

SOLVING THE *NETCHOICE* DILEMMA: REDUCING SPEECH PROTECTIONS ON INTERNET PLATFORMS WITH BROADCAST CASE LAW

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I. INTRODUCTION

In the last few decades, the internet has transformed almost every facet of our daily lives.¹ This transformation, however, has been accompanied by widespread dissatisfaction with the prevalence of harm on online platforms.² Social media discourse, for example, has been implicated in harms ranging from COVID-19 misinformation³ in the United States to the genocide of Rohingya minorities in Myanmar.⁴ Yet internet speech remains largely unregulated.⁵

Proposals to regulate internet speech are not rare, but almost all must deal with the constitutional hurdle of strict scrutiny—a stringent standard of review that requires laws to be “narrowly tailored to serve compelling state interests.”⁶ A law that qualifies for this standard of review can quickly be nullified as unconstitutional if either of the two prongs, narrow tailoring and compelling

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1. See Anmar Frangoul, *10 Ways The Web and Internet Have Transformed Our Lives*, CNBC (Feb. 9, 2018, 3:30 PM ET), <https://www.cnbc.com/2018/02/09/10-ways-the-web-and-internet-have-transformed-our-lives.html> (listing examples of how the internet has transformed many aspects of our lives).

2. See Monique Beals, *70 Percent Of Americans Say Facebook, Twitter Do More Harm than Good: Poll*, THE HILL (Oct. 20, 2021, 2:50 PM ET), <https://thehill.com/policy/technology/577625-70-percent-of-americans-say-facebook-twitter-do-more-harm-than-good-poll> (demonstrating “widespread dissatisfaction” through a poll that shows the vast majority of Americans believe that online platforms do more harm than good).

3. Amir Bagherpour & Ali Nouri, *COVID Misinformation is Killing People*. SCI. AM. (Oct. 11, 2020), <https://www.scientificamerican.com/article/covid-misinformation-is-killing-people1/>.

4. Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>.

5. See Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation*, CTR. FOR INT. & SOC’Y BLOG (Jan. 22, 2021), <http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation-0> (listing constitutional restraints on platform speech regulation).

6. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (specifying a strict scrutiny standard for First Amendment-based challenges).

state interests, are not met. Any law requiring online platforms to omit or change certain content on their websites would need to pass this strict scrutiny standard, as such a law would likely implicate the platform's First Amendment rights.⁷

Both requirements to overcome strict scrutiny represent substantial hurdles. Regarding the first requirement, the Supreme Court has never precisely defined what constitutes a compelling state interest.⁸ Case law, however, suggests that it is a high bar, often comprising essential government functions such as the military draft and tax collection.⁹ Regarding the second requirement, “[n]arrow tailoring means that the government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”¹⁰ Experts like Daphne Keller, the Director of the Program on Platform Regulation for the Stanford Cyber Policy Center, have made clear that this dual-pronged standard is a formidable obstacle to potential reforms of internet speech regulation.¹¹

Less stringent standards of review do exist, and one is “intermediate scrutiny.”¹² It requires a law to further an “important” government interest in a way that is “substantially related to that end.”¹³ One area in which intermediate scrutiny applies is broadcast speech regulation.¹⁴ In fact, *Reno v. ACLU*, the Supreme Court decision which established that strict scrutiny applied to internet speech regulation, justified its holding primarily by distinguishing the internet medium from the broadcast medium.¹⁵ Though this strict scrutiny standard is a considerable obstacle to internet rule-making, it has not prevented all such attempts at regulation.

7. *See id.*

8. *See* Robert T. Miller, *What is a Compelling Governmental Interest?*, 21 J. MKTS. & MORALITY 71, 72 (2018) (“[T]he Supreme Court has never given a general account of what makes some ends that government may pursue compelling and others not.”).

9. *See id.* at 74 n.14 (“[S]ome examples include collecting of income taxes, *Hernandez v. Commissioner*, 490 U.S. 680 (1989) . . . and drafting men into the armed forces, *Gillette v. United States*, 401 U.S. 437 (1971).”).

10. *Richland Bookmart, Inc. v. Knox Cnty.*, 555 F.3d 512, 528 (6th Cir. 2009) (internal citations and quotations omitted).

11. Daphne Keller, *Amplification and Its Discontents*, 1 J. FREE SPEECH L. 227, 262–63 (2021) (concluding that many of the proposed solutions to increase platform liability for various negative externalities would be unconstitutional and proposing that privacy and competition law should instead be leveraged to regulate platforms).

12. *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (describing the majority's heightened scrutiny standard as a form of “intermediate” scrutiny).

13. *Id.* at 197 (majority opinion) (articulating the intermediate scrutiny standard).

14. 3 RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 26:27 (3d ed. 1996 & Supp. 2021).

15. *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997).

Among the recent attempts to regulate the internet is Florida Senate Bill (SB) 7072, which implemented various rules to rein in “leftist” corporations.¹⁶ This law was swiftly blocked by the U.S. District Court for the Northern District of Florida in *NetChoice, LLC v. Moody*.¹⁷ The district court held that SB 7072 merited a preliminary injunction under strict scrutiny, but, notably, made clear that even under intermediate scrutiny, the result would have been the same.¹⁸ Additionally, and even after noting that social media does not fit neatly into existing juridical frameworks for speech regulation,¹⁹ the court nevertheless applied the strict scrutiny standard formulaically.²⁰ Thus, *NetChoice* illustrates the space that exists to adjust the constitutional standard applied to internet regulation. Intermediate scrutiny would successfully invalidate egregiously-biased laws, like SB 7072, while providing more latitude for laws that prevent harm.

This Note argues that intermediate scrutiny, the reduced level of protection that applies to broadcast speech regulation, should also apply to online platforms. Some content-motivated laws, such as Florida SB 7072, should certainly be blocked, but strict scrutiny is an overly blunt tool to do so because it also prevents necessary reform. Broadcast case law provides a judicial template that ably justifies the application of intermediate scrutiny to internet regulation. This lesser scrutiny would provide greater bandwidth to regulate the internet and reduce negative externalities. Judicial decisions that occurred in the nascent stages of broadcast technology tackled many of the same policy concerns that those in the early internet era faced, but the case law of each ultimately manifested very different levels of protection. Elucidating this inconsistency creates a strong justification for lowering protection for speech on online platforms from strict to intermediate scrutiny.

To be clear, the government should not become the arbiter of speech on the internet, as authoritarian actors could leverage that control to produce even more harm. But responsibly calibrating the scope of government power to ameliorate harms without overly restricting freedom is possible. Broadcast regulation already strikes such a balance. The severe harms that have

16. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/> [hereinafter *Gov. Ron DeSantis Signs Bill*].

17. 546 F. Supp. 3d 1082, 1096 (N.D. Fla. 2021), *aff'd in part, vacated in part*, 34 F.4th 1196 (C.A.11 (Fla.), 2022).

18. *Id.* at 1095 (“The result would be the same under intermediate scrutiny.”).

19. *Id.* at 1090.

20. *See id.* at 1093–94. This ruling was largely upheld on appeal. *See NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1231 (C.A.11 (Fla.), 2022).

accompanied the growth of the modern internet must be addressed, and so legislators must be empowered to make changes.

This Note has four additional Parts. Part II provides background information on the widespread dissatisfaction with the current state of internet regulation and surveys some proposed solutions. It also evaluates the legislative history behind Florida SB 7072 and introduces the Florida *NetChoice* case. Another *NetChoice* case, one that arose in Texas and is a mirror image of the Florida case, is also briefly summarized. This Part then outlines the subsequent appellate history of both of the Texas and Florida cases, situating the proposal in this Note within the larger jurisprudential context. Part II concludes by surveying the history of broadcast regulation and the general nature of constitutional speech protections. Part III examines the adjudicative background of the Florida *NetChoice* case more closely, delving into the conceptualizations of internet technology that influenced the doctrine at its nascent stages and attacking errant reasoning in the foundational case law. Part IV proposes a new framework based on broadcast case law that underpins the proposal to lower the standard of review for internet speech regulation. Part V concludes.

II. BACKGROUND

Florida SB 7072 sought to regulate an environment that is rife with problematic externalities and general discontent among the public. *NetChoice*'s invalidation of the law demonstrated that the reasoning that courts use to assess online speech regulation lacks a tailoring to the modern internet. This Part juxtaposes internet regulation with the parallel system of broadcast regulation, which stands out as a functional system with a reduced standard of scrutiny. Section A provides context and analysis of the Florida *NetChoice* case and SB 7072, briefly surveying the online harms that animated support for the law. It also discusses a Texas attempt to regulate social media content, as well as the subsequent appellate history of both the Florida and Texas *NetChoice* cases. Section II.B outlines constitutional speech protections and explains the evolution of the broadcast content regulation model.

A. THE MODERN INTERNET AND *NETCHOICE*

Widespread dissatisfaction with online platforms, intensified by the negative externalities that have become endemic to online speech, has motivated politicians and academics to propose regulatory measures. The circumstances surrounding the Florida *NetChoice* case elucidate some of the tension between the decades-old doctrine that governs the internet and the internet's subsequent evolution. The obvious flaws of SB 7072

notwithstanding, it has a veneer of moral authority as it, at least ostensibly, represents an attempt to regulate a functionally anarchic online environment that has allowed harms to proliferate. This Section surveys the widespread dissatisfaction with harm on online platforms and then analyzes the legislative history, the text, and the downstream effects of SB 7072.

1. *Widespread Dissatisfaction with Online Platforms Harms*

Speech on online platforms has been linked to a parade of horrors in recent years. Online platforms have been implicated in severe harms such as human trafficking²¹ and terrorist recruitment.²² They have also contributed to political polarization.²³ More generally, the European Parliamentary Research Service cites damage to social relationships, damage to community, and impaired public and private boundaries as some of the harms that the internet causes.²⁴

A recently filed complaint from a class action lawsuit by Rohingya refugees against Meta Platforms, Inc. details some particularly glaring and horrific examples of the harms that accompany an unregulated internet.²⁵ The complaint alleged that the defendant's platform "materially contributed to the development and widespread dissemination of anti-Rohingya hate speech, misinformation, and incitement of violence—which together amounted to a substantial cause, and perpetuation of, the eventual Rohingya genocide."²⁶ The complaint detailed some of the horrific content posted to the platform, such as a picture of a boat of Rohingya refugees with the caption, "[p]our fuel and set fire so that they can meet Allah faster."²⁷

Americans are not oblivious to the harms of this lack of internet regulation. A recent poll found that 70% of Americans believe social media platforms do

21. BRITTANY ANTHONY, POLARIS, REPORT: HUMAN TRAFFICKING AND SOCIAL MEDIA (July 2018), <https://polarisproject.org/human-trafficking-and-social-media/>.

