

GOTTA CATCH 'EM ALL: LEGISLATIVE OVERREACH IN FLORIDA AND TEXAS ANTI-MODERATION LAWS

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I. INTRODUCTION

A. THE ANTI-MODERATION DEBATE

On January 7th and 8th, 2021, Facebook, X,¹ and YouTube “did what legions of politicians, prosecutors and power brokers had tried and failed to do for years: They pulled the plug on [former] President [Donald] Trump.”² After determining that two of Trump’s tweets might encourage another event like the January 6th storming of the Capitol, X banned Trump permanently.³ Facebook took note of Trump’s praise for Capitol rioters on January 6th and suspended him for 2 years.⁴ Within a few days, YouTube too shut down

1. Twitter was renamed to X in July 2023. Wes Davis, *Twitter is Being Rebranded as X*, VERGE (July 24, 2023), <https://www.theverge.com/2023/7/23/23804629/twitters-rebrand-to-x-may-actually-be-happening-soon>.

2. Kevin Roose, *In Pulling Trump’s Megaphone, Twitter Shows Where Power Now Lies*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/trump-twitter-ban.html>.

3. X, *Permanent Suspension of @realDonaldTrump*, X (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

4. Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, META (Jun. 4, 2021), <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/>.

Trump's channel.⁵ All three platforms have since reversed their bans on the former President.⁶

As the saying goes, no good deed goes unpunished. Republicans across the country swiftly took action against the platforms in an attempt to rein them in. Florida and Texas enacted laws (SB 7072⁷ and HB 20⁸ respectively) (collectively, the "Anti-Moderation Laws") which ostensibly seek to prevent censorship and interference with digital expression. The Anti-Moderation Laws primarily require tech platforms to carry certain speech without exercising content moderation. The laws also contain certain transparency measures which mandate that platforms publish content moderation policies and inform users of changes to rules, terms, and agreements.

With promises of protecting the First Amendment rights of their citizens, Governors Ron DeSantis and Greg Abbott signed off on laws which would require social media platforms to spend billions of dollars in infrastructure changes.⁹ However, given the sheer breadth of the laws, the platforms would still likely violate the laws despite their efforts to comply.¹⁰ Shortly after their passage, the platforms rushed to the courts asking for stays and scrapping of the laws. After going through the appellate system, the laws have been stayed for now by the courts. The parties asked the Supreme Court to hear the cases

5. Kari Paul, *YouTube Extends Ban on Trump Amid Concerns About Further Violence*, GUARDIAN (Jan. 26, 2021), <https://www.theguardian.com/us-news/2021/jan/26/youtube-trump-ban-suspension>.

6. Nick Clegg, *Ending Suspension of Trump's Accounts With New Guardrails to Deter Repeat Offenses*, META (Jan. 25, 2023), <https://about.fb.com/news/2023/01/trump-facebook-instagram-account-suspension/>; Clare Duffy & Paul LeBlanc, *Elon Musk Restores Donald Trump's Twitter Account*, CNN (Nov. 20, 2022), <https://www.cnn.com/2022/11/19/business/twitter-musk-trump-reinstate/index.html>; Adi Robertson, *Donald Trump Has Started Posting on YouTube Again*, VERGE (Mar. 17, 2023), <https://www.theverge.com/2023/3/17/23644748/donald-trump-youtube-suspension-lifted-presidential-campaign>.

7. FLA. STAT. § 501.2041 (2022).

8. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021).

9. Madlin Mekelburg, *Texas Social-Media Law Put on Hold Pending Supreme Court Review*, BLOOMBERG (Oct. 11, 2022), <https://www.bloomberglaw.com/ms/product/blaw/document/RJNQZPDWX2PS>.

10. See Charlie Warzel, *Is This the Beginning of the End of the Internet?*, ATLANTIC (Sept. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/netchoice-paxton-first-amendment-social-media-content-moderation/671574/> (discussing hypotheticals which show that the law might be unworkable); Daphne Keller (@daphnehk), X (Sept. 16, 2022, 8:49 PM), <https://twitter.com/daphnehk/status/1570983158665052163> (discussing how the platforms can try to comply with the Texas law); and Mike Masnick, *Just How Incredibly Fucked Up Is Texas' Social Media Content Moderation Law?*, TECHDIRT (May 12, 2022) <https://www.techdirt.com/2022/05/12/just-how-incredibly-fucked-up-is-texas-social-media-content-moderation-law/> (giving examples of how the laws will lead to tremendous amounts of wasteful litigation).

and the court in turn had asked the U.S. Solicitor General to weigh in on the issue.¹¹ The Solicitor General urged the Supreme Court to grant certiorari in the cases but also to only undertake a limited review and exclude the transparency mandates from their review.¹² The Supreme Court has agreed with the Solicitor General and will hear the cases while limiting their review to content moderation questions and not to the transparency mandates.¹³ The Supreme Court is scheduled to hear the oral arguments in the cases on February 26, 2024.¹⁴

Currently, there is a circuit split regarding the Anti-Moderation Laws. The Eleventh Circuit (ruling on the Florida law) and the Fifth Circuit (ruling on the Texas law) came to diametrically opposed answers to similar legal questions. The courts differ on the most basic aspects of First Amendment analysis regarding the laws, such as: whether editorial discretion being exercised by the social media platforms is speech; whether the laws are content-based or content-neutral; whether the platforms are common carriers; and how § 230 of the Communications Decency Act impacts the analysis.

However, there is one aspect of the Anti-Moderation Laws that has largely gone unnoticed. The Anti-Moderation Laws cover a vast ambit of entities within their sweep, given that their definitions of social media platforms are exceedingly broad.¹⁵ This Note will analyze the impact of these broad definitions and how that might impact the First Amendment analysis of the laws. First Amendment scrutiny typically involves the courts looking at the

11. Mike Masnick, *Supreme Court Punts on Florida and Texas Social Media Moderation Laws, Asks US Government to Weigh in*, TECHDIRT (Jan. 23, 2023), <https://www.techdirt.com/2023/01/23/supreme-court-punts-on-florida-and-texas-social-media-moderation-laws-asks-us-government-to-weigh-in/>.

12. Brief for the United States as Amicus Curiae, *Moody v. Netchoice, LLC* (No. 22-277); Brief for the United States as Amicus Curiae, *Netchoice, LLC v. Moody* (No. 22-393); Brief for the United States as Amicus Curiae, *Netchoice, LLC v. Paxton* (No. 22-555).

13. Mike Masnick, *Let's Go! Supreme Court Grants Cert to Hear Cases About Social Media Moderation Laws in Florida & Texas*, TECHDIRT (Sept. 29, 2023), <https://www.techdirt.com/2023/09/29/lets-go-supreme-court-grants-cert-to-hear-cases-about-social-media-moderation-laws-in-florida-texas/>.

14. Amy Howe, *Court schedules February argument session*, SCOTUSBLOG (Jan. 5, 2024), <https://www.scotusblog.com/2024/01/court-schedules-february-argument-session/>.

15. The issue of how unworkable the Anti-Moderation Laws would be for certain entities has been discussed in Mike Masnick, *Did the 5th Circuit Just Make It So That Wikipedia Can No Longer Be Edited in Texas?*, TECHDIRT (Sept. 23 2022), <https://www.techdirt.com/2022/09/23/did-the-5th-circuit-just-make-it-so-that-wikipedia-can-no-longer-be-edited-in-texas/>. This article was a major inspiration for this Note.

governmental interest in the law and whether the law has been drafted properly to further that purpose.¹⁶

Part II examines the aims of the Anti-Moderation Laws and how they inform the governmental interests at play. It looks at the idea of the public square¹⁷ that has been invoked in the drafting of the laws to explain how the aim of the laws is narrower than was originally perceived by everyone other than the legislators.

Part III looks at the First Amendment analysis itself. The First Amendment is implicated in the present case even though no speech (as it is traditionally understood) is being targeted by the laws. Based on whether the law is content-based or content-neutral, courts have used different tests for First Amendment cases. By analyzing *Packingham v. North Carolina*, which is a factually analogous case, this Part conducts First Amendment analysis of the Anti-Moderation Laws. This section specifically looks at the various entities which will be caught in the sweep of the Anti-Moderation Laws and argues that the vast sweep is not in line with the laws' purpose.

