regulate the collection and use of end-user data without second-guessing the editorial judgments of these companies. In general, courts treat regulations of the collection, collation, and use of consumer data—as opposed to regulations of the sale or distribution of data—either as regulations of conduct or as content-neutral, time, place, and manner regulations subject to intermediate scrutiny.[123]

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[120] *Id.* (quoting *Turner I*, 512 U.S. at 647).

[121] *Id.* (quoting *Hurley*, 515 U.S. at 577).

[122] *See* C. Edwin Baker, Turner Broadcasting: *Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 81 (noting that structural regulation of communications industries "to advance its conception of a desirable communications order" has been ubiquitous).

[123] *See*, *e.g.*, Jack M. Balkin, *The Fiduciary Model of Privacy*, 133 Harv. L. Rev. F. 11, 30 (2020) ("Courts are more likely to treat restrictions on collection or use as not raising First Amendment questions at all, because they aim at conduct. In the alternative, courts may treat them as content-neutral time, place, and manner regulations." (footnotes omitted)); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1182–86, 1190–92 (2005) (noting the ubiquity of collection and use restrictions that do not violate the First Amendment); *cf.* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (treating privacy regulations as content-neutral); *Bartnicki*, 532 U.S. at 544 (Rehnquist, C.J., dissenting) (agreeing that restrictions on interception and disclosure were content-neutral); *see also* TikTok Inc. v. Garland, 145 S. Ct. 57 (2025) (holding that requiring divestiture to prevent data collection from a foreign adversary was a content-neutral regulation).

Regulating the collection and use of end-user data may have downstream effects on social media business models, and thus on the kinds of content they curate and recommend, but those effects in and of themselves do not trigger strict scrutiny under *Tornillo*, *Hurley*, or *Moody*.

Perhaps equally important, even after *Moody*, governments can regulate the various players in digital industries to promote fair competition, prevent information bottlenecks, and prevent monopolization of digital media.[124] Although these regulations may affect the relative communicative power of participants, this does not by itself violate the First Amendment.

Texas and Florida were worried that a small number of social media companies with ideological views hostile to their own enjoyed outsized influence in the digital public sphere. Instead of directly regulating the platforms' judgments about content, they should have tried to open up the platforms to allow for greater user choice about content moderation and recommendation systems. In fact, Florida's legislation does this in a very limited way. It gives end users the right to opt out of a platform's recommendation systems and receive "sequential or chronological posts and content."[125]

This provision is one example of a much larger strategy of structural regulations that give end users the option to implement user controls. User controls place decisions about which content end users receive with end users themselves. The Supreme Court has repeatedly pointed to user controls as a less restrictive alternative to content-based regulation of electronic media.[126]

There are two basic strategies that governments might pursue. First, governments could impose structural regulations that require large social media platforms to offer end users the choice to use "middleware."[127]

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[124] *Moody*, 603 U.S. at 742 n.10; *Turner I*, 512 U.S. at 657, 661–62; Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 189–90, 192–93 (1997).

[125] Fla. Stat. § 501.2041(2)(f)(2) (2023). Platforms must also "provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity." *Id.* § 501.2041(2)(g).

[126] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 815–18 (2000) (holding that content regulation of adult content was unconstitutional if cable companies could block adult content at customer request); Reno v. ACLU, 521 U.S. 844, 877–78 (1997) (existence of user-based software to block material inappropriate for minors is a less restrictive alternative).

[127] *Shaping the Future of Social Media with Middleware*, Found. for Am. Innovation (Dec. 2024), https://repository.library.georgetown.edu/bitstream/handle/10822/1089126/Shaping_Future_Social_Media_Middleware.pdf [https://perma.cc/3XEH-3TYF]; Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. Free

Middleware companies provide alternative content moderation and recommendation services. Platforms would still moderate and recommend content as before, but end users could also choose different companies to perform these tasks.

This kind of structural regulation would create a market for third-party middleware companies to connect with the largest platforms. It would allow end users whose speech would otherwise be blocked or demoted by a platform to reach willing listeners that subscribe to a middleware service with different rules and norms. Finally, it would allow end users to enjoy the benefits of the global communities that large platforms create without being locked into a single service for content moderation and recommendations.

A second structural solution is to require large social media platforms to be interoperable with other social media platforms.[128] This means that they would employ common technical standards for sharing, interpreting, and presenting data. Common technical standards would not require platforms to select, present or curate data in any particular way. Any platform that used these common standards could receive content posted on other platforms and share content with other platforms while presenting and curating content however it liked. This is how email works today. People using different email providers can send and receive messages to each other because the providers use common standards.

Like middleware solutions, an interoperability requirement would give end users all the benefits of belonging to large digital communities; and they could also communicate with people who belonged to other social media platforms. Interoperability would lower barriers to entry for new social media platforms that might have trouble gaining new users because network effects keep people on existing platforms. Finally, interoperability could also create a market for third-party content moderation and recommendation systems that would allow

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Speech L. 227, 268 (2021); Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. Chi. L. Rev. Online (June 28, 2022), https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech [https://perma.cc/5ZYJ-YLHC]; Francis Fukuyama, *Making the Internet Safe for Democracy*, 32 J. Democracy 37, 41–43 (2021); Francis Fukuyama, Barak Richman, Ashish Goel, Marietje Schaake, Roberta R. Katz & Douglas Melamed, *Report of the Working Group on Platform Scale*, Stanford Cyber Pol'y Ctr. (Nov. 17, 2020), https://cyber.fsi.stanford.edu/publication/report-working-group-platform-scale [https://perma.cc/ASX3-DUEV].