22. Antonia Ward, *ISIS's Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, THE RAND BLOG (Dec. 11, 2018), <https://www.rand.org/blog/2018/12/isiss-use-of-social-media-still-poses-a-threat-to-stability.html>.

23. Damon Centola, *Why Social Media Makes Us More Polarized and How to Fix It*, SCI. AM. (Oct. 15, 2020), <https://www.scientificamerican.com/article/why-social-media-makes-us-more-polarized-and-how-to-fix-it/>.

24. Gianluca Quaglio, *How The Internet Can Harm Us, and What We Can Do About It*, EUR. PARLIAMENTARY. RSCH. SERV. (Feb. 18, 2019), <https://epthinktank.eu/2019/02/18/how-the-internet-can-harm-us-and-what-can-we-do-about-it/>.

25. Complaint at 2–4, *Jane Doe v. Meta Platforms, Inc.*, 3:22-cv-00051, (N.D. Cal. filed January 5, 2022).

26. *Id.* at 2.

27. *Id.* at 7 (citing Steve Stecklow, *Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>).

more harm than good to society.²⁸ Additionally, a plurality of 47% of U.S. adults support increased regulation of “major technology companies,” with only 11% opining that “these companies should be regulated less.”²⁹ This dissatisfaction, moreover, is not rigidly partisan. Individuals from across the ideological spectrum have argued for greater regulation.³⁰ An amicus brief for the defendant-appellant in the *NetChoice* appeal summarized the prevailing sentiment:

“The States have a strong interest in ensuring that their citizens enjoy access to the free flow of information and ideas in “the modern public square” that is the social media marketplace. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). But the social-media ecosystem, run by an increasingly small number of large companies who function as the gatekeepers of online content, threatens the States’ ability to meet this salutary goal.”³¹

Many proposals exist to address these online harms. For instance, a bipartisan bill introduced in the U.S. Senate in 2019 sought to ban “dark patterns,” a term describing “tricks” derived from behavioral psychology that platforms use to persuade consumers to relinquish their data.³² A former chairman of the Federal Communications Commission (FCC) argued for a

28. Beals, *supra* note 2; see also Monica Anderson, *Fast Facts on Americans’ Views About Social Media as Facebook Faces Legal Challenge*, PEW RSRCH. CTR. (Dec. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/12/10/fast-facts-on-americans-views-about-social-media-as-facebook-faces-legal-challenge/> (“64% [of Americans] say social media have a mostly negative effect on the way things are going in the country today . . .”).

29. Anderson, *supra* note 28.

30. Compare Lauren Gambino, ‘Too Much Power’: It’s Warren v Facebook in a Key 2020 Battle, THE GUARDIAN (Oct. 20, 2019, 8:04 EDT), <https://www.theguardian.com/us-news/2019/oct/19/elizabeth-warren-facebook-break-up> (Democratic Sen. Elizabeth Warren against Facebook as a left-wing example), with Nash Jenkins, *The Mark Zuckerberg vs. Ted Cruz Showdown Was the Most Explosive Part of Today’s Facebook Testimony*, TIME (Apr. 10, 2018 6:10 PM EDT), <https://time.com/5235461/mark-zuckerberg-facebook-ted-cruz/> (Republican Sen. Ted Cruz against Facebook as a right-wing example); see also Emily A. Vogels, *Support for More Regulation of Tech Companies has Declined in U.S., Especially Among Republicans*, PEW RSCH. CTR. (May 13, 2022), <https://www.pewresearch.org/fact-tank/2022/05/13/support-for-more-regulation-of-tech-companies-has-declined-in-u-s-especially-among-republicans/> (finding that sizable percentages of Republicans, Democrats, and independents favor greater regulation for major technology companies).

31. Brief for the State of Texas, et al. as Amicus Curiae Supporting Defendants-Appellants at 1, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 21-12355), <https://digitalcommons.law.scu.edu/historical/2536>.

32. Diane Bartz, Susan Thomas & Jonathan Oatis, *U.S. Senators Introduce Social Media Bill to Ban ‘Dark Pattern’ Tricks*, REUTERS (Apr. 9, 2019 9:08 AM), <https://www.reuters.com/article/us-usa-tech/u-s-senators-introduce-social-media-bill-to-ban-dark-patterns-tricks-idUSKCN1RL25Q>.

new federal agency specifically tasked with regulating digital platforms, akin to the Federal Trade Commission (FTC) or the FCC.³³ A prominent senator submitted twenty separate regulatory proposals to the FTC, ranging from disclosure requirements for online political advertisements to a duty to clearly and conspicuously label bots.³⁴ Thus, the need for solutions is not a novel assessment. Yet strict scrutiny remains an obstacle.

The difficulties involved in regulating harmful internet speech have also attracted attention from various academics.³⁵ For instance, scholars have argued that platforms could be regulated indirectly through privacy or competition law.³⁶ Many of these proposals, however, are either novel and untested, like the regulation of content-navigation algorithms, or quite narrow, such as the proscription of only “blatant” falsifications.³⁷ Other solutions

33. See Tom Wheeler, *Facebook Says It Supports Internet Regulation. Here's an Ambitious Proposal That Might Actually Make a Difference*, TIME (Apr. 5, 2021, 4:09 PM EDT), <https://time.com/5952630/facebook-regulation-agency/>.

34. See Ariel Shapiro, *Democratic Sen. Warner has a New Policy Paper With Proposals to Regulate Big Tech Companies*, CNBC (July 30, 2018 11:59 AM EDT), <https://www.cnbc.com/2018/07/30/sen-warner-proposes-20-ways-to-regulate-big-tech-and-radically-change.html>.

35. E.g., Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018), <https://repository.law.umich.edu/mlr/vol117/iss3/4>. Wu uses his indictment of an ossified First Amendment jurisprudence to propose regulation using of the logic in *Blum v. Yaretsky* where “the state can be held responsible for private action ‘when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.’” *Id.* at 548–50, 579–80; *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982); see also Kyle Langvardt, *Can the First Amendment Scale?* 1 J. FREE SPEECH L. 273, 302 (2021) (“Certain core First Amendment doctrines have the potential to hollow out the First Amendment’s substantive aspirations if they are applied too mechanically to massive-scale content governance by online platforms.”); Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2100, 2144 (2019), <https://bclawreview.bc.edu/articles/316> (arguing to, in light of empirically proven hate speech, “amend First Amendment doctrine so that it can properly combat, control, and contemplate the power of hate speech transmitted through social media communications.”); Julie E. Cohen, *Tailoring Election Regulation: The Platform is the Frame*, 4 GEO. L. TECH. REV. 641, 661 (2020) (arguing that regulation is based on the notion that the “costs of mistaken instances of suppression (far) outweigh those of mistaken failures to suppress” and that this notion is untrue in online information environments).

36. Keller, *supra* note 11, at 271 (concluding that many of the proposed solutions of increasing platform liability for various negative externalities would be unconstitutional and proposing that privacy and competition law should instead be leveraged to regulate platforms).

37. See Dallas Flick, *Combatting Fake News: Alternatives to Limiting Social Media Misinformation and Rehabilitating Quality Journalism*, 20 SMU SCI. & TECH. L. REV. 375, 389–90 (2018), <https://scholar.smu.edu/scitech/vol20/iss2/17> (arguing that Justice Breyer’s concurrence in *Alvarez* can justify a “flexible intermediate scrutiny standard” which can regulate “blatant” falsifications that are unambiguous and contrary to easily verifiable public information); *United v. Alvarez*, 567 U.S. 709, 730–39 (2012) (Breyer, J., concurring); see also Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters* (2018), 39 PACE L. REV. 111,

touch on the availability of broadcast precedent as an alternative model of regulation but then quickly dismiss the possibility of applying this model to the internet, arguing in a conclusory fashion that it would be too administratively complex.³⁸

Alan Rozenshtein, a law professor at the University of Minnesota, authored a proposal for First Amendment deregulation that touches on broadcast precedent. He addressed *NetChoice* directly, arguing the court “undervalued the government interest behind laws limiting content moderation.”³⁹ Specifically, he argued for a “broader societal free expression interest in limiting the First Amendment rights of social media platforms.”⁴⁰ Rozenshtein further critiqued the *NetChoice* court’s reliance on case law that possessed an “expansively laissez-faire vision”⁴¹ of internet regulation and was “famously conclusory and under-reasoned.”⁴² He then used broadcast precedent to illustrate the existence of an alternative legal model governing editorial decisions. By doing so, he implicitly contended that the *NetChoice* court made substandard use of historical precedent.⁴³

This Note’s proposal for greater regulatory permissibility, achieved through an intermediate scrutiny standard, takes Rozenshtein’s reasoning much further. It argues that not only does broadcast precedent provide an alternative legal model, it provides the correct legal model. The widespread and severe harms of the internet medium merit greater government intervention. Intermediate scrutiny, a standard of review that is already applied to broadcast media, would successfully facilitate this end.

2. *The Enactment of Florida SB 7072*

Florida Senate Bill 7072 was a recent legislative attempt to regulate online platforms, signed on May 24, 2021.⁴⁴ This bill contained a host of provisions ranging from specific rules about the presentation of content on platforms to

134 (2018) (arguing that there is a subset of content-navigation algorithms that could be regulated without constitutional objections).

38. See Langvardt, *supra* note 35, at 300–02 (discussing briefly the existing models of regulation in broadcast and cable but then quickly dismissing these models as unworkable).

39. Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 367 (2021), <https://www.journaloffreespeechlaw.org/rozenshtein.pdf>.

40. *Id.*

41. *Id.* at 370.

42. *Id.* at 369.

43. *Id.* at 370.