The remainder of this section lays out the governmental interest involved in the Anti-Moderation Laws. It proceeds to examine whether the provisions concerning the actions and entities governed by the laws are adequately tailored to pass a First Amendment analysis. The Note weighs the laws against both intermediate and strict scrutiny, and concludes that the laws fail both levels of scrutiny.

Finally, in Part IV, the Note argues that there are no changes to the Anti-Moderation Laws which would allow them to pass First Amendment scrutiny while allowing them to retain their essence.

B. THE ANTI-MODERATION LAWS AND THE PLATFORMS' APPELLATE CHALLENGE

While the two Anti-Moderation Laws are similar in nature, each has certain distinctive features. This sub-Part lays out the details of the laws as well as the judicial challenges they have faced.

16. See *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (explaining the test for strict scrutiny); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 801 (2007) (explaining the test for intermediate scrutiny).

17. This Note refers to the concept of a public square, which has been referred elsewhere to as public sphere or public space. For the purposes of this Note, these terms are synonymous.

1. *Florida Anti-Moderation Law*

The Florida law prohibits social media platforms from restricting posts made by public officials or candidates for office, and further protects those persons from being deplatformed.¹⁸ It extends similar protections to most media organizations, as long as the posted content is not obscene.¹⁹ For all other users, the law prohibits platforms from deplatforming them or reducing their reach without notifying them.²⁰ Finally, it has certain transparency measures, such as requiring publication of standards, which inform users of changes to rules, terms and agreements.²¹ The Florida law applies to all information services, systems, search engines, and access software providers that provide multiple users with access to a server and that cross either of the law's specified revenue or user thresholds.²²

The District Court for the Northern District of Florida issued a preliminary injunction on the grounds that the Florida law was viewpoint-based, violated the First Amendment, and failed a strict scrutiny analysis.²³ The District Court's order was appealed before the Eleventh Circuit which affirmed the preliminary injunction as it applied to the anti-content moderation parts.²⁴ The Eleventh Circuit held that the Florida law triggered First Amendment scrutiny because it restricts the exercise of editorial judgment by the platforms and it would fail even an intermediate scrutiny analysis.²⁵ The Eleventh Circuit order has been appealed before the United States Supreme Court by the Florida Attorney General.²⁶

2. *Texas Anti-Moderation Law*

Unlike the Florida law, the Texas law does not protect users differently based on whether they are candidates for office or part of the media. It simply prohibits social media platforms from censoring users based on their viewpoint.²⁷ It has certain exceptions to the prohibition which involve sexual exploitation of children, incitement of criminal activity, and unlawful

18. FLA. STAT. § 501.2041(1)(c) (2022).

19. *Id.* §§ 501.2041(2)(j), (4).

20. *Id.* § 501.2041(2)(d).

21. *Id.* § 501.2041(2).

22. *Id.* § 501.2041(1)(g).

23. *NetChoice, L.L.C. v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

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

25. *Id.* at 1231, 1227.

26. Rebecca Kern, *Florida Appeals 11th Circuit Social Media Ruling to SCOTUS*, POLITICO (Sept. 21, 2022), <https://www.politico.com/news/2022/09/21/florida-appeals-11th-circuit-social-media-ruling-to-supreme-court-00058073>.

27. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021).

expression, among others.²⁸ Among other requirements, the platforms must disclose certain policies, how they are implemented, and maintain a complaint and appeals system.²⁹ The Texas law applies to websites or applications with over fifty million monthly active users that are open to the public, that allow a user to create an account, and that enable users to communicate with others primarily for posting information.³⁰

The District Court for the Western District of Texas issued a preliminary injunction against the Texas law on the grounds that it violates the platforms' First Amendment rights.³¹ The court found that the Texas law "imposes content-based, viewpoint-based, and speaker-based restrictions" and fails both strict and intermediate scrutiny.³² This preliminary injunction was stayed by the Fifth Circuit without providing any reasons, which would have allowed the law to go into effect.³³

However, the Fifth Circuit stay was then vacated by the Supreme Court, stopping the law from taking effect.³⁴ The majority did not provide any reasoning for their decision. However, Justice Alito wrote a dissent (joined by Justice Thomas and Justice Gorsuch) arguing: (1) the law concerns issues of great importance that should be reviewed by the Supreme Court; (2) it is unclear if the platforms will succeed in their lawsuit against the Texas law under existing constitutional law; (3) the law and the applicants' business models are novel; (4) the application of existing precedents (which predate the internet) to large social media companies is not obvious; and (5) Texas should not be required to seek preclearance from the federal courts before putting its laws into effect and the preliminary injunction was a "significant intrusion on state sovereignty."³⁵

The Fifth Circuit reviewed the Texas law again after the Supreme Court's ruling.³⁶ It found the law to be constitutional as it does not compel or obstruct the platforms' own speech in any way and the platforms had no First Amendment right to censor users.³⁷ In a First Amendment challenge, according to the Fifth Circuit, a plaintiff must show that the impugned law

28. *Id.* § 143A.006.

29. TEX. BUS. & COM. CODE ANN. §§ 120.051–120.053, 120.101 (West 2021).

30. *Id.* § 120.001(1).

31. *NetChoice, L.L.C. v. Paxton*, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

32. *Id.* at 1114.

33. *NetChoice, L.L.C. v. Paxton*, No. 21-51178, 2022 WL 1537249 (5th Cir. May 11, 2022).

34. *NetChoice, L.L.C. v. Paxton*, 142 S. Ct. 1715 (2022).

35. *Id.* at 1716.

36. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

37. *Id.* at 494.

either compels the host to speak or restricts the host's speech, and the court found that the Texas law does neither.³⁸ The Fifth Circuit applied intermediate scrutiny applied because they found the law to be content-neutral.³⁹ According to the Fifth Circuit, the Texas law satisfies intermediate scrutiny because it advanced an important governmental interest in protecting the free exchange of ideas and information, and it did not burden substantially more speech than necessary to further the state's interests.⁴⁰ Accordingly, the Fifth Circuit vacated the preliminary injunction, and the case was remanded.⁴¹ The ruling was, however, put on hold while the parties ask the Supreme Court to hear the case.⁴² The law has now been challenged before the United States Supreme Court by the platforms.⁴³

II. ANTI-MODERATION LAWS ARE AIMED AT REGULATING THE DIGITAL PUBLIC SQUARE

A. ORIGIN OF THE ANTI-MODERATION LAWS

The Anti-Moderation Laws were conceived in the wake of major social media platforms banning former President Trump. However, there was an intervening step in the story involving the highest court in the land. In *Biden v. Knight First Amendment Institute at Columbia University*, which was eventually rendered moot due to Trump losing the 2020 presidential election,⁴⁴ Justice Clarence Thomas wrote a concurring opinion which set in motion ideas that were eventually heavily relied upon in the drafting of the Florida and Texas statutes.⁴⁵ The case involved President Trump blocking several users on his X account.⁴⁶ The Second Circuit found this blocking to violate the First Amendment as the President's X account was a public forum where he acted in a governmental capacity while blocking users.⁴⁷ The blocking was thus

38. *Id.* at 459.

39. *Id.* at 480.

40. *Id.* at 482–83.

41. *Id.* at 494.

42. Mike Masnick, *Texas' Ridiculous Content Moderation Bill Put on Hold Until The Supreme Court Can Consider It*, TECHDIRT (Oct. 13, 2022), <https://www.techdirt.com/2022/10/13/texas-ridiculous-content-moderation-bill-put-on-hold-until-the-supreme-court-can-consider-it/>.

43. Brian Fung, *Tech Groups Ask Supreme Court to Rule on Hot-Button Texas Social Media Law*, CNN (Dec. 15, 2022), <https://www.cnn.com/2022/12/15/tech/tech-groups-supreme-court-texas-social-media-law/index.html>.

44. 141 S. Ct. 1220.