[128] Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, Knight First Amend. Inst. (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech [https://perma.cc/UPY2-CRL6].

end users to escape the largest platforms' control over what they say, see, and hear.

These possibilities are not speculative. A third party middleware company, Block Party, once gave Twitter users the power to block harassing or threatening posts until the new ownership prevented its operation.[129] The social media platform Bluesky has been designed to accommodate customized content moderation.[130] Another platform, Mastodon, is premised on interoperability between different nodes that can have different content moderation and recommendation rules.[131]

The power of social media platforms over the digital public sphere comes in large part from network effects: The more people belong to a platform, the more valuable the platform is and the harder it is to exit from it. That gives enormous advantages to the largest companies and helps maintain their dominance over public discussion. Middleware and interoperability mandates allow users to enjoy the benefits of network effects while also allowing them to choose other platforms or middleware companies with different values and moderation standards. These mandates also promote industry competition because they lower barriers to entry for new social media companies that might offer new kinds of services.

Regulations facilitating middleware and interoperability do not attempt to regulate social media companies' editorial judgments. They do not require social media companies to remove, restore, promote or demote any content. Instead, they alter the competitive structure of the industry. For this reason, *Turner I* and *II*, and not *Tornillo* and *Hurley*, are the relevant First Amendment precedents.

The Supreme Court held in *Turner I* and *II* that "promoting the widespread dissemination of information from a multiplicity of sources" is an important purpose that is unrelated to the suppression of free expression and therefore does not trigger strict scrutiny.[132]

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[129] Tracy C. Chou, *The Path to a Better Internet for Everyone*, Block Party Newsl. (Mar. 3, 2022), https://blog.blockpartyapp.com/p/a-better-internet-for-everyone [https://perma.cc/LF77-YQ2W].

[130] *See generally* Martin Kleppmann et al., *Bluesky and the AT Protocol: Usable Decentralized Social Media*, arXiv (Oct. 16, 2024), https://arxiv.org/abs/2402.03239 [https://perma.cc/2XFQ-R8QF] (describing how Bluesky permits custom feeds for content moderation).

[131] *See* Alan Z. Rozenstein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. Free Speech L. 217, 218 (2023).

[132] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 189 (1997).

This phrase originally comes from Justice Black's opinion in *Associated Press v. United States*,[133] which argued that the government could apply the antitrust laws to a publisher's association that restricted the sale of news stories to non-members.[134] This language might seem to be in tension with the position stated in *Buckley* and reaffirmed in *Moody* that the "government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"[135] But as the Court explained in *Turner I*, the two ideas are consistent. The government may regulate industry structure and shape the rules of market competition to increase the number and diversity of voices in the public sphere as long as it does not aim at restricting anyone's expression because the government objects to its content.[136]

VI. *Moody* and the Technology Stack

Moody gives social media companies First Amendment protection to edit and curate end-user content to the extent that by doing so they produce "expressive products." What *Moody* leaves open is First Amendment protection for other kinds of internet services. These include other services at the application layer like email, Uber, or eBay, and services further down the tech stack, like broadband, app stores and web hosting services.

Note once again that when governments regulate infrastructure owners in order to get them to block or censor end-user content, courts may recognize that infrastructure owners have First Amendment rights even if they are not independent speakers or editors because they make possible the distribution of end-user content. But here, as in *Moody*, the question is whether infrastructure owners have independent First Amendment rights to edit, block, or censor end-user content.

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[133] 326 U.S. 1, 20 (1945) ("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.").

[134] *Id.* at 20 ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.").

[135] Moody v. NetChoice, LLC, 603 U.S. 707, 742 (2024) (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam)).

[136] *Turner I*, 512 U.S. at 658 ("*Buckley* thus stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.").

Start first with the application layer. Not all digital services produce the equivalent of social media feeds. But digital applications are protean. Their designs can change rapidly and they can offer many different features and affordances. Many applications allow end users to communicate with each other on the platform, either by sending messages or by posting ratings and comments. As soon as platforms allow end-user communication, they will find it necessary to engage in content moderation.[137] As a result, content moderation is ubiquitous on platforms, whether or not they resemble Facebook or YouTube. Even applications that seem resistant to content moderation, like encrypted messaging apps, can be moderated.[138] Moreover, some modern messaging apps allow broadcasting messages to hundreds of other users, which blurs distinctions between their services and social media feeds.[139]

Moody's focus on the existence of an "expressive product" is not well-designed to address the variety and complexity of digital applications. That is perhaps the best reason to read *Moody* fairly narrowly—as giving lower courts an example of what is protected by the First Amendment without establishing necessary and sufficient conditions for all digital platforms and applications.

At oral argument the Justices gave the example of email as an application for which common carriage or nondiscrimination rules might be constitutional.[140] Their assumption was that given the nature of the service, email providers had no good reason to engage in content discrimination—for example, banning all emails by conservatives.[141] But that is not what email services actually do. In fact, email services are among the earliest content moderators on the internet. They try to identify and block spam, because if they did not do so, they would quickly be overrun with it. Most spam is commercial solicitation (much of it fraudulent) but not all of it is commercial, and the category is

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[137] *See* James Grimmelmann, *The Virtues of Moderation*, 17 Yale J.L. & Tech. 42, 51–53 (2015) (explaining that, because online communities are a shared resource, they are liable to abuse).