44. *Gov. Ron DeSantis Signs Bill*, *supra* note 16.

a ban on the removal of users.⁴⁵ Some provisions were relatively innocuous, such as disclosure requirements before rule changes⁴⁶ and annual notice requirements regarding the use of algorithms.⁴⁷ Other provisions, however, were more onerous, such as limitations on deplatforming⁴⁸ and directives on content display and amplification.⁴⁹

The law's primary defect was its hyperpartisan motivation. Florida Governor Ron DeSantis argued the bill "guaranteed protection" for the "real Floridians" against the tyranny of the "Silicon Valley elites."⁵⁰ The Florida Lieutenant Governor went further, equating this tyranny to communism and declared that many Floridians "know the dangers of being silenced or have been silenced themselves under communist rule."⁵¹ Therefore, she continued, they were lucky to have "a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative."⁵² Other Florida politicians expressed similar sentiments.⁵³

The constitutionality of SB 7072 was never a serious question. Laws regulating speech are subject to strict scrutiny if they "cannot be 'justified without reference to the content of the regulated speech.'"⁵⁴ Here, the partisan intent of the law was inescapable. Indeed, the law's enactors highlighted it. As a clear example of its absurdity, the law contained a specific carve-out favoring technology companies that owned theme parks—a key industry and employer in Florida.⁵⁵ Scholars quickly identified the blatant unconstitutionality. For example, A. Michael Froomkin, a University of Miami law professor, said the

45. S. 7072 (Fla. 2021). <https://www.flsenate.gov/Session/Bill/2021/7072/BillText/pb/HTML>.

46. FLA. STAT. § 501.2041(2)(c), *subjected to preliminary injunction by NetChoice, LLC v. Moody*, 546 F.Supp.3d 1082 (2021).

47. *Id.* § 501.2041(2)(g).

48. *Id.* § 501.2041(2)(d).

49. *Id.*

50. *Gov. Ron DeSantis Signs Bill*, *supra* note 16.

51. *Id.*

52. *Id.*

53. *See id.* (describing statements by the Speaker of the Florida House, Chris Sprowls, that social media platforms have turned into the town square and that if "democracy is going to survive, we must stand up to these technological oligarchs and hold them accountable.").

54. *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015) (citation omitted).

55. *See* Jon Brodtkin, *Florida Makes it Illegal for Facebook and Twitter to Ban Politicians*, ARS TECHNICA (May 25, 2021, 11:47 AM), <https://arstechnica.com/tech-policy/2021/05/florida-regulates-facebook-and-twitter-compares-big-tech-to-communist-rule/> ("The new law . . . carves out an exception for tech companies that happen to also own theme parks. That would exempt . . . Disney . . .").

law was “so obviously unconstitutional, you wouldn’t even put it on an exam.”⁵⁶ Broadly, the *NetChoice* court agreed with his assessment.

3. *The NetChoice Case*

The plaintiffs in *NetChoice, LLC v. Moody* were NetChoice, LLC (“NetChoice”) and the Computer & Communications Industry Association (CCIA)—trade associations that represent social-media providers.⁵⁷ The CCIA is an influential organization that has represented the computer technology, telecom, and internet industries since 1972.⁵⁸ NetChoice was founded in 2001 and “works to make the Internet safe for free enterprise and free expression.”⁵⁹ The defendants consisted of those tasked with enforcing SB 7072, including the Attorney General of Florida.⁶⁰

The *NetChoice* court recognized that the place of online platforms in the existing typology of constitutional scrutiny for First Amendment laws was not entirely clear.⁶¹ In general, the appropriate level of First Amendment protection often depends on differentiating speech from conduct and varies based on the specific medium of expression.⁶² The plaintiffs in *NetChoice* insisted that speech on internet platforms should be treated no differently from typical speech.⁶³ The State, conversely, argued that internet platforms should be treated more like common carriers—“transporting information from one person to another much as a train transports people or products from one city to another.”⁶⁴ The court in *NetChoice* concluded that the “truth is in the middle.”⁶⁵ The court decided that a social media platform was functionally dissimilar to newspapers and other more traditional mediums for First Amendment purposes.⁶⁶ They also, however, disagreed with the notion that

56. Gilad Edelman, *Florida’s New Social Media Law Will Be Laughed Out of Court*, WIRED, (May 24, 2021, 6:20 PM), <https://www.wired.com/story/florida-new-social-media-law-laughed-out-of-court/>.

57. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. 2021).

58. *See About CCLA*, COMPUT. & COMM’NS INDUS. ASS’N, ccianet.org/about/ (last visited Mar. 18, 2020).

59. *See About Us*, NETCHOICE, netchoice.org/about/ (last visited Mar. 18, 2020).

60. *NetChoice*, 546 F. Supp. 3d at 1084.

61. *See id.* at 1093.

62. *See* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:1 (3d ed. 1996 & Supp. 2021).

63. *NetChoice*, 546 F. Supp. 3d at 1091.

64. *Id.*

65. *Id.*

66. *Id.* at 1093 (“[I]t cannot be said that a social media platform, to whom most content is invisible to a substantial extent, is indistinguishable for First Amendment purposes from a newspaper or other traditional medium.”). The phrase “invisible” is used by the court to indicate that, unlike a newspaper, a social media platform does not manually review all

platforms “engage[] only in conduct.”⁶⁷ Their activities, like those of newspapers, have a speech component.⁶⁸ This analysis highlights the difficulty courts face when applying existing case law to the modern internet: wedging the internet awkwardly into outdated categories.

Despite the legal quandaries, the *NetChoice* decision was straightforward given the law’s clear motivation and obviously overbroad language. The court held that the legislation failed under both strict and intermediate scrutiny due to the “substantial factual support” that the law was motivated by “hostility to the social media platforms’ perceived liberal viewpoint.”⁶⁹ The court also questioned the broad scope of the law. The law, for instance, prohibited platforms from banning website access to “any candidate for office,” defined as “any person who has filed qualification papers and subscribed to the candidate’s oath.”⁷⁰ The court noted that platforms often ban users for reasons such as “spreading a foreign government’s disinformation . . . or attempting to entice minors for sexual encounters.”⁷¹ Filing candidate papers would be a “low bar” for anyone wishing to carry out these activities to avoid deplatforming.⁷² In an explicit repudiation of the law’s lack of precision, the court pointed that “some of the disclosure provisions seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms.”⁷³

Ultimately, the *NetChoice* court held that strict scrutiny was the appropriate standard of review for laws that regulate freedom of expression on the internet, a stance it entirely justified using the seminal 1997 precedent, *Reno v. ACLU*. Unambiguously, the court asserted in one short paragraph what it considered clear precedent:

[T]he First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (stating that prior cases, including those allowing greater

published content. “[T]he overwhelming majority of the material never gets reviewed except by algorithms.” *Id.* at 1091–92.

67. *Id.* at 1093.

68. *See id.* (concluding that platform speech exists and is thereby subject to First Amendment scrutiny).

69. *Id.*

70. *Id.* at 1086.

71. *Id.*

72. *Id.*

73. *Id.* at 1095.

regulation of broadcast media, ‘provide no basis for qualifying the level of First Amendment scrutiny that should be applied’ to the internet).⁷⁴

Therefore, despite the court’s explication about intermediate scrutiny and the inadequacy of the jurisprudence, the court’s reasoning is ultimately mechanical. In the court’s opinion, *Reno v. ACLU* is clear governing precedent, which requires that strict scrutiny should apply to the law, and the law is clearly invalid under strict scrutiny.⁷⁵ The robust evidence for the partisan motivation of the law combined with the lack of precision in tailoring the provisions were constitutionally fatal.

This district court ruling was largely upheld on appeal.⁷⁶ The Eleventh Circuit found that “NetChoice ha[d] shown a substantial likelihood of success on the merits of its claim that S.B. 7072’s content-moderation restrictions . . . violate the First Amendment.”⁷⁷ To note, the Eleventh Circuit did differentiate their ruling slightly, finding that the disclosure provisions in SB 7072 were more likely to be constitutionally permissible because they were “content-neutral.”⁷⁸ Nonetheless, the vast majority of the more substantive provisions, like the prohibition on candidate deplatforming, were found to be subject to strict scrutiny.⁷⁹ Thus, Florida’s attempt to regulate online platforms with SB 7072 was almost entirely nullified.

Those who passed SB 7072, however, were ultimately trying to regulate a medium in dire need of regulation. Some of the observations made by those who engaged in the partisan rancor that accompanied the signing of SB 7072 were not entirely inaccurate. The internet and social media have arguably created a virtual public square for political dialogue.⁸⁰ The internet has become a key element of political campaigns, and internet content can drive public opinion.⁸¹ Social media can create movements and spur political mobilization.

74. *Id.* (emphasis added).

75. *Id.*

76. *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1231–32 (11th Cir. 2022)

77. *Id.* at 1229–30.

78. *Id.* at 1209, 1232; *see id.* (“The State’s interest here is in ensuring that users—consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren’t misled about platforms’ content-moderation policies. This interest is likely legitimate.”).

79. *Id.* at 1226.

80. *See, e.g.,* Christopher Mascaro & Sean Patrick Goggins, *Twitter as Virtual Town Square: Citizen Engagement During a Nationally Televised Republican Primary Debate*, SPA 2012 ANN. MEETING PAPER (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2108682.

81. *See* Lata Nott, *Political Advertising on Social Media Platforms*, AM. BAR ASS’N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/ (“[T]he public

Powerful tools such as microtargeting bring new capabilities to both incumbents and insurgents.⁸² Moreover, the concentration of these political tools on a few key platforms *does* give those platforms tremendous power.⁸³ Yet, this power has not been effectively managed to mitigate the attendant harms of the online environment.⁸⁴

4. *The Spread of SB 7072—Building Pressure to Reform*

A few months later, *NetChoice, LLC v. Paxton* mirrored the proceedings of the Florida district court case when another law aimed at regulating online platforms was enacted in Texas and summarily blocked by a district court.⁸⁵ The Texas law, House Bill (HB) 20, prohibited censorship by social media platforms based on “viewpoint.”⁸⁶ Upon signing the bill, Governor Abbott of Texas tweeted that “[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas.”⁸⁷ Similar to the Florida *NetChoice* case, the Paxton court granted a preliminary injunction, and noted that their decision would be the same under both strict and intermediate scrutiny.⁸⁸ The district court in Paxton again utilized *Reno* to justify applying strict scrutiny to the internet medium.⁸⁹

Though the Florida law and the Texas law vary slightly—the Texas law focused more on general content regulation while the Florida law focused on user deplatforming—the subsequent court proceedings for each were undeniably similar.⁹⁰ The Texas law’s enactment suggests that the tension

became aware of how powerful and game changing political advertising on social media could be.”).

82. *Id.* (“social media has a distinctive characteristic that makes it very different from those traditional mediums of communication—it allows for microtargeting.”).

83. *See, e.g.,* Eileen Guo, *Facebook is Now Officially Too Powerful, Says the US Government*, MIT TECH. REV. (Dec. 9, 2020), <https://www.technologyreview.com/2020/12/09/1013641/facebook-should-be-broken-up-says-us-government/>.

84. *See supra* Section II.A.1.