45. Blake Ellis Reid, *Uncommon Carriage*, 76 STAN. L. REV. 89 (2024).

46. *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

47. *Id.* at 238, 236.

unconstitutional viewpoint discrimination and could not stand in light of the First Amendment.⁴⁸

The case then reached the Supreme Court.⁴⁹ By this time however, X itself had banned Trump.⁵⁰ The Supreme Court remanded the case back to the Second Circuit with instructions to dismiss it as moot.⁵¹ However, Justice Thomas took the opportunity to express his views on X's⁵² actions.⁵³

Justice Thomas found the “private, concentrated control over online content and platforms available to the public” to be problematic.⁵⁴ He then laid out the beginnings of a “solution” which relied on doctrines that “limit the right of a private company to exclude” including “common carrier” and “places of public accommodation.”⁵⁵

While concluding his opinion, Justice Thomas stated: (1) if the aim is to ensure “speech that is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves”; and (2) private digital platforms hold “the right to cut off speech . . . most powerfully”⁵⁶ He ended his opinion by stating that the relevance of this power for First Amendment purposes and “the extent to which [it] can lawfully be modified” were interesting and important questions.⁵⁷

B. THE AIMS OF ANTI-MODERATION LAWS

The questions raised by Justice Thomas ceased to be hypothetical as Florida and Texas enacted Anti-Moderation Laws that same year.⁵⁸ These laws restricted the ability of social media companies to moderate content on their platforms.⁵⁹ This Section of the Note will lay out the motivations behind the Anti-Moderation Laws and elaborate on the concept of a public square. It then argues that the laws were meant to regulate only those platforms which affect political debate.

48. *Id.* at 239.

49. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220.

50. X, *supra* note 3.

51. 141 S. Ct. at 1220.

52. X was not a party to the action before the court.

53. 141 S. Ct. at 1221–27.

54. *Id.* at 1222.

55. *Id.* at 1222–23.

56. *Id.* at 1227.

57. *Id.*

58. FLA. STAT. § 501.2041 (2022); TEX. CIV. PRAC. & REM. CODE ANN. §143A.002. (West 2021).

59. *Id.*

1. *Legislative Findings and Lawmakers' Motivations Behind the Anti-Moderation Laws*

The two Anti-Moderation Laws are primarily aimed at protecting the First Amendment rights of citizens and are very cognizant of the importance of social media platforms in this regard. The lawmakers wanted to protect citizens from the platforms' private censorship. However, both the legislative findings and the lawmakers' statements show that the concern is only about certain specific platforms and not all social media platforms.

Florida's SB 7072 starts with the following declarations: (1) "Floridians increasingly rely on social media platforms to express their opinions"; (2) "Social media platforms have transformed into the new public town square"; (3) "Social media platforms have become as important for conveying public opinion as public utilities are for supporting modern society"; and (4) "Social media platforms hold a unique place in preserving First Amendment protections for all Floridians and should be treated similarly to common carriers."⁶⁰ These declarations show that law is concerned only with those social media platforms which are equivalent to public utilities and are essential to safeguarding Floridians' First Amendment rights.

The official press release accompanying the Florida law states that the law aims to ensure protection against "Silicon Valley elites" by taking back the "virtual public square."⁶¹ The Florida law became a priority for Governor Ron DeSantis after X and Facebook blocked Trump from their platforms.⁶² The sponsor of the House version of the bill admitted that he started pursuing the bill after X and Facebook's response to the *New York Post* story on Hunter Biden.⁶³ This further illustrates the focus of the laws on only the biggest platforms like X and Facebook.

Texas's HB 20 starts with declarations similar to the Florida law: (1) "[S]ocial media platforms function as common carriers, are affected with a public interest, are central public forums for public debate"; and (2) "[S]ocial media platforms with the largest number of users are common

60. S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

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

62. Jim Saunders & Tom Urban, *Social Media Crackdown Clears Florida Senate, Giving Gov. Ron DeSantis One of His Top Priorities*, S. FLA. SUN SENTINEL (Apr. 27, 2021), <https://www.sun-sentinel.com/news/politics/fl-ne-nsf-florida-senate-approves-social-media-crackdown-20210426-hcbykznsnca4ngpyaa5a667nwm-story.html>.

63. Mary Ellen Klas, *Florida Lawmakers Advance Bill to Penalize Social Media Companies*, TAMPA BAY TIMES (Apr. 27, 2021), <https://www.tampabay.com/news/florida-politics/2021/04/27/florida-lawmakers-advance-bill-to-penalize-social-media-companies/>.

carriers by virtue of their market dominance.”⁶⁴ Here too, the focus is on the biggest social media platforms, i.e., the dominant ones and the ones who are central public forms for debate.

Governor Abbott, while signing the Texas bill into law, called social media websites the “modern-day public square.”⁶⁵ The statement of intent for the Texas law notes that the need for protection from private censorship stems from “the nearly universal adoption of a few sites.”⁶⁶ Further, during the Texas Senate debates over the law, the bill’s author (Representative Briscoe Cain) cited Justice Kennedy’s opinion in *Packingham v. North Carolina*⁶⁷ to say that the public square the law sought to regulate is a few dominant websites which “for many are the principal sources for knowing current events, checking ads for employment, speaking, and listening.”⁶⁸ Cain also noted Elizabeth Warren’s criticism of Facebook⁶⁹ wherein the former presidential candidate said, “we must ensure that today’s tech giants do not . . . wield so much power that they can undermine our democracy.”⁷⁰ Focusing in on Big Tech’s outsized influence, Cain emphasized that “a small handful of social media sites drive the national narrative and have massive influence over the progress and developments of medicine and science, social justice movements, election outcomes, and public thought.”⁷¹ The politicians’ intent behind the law is therefore to target the few dominant websites which can undermine democracy if their ability to drive the narrative goes unchecked.

While Cain did say that the bill doesn’t target specific companies, only those big enough to be a public square,⁷² both the law and his statements indicate that not all big websites are meant to be regulated. Indeed, the only platforms mentioned in the entire Senate debate are Facebook, X, and Instagram.⁷³

64. H.B. 20, 87th Leg., 2d Called Sess. (Tex. 2021).

65. *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFF. TEX. GOVERNOR (Sept. 9, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship>.

66. BRISCOE CAIN, SELECT COMM. ON CONST. RTS. & REMEDIES, BILL ANALYSIS, H.B. 20, 2021 Leg., 87th Sess. (Tex. 2021).

67. 137 S. Ct. 1730 (2017).

68. House Journal, 87th Leg., 2d Called Sess., Fourth Day Supplement S157, S175 (Tex. 2021), <https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY04SUPPLEMENT.pdf>.

69. Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

70. House Journal, 87th Leg., 2d Called Sess., Fourth Day Supplement S157, S175 (Tex. 2021), <https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY04SUPPLEMENT.pdf>.

71. *Id.*

72. *Id.* at S177.

73. *Id.*

The legislative findings and the statements by the politicians involved in the enactment of the Anti-Moderation Laws clearly show that the aim of the laws is not to target all or even most social media companies, but only those that directly affect the public's political opinions and electoral outcomes.

2. *The Idea of a Public Square, Sphere, or Space*

The claim that the internet is the “modern public square” has been repeated so often that it has now become conventional wisdom.⁷⁴ However, neither Justice Kennedy (when he called internet the modern public square in *Packingham*⁷⁵) nor any of the lawmakers involved in the enactment of the Anti-Moderation Laws have explained what they mean by it. Therefore, to understand why and how the internet should be regulated in its capacity as a modern public square, one must understand what a “public square” means in this context.

Public squares are a concept that has long been discussed in a sociological sense. Hannah Arendt in her seminal work *The Human Condition* discussed the theme of the common place for public discussions.⁷⁶ Arendt discusses the concept as a space of appearance where it provides the “widest possible publicity” to individuals and the option of being seen and heard by everyone.⁷⁷ This is a realm that “is common to all of us and distinguished from our privately owned place in it.”⁷⁸ Given that Arendt was writing in a time before the internet, her articulation of the public realm is more spatial, as it was an improvised place that arose from the actions and words of people who came together to undertake common activities.⁷⁹

While Arendt may have started the discussion on public spaces, the concept of public square is most commonly associated with another German, Jürgen Habermas. Habermas introduced the concept of a “public sphere” which is a discursive arena where people discuss matters of common concern.⁸⁰ It is not part of the state and “is ideally the site of free, unrestricted, rational communication.”⁸¹ It is a “site for the production and circulation of

74. Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. F. 427, 427 (2021–2022).

75. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

76. HANNAH ARENDT, *THE HUMAN CONDITION* 50 (1958).

77. *Id.*

78. *Id.*

79. Alexey Salikov, *Hannah Arendt, Jürgen Habermas, and Rethinking the Public Sphere in the Age of Social Media*, 17 RUSS. SOC. REV., no. 4, 2018, at 88, 93.