[138] Charles Duan & James Grimmelmann, *Content Moderation on End-to-End Encrypted Systems: A Legal Analysis*, 8 Geo. L. Tech. Rev. 1 (2024).

[139] *See generally* Akriti Gaur, Social Media Shapeshifters: The Emergence of a "Public-Private Hybrid" (2023) (unpublished manuscript) (on file with author).

[140] Transcript of Oral Argument at 70–80, *Moody*, 603 U.S. 707 (Nos. 22-277 & 22-555).

[141] *See id.* at 79–80 (Barrett, J.) ("I'm not sure I agree with you about DMs and—and Gmail . . . it's not obvious to me anyway that . . . they can't qualify as common carriers.").

notoriously difficult to define. Email services moderate and organize content in other ways, too: Gmail, for example, now sorts incoming emails into content-based categories like "primary," "social," and "promotions."[142] End users can change this system, but content moderation occurs as a default.

If one reads *Moody* narrowly to protect only "expressive products" that resemble social media feeds, then states could impose nondiscrimination rules for other kinds of platforms and applications. States could also create carve-outs to allow for specific kinds of content moderation—for example, eliminating spam—without running afoul of the First Amendment because they are not interfering with editorial judgment nor is it their goal to do so. It is true that states could wreak havoc with platforms if their regulations are ham-handed and intrusive. But the First Amendment is not always the most flexible tool for separating out good platform policies from bad ones.

Now consider applications lower in the internet stack—broadband companies, domain name companies, and web hosting services. Here is where nondiscrimination or common carriage rules make the most sense. After all, the central purpose of the services lower in the stack is to get bits of information from one part of the internet to the other as quickly and efficiently as possible. Moreover, services lower in the stack are generally less adept at granular moderation of content.[143] For example, domain name companies can block all content hosted under a single domain name (e.g., facebook.com), but they cannot make finer distinctions.

Even so, some services lower in the tech stack do regulate content directly or indirectly. App stores may refuse to carry applications unless the latter have appropriate content moderation and safety policies.[144]

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[142] Matthew Izatt, *Making Gmail's Tabbed Inbox Work Better for You*, Google Workspace Blog (Jan. 16, 2020), https://workspace.google.com/blog/productivity-collaboration/how-gmail-sorts-your-email-based-on-your-preferences [https://perma.cc/V7H2-JYZY].

[143] *See* Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. Free Speech L. 71, 73 (2021) (arguing that, in general, services lower in the stack should not engage in content discrimination); Goldman, *supra* note 22, at 49–50 ("Services with limited remedy options are not in good positions to redress user violations. . . . [T]he coarseness of the remedy options increases the odds that any remedial actions will be miscalibrated or will have adverse collateral consequences."); Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. Sci. & Tech. L. 193, 205 (2018) (arguing that control over content should occur at the edge of the network or at the application layer).

[144] *See App Review Guidelines*, Apple Dev. (June 5, 2023), https://developer.apple.com/app-store/review/guidelines [https://perma.cc/56EW-T2U2] (specifying content moderation requirements for apps available on the Apple App Store); *Restricted Content Policy*, Amazon

Web hosting services may refuse to host applications that encourage violence or terrorist activity, and so on.[145] *Moody* does not tell us whether the First Amendment protects these decisions. Web hosting services do not appear to offer a single expressive product, because people do not experience the collection of websites the companies host as a product. The same would also seem to apply to domain name servers and caching services. App stores may be a closer call: They are applications in their own right that appear on people's phones and they offer end users a list of applications that the store is willing to host, including games and entertainment. Even so, when states are trying to promote efficiency and nondiscrimination in the delivery of digital services lower in the tech stack, there is good reason to read *Moody* narrowly. If *Moody* does not apply, states can easily create carve-outs from nondiscrimination rules to allow companies to prevent the misuse of their platforms and services.

What about network neutrality rules for broadband providers? These rules classify broadband providers as "telecommunications services" and require, in essence, that broadband providers may not discriminate against content or applications traveling through their facilities.[146] The FCC adopted network neutrality rules during the Obama Administration but subsequently eliminated them during the Trump Administration.[147]

When he served on the D.C. Circuit, Justice Brett Kavanaugh argued that network neutrality rules violated the First Amendment, because broadband providers might want to engage in content moderation just like Facebook. To be sure, the government might impose must-carry obligations to promote fair competition as in *Turner I* and *II*. But "[a]bsent a showing of market power," Kavanaugh argued, "the Government may not tell Internet service providers how to exercise

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Appstore (Nov. 17, 2021), https://developer.amazon.com/docs/policy-center/restricted-content.html [https://perma.cc/2MPU-DYS9] ("[A]pps that include or link to user-generated content must include a method for filtering objectionable content, an age verification system, and a mechanism to report and remove offensive content.").

[145] *See AWS Acceptable Use Policy*, Amazon Web Servs. (July 1, 2021), https://aws.amazon.com/aup [https://perma.cc/5NF2-DA9N] (listing content restrictions for use of AWS services).

[146] *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, ¶ 4 (2015) (imposing rules at the network layer prohibiting providers from blocking lawful content, throttling lawful content, or discriminating against lawful content on the basis of its source or destination).