85. *See* *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021), *rev’d*, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022). This Note will refer to this Texas *NetChoice* case as “*Paxton*” and the Florida *NetChoice* case as “*NetChoice*” in order to avoid confusion.

86. *Id.* at 1 (citing Tex. Civ. Prac. & Rem. Code Ann. § 143A.002 (West 2021)).

87. *Id.* (alterations in original).

88. *Id.* at 13–14.

89. *See id.* at 6 (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

90. John Villasenor, *Texas’ New Social Media Law is Blocked For Now, But That’s Not the End of the Story*, BROOKINGS (Dec. 14, 2021), <https://www.brookings.edu/blog/techtank/2021/12/14/texas-new-social-media-law-is-blocked-for-now-but-thats-not-the-end-of-the-story/>.

between rigid speech protections on the internet and the government interest in regulating such speech is set to become a recurring pattern.⁹¹

Further muddling this legal landscape, the Fifth Circuit actually reversed the district court ruling in Paxton on appeal, distinguishing its conclusion from the recent Eleventh Circuit ruling in Florida.⁹² The Fifth Circuit differentiates the Texas law from the Florida law by noting, *inter alia*, that “SB 7072 prohibits all censorship of some speakers, while HB 20 prohibits some censorship of all speakers.”⁹³ The Fifth Circuit concluded, therefore, that HB 20 is “a content- and viewpoint-neutral law and is therefore subject to intermediate scrutiny at most.”⁹⁴ While largely diverging from the Eleventh Circuit ruling, this conclusion mirrors the particular Eleventh Circuit holding that “content-neutral” regulations, like the disclosure requirements in SB 7072, on social media platforms are subject to intermediate scrutiny.⁹⁵ Nonetheless, it is clear that the legal framework governing content moderation laws on the internet is fractured and unsettled.

This prevailing legal landscape is clearly in need of a modern and tailored constitutional framework that courts can more predictably apply. Indeed, the Supreme Court recently requested the Biden administration for its views on whether Florida and Texas could “prevent large social media companies from removing posts based on the views they express,” signaling that the Court plans to take up the issues presented by the *NetChoice* cases in its next term.⁹⁶ This Note seeks to solve this content moderation problem by proposing an intermediate level of scrutiny that courts can apply to all content moderation laws on the internet medium. To do so, courts should look to case law surrounding another speech medium: broadcast.

91. *See id.* Both the Florida and Texas cases are currently on appeal within different circuit courts. *See id.* Moreover, other states have also recently passed regulations. *See More State Content Moderation Laws Coming to Social Media Platforms*, PERKINS COIE (Nov. 17, 2022), <https://www.perkinscoie.com/en/news-insights/more-state-content-moderation-laws-coming-to-social-media-platforms.html>.

92. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022).

93. *Id.* at 489 (emphasis in original).

94. *Id.* at 480. Less relevant to this specific analysis but perhaps more profoundly, the Fifth Circuit even held that content moderation decisions by platforms should not be considered editorial judgment. *See id.* at 459 (“Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content. And then virtually everything else is just posted to the Platform with zero editorial control or judgment.”).

95. *Compare NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th at 1209, 1230 *with NetChoice, LLC v. Paxton*, 49 F.4th at 480.

96. Adam Liptak, *Supreme Court Puts Off Considering State Laws Curbing Internet Platforms*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/01/23/us/scotus-internet-florida-texas-speech.html?searchResultPosition=1>.

B. FIRST AMENDMENT SCRUTINY: BROADCAST AS A TEMPLATE

Though current precedent subjects internet speech regulations to unqualified strict scrutiny, First Amendment jurisprudence contains plenty of variations in which protections change based on a multitude of factors. Broadcast speech is an intriguing example of a medium that amplifies speech to global audiences, like the internet, yet has historically enjoyed less First Amendment protection.

1. *Constitutional Background for Speech Protections*

Reed v. Town of Gilbert explains the application of the strict scrutiny standard to content-based speech regulations.⁹⁷ Content-based legislation is “presumptively unconstitutional and may be justified only if the government proves that they are *narrowly tailored* to serve *compelling state interests*.”⁹⁸ This strict scrutiny standard applies to laws that are explicitly content-based, as well as “laws that cannot be ‘justified without reference to the content of the regulated speech,’ or that were adopted by the government ‘because of disagreement with the message [the speech] conveys.’”⁹⁹

Strict scrutiny, however, sometimes gives way to reduced levels of protection depending on the speech medium. “[S]peech in public schools, speech by government employees, speech on government property that is not a public forum, speech funded by the government, or the regulation of broadcasting” are all examples of speech that receive lower levels of protection for various reasons.¹⁰⁰ For example, in government-funded speech, the speaker can be precluded from speaking about religion due to the Establishment Clause.¹⁰¹ Additionally, broadcast speech is subject to reduced levels of protection based on the specific features of the technology that transmits it.¹⁰²

Moreover, limits on First Amendment scrutiny are not always based on the medium. The nature and location of the speech, as well as the identity of the speaker, can reduce the level of constitutional protection. For example, speech that is commercial in character receives a diminished level of protection,¹⁰³ laws limiting obscene speech are constitutionally permissible,¹⁰⁴ student and

97. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (citation omitted).

98. *Id.* at 163 (emphasis added).

99. *Id.* at 164 (citation omitted).

100. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:4 (3d ed. 1996 & Supp. 2021).

101. *See* 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH, § 19:1(3d ed. 1996 & Supp. 2021).

102. *See* 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 14, § 26:1.

103. *See* 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 101, § 20:1.

104. *See id.* § 14:7.

government speakers enjoy lower levels of protection; and protection is reduced in courtrooms and on sidewalks constructed for specific purposes, such as allowing access to a post office.¹⁰⁵

Furthermore, some forms of internet speech regulation already exist. Defamation suits against online platforms are constitutionally permissible,¹⁰⁶ and internet service providers (ISPs) can also be liable for certain forms of intellectual property infringement. For example, the Second Circuit held that the online video-sharing platform Vimeo could be liable for the copyright-infringing content of certain posts if Vimeo was reasonably aware of the infringement.¹⁰⁷ In the *NetChoice* cases, the Fifth Circuit and Eleventh Circuit also permitted certain internet regulations insofar as they were “content-neutral.”¹⁰⁸ These constitutionally-permissible regulations, however, are often either quite narrow or overly blunt. A broader vehicle to reduce constitutional protection that can allow legislators to regulate ISPs more precisely, like a reduced standard of scrutiny based on the notion that the internet *medium in general* deserves less protection, would have a larger impact.

2. History of Broadcast Regulation

The constitutional framework for broadcast regulation has its foundation in spectrum scarcity.¹⁰⁹ The germinal Supreme Court decision, *Red Lion Broadcasting Co. v. FCC*, upheld the fairness doctrine using this logic: “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast”¹¹⁰

The Court in *Red Lion* began by explaining the historical development of broadcast regulations.¹¹¹ It noted that prior to the governmental allocation of broadcast frequencies in 1927, allocation “was left entirely to the private sector,

105. *Id.* § 8:32 (courtrooms); *id.* § 8:17 (sidewalk constructed for a post office).

106. *See, e.g.,* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3–5 (N.Y. Sup. Ct. May 24, 1995) (holding an online platform liable for defamatory content posted on the platform). This holding was later nullified by 47 U.S.C. § 230, but it nonetheless demonstrates that there is no *constitutional* hurdle to holding platforms liable for defamation.

107. *Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78, 98 (2d Cir. 2016) (describing the standard for forfeiting a safe-harbor provision due to possession of infringing content as “either kn[ow]ing the video was infringing or kn[ow]ing facts making that conclusion obvious to an ordinary person who had no specialized knowledge . . .”).

108. *Compare* *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th at 1230 *with* *NetChoice, LLC v. Paxton*, 49 F.4th at 480.

109. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 14, § 26:3.

110. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

111. *See id.* at 375–76.

and the result was chaos.”¹¹² The petitioning broadcasters argued that the fairness doctrine, specifically its rules concerning political editorials, was unconstitutional.¹¹³ The fairness doctrine was a Congressional mandate for the FCC to ensure “that equal time be allotted all qualified candidates for public office.”¹¹⁴ The Court understood the broadcasters as claiming the constitutional right to “use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency.”¹¹⁵ It firmly disagreed with this position, comparing the contested regulations to the rules surrounding sound-amplifying equipment that had the capacity to “drown[] out civilized private speech” and concluding that the same policy concerns “limit[ed] the use of broadcast equipment.”¹¹⁶ In its most direct reasoning, the Court stated,

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish, and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.¹¹⁷

“[T]his fact,” combined with the chaos that existed when broadcast allocation was left to the private sector, necessitated government regulation of the broadcast medium.¹¹⁸ No one, the Court concluded, had a right to “monopolize” a scarce frequency, nor did the First Amendment preclude “the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community.”¹¹⁹ The role of

112. *Id.* at 375.

113. *Id.* at 386.

114. *Id.* at 370–71.

115. *Id.* at 386.

116. *Id.* at 387.

117. *Id.* at 387–88.

118. *Id.* at 388.

119. *Id.* at 388.

the First Amendment was to protect the “right[s] of the viewers and listeners,” as opposed to the broadcasters.¹²⁰

The underlying policy in *Red Lion* was that broadcast regulations served an enabling function, allowing a freer speech environment to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹²¹ Notably, the Court pointed out that the regulations could have gone further. Given the scarce resource of spectrum, the Court declared,

in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far.¹²²

In a later case, *FCC v. Pacifica Foundation*, the Supreme Court similarly upheld a regulatory action that prohibited content on the broadcast medium, agreeing that the FCC had the authority to regulate material that was indecent but not obscene.¹²³ It noted that the reasons for the broadcast medium’s reduced First Amendment protection are “complex” but asserted that the “uniquely pervasive presence” of broadcast was an important element.¹²⁴ Specifically, the offensive and indecent material on a broadcast medium “confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”¹²⁵ The Court concluded that because the audience of a broadcast “is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”¹²⁶ Drawing a comparison with a physical altercation, the Court wrote, “to say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”¹²⁷

In a third case, *Sable Communications of California, Inc. v. FCC*, the Supreme Court considered the constitutionality of an outright ban on indecent interstate commercial telephone messages.¹²⁸ There, however, the Court held that the rule “far exceed[ed] that which is necessary to limit the access of minors to

120. *Id.* at 390 (citation omitted).

121. *Id.*

122. *Id.* at 390–91.

123. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 729, 750–51 (1978).

124. *Id.* at 748.

125. *Id.*

126. *Id.*

127. *Id.* at 748–49.