80. Nancy Fraser, *The Theory of the Public Sphere*, in *THE HABERMAS HANDBOOK* 245 (Hauke Brunkhorst, Regina Kreide & Ristina Lafont eds., 2018).

81. *Id.*

discourses that can in principle be critical of the state.”⁸² It is not part of a market, as it is “a theater for debating and deliberating rather than for buying and selling.”⁸³ It allows the people to scrutinize and hold state officials accountable, as well as rein in the operation of private power.⁸⁴ In the internet context, this excludes government websites and ecommerce websites from the discussion.

Public spheres are thus places where people “establish common goals in pursuit of our common good,” “promote the general welfare,” and weave together a “democratic political culture.”⁸⁵ Further, the public sphere is linked to political communication.⁸⁶ Citizens meet in this space of political communication and form political opinions.⁸⁷

The initial conception of the Habermasian public sphere drew criticism by scholars who pointed out that he had not adequately incorporated the effects of structural inequalities which prevented many from participating in the public sphere at a level which was on par with others.⁸⁸ His critics also said that he had not considered the full force of structural issues that choke “the flow of public opinion from society to the state” and thereby deprive it of “political muscle.”⁸⁹ Essentially, the initial idea of a public sphere was deemed far too idealistic and failed to account for power dynamics in society, both between the people themselves and between the people and the state. In the current context, this would mean that websites with little viewership should not be seen as a public square as they would have little “political muscle” to effect any real change.

Habermas responded to some of these criticisms by providing a revised idea of the public sphere as a decentralized network of multiple, overlapping communicative spaces.⁹⁰ He reiterated this in a later work where he described the public sphere as “an intermediary system of communication between

82. Franks, *supra* note 74, at 446 (citing JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 36 (Thomas Burger trans., 1991)).

83. *Id.*

84. Fraser, *supra* note 80.

85. Leo Casey, *Why We Defend the Public Square*, ALBERT SHANKER INST. (May 7, 2015), <https://www.shankerinstitute.org/blog/why-we-defend-public-square>.

86. Christian Fuchs, *The Digital Commons and the Digital Public Sphere: How to Advance Digital Democracy Today*, 16 WESTMINSTER PAPERS COMM. & CULTURE, no. 1, 2021, at 9, 13, <https://doi.org/10.16997/wpcc.917>.

87. *Id.*

88. Fraser, *supra* note 81, at 249.

89. *Id.*

90. *Id.* at 249–50.

formally organized and informal face-to-face deliberations in arenas at both the top and the bottom of the political system.”⁹¹

While the internet has been argued to not be a public sphere,⁹² such arguments are outdated in light of the massive electoral changes brought about by the power of the internet in recent years. Starting with the Arab Spring in 2011 and right up to the 2022 U.S. midterm elections, the internet has been a crucial part of deciding who wins elections. However, it is not the entirety of the internet that comprises this public square, given that smaller websites are unable to effect real change on the political stage. The three biggest websites that affect democratic debate are Facebook, X, and YouTube—the “dominant platforms in global content sharing.”⁹³ The importance of these three platforms can be gauged by the fact that their actions lead to calls for regulating social media platforms.⁹⁴ Therefore, the public square in this context is limited to these three websites.

The Arendtian and Habermasian ideas discussed above are at the root of the general understanding of a “public square” in the context of social media platform regulation. Politicians, judges, and critics associate greater importance to the moderation of content on certain platforms because they believe that this moderation is leading to changes in electoral outcomes, something that is associated with discussion in a “public square.” This also falls within the definition Habermas proposed⁹⁵ because it is an “intermediary system of communication” in arenas across the political system. As a result, regulation

91. Jürgen Habermas, *Political Communication in Media Society*, COMMUNICATION THEORY 16, 415 (2006). Reading his works together, Habermas’s argument for a desirable public sphere is as follows: (1) the public sphere must remain independent as it has its own code of rational-critical debate; and (2) this independence is required both from state and private actors. Lewis A. Friedland, Thomas Hove & Hernando Rojas, *The Networked Public Sphere*, 13 JAVNOST - PUB., no. 4, 2006, at 5, 12. In case of Anti-Moderation Laws, this creates an issue as they are ostensibly state action which results in independence from private actors in the public square. However, this does not affect the constitutional analysis of the laws.

92. Stuart Jeffries, *What The Philosopher Saw*, FIN. TIMES (May 1, 2010) <https://www.ft.com/content/eda3bcd8-5327-11df-813e-00144feab49a> (arguing that the web cannot produce public spheres because users are dispersed and form opinions simultaneously); Zizi Papacharissi, *The Virtual Sphere*, 4 NEW MEDIA & SOC. 1, 9 (2002) (arguing that the internet is merely a “new public space for politically oriented conversation” and has not ascended to the level of a public sphere).

93. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).

94. See Dawn Carla Nunziato, *Protecting Free Speech and Due Process Values on Dominant Social Media Platforms*, 73 HASTINGS L.J. 1255, 1262–69 (2022) (tracing the call for regulation of social media platforms notes to actions only by X, Facebook and YouTube); *infra* Part II.B.4 (establishing that Anti-Moderation Laws aim to regulate platforms which affect political debate).

95. Habermas, *supra* note 91.

of the modern public square is informed by our collective understanding of which platforms are consequential.

3. *Anti-Moderation Laws Aim to Regulate Platforms Which Affect Political Debate*

While it is hard to attribute a clear purpose to the lawmakers in Florida and Texas, it certainly appears that they intended to free up the public square (comprised of Facebook, X, and YouTube) from the control of private companies rather than regulate the internet as an expansive virtual public space. It is extremely important to clarify this purpose because First Amendment scrutiny of the laws requires a clear purpose in place to weigh the laws against.

The Florida law is specifically aimed at protecting political candidates from moderation by the social media platforms,⁹⁶ while the Texas law is aimed at prohibiting all moderation based on “viewpoint.”⁹⁷ These laws stem from actions by only the major platforms, for example, X, Facebook, and YouTube.⁹⁸ Even scholars who are proponents of laws prohibiting social media platforms from discriminating on the basis of viewpoint favor legislation which targets discrimination on the basis of political views.⁹⁹ Indeed, they note that such prohibiting provisions “would be narrowly tailored because [they require] only that platforms refrain from censoring speech on the basis of its political content.”¹⁰⁰

Both statutes are aimed at regulating the dominant social media platforms which bear some resemblance to public utilities and are central for public debate. The analogy to public squares further strengthens this idea as those were meant to affect general welfare and political issues.¹⁰¹ Given the laws themselves and the circumstances surrounding their enactment, they are meant to regulate only the platforms which influence political debates and the narrative around government. In the current scenario, these are limited to Facebook, X, and YouTube.

96. FLA. STAT. § 501.2041(2)(h) (2022).

97. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021).

98. See Nunziato, *supra* note 94, at 1262–69 (2022) (tracing the call for regulation of social media platforms notes to actions only by X, Facebook and YouTube).

99. Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, HILL (Feb. 18, 2021), <https://thehill.com/opinion/judiciary/539341-how-congress-can-prevent-big-tech-from-becoming-the-speech-police>.

100. *Id.*

101. *Supra* Section II.B.3 (discussing the idea of a public square/sphere/space).

III. ANTI-MODERATION LAWS ARE UNCONSTITUTIONAL AS THEY INFRINGE THE FIRST AMENDMENT

A. ANTI-MODERATION LAWS IMPLICATE THE PLATFORMS' FIRST AMENDMENT RIGHTS

The First Amendment prohibits the enactment of any laws which abridge the freedom of speech or of the press.¹⁰² This prohibition on state action in turn provides a right to people and organizations to exercise their freedom of speech. This right has been read to include the right of private organizations to exercise editorial discretion.¹⁰³

In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court struck down a Florida statute which required newspapers to give political candidates free space to reply to columns which attacked the candidate.¹⁰⁴ The case upheld the right of a newspaper to decide what it publishes and held that the exercise of editorial control and judgment comprises “the choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair.”¹⁰⁵

More recently, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court has held that a corporation operating public access channels had the right to exclude certain speakers.¹⁰⁶ Since the corporation was a private actor, it was not limited by the First Amendment with regard to how it exercised “editorial discretion over the speech and speakers on its public access channels.”¹⁰⁷ Further, that case supported the idea that corporations have First Amendment rights.¹⁰⁸ The entity operating public access channels in that case was a corporation and was held to have First Amendment rights to exercise editorial discretion.¹⁰⁹ This position had been clearly recognized earlier in *Citizens United v. FEC*, where the Supreme Court held: “First Amendment protection extends to corporations.”¹¹⁰

Since corporations have First Amendment rights, and editorial discretion is a form of speech protected under the First Amendment, the restrictions put

102. U.S. CONST. amend. I.

103. Evelyn Douek & Genevieve Lakier, *Rereading “Editorial Discretion,”* KNIGHT FIRST AMEND. INST. COLUM. U. (Oct. 24, 2022), <https://knightcolumbia.org/blog/rereading-editorial-discretion>.