[147] The FCC promulgated its network neutrality rules once again during the Biden Administration, but the Sixth Circuit rejected them as inconsistent with the Telecommunications Act of 1996. *See In re* MCP No. 185, 124 F.4th 993, 1009 (6th Cir. 2025).

their editorial discretion about what content to carry or favor any more than the Government can tell Amazon or Politics & Prose what books to promote; . . . or tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor."[148]

Nondiscrimination rules such as network neutrality make sense for services beneath the application layer because the central goal of these services is speedy and efficient distribution of digital information. Once again, governments can make exceptions to general nondiscrimination rules to ensure efficient network management. If content moderation occurs at all, it should primarily occur at the application layer, or better still, through choices made by end users at the edge of the network. (This is another justification for middleware). This is why Kavanaugh's First Amendment arguments against network neutrality miss the mark. They do not seem to recognize the different functions played by the different parts of the tech stack.

Moody cites Kavanaugh's D.C. Circuit dissent for the general proposition that the government ordinarily may not interfere in the editorial choices of private actors, although it may regulate them to promote fair competition.[149] If *Moody* meant to incorporate all of Kavanaugh's reasoning, however, it would be especially unfortunate, because that would prevent governments from ensuring nondiscrimination lower in the tech stack. The D.C. Circuit has upheld network neutrality against a First Amendment challenge,[150] but the Supreme Court has never decided the issue. *Moody* complicates that question but does not answer it. It remains unclear whether the Court will view the stream of bits that flows through a broadband provider's facilities as an "expressive product" like a social media feed or a St. Patrick's Day Parade.

VII. The Speech Rights of End Users—Informed Consumers or Due Process?

Texas and Florida also created procedural requirements to prevent arbitrary decision making by social media platforms. Texas

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[148] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[149] Moody v. NetChoice, LLC, 603 U.S. 707, 742 (2024) (citing *U.S. Telecom Ass'n*, 855 F.3d. at 432 (Kavanaugh, J., dissenting from the denial of rehearing en banc)).

[150] U.S. Telecom. Ass'n v. FCC, 825 F.3d 674, 739, 741–42 (D.C. Cir. 2016), *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied sub nom.* Berninger v. FCC, 586 U.S. 994 (2018).

requires social media companies to provide an explanation when content is removed.[151] It also requires a right of appeal and a written determination of the decision on appeal.[152]

Florida requires that social media companies explain each moderation and recommendation decision that affects an end user by "a thorough rationale explaining the reason that the social media platform censored the user," and "a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable."[153]

Florida allows end users a private right of action to sue for actual, statutory, and punitive damages if the platform's explanation for its content moderation or recommendation decision is inadequate.[154] Finally, Florida requires that "[a] social media platform must inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days."[155]

The Court did not resolve the First Amendment issues presented by these elements of the statutes and sent them back to the lower courts.[156] The Court assumed, although it did not squarely hold, that lower courts should analyze these questions according to the Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[157] which announced the basic doctrines for compelled commercial speech. As Justice Kagan explained, "for the individualized-explanation provisions" lower courts must ask "whether the required disclosures unduly burden expression," citing *Zauderer*.[158] (Kagan did

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[151] Tex. Bus. & Com. Code Ann. § 120.103(a)(1) (West 2023).

[152] *Id.* § 120.103(a)(2).

[153] Fla. Stat. § 501.2041(3)(c)–(d) (2023); *id.* § 501.2041(2)(a)–(e).

[154] *Id.* § 501.2041(6).

[155] *Id.* § 501.2041(2)(c).

[156] Moody v. NetChoice, LLC, 603 U.S. 707, 725–26 (2024).

[157] 471 U.S. 626 (1985).

[158] *Moody*, 603 U.S. at 725 (citing *Zauderer*, 471 U.S. at 651); *see also id.* at 727 n.3 ("[R]equirements [like the individualized-explanation provisions] violate the First Amendment if they unduly burden expressive activity."); *id.* at 750–51 (Thomas, J., concurring in the judgment) (noting that the Court has assumed that *Zauderer* applies but arguing that the Court should revisit *Zauderer*); *id.* at 791 n.46 (Alito, J., concurring in the judgment) ("If, on remand, the States show that the platforms have been able to comply with [European law] without having to forgo 'exercising editorial discretion at all,' . . . then that might help them prove that their disclosure laws are not 'unduly burdensome' under *Zauderer*." (citation omitted)); *id.* at

not address Texas's appeal provision or Florida's thirty-day requirement separately).

There are two problems here. First, the use of commercial speech doctrine fits awkwardly with the Court's argument that the platforms are engaged in editorial judgment like newspapers. Second, commercial speech doctrine is a poor proxy for addressing what is really at stake. The point of Texas's and Florida's statutes is not simply informing consumers. They are offering procedural protections against arbitrary governance by platforms.

Here is why the difference in characterization matters. In the pluralist model, end users have free speech interests against governments *and* against the platforms that host their speech, because both states and platforms regulate end-user speech. The substantive doctrines of the First Amendment constrain governments; however, because of the Court's state action doctrines, they do not constrain platforms. Private parties may impose whatever content-based and viewpoint-based limits on speech they like. *Moody* reaffirms this principle, at least for social media companies.