128. *See* *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989).

such messages” and, therefore, that “the ban does not survive constitutional scrutiny.”¹²⁹ *Sable* differentiated from *Pacifica* on volition grounds. *Sable* emphasized the fact that the primary concern in *Pacifica* was that “the recipient ha[d] no meaningful opportunity to avoid” the “public radio broadcast.”¹³⁰ Contrastingly in the Court stressed that a phone sex hotline “require[d] the listener to take affirmative steps to receive the communication,” unlike “public displays, unsolicited mailings and other [less avoidable] means of expression.”¹³¹ The Court therefore found “no ‘captive audience’ problem” with the telephone service, as “callers [would] generally not be unwilling listeners.”¹³² Ultimately, the Court concluded the service was “not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”¹³³

Since these decisions, the Court has essentially settled on an “intermediate” scrutiny for broadcast.¹³⁴ Justice Brennan elucidated this standard in *FCC v. League of Women Voters of California*: a broadcast restriction is constitutional “only when we were satisfied that the restriction is narrowly tailored to further a substantial government interest, such as ensuring adequate and balanced coverage of public issues.”¹³⁵ His phrasing is substantially similar to the classic characterization of intermediate scrutiny.¹³⁶

The three cases explained above provide the *policy* justifications underlying the case law governing broadcast regulation and reveal that *Reno v. ACLU* completely misinterpreted the broadcast case law it used to justify applying strict scrutiny to laws that regulate internet speech.¹³⁷

III. RECONSIDERING THE STRICT SCRUTINY DOCTRINE

Reno v. ACLU, the determinative case applying strict scrutiny to internet speech regulation, utilized a myopic techno-optimist view of the internet that

129. *Id.* at 131.

130. *Id.* at 127 (emphasis added).

131. *Id.* at 128.

132. *Id.*

133. *Id.*

134. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 14, § 26:27.

135. *Id.* (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984)).

136. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

137. *See* *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (holding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].”).

distorted the Supreme Court's reasoning.¹³⁸ Compounding this errant perspective is an overly textualist and simplistic view of the case law considering the regulation of broadcast, a medium that *Reno* distinguished from the internet to ground its conclusion.¹³⁹ Deconstructing these layers of distortion, however, reveals that the logic justifying the level of First Amendment scrutiny applied to broadcast actually mirrors the juridical concerns animating internet speech jurisprudence quite closely.

This Part dismantles the *Reno* precedent that obligated the *NetChoice* courts to apply strict scrutiny to Florida SB 7072 and Texas HB 20. Section III.A situates the *Reno* case in its historical context, examining the broader ideological perspectives about the internet that existed contemporaneously. Section B then examines the hyper-formalist reasoning the *Reno* Court used to justify its application of strict scrutiny to internet regulation. After noting the cursory nature of the reasoning, Section III.B corrects the *Reno* Court's error and correctly applies the broadcast case law to the internet medium by properly considering the underlying policy concerns.

A. THE IDEOLOGICAL GROUNDING OF *RENO V. ACLU*

Though the opinion of the techno-optimist majority in *Reno v. ACLU* predominated the case, its perspective was not universally held. At the time *Reno* was decided, disagreements with this optimistic ideology existed both in the judiciary and legislature, a position that aligns with modern scholars who are wary of the harms that the internet might facilitate. A comparison of these ideological strains illustrates the modern ramifications of the prevailing techno-optimist judicial perspective.

1. *Techno-Optimism and the Majority Opinion*

The potential of the internet generated substantial optimism in the late 1990s. Around this time, John Perry Barlow, the founder of the Electronic Frontier Foundation (EFF), penned an email that became known as the "Declaration of the Independence of Cyberspace."¹⁴⁰ The email went viral within the technological community, and *Wired* reprinted a copy of it in 1996.¹⁴¹ Barlow argued that cyberspace was not a realm subject to traditional

138. See *Reno*, 521 U.S. at 870 (1997) (finding no basis for qualifying the level of scrutiny after providing an optimistic description of the internet as a "dynamic, multifaceted category of communication.").

139. See *id.* at 868 (citing "special justifications for regulation of broadcast media" and then concluding that these justifications were "not present in cyberspace.").

140. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 77 (2019).

141. *Id.*

governments and institutions.¹⁴² He proclaimed that traditional “legal concepts of property, expression, identity movement, and context do not apply to us. They are all based on matter, and there is no matter here.”¹⁴³

Jeff Kosseff, a law professor who has written extensively about the techno-optimism that permeated the government in the late 1990s, explained that under the ideological framework typified by emails like Barlow’s, “the Internet is simply different from the media that came before it.”¹⁴⁴ Kosseff argued that individuals at the time thought the internet presented “greater social benefits than old-school media.”¹⁴⁵ Therefore, according to Kosseff, these same proponents naturally concluded that the internet should not be subject to the same laws and regulations.¹⁴⁶ Congressional floor debates over legislation seeking to protect ISPs from liability echoed these sentiments, with legislators emphasizing “the need to nurture the amazing potential of this burgeoning technology.”¹⁴⁷ Kosseff also noted that the Supreme Court had signaled an adoption of techno-optimist vision.¹⁴⁸ Justice Stevens, for example, wrote that “the Internet allows ‘tens of millions of people to communicate with one another and to access vast amounts of information from around the world’ and is ‘a unique and wholly new medium of worldwide communication.’”¹⁴⁹

The *NetChoice* courts used *Reno*, a case decided during this heady, enthusiastic period of the late 1990s, as the foundational precedent to justify strict scrutiny.¹⁵⁰ In *Reno*, the Supreme Court considered two provisions intended “to protect minors from ‘indecent’ and ‘patently offensive’ communications on the internet.”¹⁵¹ Effectively, the rules banned any internet provider from the “knowing” transmission of indecent content to any minor.¹⁵² The law provided up to two years in prison as punishment.¹⁵³

The Court found these provisions clearly unconstitutional.¹⁵⁴ In a strong repudiation, the Court stated that the provisions were not narrow enough to compensate for what was otherwise an inappropriately wide-ranging

142. *Id.*

143. *Id.*

144. *Id.* at 78.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.*

149. *Id.*

150. *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1091 (2021) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

151. *Reno*, 521 U.S. at 849.

152. *Id.* at 859 (citing 47 U.S.C. § 223(a)).

153. *Id.* at 872. *Reno* ultimately invalidated the punishment provision. *Id.* at 885.

154. *See id.* at 882.

prohibition on certain types of content. The provisions “threaten[ed] to torch a large segment of the Internet community.”¹⁵⁵ Therefore, the Court invalidated them by generally subjecting internet speech regulation to strict scrutiny. It justified the high level of protection by distinguishing the internet from broadcast.¹⁵⁶ Specifically, the Court reasoned that broadcast’s (1) “history of extensive government regulation,” (2) “scarcity of available frequencies at inception,” and (3) “‘invasive’ nature,” were all “not present in cyberspace.”¹⁵⁷

Explaining this reasoning, the Court asserted that, unlike broadcast, the internet does not “invade an individual’s home or appear on one’s computer screen unbidden.”¹⁵⁸ And dissimilar from broadcast, the internet is not a “scarce” commodity; it “provides relatively unlimited, low-cost capacity for communication of all kinds.”¹⁵⁹ Also, broadcast was “a medium which as a matter of history had ‘received the most limited First Amendment protection,’ . . . in large part because warnings could not adequately protect the listener from unexpected program content.”¹⁶⁰ The Court concluded that “[t]he Internet . . . has no comparable history.”¹⁶¹

An optimistic perception of the internet pervades *Reno*. According to the Court, the internet is a “vast democratic forum[]”¹⁶² and the “new marketplace of ideas.”¹⁶³ In one of the clearest examples of this enthusiastic rhetoric, the Court describes the internet’s potential as follows:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.¹⁶⁴

In line with this sentiment, the Court optimistically concluded that “a reasonably effective method by which parents can prevent their children from

155. *Id.*

156. *See id.* at 868–69.

157. *Id.* at 868 (citations omitted).

158. *Id.* at 869 (citing *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)).

159. *Id.* at 870.

160. *Id.* at 867 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)).

161. *Id.*

162. *Id.* at 868.

163. *Id.* at 885.

164. *Id.* at 870.

accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.”¹⁶⁵

2. Justice O'Connor Endorses a Measured Approach

The optimism regarding the new internet medium was not universal. Justice O'Connor wrote separately in *Reno*—dissenting in part and concurring in part—and was more measured in her technological predictions. She thought that the law's references to “adult zones” on the internet were potentially constitutional, instead emphasizing that it was the current state of the internet that precluded that possibility.¹⁶⁶ She acknowledged that the internet was merely an “interconnection of electronic pathways” that “allow[s] speakers and listeners to mask their identities.”¹⁶⁷ But, she contended, “Cyberspace undeniably reflects some form of geography” with services like chat rooms existing in “fixed ‘locations’ on the Internet.”¹⁶⁸

While acknowledging that the internet at the time was not “zoned,” Justice O'Connor asserted that certain technologies that could structure the internet into this more fixed state appeared “promising,” and she indicated an openness to regulation if the circumstances changed.¹⁶⁹ Ultimately though, the technologies that she envisioned would remedy the constitutional problem were not sufficiently available in the late 1990s.¹⁷⁰ For this reason, she agreed with the majority that the provisions could not pass strict scrutiny as they would have functionally required all websites to eliminate all indecent content, even for adults.¹⁷¹ Justice O'Connor's opinion demonstrates a doctrinal flexibility, implicitly more sensitive to the potential harms of the internet, that did not continue in *Reno*'s progeny.

Justice O'Connor was not alone in her assessment. Senator Exon, the drafter of the legislation invalidated in *Reno*, was described as someone who “genuinely had a concern about what kids could be exposed to [on the internet].”¹⁷² The strict two-year prison sentence evidenced the seriousness of his concerns. Nonetheless, the secure “adult zones” of the internet never came to fruition, and internet harms only proliferated.

Though this demonstrates the existence of an alternative perception towards the internet and its accompanying harms, it is worth noting that only

165. *Id.* at 855.

166. *Id.* at 886 (O'Connor, J., concurring in part).

167. *Id.* at 889.

168. *Id.* at 890.

169. *Id.* at 890–91.

170. *See id.* at 891.

171. *Id.* at 891–92.

172. KOSSEFF, *supra* note 140, at 62.

a single other justice joined Justice O'Connor's opinion.¹⁷³ Instead, the holding in *Reno v. ACLU* was primarily justified through the optimistic language in the majority opinion. As a result, the protections that have emanated from *Reno* more closely align to a perception of the internet guided by a distorted, optimistic view.