104. 418 U.S. 241 (1974).

105. *Id.* at 258.

106. 139 S. Ct. 1921 (2019).

107. *Id.* at 1933.

108. *Id.*

109. *Id.*

110. 558 U.S. 310, 342 (2010).

in place by the Anti-Moderation Laws implicate the First Amendment rights of social media platforms. Therefore, these Anti-Moderation Laws must be analyzed in light of the tests laid down by the courts for constitutionality of laws implicating the First Amendment.

B. TESTING THE CONSTITUTIONALITY OF LAWS IMPLICATING THE FIRST AMENDMENT

While evaluating cases concerning the free speech clause of the First Amendment, the Supreme Court has held that content-based restrictions must satisfy strict scrutiny while content-neutral laws only need to satisfy intermediate scrutiny.¹¹¹ Content-based laws are those which “suppress, disadvantage, or impose differential burdens upon speech because of its content.”¹¹² Content-neutral laws are those which “are unrelated to the content of speech.”¹¹³

This Note does not discuss whether the Anti-Moderation Laws are content-based or content-neutral because it posits that the laws fail the lower standard of intermediate scrutiny and will therefore automatically fail the higher standard of strict scrutiny. Therefore, regardless of whether the laws are content-based or content-neutral, the Anti-Moderation Laws fail the First Amendment analysis.

Under strict scrutiny, the Government must prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.¹¹⁴ In contrast, the test for intermediate scrutiny is more nuanced (or in some ways more incoherent). Ashutosh Bhagwat has traced eight different kinds of free speech cases in which intermediate scrutiny was applied to First Amendment cases.¹¹⁵ Based on this analysis, Bhagwat concludes that the Supreme Court appears to have landed on the following test for intermediate scrutiny: “laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are reasonably well tailored to that purpose (i.e., not unreasonably overbroad).”¹¹⁶

The First Amendment analysis of the Anti-Moderation Laws thus takes the following form:

111. *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 642 (1994).

112. *Id.*

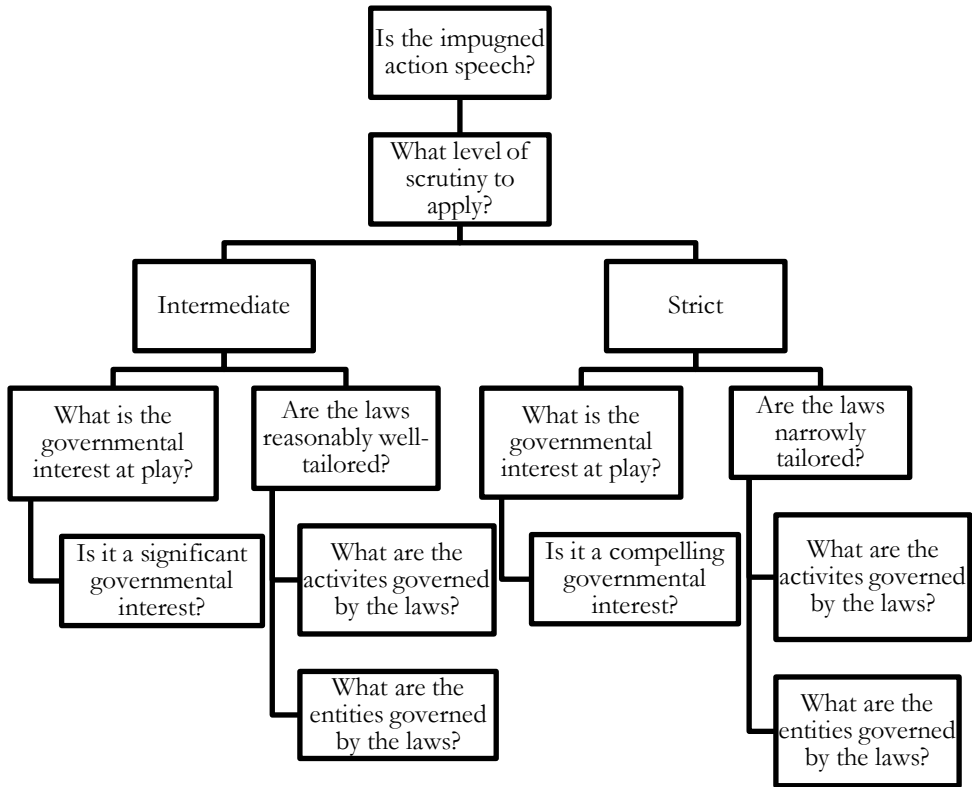
113. *Id.*

114. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

115. Bhagwat, *supra* note 16, at 788–800.

116. *Id.* at 801.

Figure 1: Flowchart of Steps in Supreme Court's First Amendment Analysis



The constitutional analysis of the Anti-Moderation Laws should be instructed by *Packingham*, a case where a state statute was struck down because its scope implicated a vast number of websites.¹¹⁷

C. GUIDANCE FROM *PACKINGHAM V. NORTH CAROLINA*

The defendant in *Packingham v. North Carolina* was a registered sex offender who expressed happiness on Facebook when his traffic ticket was dismissed.¹¹⁸ A lower court held that the defendant's action violated a North Carolina statute which criminalized the access of most social media websites by registered sex offenders.¹¹⁹ Specifically, the law prohibited registered sex offenders from accessing a "commercial social networking Web site where the sex offender [knew] that the site permits minor children to become members or to create or maintain personal Web pages."¹²⁰

117. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1730 (2017)

118. *Id.* at 1734.

119. *Id.* at 1731.

120. *Id.* at 1733.

Aimed at protecting children from sexual abuse,¹²¹ the law covered within its sweep websites which fulfilled all the following criteria:¹²² (1) the operator of the website derived revenue from the website; (2) the website facilitated “social introduction” between people; (3) the website allowed users to create profiles; and (4) the website provided users/visitors “mechanisms to communicate with other users.”

The Supreme Court struck down the statute as unconstitutional on First Amendment grounds and noted that the statute would “bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com.”¹²³ Noting that North Carolina had not been able to show that the “sweeping law is necessary or legitimate to serve” the government’s purpose,¹²⁴ the court ruled that the statute would fail even intermediate scrutiny.¹²⁵

Justice Alito in his concurring opinion explained the application of intermediate scrutiny in greater detail.¹²⁶ Applying the statute’s criteria (enumerated above), he showed how it would cover almost any website.¹²⁷ Then using examples, he showed that the statute bars “access to [many] websites which are most unlikely to facilitate the commission of a sex crime against a child.”¹²⁸ Since the statute had a broad reach, and barring registered sex offenders from such a large number of websites did “not appreciably advance the State’s goal of protecting children from . . . sex offenders,” the law was unconstitutional.¹²⁹

D. THE GOVERNMENTAL INTEREST INVOLVED

The first aspect of a First Amendment analysis (under either strict scrutiny or intermediate scrutiny) is to determine the governmental interest at play.

Before the Eleventh Circuit, Florida failed to offer a governmental interest in its anti-moderation law, which left the court to theorize as to the potential governmental interest.¹³⁰ The court came up with two such interests to carry out a First Amendment analysis: (1) “counteracting unfair private censorship that privileges some viewpoints over others on social-media platforms”; and

121. *Id.* at 1740.

122. *Id.* at 1733–34.

123. *Id.* at 1736.

124. *Id.* at 1737.

125. *Id.* at 1736.

126. *Id.* at 1740–43.

127. *Id.* at 1740–41.