Because of this difference between public and private governance, enforceable end-user speech interests turn out to be mostly procedural guarantees. Platforms must state their content moderation standards publicly, and apply them consistently, even-handedly, and nonarbitrarily. Where private governance is concerned, freedom of speech is largely a matter of due process.[159]

Commercial speech doctrine emerged out of the dyadic model of speech regulation characteristic of the twentieth century. Platforms claim a First Amendment right to be free from state regulation, and the state justifies disclosure because it informs consumers. The speech interests of end users are left completely out of the picture. Now consider the problem from the standpoint of the free speech triangle. The issue is not that platforms are giving consumers incomplete information. It is that platforms are governing end users by creating and

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796 n.57 ("[I]n the Florida case in particular, NetChoice did not contest—and accordingly forfeited—whether *Zauderer* applies here.").

[159] Balkin, *Free Speech in the Algorithmic Society*, *supra* note 7, at 1196–98 (arguing that the shift from the dyadic to the pluralist model makes due process especially important to end users); Matthew Prince, *Why We Terminated Daily Stormer*, Cloudfare (Aug. 16, 2017), https://blog.cloudflare.com/why-we-terminated-daily-stormer [https://perma.cc/3447-JVV6] (arguing that "Freedom of Speech < Due Process" in "[t]he issue of who can and cannot be online").

enforcing rules and standards. The danger is not that end users will be misinformed. It is that they will be unfairly governed without procedural protections. End users want the right to speak on the platform, and they do not want to be governed arbitrarily when they do so.

Under the dyadic model, what is at stake is consumer information. Under the pluralist model, it is due process. One can describe both of these concerns as issues of "consumer protection." But what is protected is different. In the first case, the law protects consumers from deception and lack of knowledge. In the second case, the law protects end users from abuses of private governance.

The *NetChoice* litigation in Texas and Florida suggests that in the short run at least, the federal courts will cling to the dyadic model. They will think and talk about the issues in terms of access to consumer information.[160] That is how the parties argued the cases and how the lower courts and the Supreme Court initially conceptualized the question. That is hardly surprising because the interests of end users went unrepresented in the *NetChoice* litigation.[161] But commercial speech doctrine is only an imperfect proxy for the deeper questions raised by private governance. At some point, the courts will have to focus on the real problems created by the free speech triangle and not on how commercial speech doctrine imagines them.

For the moment, however, the commercial speech model will prevail. Yet even that model reveals problems with the Court's holding that platforms are editors. For it suggests that what social media companies are doing is importantly different from newspapers or organizers of parades.[162] If social media companies really were engaged

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[160] *But see* X Corp. v. Bonta, 116 F.4th 888, 897–98, 901 (9th Cir. 2024) (striking down as compelled non-commercial speech California law requiring social media companies to issue reports on their content moderation policies). The Ninth Circuit argued that *Zauderer* did not apply because "the Content Category Reports are not commercial speech. They require a company to recast its content-moderation practices in language prescribed by the State, implicitly opining on whether and how certain controversial categories of content should be moderated." *Id.* at 901.

[161] This is a recurrent problem in platform regulation cases, in which either platforms or end users appear before the courts but not both. *See* Daphne Keller, *The Three-Body Problem: Platform Litigation and Absent Parties*, Lawfare (May 4, 2023, 9:00 AM), https://www.lawfaremedia.org/article/the-three-body-problem-platform-litigation-and-absent-parties [https://perma.cc/HT5C-TR3Z].

[162] *See* Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. Free Speech L. 1, 4 (2023) (arguing that the newspaper analogy is flawed because platforms process enormous amounts of information and "have far less commercial or editorial interest in defending any particular user's posts than a newspaper has in defending its articles").

in editorial judgments like newspapers, and in producing "expressive products" like the authors of anthologies, it would seem contrary to the First Amendment to ask them to defend their choices of which content to exclude, promote, or demote, or require them to create appeal procedures. Under current precedents, it would be unconstitutional for a state to require the *New York Times* to offer explanations for each rejection of a letter to the editor, or to require the *New Yorker* to create an appeal process for authors whose articles, short stories, and cartoons are rejected. It would also be unconstitutional to require that a newspaper wait thirty days before changing any aspect of its editorial standards. And under *Hurley*, it is doubtful that Massachusetts could require the organizers of the St. Patrick's Day parade to publish their rules for inclusion in the parade publicly in advance and offer explanations and an appeal process for rejected participants.

Editors normally enjoy First Amendment rights to speak or not to speak without having to justify their editorial choices to the state. But the assumption underlying a requirement of explanation or appeal is that editors must act reasonably in deciding what to include in their expressive products according to publicly available criteria stated in advance. This raises problems of compelled speech and even prior restraint. But beyond this, the idea that editors must justify their creative process to the state seems foreign to the rights of expression that the First Amendment guarantees. Moreover, because the goal of Texas's and Florida's statutes is to coax social media companies to publish or restore some content that they would otherwise remove, these procedural guarantees would also seem to violate the *Buckley* principle on which Kagan relies: restricting the voice of some (social media companies) to enhance the voices of others (end users).

Redescribing the statutes' procedural guarantees as purely informational measures—and thus as governed by commercial speech doctrine—seeks to avoid these problems, although, as we shall see, it does not really eliminate them. The basic idea is that states are simply requiring the platforms to "provide somewhat more information [about their services] than they might otherwise be inclined to present"[163] and "include . . . purely factual and uncontroversial information about the terms under which [their] services will be available."[164] The platforms

[163] *Zauderer*, 471 U.S. at 650.

[164] *Id.* at 651.

enter into consumer contracts with end users that incorporate their community standards by reference. States should be able to require platforms to explain why end users have violated these contracts and are subject to content moderation or even exclusion. By contrast, parade organizers do not have contracts with potential participants and newspapers do not have contracts with people submitting letters to the editor.[165] In other words, states can require disclosure because of an ongoing commercial relationship.