3. Modern Ramifications

Both the optimistic and cautious perspectives of the internet have survived to the present day. Those who opposed Florida's internet regulation law displayed the positive perspective in various *NetChoice* amicus briefs. The cautious perspective is percolating in academic circles.

Many academics are quite skeptical of unbounded optimism over the internet's potential. Legal scholar Tim Wu has argued that scarcity in the online domain has shifted from a lack of speech to a lack of listener attention.¹⁷⁴ Wu suggested that law enforcement should become more involved in this online era.¹⁷⁵ He aligns with law professor Julie Cohen, who has challenged the traditional paradigm that the "costs of mistaken instances of suppression (far) outweigh those of mistaken failures to suppress."¹⁷⁶ Cohen argued this paradigm is not entirely true in online information environments.¹⁷⁷ Additionally, Lauren Beausoleil has argued that the degree of harm on online platforms merits a re-analysis of the existing law around the First Amendment and online platforms.¹⁷⁸

Conversely, the amicus briefs in support of the *NetChoice* plaintiffs were highly optimistic about the positive effects of the internet. A brief by the Reporter's Committee for Freedom of the Press was concerned that the government could "improperly skew public discussion" through the regulations, which it characterized as "dictat[ing] what appears online."¹⁷⁹ It argued that the government's "interference" with "online platforms' exercise of editorial control and judgment is antithetical to the public's interest in freely

173. See *Reno*, 521 U.S. at 886 (O'Connor, J., concurring in part) ("Justice O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment . . .").

174. See Tim Wu, *supra* note 35, at 548. ("[I]t is no longer speech itself that is scarce, but the attention of listeners.").

175. *Id.* at 550.

176. Cohen, *supra* note 35, at 661.

177. See *id.*

178. See Beausoleil, *supra* note 35, at 2144.

179. Motion of the Reporters Committee for Freedom of the Press, et al. for Leave to File Amici Curiae Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 13, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21-cv-00220-RH-MAF).

receiving and disseminating information.”¹⁸⁰ It further emphasized case law that describes the First Amendment as a “powerful antidote to any abuses of power.”¹⁸¹ Another amicus brief espoused similar positive sentiments, describing the internet as “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”¹⁸²

Supporting the optimistic point of view are the many incredible advances that the internet has enabled. Services like Twitter have become both an environment for political dialogue and a source of official statements from government leaders, arguably fitting the definition of a “vast democratic forum[.]”¹⁸³ Social media has helped foster coalitions like the #MeToo movement as the collective consciousness generated on online forums intensifies support for certain causes.¹⁸⁴ Facebook groups have allowed people to share their resources and help their communities, a recent example being neighborhood groups that have coordinated daily tasks like grocery shopping for vulnerable people during the COVID-19 crisis.¹⁸⁵ Candidates outside of the political mainstream and traditional institutions, such as Andrew Yang, have been able to use social media to spread novel ideas like universal basic income,¹⁸⁶ aligning with the characterization of the internet as a “marketplace of ideas.”¹⁸⁷ Moreover, email, social media, and online blogging have indeed

180. *Id.* at 13.

181. *Id.* at 14 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) (citation omitted in original)). In *Tornillo*, the Supreme Court found a “right-to-reply” statute, which forced newspapers to allow space in their publications for political candidates to publish a reply to any attack on their personal character, unconstitutional. *Tornillo*, 418 U.S. at 244–45, 258.

182. Brief for the Amicus Curiae Electronic Frontier Foundation and the Protect Democracy Project, Inc. in support of Plaintiffs’ Motion for Preliminary Injunction at 17, *NetChoice, LLC v. Moody* 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (No. 4:21-cv-00220-RH-MAF) (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)). In *Packingham*, the Supreme Court struck down a North Carolina law that prevented registered sex offenders from accessing social media websites. *Packingham*, 137 S. Ct. at 1733–35. The Court concluded that to “foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” *Id.* at 1737.

183. *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

184. See Katie Thomson, *Social Media Activism and the #MeToo Movement*, MEDIUM (June 12, 2018), <https://medium.com/@kmtthomson.11/social-media-activism-and-the-metoo-movement-166f452d7fd2>.

185. Michael Torres, *Local Community Facebook Groups Helping Those in Need Amid Coronavirus*, KSBY6 (Mar. 18, 2020, 7:34 AM), <https://www.ksby.com/news/local-news/local-community-facebook-groups-helping-those-in-need-amid-coronavirus>.

186. Kevin Roose, *In Andrew Yang, the Internet Finds a Meme-Worthy Candidate*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/technology/andrew-yang-internet-democratic-primary.html>.

187. See *Reno*, 521 U.S. at 885 (describing the internet as a “new marketplace of ideas.”).

provided everyone with the capacity to be “a town crier with a voice that resonates farther than it could from any soapbox” or an incredibly effective digital “pamphleteer.”¹⁸⁸

The problem, however, is not that *Reno* was incorrect as to the potential benefits of the internet. The problem is that *Reno*, decided in 1997 during the internet’s infancy, did not foresee the potential for harm. At that time, only about seventy million people, or 1.7% of the world population, used the internet.¹⁸⁹ Only 20% of Americans got their news from the internet at least once a week, and weather was the most popular online news attraction.¹⁹⁰ Even in 2000, only forty million Americans had ever purchased a product online,¹⁹¹ and over 90% of Sub-Saharan Africa, South Asia, East Asia, and the Pacific had no internet access at all.¹⁹² The *Reno* Court’s simplistic descriptions reflect this context.¹⁹³

The modern internet is dramatically different. Internet usage as of March 2021 constituted about 65.6% of the world population, or 5.1 billion users.¹⁹⁴ The internet has transitioned from being U.S.-centric to a completely global network. Now, around 2 billion people are online in East and South Asia with another 489 million in Africa.¹⁹⁵ Smartphones connect millions of individuals to the internet instantly from almost anywhere in the United States, and people can access most essential services, from health records and insurance to commercial banking, almost entirely digitally. Doctor’s appointments and business meetings are now regularly conducted electronically, and public officials utilize messaging platforms like Twitter for official proclamations and announcements.

188. *Id.* at 870.

189. *Today’s Road to e-Commerce and Global Trade Internet Technology Reports*, INTERNET GROWTH STAT., <https://www.internetworldstats.com/emarketing.htm> (last accessed Mar. 20, 2020).

190. *World Wide Web Timeline*, PEW RSCH. CTR. (Mar. 11, 2014), <https://www.pewresearch.org/internet/2014/03/11/world-wide-web-timeline/>.

191. *Id.*

192. Max Roser, Hannah Ritchie & Esteban Ortiz-Ospina, *Internet*, OUR WORLD IN DATA (2015), <https://ourworldindata.org/internet>.

193. For example, the “World Wide Web” was the “best known category of communication over the Internet,” allowing individuals to “search for and retrieve information stored in remote computers.” *Reno*, 521 U.S. at 852. And webpages were “elaborate documents.” *Id.*

194. INTERNET GROWTH STAT., *supra* note 189.

195. *Number of Worldwide Internet Users In 2021, By Region (in Millions)*, STATISTA, <https://www.statista.com/statistics/249562/number-of-worldwide-internet-users-by-region/> (last visited Apr. 1, 2023).

The harms of social media and online platforms have also increased. Terrorist organizations utilize social media for nefarious ends with groups like ISIL using platforms to spread toxic propaganda.¹⁹⁶ Human traffickers also use platforms to recruit and control new victims, as well as to spread rumors and deceptions online.¹⁹⁷ These services also increase political polarization and societal division.¹⁹⁸ And perniciously, the substantial amount of misinformation they contain has tangible effects outside of the virtual world.¹⁹⁹ For example, exposure to social media misinformation about the COVID-19 pandemic has been correlated with refusal of the COVID-19 vaccine.²⁰⁰

The utopian predictions about future of the internet from the late 1990s have not become reality. The internet might be a democratic forum in some sense, but powerful intermediaries still modulate all communication. Everyone is not standing in the town square, expressing their voices and ideas. Instead, everyone is standing in that square silently, with one or two powerful individuals passing messages between all present. These messages must be sent in a specific form, according to specific rules, and they are transmitted to individuals based on predesigned structures and algorithms. Further, those who control this speech are not motivated by the public interest; they are motivated by profit.²⁰¹

To summarize, the rigid application of the strict scrutiny standard in the *NetChoice* cases can be traced to *Reno*, and this standard is unworkable in the digital age. In 1997, *Reno* put forth an ironclad endorsement of the new internet medium and dismissed one existing harm—exposure of children to indecent material—guided by an optimistic view of the internet’s future. The Court largely downplayed the child protection interest on the assumption that “evidence indicates” that a “reasonably effective” technology for parents to prevent children from seeing this material was bound to arise.²⁰² If current content moderator working conditions, post-traumatic stress disorder, and

196. Ward, *supra* note 22.

197. ANTHONY, *supra* note 21, at 19–21, 25–26.

198. Centola, *supra* note 23.

199. See Tiffany Hsu, *Tracking Viral Misinformation*, N.Y. TIMES (Feb. 24, 2022, 12:01 AM ET), <https://www.nytimes.com/live/2020/2020-election-misinformation-distortions#qanon-believers-us-survey>.

200. *Id.*

201. For more discussion on the uniqueness of the online platform medium, see Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 36, 40 (2019), <https://digitalcommons.law.uw.edu/wjlta/vol15/iss1/3>; Beausoleil, *supra* note 35; Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1601-02 (2018); Cohen, *supra* note 35; Grafanaki, *supra* note 37.

202. *Reno v. ACLU*, 521 U.S. 844, 855 (1997).

workplace trauma are any indication, a “reasonably effective” method of regulating undesirable content has still not been realized.²⁰³ And yet, the modern internet is still confined by *Reno*’s inelastic reasoning. This reasoning has forced judges, as in *NetChoice*, into an apparent cognitive dissonance, acknowledging on the one hand how social media does not fit neatly into existing jurisprudence but formulaically applying strict scrutiny on the other. *Reno*, however, was errant not only in its predictions regarding the internet’s future but also in its core logic regarding the regulation of the internet. These logical errors justify overturning the decision.