128. *Id.* at 1741.

129. *Id.* at 1743.

130. *NetChoice, L.L.C. v. Att’y Gen., Fla.*, 34 F.4th 1196, 1228 (11th Cir. 2022).

(2) “promoting the widespread dissemination of information from a multiplicity of sources.”¹³¹ In its own First Amendment analysis, the Fifth Circuit considered “protecting the free exchange of ideas and information” in Texas as the relevant governmental interest.¹³²

However, in light of the analysis undertaken above in Part II, this Note posits that the aim of the Anti-Moderation Laws is not to regulate all websites. Instead, the legislative aim is to regulate the modern public square (Facebook, X, and YouTube).¹³³ This renders the governmental interests discussed by the Eleventh and Fifth Circuits of little use, and one must instead consider the alternative governmental interest in regulating the modern public square. Regulation of the modern public square can be considered a valid government interest as governments should be allowed to act in the interest of preserving democracy and fair electoral practices. In *Citizens United v. FEC*, Justice Stevens in a partly concurring opinion found there to be a compelling government interest in “preserving the integrity of the electoral process . . . sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government and maintaining the individual citizen’s confidence in government.”¹³⁴

Therefore, the Anti-Moderation Laws (as far as they regulate the modern public square) can be considered as furthering a compelling government interest which is required for a strict scrutiny analysis. Since the governmental interest is a compelling one, it is also a significant/substantial/important governmental interest (as required for an intermediate scrutiny analysis) because a compelling government interest is surely a significant/substantial/important governmental interest as well.

E. THE BROAD SWEEP OF FLORIDA AND TEXAS STATUTES

1. *Actions Regulated by the Anti-Moderation Laws*

a) The Florida Law (SB 7072)

The Florida law largely protects candidates for office and journalistic enterprises from editorial discretion. It applies to a broader class of social media platforms (compared to the Texas law) but requires them to comply with it only with regards to certain classes of users.

131. *Id.*

132. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 482 (5th Cir. 2022).

133. *Supra* Section II.B.4 (arguing that Anti-Moderation Laws aim to regulate platforms affecting political debate).

134. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 440 (2010).

It prohibits “social media platforms” from deplatforming¹³⁵ or shadowbanning¹³⁶ a candidate for office who the platform knows to be a candidate.¹³⁷ The platform also cannot prioritize or de-prioritize posts¹³⁸ by such candidates.¹³⁹ These are all actions that have been taken by social media platforms to respond to speech on their platforms that they find undesirable.¹⁴⁰ While this list does not encompass the vast universe of actions that platforms can take,¹⁴¹ it does cover the most often-discussed remedies for violation of platform rules.

The protections are available to the candidates only between the date of qualification and the date they cease to be a candidate.¹⁴² The platform must provide each user a way to identify themselves as a qualified candidate in a manner that allows the platform to confirm their candidature on the relevant election website.¹⁴³ Further, the platform cannot censor,¹⁴⁴ deplatform, or

135. FLA. STAT. § 501.2041(1)(c) (defining deplatforming as the “action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days”).

136. *Id.* § 501.2041(1)(f) (defining shadow-banning as the “action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform,” including “acts of shadow banning by a social media platform which are not readily apparent to a user”).

137. *Id.* § 501.2041(2)(h).

138. *Id.* § 501.2041(1)(e) (defining post-prioritization as the “action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results. the term does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media platform”).

139. *Id.* § 501.2041(2)(h).

140. *See* Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 23–40 (2021) (discussing the various remedies exercised by platforms for violations of their rules).

141. *See id.* (noting that the remedies the platforms can employ include editing/redacting content, adding warnings to the content, disabling comments, removing credibility badges, forfeiting earnings etc. Many of these will not be covered by the Florida law).

142. FLA. STAT. § 501.2041(2)(h) (2022).

143. *Id.*

144. *Id.* § 501.2041(1)(b) (defining “censor” as “any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. the term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform”).

shadow ban a journalistic enterprise¹⁴⁵ based on the content of its publication or broadcast unless the content is obscene.¹⁴⁶

The law allows for moderating the content of most users but adds an obligation on the platforms as it prohibits them from censoring content, shadow banning, or deplatforming a user without notifying the user.¹⁴⁷ The exception to this notification requirement is if the content being censored is obscene.¹⁴⁸

The Florida law also has certain transparency measures which are not relevant for the purpose of this Note.

b) The Texas Law (HB 20)

The Texas law prohibits social media platforms from censoring¹⁴⁹ users based on one or more of the following criteria: (1) the user's viewpoint; (2) the viewpoint represented in the user's experience; or (3) the user being in Texas.¹⁵⁰ The prohibition applies regardless of whether the viewpoint is expressed on the platform or off of it.¹⁵¹ However, the platform may censor content that fulfills one or more of the following criteria: (1) federal law has specifically authorized censoring of that content; (2) the content is the subject of a request from an organization for preventing sexual exploitation of children and protecting sexual abuse survivors from ongoing harassment; (3) it directly incites criminal activity or threatens a "person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge"; or (4) it is "unlawful expression."¹⁵²

The Texas law also has certain transparency measures which are not relevant for the purpose of this Note.

145. *Id.* § 501.2041(1)(d) (defining "journalistic enterprise" as "an entity doing business in Florida that: 1. publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users; 2. publishes 100 hours of audio or video available online with at least 100 million viewers annually; 3. operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or 4. operates under a broadcast license issued by the Federal Communications Commission").

146. *Id.* § 501.2041(2)(j).

147. *Id.* § 501.2041(2)(d).

148. *Id.* § 501.2041(4).

149. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001(1) (West 2021) (defining "censor" as to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression").

150. *Id.* § 143A.002(a). The last part regarding the user being in Texas appears to have been added to prevent platforms from stopping the provision of their services in Texas.

151. *Id.* § 143A.002(b).

152. *Id.* § 143A.006(a).

2. *Entities Regulated by Anti-Moderation Laws*

The Florida law applies to “social media platforms” which are “information service[s], system[s], internet search engine[s], or access software provider[s]” doing business in Florida which: (1) “provides or enables computer access by multiple users to a computer server, including an internet platform or a social media site”; and (2) have annual gross revenues of over \$100 million or at least 100 million monthly global users.¹⁵³

The Texas law applies to “social media platforms” which are websites or internet applications that are “open to the public, [allow] a user to create an account, and [enable] users to communicate with others . . . [primarily] for posting information, comments, messages or images.”¹⁵⁴ The law exempts from its application internet service providers, emails, as well as online services, applications, and websites which consist primarily of information or content that is not user-generated but is pre-selected by service providers.¹⁵⁵ The Texas law’s effect is also limited to social media platforms that have over fifty million monthly active users in the United States.¹⁵⁶

The definition of social media platforms is extremely broad under both statutes. Under Florida law, *any* website that crosses the revenue or user thresholds will be required to comply with the provisions of the law. This means that among others, the following websites will fall within the ambit of the law: Amazon (an online marketplace),¹⁵⁷ Netflix (an online movie and TV streaming platform),¹⁵⁸ Wikipedia (an online encyclopedia),¹⁵⁹ Pornhub (a pornographic website),¹⁶⁰ Eventbrite (an online ticketing service),¹⁶¹ Bit.ly (a

153. FLA. STAT. § 501.2041(1)(g) (2022).

154. TEX. BUS. & COM. CODE ANN. § 120.001(1) (West 2021).

155. *Id.*

156. *Id.* § 120.002(b).

157. Amazon.com, Inc., Annual Report (Form 10-K), at 65 (Feb. 4, 2022), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/f965e5c3-fded-45d3-bbdb-f750f156dcc9.pdf> (showing that sales from only the online stores in 2021 was \$222 billion).

158. Netflix, Inc., Annual Report (Form 10-K), at 20 (Jan. 27, 2022), https://s22.q4cdn.com/959853165/files/doc_financials/2021/q4/da27d24b-9358-4b5c-a424-6da061d91836.pdf (showing that revenue in 2021 was \$29 billion).

159. WIKIMEDIA STAT., [https://stats.wikimedia.org/#/en.wikipedia.org/reading/unique-devices/normal|line|1-month|\(access-site\)~mobile-site*desktop-site|monthly](https://stats.wikimedia.org/#/en.wikipedia.org/reading/unique-devices/normal|line|1-month|(access-site)~mobile-site*desktop-site|monthly) (last visited Aug. 7, 2023) (showing that almost 800 million unique devices visited the English Wikipedia site in August 2022).