This theory faces a number of hurdles. First, *Zauderer* was a case about compelling information from advertisers to avoid misleading or deceiving consumers.[166] The disclosures required here go well beyond this. However, lower courts have generally held that compelled commercial disclosures are not limited to preventing deception in advertising, although the Supreme Court has yet to address the matter squarely.[167]

Second, one would have to show that disclosure of the grounds for moderating content was "factual and uncontroversial."[168] *Why* a social media platform moderated content would seem to be a question of fact that is easily available to the platform. The only wrinkle is the "uncontroversial" requirement. In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, the Court glossed this part of the test.[169] It held that requiring a crisis pregnancy center—dedicated to preventing abortions—to disclose the availability of abortion services is not consistent with *Zauderer* because "information about state-sponsored services . . . including abortion [is] anything but an 'uncontroversial' topic."[170]

At first glance this might mean that *Zauderer* does not apply to mandatory disclosures about content moderation, because platforms

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[165] *See* Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae in Support of Neither Party at 26–27 & n.18, Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (Nos. 22-277 & 22-555) (explaining why disclosure rules are compelled commercial speech).

[166] *Zauderer*, 471 U.S. at 651 ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

[167] *See*, *e.g.*, CTIA – The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases from the various circuits); *cf.* Nat'l Inst. of Family & Life Advocs. v. Becerra (*NIFLA*), 585 U.S. 755, 775 (2018) ("[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.").

[168] *Zauderer*, 471 U.S. at 651.

[169] *NIFLA*, 585 U.S. 755.

[170] *Id.* at 769 (emphasis omitted).

make moderation decisions about controversial topics all the time, including hate speech, sexuality, and misinformation. But one might distinguish *NIFLA* as follows: There the state was forcing the crisis pregnancy center to talk about services provided by the state, and not its own services. Moreover, it required the center to convey a controversial message about abortion that was inconsistent with the center's mission.[171] These concerns do not apply to disclosures about a platform's own content moderation decisions. They are central to what the platform does. Even if the subject of a post is controversial, and even if the platform's judgment about the post is controversial, it is not controversial that the platform moderated the content for a particular reason based on its terms of service or community standards.

Zauderer places some limits on the government's ability to compel commercial speech. Mandated disclosures cannot be "unjustified or unduly burdensome."[172] In his concurrence in the judgment in *Moody*, Justice Alito pointed out that the largest platforms already comply with the disclosure provisions of the European Union's Digital Services Act (DSA), and he suggested that "complying with that law does not appear to have unduly burdened each platform's speech in those countries."[173] But the fact that global platforms must adhere to DSA rules as a cost of doing business in the European Union does not mean that the regulations are not unduly burdensome under *Zauderer*.[174] The test cannot be whether a regulation causes or does not cause a company to close up shop.

Because of the enormous scale of the content that flows through the platforms every day and the millions of violations that platforms identify each quarter,[175] it would be very difficult for platforms to do

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[171] *See* Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1092–93 (2022) ("[T]he mandated notices . . . potentially undermine[d] . . . the [crisis pregnancy centers'] efforts to persuade women to repudiate abortions.").

[172] *Zauderer*, 471 U.S. at 651.

[173] Moody v. NetChoice LLC, 603 U.S. 707, 797–98 (2024) (Alito, J., concurring in the judgment).

[174] Article 17 of the Digital Services Act requires platforms to offer a "statement of reasons" explaining their content moderation decisions. Platforms can provide automated responses as long as they are "clear and specific." Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), art. 17, 2022 O.J. (L 277) 1, 51–52.

[175] YouTube's latest transparency report states that the company removed nine million individual videos and 4.8 million channels (constituting seventy-two million videos) from July 2024 to September 2024. *YouTube Community Guidelines Enforcement*, GOOGLE TRANSPARENCY

much more than provide automated responses that identity the specific part of the platform's community standards violated and describe the basic category of content at issue (for example, hate speech). As a result, disclosure requirements will have to be relatively modest to remain constitutional.[176]

In addition, constitutional disclosure rules under *Zauderer* must not deter content moderation and curation, leading digital companies to refrain from promulgating and enforcing content standards (or water them down) in order to avoid costly lawsuits and intrusive discovery. *Moody* states that content moderation and curation are expressive activity protected by the First Amendment. But litigants, including fiercely partisan state attorneys general, may try to use litigation about whether disclosures are adequate to fight over platforms' definitions of hate speech, sexual orientation discrimination, and other aspects of community standards linked to the culture wars.[177] In response, platforms may decide that enforcing their community standards is not worth the trouble and discard them or water them down. For commercial speech doctrine to work consistently with *Moody*, disclosure rules cannot become a tool for chilling editorial judgment.

Florida's disclosure rules exemplify these problems of burdensome costs and chilling effects. Whereas Texas's disclosure rules apply only to removals of content, Florida's rules are much broader. They apply to every act of moderating content and every decision about what content to promote or demote. Moreover, they require "a thorough rationale explaining the reason that the social media platform censored the user," and "a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable."[178] It would be very difficult if not impossible to perform this kind of

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Rep., https://transparencyreport.google.com/youtube-policy/removals [https://perma.cc/MVF9-88LF].