B. RE-READING THE FORMALIST JUSTIFICATIONS FROM *RENO V. ACLU*

Supported by its positive perception of the internet medium, the Court in *Reno* distinguished the internet from broadcast to justify a high level of protection in the form of strict scrutiny. Its mechanical application of broadcast case law, however, obscured the true nature of that precedent. The *Reno* Court boiled down the distinction with broadcast along three valences. Broadcast’s (1) “history of extensive government regulation,” (2) “scarcity of available frequencies at . . . inception,” and (3) “‘invasive’ nature” were all “not present in cyberspace.”²⁰⁴

The Court’s logic is problematic. Apart from the fact that it does not actually say anything about the internet—instead defining the internet as essentially “not broadcast”—the substantive case law is improperly conceptualized. This Section comprehensively examines valences (2) and (3) to demonstrate the overly-textualist misreading that causes the conceptualization error. Not examined further is valence (1)—that the internet, a new medium, lacks a history of regulation—because the reasoning is circular. Any new medium, by definition, will lack a history of regulation.

1. Underlying Policy of “Frequency Scarcity”

Red Lion Broadcasting Inc. v. FCC first introduced the concept of frequency scarcity.²⁰⁵ In *Red Lion*, the Court upheld the fairness doctrine largely on the basis that broadcast frequencies were scarce,²⁰⁶ but relied on reasoning that

203. See Casey Newton, *The Trauma Floor The Secret Lives of Facebook Moderators in America*, THE VERGE (Feb. 25, 2019 8:00 AM EST), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>.

204. *Reno*, 521 U.S. at 868 (citations omitted).

205. See 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 14, § 26.3 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)).

206. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit

demonstrated an acute concern with the policy consequences that frequency scarcity produced in the speech environment. These policy considerations included (1) equity in who can produce speech, and (2) clarity and quality of speech provided. Thus, the concern with “frequency scarcity” in the literal sense in cases like *Reno* is arguably misguided. Indeed, *Pacifica*, a subsequent seminal case after *Red Lion*, only mentioned frequency scarcity in its footnotes—further implying that the policy concerns were the true issues.²⁰⁷

The *Red Lion* Court clearly evinced the first policy, speech equity, when it mentioned that the political editorial regulation by the FCC could have imposed even stricter requirements. Specifically, the FCC could have mandated that the broadcast spectrum be apportioned to provide time to *anyone* who wanted to use the medium.²⁰⁸ Thus, the Court privileged the need for equality on the broadcast medium. The pursuit of such equality was so important that it merited abridging the speech of others who were using the service.

The speech equity policy is also evident in *Red Lion*’s reasoning that no one should have the right to “monopolize” a scarce frequency,²⁰⁹ and its concern over the possibility that “lack of know-how and equipment may keep many from the air.” The Court sought to avoid a situation where “only a tiny fraction of those with resources and intelligence can hope to communicate by radio.”²¹⁰ These concerns only indirectly relate to frequency scarcity. Even if an infinite amount of frequency were available, insufficient “know-how” and resources to communicate using the medium would still raise access issues.²¹¹ Monopoly, moreover, is an ownership dynamic that prevents other users from obtaining fair access. It does not necessarily require scarcity, even if scarcity makes it easier for a monopoly to occur. Equity remains the unifying principle animating the Court’s reasoning, not frequency scarcity per se.

The other overarching concern in *Red Lion* that undergirds the language of “scarcity” is the clarity and quality of the discourse in the speech environment. The government sought to regulate broadcast to “preserve an uninhibited marketplace of ideas *in which truth will ultimately prevail.*”²¹² In the Court’s view,

an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

207. *FCC v. Pacifica Found.*, 438 U.S. 726, 731 n.2, 770 n.4 (Brennan, W., dissenting) (1978).

208. *Red Lion*, 395 U.S. at 390–91.

209. *Id.* at 388–89.

210. *Id.* at 388.

211. *Id.*

212. *Id.* at 390 (emphasis added).

the “chaos” of unregulated spectrum would inhibit this truth.²¹³ As an example, the Court equated the nature of the unregulated spectrum with voice amplification devices. Both had the potential to “drown[] out civilized private speech.”²¹⁴ As with the speech equity concern, frequency scarcity was not the literal issue; it was the effect of that scarcity on discourse.

2. Underlying Policy of “Invasiveness”

Reno also distorted the policy concern that broadcast was “invasive” through an overly literal application. *Sable* and *Pacifica* demonstrate that the invasiveness concern reflects two underlying concerns which are distinct but related: (1) the volition of the consumer to control the nature of the content consumed; and (2) the pervasiveness of the medium in general society.

A comparison of *Sable* and *Pacifica* illustrates the volition concern. In *Sable*, it was important that the commercial telephone service at issue required “affirmative steps,” creating a “meaningful opportunity” to avoid the indecent content.²¹⁵ Contrastingly, in *Pacifica*, the broadcast’s audience was “constantly tuning in and out.”²¹⁶ Therefore, pre-program warnings could not “completely protect the listener or viewer from unexpected program content.”²¹⁷ *Pacifica* analogized broadcast to an assault, reasoning that saying that one had sufficient control over a broadcast because one could turn off the television or radio was like saying “that the remedy for an assault is to run away after the first blow.”²¹⁸ Because an audience member could not completely prevent the reception of offensive content, the member did not have sufficient volition.

The second underlying concern, pervasiveness, derives from language in *Pacifica* stating that broadcast had a “uniquely pervasive presence”²¹⁹ because it “confronts the citizen, not only in public, but also in the privacy of the home.”²²⁰ Therefore, *Pacifica* concluded broadcast implicates one’s right to “privacy [in] the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”²²¹ To enjoy a broadcast, individuals do not need to go to a theater in a public area. They simply turn on the television in their houses in front of their families. Simply

213. *Id.* at 375.

214. *Id.* at 387 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

215. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–28 (1989).

216. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

217. *Id.*

218. *Id.* at 749.

219. *Id.* at 748.

220. *Id.*

221. *Id.*

stated, the concern was that broadcast's presence made it unreasonable to expect that individuals would be able to avoid the medium altogether.

Overall, the frequency scarcity and invasiveness concepts that were utilized in *Reno* represent underlying concerns that a literal reading omits. Incorporating these concerns into a more modern comparison of the internet and broadcast mediums demonstrates that intermediate scrutiny is as appropriate for the internet as it was for broadcast.

IV. FINALIZING A BASIS FOR INTERMEDIATE SCRUTINY

Courts should replace the strict scrutiny standard of review for internet speech with the intermediate scrutiny standard that applies to broadcast speech. The modern internet implicates many of the same concerns that drove the adoption of reduced protection for broadcast. Therefore, internet speech law can seamlessly incorporate the juridical framework that grounds broadcast speech protections.

This Part justifies the application of intermediate scrutiny to internet regulation. Section IV.A demonstrates that subjecting the modern internet to the exact same reasoning used in *Reno* leads to a different result if the normative underpinnings of “frequency scarcity” and “invasiveness” are considered. Section IV.B then probes the broadcast precedents of *Pacifica* and *Sable* further, finding that their shared interest in protecting children provides yet another viable parallel to further justify an intermediate scrutiny standard.

A. BROADCAST JURISPRUDENCE APPLIED TO THE INTERNET

The underlying concerns that motivated the “frequency scarcity” and “invasiveness” concepts cited by the *Reno* Court, when re-examined with a more holistic and historically-grounded understanding, directly implicate the modern internet. *Reno* could not have foreseen the development of the modern internet. But applying that Court's reasoning to today's internet leads to a different conclusion.

1. *Applying “Frequency Scarcity” to the Modern Internet*

Concerns over speech inequality and the clarity and quality of online discourse animated the original “frequency scarcity” prong of broadcast case law. Both concerns are also problems with the modern internet. Those who engage in online speech can have dramatically unequal reach and influence, and online misinformation and polarization dilute the clarity and quality of internet discourse.

The dynamics of online viral speech, as well as internet availability more generally, elucidate the internet's considerable speech inequality. “Viral” online

speech is defined as content that is “quickly and widely spread or popularized especially by means of social media.”²²² Complex, psychological factors control virality,²²³ and algorithms are often designed to amplify excitable and controversial content to keep individuals engaged on the platforms.²²⁴ This complexity, obviously, can make the system opaque to the average individual, while more sophisticated actors can strategically curate and amplify their content. Predictably, a small percentage of people provide a vast majority of the content on social media platforms, and certain individuals exert outsized influence on public discourse.²²⁵ Moreover, virality can be better utilized by individuals who are savvy enough to use the platforms in an effective manner, systemically favoring individuals with greater access to resources and relevant expertise.²²⁶ Other, more basic resource concerns such as internet access further compound this inequality, as individuals in lower socioeconomic levels sometimes cannot access internet devices as easily or reside in areas with unreliable internet connections.²²⁷ Just as frequency scarcity limited speech equity in the broadcast medium, these features of online discourse limit speech equity in the internet medium.

222. *Viral*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/viral#other-words> (last visited Apr. 6, 2022).

223. See Jonah Berger & Katherine L. Milkman, *Emotion and Virality: What Makes Online Content Go Viral?* 5 GFK MKT. INTEL. REV. 18, 19–23 (2013).

224. See Jon Evans, *Facebook Isn't Free Speech, It's Algorithmic Amplification Optimized for Outrage*, TECHCRUNCH (Oct. 20, 2019, 6:00 AM PDT), <https://techcrunch.com/2019/10/20/facebook-isnt-free-speech-its-algorithmic-amplification-optimized-for-outrage/>.

225. See Shannon Bond, *Just 12 People Are Behind Most Vaccine Hoaxes on Social Media, Research Shows*, NPR (May 14, 2021, 11:48 AM ET), [npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes](https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes); Trevor van Mierlo, *The 1% Rule in Four Digital Health Social Networks: An Observational Study*, 16 J. MED. INTERNET RSCH. 1, 1 (2014) (illustrating the rule that 1% of users contribute the vast majority of online content).

226. See Beatrice Forman, *Wealth Inequality Exists Among Influencers, Too*, VOX (Sept. 1, 2021, 10:58 AM EDT), <https://www.vox.com/the-goods/22630965/influencer-pay-gaps-privilege-creator-economy> (“[T]he savvy required to make it online is distinctly . . . corporate. Creators are drafting contracts, negotiating pay for nebulous freelance assignments For those who grow up around upper-middle-class office jargon, the jump from regular person to marketable online celebrity is a bit more natural . . .”). This is a corollary to the Court’s concern in *Red Lion* over the inability of some people to use the broadcast spectrum due to a lack of “know-how.” See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969).