160. SIMILARWEB, <https://www.similarweb.com/website/pornhub.com/#overview> (last visited Aug. 7, 2023) (showing that Pornhub had 2.5 billion visits in August 2022).

161. EVENTBRITE, Q4 2021 SHAREHOLDER LETTER 15, (Feb. 10, 2022), https://s22.q4cdn.com/238770421/files/doc_financials/2021/q4/Q4-2021-Earnings-Shareholder-Letter-vFINAL.pdf (showing that Eventbrite had net revenue of \$187.1 million in 2021).

URL shortening website),¹⁶² Steam (an online games marketplace),¹⁶³ and Etsy (an online marketplace).¹⁶⁴

It can be argued that when read practically, the Florida law will not affect entities with little to no “user-generated content,” such as Netflix and Steam, as they were not taking content moderation decisions anyway. However, a couple of hypotheticals show how the law will be of concern to such entities as well. For instance, consider a moviemaker whose film is on Netflix decides to run for a political position. As per Florida law, Netflix now may not remove the film from the platform till the time the filmmaker remains a candidate. Further, it may not even be able to downrank the movie as it is not allowed to de-prioritize posts by candidates. Similarly, if a media house produces a movie that is picked up by Netflix, every action by Netflix regarding that movie will be subject to Florida law. Further, all such websites will have to comply with the transparency provisions by having standards for censorship, deplatforming, and shadow banning, even if they do not do any of those things. The websites will also be unable to change their user-facing rules any earlier than once in 30 days. This will require resources, and the legal teams at such entities will have to weigh many of their respective company’s actions against the obligations in the Florida law.

While the Texas law does add more criteria to its definition, it still catches within its ambit a lot of websites which have user-generated content. The following entities (among others) would fall within the ambit of the Texas law: Wikipedia (an online encyclopedia);¹⁶⁵ Shopify (an online service to create

162. *Most Popular Websites Worldwide as of November 2021, By Total Visits*, STATISTA, <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/> (last visited Aug. 7, 2022) (showing that 2.11 billion users visited Bit.ly in November 2021; assuming 10% of those users were from the United States, that is 211 million users from the United States).

163. *Steam – 2021 Year in Review*, STEAM (Mar. 8, 2022), <https://store.steampowered.com/news/group/4145017/view/3133946090937137590> (stating that Steam had 132 million monthly active players globally).

164. Etsy, Inc., Annual Report (Form 10-K), at 73 (Feb. 24, 2022), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001370637/619701ee-f7dc-4baa-9463-4374cfcef85e.pdf>. (showing that Etsy had a total revenue of \$2.3 billion in 2021).

165. WIKIMEDIA STAT., [https://stats.wikimedia.org/#/en.wikipedia.org/reading/unique-devices/normal|line|1-month|\(access-site\)~mobile-site*desktop-site|monthly](https://stats.wikimedia.org/#/en.wikipedia.org/reading/unique-devices/normal|line|1-month|(access-site)~mobile-site*desktop-site|monthly) (last visited Aug. 7, 2023) (showing that almost 800 million unique devices visited the English Wikipedia site in August 2022; assuming 10% of that is United States users, then that is 80 million monthly active users from the United States).

shopping platform);¹⁶⁶ Pornhub (a pornographic website);¹⁶⁷ Pinterest (an image-sharing website);¹⁶⁸ and Indeed (an online jobs board).¹⁶⁹ Similar to the discussion under the Florida law, a few hypotheticals will show how the Texas law will require entities to devote resources to ensure compliance with the law.

Consider the most ridiculous example first. The law will require Pornhub to not discriminate between users based on their viewpoint. Since many pornographic movies have some semblance of a story which could be depicting a viewpoint, a user could ask Pornhub to rank their content on the first page, otherwise Pornhub might be discriminating against them on the basis of viewpoint. Further, Wikipedia will be required to produce a transparency report on how it moderated content. Given that it is a non-profit largely run by volunteers, it would be extremely difficult for it to muster the resources for a team which can compile all the content moderation decisions taken on the website and present them to the Texas government in the specified manner.

The definitions and the hypotheticals clearly show that even if they are read practically, the laws cover within their ambit a large number of entities which have not been part of the discussion around these laws.

166. *Shopify Usage Statistics*, BUILTWITH, <https://trends.builtwith.com/shop/Shopify> (last visited Aug. 7, 2023) (showing that 2.5 million websites in the United States use Shopify; assuming those websites have an average of 20 monthly active users, then that is 50 million monthly active users from the United States).

167. *Porn Sites Collect More User Data Than Netflix or Hulu. This Is What They Do With It*, QUARTZ, <https://qz.com/1407235/porn-sites-collect-more-user-data-than-netflix-or-hulu-this-is-what-they-do-with-it> (last visited Aug. 18, 2023) (stating that Pornhub has over 100 million daily visits, which works out to 3 billion monthly visits). The United States is by far the country with the highest daily traffic to Pornhub. *2021 Year in Review*, PORNHUB: INSIGHTS (Dec. 14, 2021), <https://www.pornhub.com/insights/yir-2021#Countries-by-Traffic>.

168. *Social Media Usage in the United States*, STATISTA, <https://www.statista.com/study/40227/social-social-media-usage-in-the-united-states-statista-dossier/> (last visited Aug. 7, 2023) (showing that Pinterest had 98.77 million users in 2021; assuming that about half of them are active monthly users, Pinterest is likely to cross the 50 million monthly active users threshold).

169. *Worldwide Visits to Indeed.com From November 2022 to April 2023*, STATISTA, <https://www.statista.com/statistics/1259806/number-of-unique-visitors-to-indeed/> (last visited Aug. 7, 2023) (showing that Indeed had over 650 million unique global users in May 2022; even if 10% of those visitors are from the United States, that will cross the fifty million monthly active users threshold).

F. ANTI-MODERATION LAWS FAIL INTERMEDIATE SCRUTINY

To survive intermediate scrutiny, the Anti-Moderation Laws must serve “a significant/substantial/important governmental interest and [be] reasonably well tailored to that purpose (i.e., not unreasonably overbroad).”¹⁷⁰

The governmental interest at play here is to regulate the modern public square to ensure that democracy and the electoral process are preserved. This is a significant/substantial/important governmental interest in light of *Citizens United*.¹⁷¹

While judging the laws against the second part of intermediate scrutiny (i.e., that they are reasonably well tailored to the governmental interest) there are two aspects to consider: (1) whether the actions regulated by the laws are reasonably well tailored to the governmental interest; and (2) whether the broad sweep of entities covered by the laws still leave the laws reasonably well tailored to the governmental interest.

On the first aspect, the laws provide specific checks and obligations on social media platforms which will reduce the discretion they have in moderating content. Since the aim of the laws is to open up the modern public square and ensure that conversation flows freely with little intervention by private actors, the laws might further that aim. While it is certainly debatable what the practical effects of the law will be,¹⁷² for the purposes of an analysis that is taking place before they go into effect, the provisions of the laws do appear to further free discussion on social media platforms.

However, the laws fail the second part of the test. As discussed above in Section III.E.2, the definitions of social media platforms are extremely broad and will implicate a large number of entities that have nothing to do with the modern public square and political discussions.

While it can be argued that the biggest social media platforms such as Facebook, X, and YouTube are the modern public square, given the immense impact they have on politics and democracy, the same cannot be said for the other websites that will come under the sweep of the Anti-Moderation Laws. The Anti-Moderation Laws cover within their ambit websites that are in no way linked to “political communication.”¹⁷³ These websites do not “establish common goals in pursuit of our common good” or “promote the general

170. Bhagwat, *supra* note 16, at 801.

171. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 440 (2010).

172. *See* Warzel, *supra* note 10 (discussing hypotheticals which show that the law might be unworkable); Keller, *supra* note 10 (discussing how the platforms can try to comply with the Texas law); Masnick, *supra* note 10 (giving examples of how the laws will lead to tremendous amounts of wasteful litigation).

173. Fuchs, *supra* note 86, at 13.

welfare” to weave together a “democratic political culture” as required in a public square.¹⁷⁴ Netflix, Pornhub, Eventbrite, and Steam might be useful services in their own right, but they do not contribute to the public discourse in a manner such that governments need to regulate them through Anti-Moderation Laws.