[176] *See* Evelyn Douek, *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526, 577–83 (2022) (explaining why traditional conceptions of due process do not work well for content moderation systems).

[177] *See* Daphne Keller, *State Abuse of Transparency Laws and How to Stop It*, Ctr. for Internet & Soc'y (Sept. 19, 2022), https://cyberlaw.stanford.edu/blog/2022/09/state-abuse-transparency-laws-and-how-stop-it [https://perma.cc/C35F-R296] ("State actors who are licensed to examine the adequacy of platform transparency will have unique leverage to influence the substantive speech policies applied to users.").

[178] Fla. Stat. § 501.2041(3)(c)–(d) (2023); *id.* § 501.2041(2)(a)–(e).

reporting at scale. Moreover, these rules, combined with a right of private action that allows awards of statutory and punitive damages for each instance of inadequate disclosure, seem designed more to bully the platforms into changing their editorial policies than to informing consumers.[179]

So far, I've considered whether one might justify laws like Texas's and Florida's through compelled commercial speech doctrine. Texas's law, however, does more than mandate disclosure. Whenever platforms remove content, Texas also provides for a right to appeal and the right to a written explanation of the decision reached.[180] This provision shows what Texas's statute is really about. It does not simply inform consumers about the nature of commercial services. Rather, it involves the rudiments of due process. This casts the disclosure provisions in a different light. Texas is trying to protect end users' speech interests by giving them a right to non-arbitrary decisionmaking by the platforms. It is responding, albeit in a haphazard way, to the problems of the free speech triangle. And the statute shows, once again, why commercial speech doctrine is an imperfect proxy for safeguarding the interests of end users.

VIII. Conclusion: *Moody*, Artificial Intelligence and Algorithmic Speech

Moody raises a final set of issues that will only grow in importance in the years to come. In a very preliminary way, *Moody* begins to discuss the First Amendment status of expression produced by algorithms and artificial intelligence. That question is of enormous importance generally, but here are the stakes for social media companies. Suppose that using automated systems—including artificial intelligence—to engage in content moderation and recommendation is unprotected by the First Amendment. Then the social media companies that employ automated systems might be sued—or otherwise regulated—because of the harmful effects that their moderation and recommendation systems produce on populations. This assumes, of course, that they are not otherwise immune from suit under Section 230

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[179] *See* Keller, *supra* note 162, at 4 (arguing that burdensome transparency requirements give platforms incentives to change their editorial practices).

[180] Tex. Bus. & Com. Code Ann. § 120.103(a)(2) (West 2023).

of the Telecommunications Act of 1996, which the Court did not consider in *Moody*.[181]

Digital companies have sought to protect as much of their operations as possible under the shield of the First Amendment (and Section 230). To the extent that companies' use of artificial intelligence (or algorithms more generally) is unprotected, it will have major consequences for this strategy.

In *Moody*, Justice Kagan noted that much social media curation occurs through algorithms; these remove or demote content based on predictions of whether the content matches end users' interests and activities and whether the content violates a platform's community guidelines or standards.[182] Kagan assumed that this use of algorithms is part of a platform's editorial judgment and is therefore protected by the First Amendment.[183] That assumption is one of *Moody*'s most important holdings, a holding that litigators will try to build on (or distinguish) in future cases involving algorithmic speech and artificial intelligence. Read broadly, *Moody* might suggest that where programs further a human being's expressive goals, their use is protected by the First Amendment.

At the same time, Kagan expressed no opinion about situations in which "algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards."[184] Justice Amy Coney Barrett offered a similar caveat in her concurrence: "[I]f a platform's algorithm just

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[181] 47 U.S.C. § 230(c); *see* Moody v. NetChoice LLC, 603 U.S. 707, 771 n.8 (2024) (Alito, J., concurring in the judgment) (noting that the Eleventh Circuit declined to pass on the Section 230 issues in the case).

[182] *Moody*, 603 U.S. at 734–36 & n.5.

[183] *Id.* at 734–35 ("The key to the scheme is prioritization of content, achieved through the use of algorithms. . . . The platforms write algorithms to implement [their community] standards. . . ."). Justice Barrett makes a similar argument in her concurrence:

> Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation.

Id. at 746 (Barrett, J., concurring) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995)).

[184] *Id.* at 736 n.5 (majority opinion).

presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged . . . [t]he First Amendment implications . . . might be different. . . ."[185]

This distinction, however, does not work. After all, the algorithms maximize engagement because human beings programmed them to do so; they are furthering human goals in producing an "expressive product." People often tailor their expression—including their choices of what to say and when to say it—based on what they think their audiences will like, and there is no doubt that they have a First Amendment right to do so. Musicians order their concert playlists to keep their audiences entertained. Newspapers decide which stories to cover and where to place them based on expectations about reader engagement. Local television news shows frontload attention-grabbing violent stories according to the dictum "if it bleeds, it leads."[186] Motion picture producers test audience reactions to the endings of movies and the inclusion or exclusion of certain scenes or characters, and so on.

In the attention economy of the digital age, it should be obvious that a central object of much popular expression and entertainment is audience engagement, and that producers, composers, editors, and publishers employ algorithms and other computer programs as tools to maximize the same.[187] If a musician, for example, uses artificial intelligence to program a concert *solely* to please her audience and maximize engagement (and revenues), this is still protected by the First Amendment.