227. See Kendall Swenson & Robin Ghertner, *People in Low-Income Households Have Less Access to Internet Services—2019 Update*, U.S. DEPT. OF HEALTH & HUM. SERVS. (Mar. 2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/263601/internet-access-among-low-income-2019.pdf>; Emily A. Vogels, *Digital Divide Persists Even as Americans With Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

Moreover, the clarity and quality of the discourse, the second policy concern embedded into “frequency scarcity,” is frustrated by the nature of the modern internet. Misinformation and polarization, for instance, substantially reduce the quality of online discourse. Algorithms that control and channel content for users on social media can have polarizing effects.²²⁸ Moreover, online misinformation is difficult to police,²²⁹ affects a vast segment of the population,²³⁰ and can cause tangible harm.²³¹ Therefore, the clarity and quality of online speech is certainly a concern for the modern internet, again implicating the “frequency scarcity” concern in broadcast case law.

In this light, the reasoning the *Reno* Court used to distinguish the internet from broadcast in order to apply the strict scrutiny standard is on less solid ground. The Court in *Reno* sought to justify its reasoning through a hyper-textualist application of “frequency scarcity” but functionally ignored the policy considerations that gave this phrase meaning. The internet is, in fact, a medium with substantial speech inequality and also suffers from a lack of clear, high-quality discourse. Thus, with regard to the “frequency scarcity” prong, the same concerns that drove the reduction of constitutional protection for broadcast also counsel for reduced protection for the internet.

2. *Applying “Invasiveness” to the Modern Internet*

“Invasiveness” is similarly motivated by two related policy considerations that are not reflected in the literal meaning of the term. These considerations are (1) user volition, which refers to the meaningful opportunity for a user to control their consumption of content; and (2) the pervasiveness of the medium in society. These considerations are related because user volition also concerns

228. See Joshua A. Tucker, Andrew Guess, Pablo Barbera, Cristian Vacarri, Alexandra Siegel, Sergey Sanovich, Denis Stukal, Brendan Nyhan, *Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature*, HEWLETT FOUND. (Mar. 19, 2018), <http://dx.doi.org/10.2139/ssrn.3144139>; Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi & Michele Starnini, *The Echo Chamber Effect on Social Media*, PNAS (Feb. 23, 2021), <https://www.pnas.org/content/118/9/e2023301118>.

229. See Mathew Ingram, *The Challenges of Global Content Moderation*, COLUM. JOURNALISM REV.: THE MEDIA TODAY (June 10, 2021), https://www.cjr.org/the_media_today/the-challenges-of-global-content-moderation.php.

230. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211, 214–15 (2017), <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>.

231. See Angus Bridgman, Eric Merkley, Peter John Loewen, Taylor Owen, Derek Ruths, Lisa Teichmann, Oleg Zhilin, *The Causes and Consequences of COVID-19 Misperceptions: Understanding the Role of News and Social Media*, HARV. KENNEDY SCH. MISINFO. REV. (SPECIAL ISSUE) (June 18, 2020), <https://misinfoview.hks.harvard.edu/article/the-causes-and-consequences-of-covid-19-misperceptions-understanding-the-role-of-news-and-social-media/>.

the ability to avoid the medium altogether, and something that is highly pervasive is more difficult to avoid.

Online speech implicates both considerations. Currently, individuals who seek to avoid the internet lack volition because of the internet's pervasiveness in modern society. Internet platforms have billions of users, and individuals often depend on platforms for necessities. People use social media for news, dating, buying and selling goods, searching for jobs, communicating with friends and family, and entertainment. Some people earn the majority of their income from online platforms.²³² For instance, the sole job of social media managers is to utilize online platforms to benefit their employers.²³³ Society is so dependent on social media that political campaigns and government officials make announcements using various online platforms.²³⁴ Entirely proscribing social media from one's lifestyle may technically be possible, but an average person living in the United States no longer has any "meaningful opportunity" to do so. And although users have to take "affirmative steps" to log into their various profiles, users enjoy little volition in practical terms due to the degree of societal dependency on social media.

This lack of volition extends to the amount of control a user can exert over their experience while using the internet. The algorithmically driven displays on social media prevent viewers from having full control over the content that they receive in many cases. Moreover, dark patterns online often use "design[s] that manipulate[] or heavily influence[] users to make certain choices,"²³⁵ as the following illustrates:

Facebook tells us when our friends have 'liked' a page, encouraging us to do the same; dark patterns trigger our preference for shiny buttons over grey ones; platforms nudge us to buy products others

232. See Jennifer Herrity, *What are Influencers?*, INDEED (Nov. 1, 2021), <https://www.indeed.com/career-advice/career-development/what-are-influencers> (describing the "influencer" profession as an "online personality who impacts their followers' purchasing decisions based on their reputation" and noting that the "national average salary for an influencer is \$52,035 per year") (last visited Apr. 1, 2023).

233. See, e.g., *Social Media Manager Job Description: Top Duties and Qualifications*, INDEED, [https://www.indeed.com/hire/job-description/social-media-manager?gclid=Cj0KCCQjwtrSLBhCLARIsACh6Rmg40qa8Ojop-actY5qwrtdtU2coBf7tLu7DKS1Twr760pToP\]rG0v4aAp4mEALw_wCB&accid=](https://www.indeed.com/hire/job-description/social-media-manager?gclid=Cj0KCCQjwtrSLBhCLARIsACh6Rmg40qa8Ojop-actY5qwrtdtU2coBf7tLu7DKS1Twr760pToP]rG0v4aAp4mEALw_wCB&accid=) (Mar. 21, 2022).

234. E.g., The White House (@whitehouse), INSTAGRAM, <https://www.instagram.com/whitehouse/?hl=en> (last visited Mar. 21, 2022); FTC (@FTC), TWITTER, https://twitter.com/FTC?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Mar. 21, 2022).

235. Sara Morrison, *Dark Patterns, The Tricks Websites Use to Make You Say Yes, Explained*, VOX: RECODE (Apr. 1, 2021, 11:20 AM EDT), <https://www.vox.com/recode/22351108/dark-patterns-ui-web-design-privacy>.

have bought before us; and apps gamify sharing by encouraging us to continue a ‘streak’ with our friends. The list goes on.²³⁶

Ari Ezra Waldman, a professor of law and computer science at Northeastern University, concludes, “At a minimum, the power of design means that our choices [online] do not always reflect our real personal preferences.”²³⁷ The “captive audience”²³⁸ problem, therefore, stems from both the reality that the internet permeates so many aspects of society and from a users’ lack of control over their experience while using the internet.

Applying strict scrutiny to online platform regulation is illogical today. Many of the concerns that led to broadcast’s greater regulation are directly implicated by the internet medium. Given that the asserted differences between the internet and broadcast constituted the primary reason that the Supreme Court applied strict instead of intermediate scrutiny in *Reno*, the fact that those differences are illusory indicates that intermediate scrutiny is the appropriate standard for First Amendment challenges to internet regulation.

B. PROTECTING CHILDREN THROUGH AN INTERMEDIATE SCRUTINY

The protection of children, an important interest in both *Sable* and *Pacifica*, also justifies applying intermediate scrutiny to the internet. *Pacifica* was concerned that broadcasts were “uniquely accessible” to children and used this logic to justify greater regulation.²³⁹ *Sable* discussed protecting “the physical and psychological well-being of minors.”²⁴⁰ Both cases concluded that the child protection interest justified increased regulation for broadcast content.²⁴¹

The internet undeniably causes considerable harm to minor users. Facebook’s own internal research has demonstrated that Instagram has negative effects on the mental health of teenage girls.²⁴² Exposure to self-harm on Instagram has led to an increase in suicidal ideation.²⁴³ These harms are compounded by the ubiquity of platform usage with younger demographics.

236. *Id.*

237. Ari Ezra Waldman, *Cognitive Biases, Dark Patterns, and the ‘Privacy Paradox’*, 31 CURRENT OP. PSYCH. 105, 107 (2020), <https://doi.org/10.1016/j.copsyc.2019.08.025>.

238. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

239. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

240. *Sable*, 492 U.S. at 126 (citations omitted).

241. *Pacifica*, 438 U.S. at 749–50; *Sable*, 492 U.S. at 126–28.

242. Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021 7:59 AM ET), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739>.

243. *See Florian Arendt, Sebastian Scherr & Daniel Romer, Effects of Exposure to Self-Harm on Social Media: Evidence From a Two-Wave Panel Study Among Young Adults*, 21 NEW MEDIA & SOC’Y 2422, 2435–37 (2019), <https://doi.org/10.1177/1461444819850106>.

According to the American Academy for Pediatric and Adolescent Psychiatry, around 75% of individuals aged thirteen to seventeen have at least one active social media account.²⁴⁴ Some of the risks of social media to children include exposure to “harmful or inappropriate content,” “exposure to dangerous people,” “cyber bullying,” and “interference with sleep.”²⁴⁵ These harms demonstrate that increased internet regulation would serve a child-protection interest as well, providing another strong justification for the adoption of an intermediate scrutiny standard.

V. CONCLUSION

Internet-facilitated human trafficking, extremist recruitment and propaganda, public health misinformation, and cyberbullying are all online harms that have proliferated in the last few decades of the internet’s development. Yet many proposals to address these harms through increased regulation are still largely precluded by *Reno v. ACLU*, a case decided when the internet was in its infancy. The laissez-faire orthodoxy that dominated earlier conversations about internet regulation is woefully unprepared for the realities of an internet that has the power to fuel genocide, accelerate conspiracies, and degrade the mental health of children.

Government intervention is clearly needed, and intervention through broadcast case law is ultimately preferable to other proposals due to its straightforward nature. *Reno* initially distinguished the internet from broadcast to justify applying strict scrutiny to the internet.²⁴⁶ Thus, the reality that the *underlying policy concerns* of broadcast case law, instead, justify the application of the intermediate scrutiny standard, helps to dismantle the authority of the *Reno* decision. Put differently, *Reno* is precedent for using broadcast cases as precedent, therefore, demonstrating that the *Reno* Court’s original logic actually points in the opposite direction has increased potency as a legal argument.

Intermediate scrutiny would provide lawmakers with desperately needed flexibility to create laws that reduce the severe negative externalities of the modern internet. Extreme or overtly partisan laws, like many of those at issue in the *NetChoice* cases, could still be struck down. They would be struck down, however, by a constitutional standard that affords governments the freedom to enact effective, calibrated regulations that seek to reduce internet speech harms. The status quo of internet regulation has proliferated harmful

244. *Social Media and Teens*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx.

245. *Id.*

246. *See Reno v. ACLU*, 521 U.S. 844, 868 (citations omitted).

misinformation and provided a digital environment that allows for horrific crimes to perpetuate. An intermediate scrutiny standard would be a responsible recalibration that would allow regulators to finally tackle these problems more effectively.