Regulating Netflix and Pornhub would not further even the expansive governmental interests that were considered by the Eleventh¹⁷⁵ and Fifth¹⁷⁶ Circuits. When measured against the actual government interest (regulation of the modern public square), the aims and effects of these laws are in no way linked, and these laws cannot be said to be reasonably well tailored to the governmental respect.

In *Packingham*, Justice Alito used the fact that the statute barred access to many websites unrelated to the state’s purpose to deduce that the impugned statute had a broad reach and did not appreciably advance the state’s goal.¹⁷⁷ Similarly, the implication under Anti-Moderation Laws of multiple websites which have little relation to the states’ purposes is that the statute is overbroad. Since the Anti-Moderation Laws are not reasonably well-tailored to the governmental interest, they fail intermediate scrutiny and are therefore unconstitutional.

G. ANTI-MODERATION LAWS FAIL STRICT SCRUTINY

Given the tiered system of analysis, a law that fails intermediate scrutiny will inevitably fail strict scrutiny.¹⁷⁸ This is true in the present case as well.

Under the strict scrutiny test, the restriction implicated must further a compelling government interest and be narrowly tailored to achieve that interest.¹⁷⁹ Here, the governmental interest is a compelling one as discussed in Section III.D. The second part of the test (the laws being narrowly tailored to achieve the compelling government interest) can again be split into two: (1)

174. Casey, *supra* note 85.

175. The Eleventh Circuit considered ‘counteracting unfair private censorship that privileges some viewpoints over others on social-media platforms and promoting the widespread dissemination of information from a multiplicity of sources’ as a potential governmental interest. *NetChoice, L.L.C. v. Att’y Gen., Fla.*, 34 F.4th 1228 (11th Cir. 2022).

176. The Fifth Circuit considered ‘protecting the free exchange of ideas and information in Texas’ as a governmental interest. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 482 (5th Cir. 2022).

177. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017)

178. See Dan V. Kozlowski & Derigan Silver, *Measuring Reed’s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMM. L. & POLY 191, 196 (2019) (noting that “it is still the case that it is much easier for a law to pass intermediate scrutiny than strict scrutiny”).

179. Bhagwat, *supra* note 16, at 171.

the actions regulated by the laws; and (2) the entities regulated by the laws. While the actions may be argued to be narrowly tailored to ensure free discussion on the platforms, the broad universe of the entities regulated prevents the laws from being narrowly tailored. The laws regulate entities which have nothing to do with the governmental interest at play. Therefore, the laws fail strict scrutiny and are therefore unconstitutional.

IV. ANTI-MODERATION LAWS CANNOT BE REDRAFTED IN A CONSTITUTIONAL MANNER

A. CHANGING THE DEFINITION OF SOCIAL MEDIA PLATFORMS TO INCORPORATE THE MODERN PUBLIC SQUARE WILL NOT SOLVE THE CONSTITUTIONALITY ISSUE

Given the thesis of this paper that the Anti-Moderation Laws are unconstitutional simply because of bad definitions of social media platforms, one's first instinct might be to simply redraft the definitions themselves. However, that is far easier said than done.

If the definition is simply amended to include websites and apps which comprise the modern public square, the definition would be far too broad and be suspect to a vagueness challenge. While all laws have some vagueness, the Supreme Court has clarified that greater precision is required when laws regulate speech.¹⁸⁰ Laws can be challenged as being facially unconstitutional for being unduly vague, and a successful facial challenge will result in the law being entirely invalidated.¹⁸¹ In *Baggett v. Bullitt*, the Supreme Court held that a state law requiring state employees to swear that they were not a “subversive person” was invalid as its language was unduly vague, uncertain, and broad.¹⁸² The reasoning for the court's decision was that the ambiguities inherent in the term “subversive” gave people little guidance as to what exactly was proscribed.¹⁸³

Practically, entities would be confused as to whether they fall within the modern public square or not. They would thus not know whether to comply with the laws. Therefore, changing the definition to incorporate the modern public square would not solve the constitutionality issue of the laws.

180. ERWIN CHEMERINSKY, *THE FIRST AMENDMENT* 59 (2021).

181. *Id.* at 57.

182. 377 U.S. 360, 366 (1964).

183. *Id.* at 371.

B. CHANGING THE DEFINITION OF SOCIAL MEDIA PLATFORMS TO TARGET SPECIFIC PLATFORMS WILL VIOLATE THE FIRST AMENDMENT

Another option could be to change the definition of social media platforms to name specific platforms which comprise the modern public square according to the state. As discussed above in Part II.B.3, the modern public square comprises Facebook, X, and YouTube for now. However, this would be akin to targeting specified speakers for their speech, which would be unconstitutional. The Supreme Court has held that in the context of political speech, the government may not “impose restrictions on certain disfavored speakers.”¹⁸⁴ The court there observed that restrictions “based on the identity of the speaker are all too often simply a means to control content.”¹⁸⁵

Speaker-based discrimination infringes the First Amendment because by regulating those who may speak, the government can control the content of what is said because personal identity usually correlates with political opinions.¹⁸⁶ Further, the speaker’s identity shapes how the content is received and interpreted.¹⁸⁷ Therefore, in light of *Citizens United*, a law that imposes restrictions on certain speakers in the political context will not stand.¹⁸⁸ The Anti-Moderation Laws, even if amended to enumerate certain platforms in the definition of social media platforms, would be unconstitutional.

V. CONCLUSION

The Anti-Moderation Laws are part of a backlash against tech companies. Lawmakers have used various areas of laws to regulate tech platforms, including privacy, antitrust, and free speech. Given the harms these companies have (intentionally or unintentionally) brought into the world, the clamor for regulating them has steadily increased. However, it is important to balance the need for free expression and the right to access information with the need to protect individuals and society from harmful or malicious content. Finding the right balance is rarely easy, and there are always competing interests at play.

Overall, these types of laws may be seen as problematic because they could potentially interfere with the ability of social media companies to enforce their own terms of service and moderate content on their platforms in a way that

184. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010).

185. *Id.* at 340.

186. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 816 (2015).

187. *Id.*

188. *Citizens United*, 558 U.S. at 341.

they see fit. Ironically—given the laws’ aim to free up online speech—these laws could lead to less online speech and a less diverse and open online environment as bots and extremists take over the online space while platforms are helpless to control them. Social media companies will be more hesitant to moderate content out of fear of facing legal consequences, which could result in more harmful or malicious content remaining on the platform. It is worth noting that the platforms may still be able to take action to remove certain types of content that are not protected by the Anti-Moderation Laws. However, the specific provisions of the laws may limit the discretion of social media companies to make these types of decisions.

Ultimately, the question of whether the Texas and Florida social media laws are bad will depend on one’s perspective and values. Some may view these laws as necessary protections for free speech, while others may see them as harmful interference with the ability of social media companies to regulate content on their platforms.

However, none of the above discussions change the fact that the Anti-Moderation Laws are extremely broad statutes which cover within their scope websites which do not contribute to the states’ goal of having an unfettered modern public square. The origin of these laws is clearly in the political arena and the lawmakers’ motivations are to largely protect political speech. However, the drafting of these laws has led to the scenario where many entities who have no effect on political speech are implicated under these laws. Given their overbroad nature, these laws should be struck down as unconstitutional. There is also no way of redrafting the laws in a way that allows them to apply to social media platforms that are actually the modern public square that the laws aim to regulate.

These laws are likely just the beginning of state action against platforms given the deadlock at the federal level regarding tech legislation. If the Elon Musk-X saga has shown us anything, it is that there is a need to regulate the power that has landed in the hands of a few technocrats. However, given the exponential effects of such laws on the entire internet ecosystem, the drafting of such laws with anticipation of the future effects of these laws becomes extremely important. Laws moderating platforms can very easily stifle innovation because the largest players are the most well-placed to comply with the onerous obligations that such laws bring along. Further, even the largest platforms need protection from the partisan actions of lawmakers in fiercely red or blue states.

Tech regulation is hard work, and the Anti-Moderation Laws show how difficult it is to draft laws which only have the intended effect and no more.

However, that is no excuse for putting overbroad laws in the books which harm free speech far more than they promote it.