One might respond that these situations involve ordering a speaker's *own* content. People have a right to choose from their own compositions solely for the purpose of maximizing audience engagement. The concert musician picks the order of her own songs; the newspaper chooses from among possible stories to put on the front

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

[186] *If It Bleeds, It Leads*, TvTropes, https://tvtropes.org/pmwiki/pmwiki.php/Main/IfItBleedsItLeads [https://perma.cc/A8QC-AC5W].

[187] *See, e.g.*, The NYT Open Team, *How The New York Times Incorporates Editorial Judgement in Algorithms to Curate Home Screen Content*, Medium (Oct. 2, 2024), https://open.nytimes.com/how-the-new-york-times-incorporates-editorial-judgement-in-algorithms-to-curate-home-screen-content-85f48209fdad [https://perma.cc/YD57-ZB55]; Emmet McDermott, *AI Decision-Making in Hollywood Is Already Here, Now What?*, Hollywood Rep. (May 4, 2023, 10:21 AM), https://www.hollywoodreporter.com/business/digital/ai-filmmaking-algorithm-documentaries-non-fiction-1235478174 [https://perma.cc/2RSB-VV28] (describing how filmmakers use algorithms to choose subjects for films).

page; movie studios decide how to end their own movies; stand-up comedians include or discard jokes from their own stable of material, and so on. And a musician, a newspaper, a movie studio, or a comedian does not lose First Amendment protection if they employ an algorithm or other predictive tool to figure how to maximize engagement.

By contrast, Kagan and Barrett are pointing to algorithms that compile *other* people's content solely on the grounds that people will like it or be engaged with it. But *Moody* already holds that producing a compilation consisting solely of other people's speech creates an "expressive product" and that the right to create such a product is protected by the First Amendment. If so, then choosing which posts to present and in which order should also be protected as part of the compilation if it furthers the expressive and editorial goals of human beings. And if using algorithms to remove posts from a feed is a permissible tool for creating an "expressive product," so too would be choosing which posts to promote and in what order to encourage audience engagement.

Justice Barrett, however, expressed a deeper concern. Platforms might use artificial intelligence programs to substitute for human judgment more generally. "[A] platform's owners [might] hand the reins to an AI tool and ask it simply to remove 'hateful' content" based "on large language models to determine what is 'hateful' and should be removed. . . ."[188] If so, "has a human being with First Amendment rights made an inherently expressive 'choice . . . not to propound a particular point of view?'"[189] "[T]he way platforms use this sort of technology might have constitutional significance," Barrett argued, because "technology may attenuate the connection between content-moderation *actions* . . . and human beings' constitutionally protected right to '*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence.'"[190] Barrett argues that at some point human input into the work of an AI agent is so small that we should not say that what results is a human being's "expressive product"[191] that is protected by the First Amendment.

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

[189] *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 575 (1995)).

[190] *Id.* (quoting Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 641 (1994)).

[191] *Id.* Justice Alito was equally concerned. *Id.* at 795 (Alito, J., concurring in the judgment) ("[W]hen AI algorithms make a decision, 'even the researchers and programmers creating them don't really understand why the models they have built make the decisions they make.' Are such decisions equally expressive as the decisions made by humans? Should we at least

What kind and degree of human input is necessary to enjoy First Amendment protection? Justice Barrett seems to suggest that simply articulating substantive goals in training such as "get rid of hate speech" and asking the AI agent to perform these goals is not sufficient to bestow First Amendment protection. But that argument is in some tension with Justice Kagan's assumption that most content moderation is and will be performed by automated systems. These systems are programmed and trained by human beings and they reflect human judgments about content.

Perhaps the line might be drawn between different kinds of automated systems, for example, between algorithms that do not employ machine learning and artificial intelligence systems that do. But if there is a line to be drawn here, the Justices do not take us very far in articulating it. For example, platforms already use artificial intelligence to manage spam and identify bots.[192] If this furthers the company's editorial goals it is not clear why the company should lose First Amendment protection under *Moody*. Finally, the fact that automated processes are opaque to humans cannot be the sole deciding criterion. The algorithms that social media companies employ may already be opaque to their content moderation teams.

The larger problem that the Justices are pointing at—even if they cannot yet draw workable lines—is how best to make companies' use of new technology accountable. A company's automated systems might produce significant harms to populations without the company understanding how or why it is happening, but the company might then turn around and use the First Amendment as a shield against liability or regulation. The First Amendment should not become a general defense against health and safety regulation. How to ensure the necessary accountability for artificial intelligence while still protecting First Amendment freedoms is a crucial question for the future.[193] *Moody* points vaguely at the problem but does not yet provide the tools to answer it.

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think about this?" (footnote omitted) (quoting Tammy Xu, *AI Makes Decisions We Don't Understand. That's a Problem.*, BuiltIn (July 19, 2021), https://builtin.com/artificial-intelligence/ai-right-explanation [https://perma.cc/T6A4-45U3])).

[192] *See*, *e.g.*, *Navigating the Impact of Artificial Intelligence in Social Media Management*, SG Analytics (Nov. 8, 2024), https://us.sganalytics.com/blog/artificial-intelligence-in-social-media-management [https://perma.cc/U6FW-KWML].

[193] *See* Ian Ayres & Jack M. Balkin, *The Law of AI Is the Law of Risky Agents Without Intentions*, U. Chi. L. Rev. Online (Nov. 27, 2024), https://lawreview.uchicago.edu/online-archive/law-ai-law-risky-agents-without-intentions [https://perma.cc/HMB9-WPUQ].