NOTE

Congress Shall Make No Law, so Someone Else Should: Why the First Amendment's "Free Speech" Promise Does Not (and Should Not) Extend to Social Media Companies

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TABLE OF CONTENTS

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INTRODUCTION

In today's digital era, speech and expression have migrated from the physical realm to the digital realm.[1] Over sixty percent of the world's population, a staggering 4.9 billion people, use social media.[2] Social media platforms provide users with the capacity to speak on a truly global level; billions of daily users[3] share content, offer opinions, and report news to a digitally-connected world audience.[4] Such modern-day oration does not go unmoderated.[5] The private entities that own these platforms (hereinafter, "Company" singularly or "Companies" collectively) exercise great unilateral discretion in controlling these platforms.[6] All users of social media platforms are contractually bound

[1] *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (describing the internet as "the most participatory form of mass speech yet developed").

[2] Dave Chaffey, *Global Social Media Statistics Research Summary 2024*, SMART INSIGHTS (Jan. 4, 2024), https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/ [https://perma.cc/QLP7-5DTV].

[3] *See, e.g.*, Stacy Jo Dixon, *Number of Daily Active Facebook Users Worldwide as of 3rd Quarter 2022 (in Millions)*, STATISTA, https://www.statista.com/statistics/346167/facebook-global-dau/ (last updated Oct. 27, 2022) [https://perma.cc/7FKA-WFTF] (showing that the number of daily active users of Facebook are nearly 2 billion).

[4] *See, e.g.*, *How Has Social Media Shaped How We Communicate?*, EKU ONLINE (May 5, 2020), https://ekuonline.eku.edu/blog/communication-studies/how-has-social-media-shaped-how-we-communicate/ [https://perma.cc/9VHB-U8VX] (noting that social media has "changed the way we communicate" and "given people the ability to communicate across geography, cultures, and languages creating an interconnected community").

[5] For an example of speech being regulated online, see *Permanent Suspension of @realDonaldTrump*, X (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/6XDU-M4H9] [hereinafter *Twitter Permanently Suspends Trump*], wherein Twitter (now X) banned the personal account of Donald Trump following posts transgressing their "Glorification of Violence policy."

[6] Social media companies moderate according to a number of extensive policies and exercise numerous enforcement policies when those policies are violated. *See, e.g.*, *Rules and Policies*, X, https://help.twitter.com/en/rules-and-policies#safety-and-cybercrime (last visited Feb. 29, 2024) [https://perma.cc/HK5X-L8BF] [hereinafter *X Rules and Policies*] (listing various policies against posting on certain topics, including policies against hateful conduct, glorifying violence, and child sexual exploitation); *Our Range of Enforcement Options*, X, https://help.twitter.com/en/rules-and-policies/enforcement-options (last visited Feb. 29, 2024) [https://perma.cc/X9AZ-BDQG] [hereinafter *X Enforcement Options*] (listing suspension action as an enforcement action taken in response to behavior that "violates the X Rules").

to (and subject to) a platforms' terms of use.[7] Such terms govern user conduct, which largely comprises what users post online.[8] Moreover, such terms usually lay out the sanctions for violations thereof, which typically include suspensions and indefinite bans.[9] Simply put, a platform's terms-of-use are its laws.[10] Users that offend those laws are subject to punishment.[11]

Recent suspensions of certain high-profile, offending users have garnered widespread discussion over the extent of these Companies' power to limit user speech.[12] Perhaps the most infamous example of a high-profile ban is when Twitter (now X) indefinitely suspended the account of former President Donald Trump.[13] X justified its ban by stating that the former President's posts denying the legitimacy of the 2020 presidential election, taken in light of the then-recent January 6 riots, violated the platform's terms against violent rhetoric.[14] This is far from the only high-profile example. Both X and Facebook suspended the account of United States Congresswoman Marjorie Taylor Greene for

[7] For an example of a platform's binding terms of service, see *Terms of Service*, X, https://twitter.com/en/tos (effective Sep. 29, 2023) [https://perma.cc/7VGT-8VFA] [hereinafter *X ToS*] ("You may use [X and X-provided services] only if you agree to form a binding contract with us . . . .").

[8] *See, e.g.*, *X Rules and Policies*, *supra* note 6 (listing various policies against posting on certain topics, including policies against hateful conduct, glorifying violence, and child sexual exploitation).

[9] *See*, *e.g.*, *X Enforcement Options*, *supra* note 6 (listing account suspension as an enforcement action taken in response to behavior that violates the X's rules).

[10] *See, e.g.*, *X ToS*, *supra* note 7.

[11] *See*, *e.g.*, *X Enforcement Options*, *supra* note 6 (detailing enforcement actions taken in response to behavior that violates X's terms of service, such as issuing content warnings, taking down posts, and suspending user accounts).

[12] For an example of a high-profile suspension that garnered widespread discussion, see Tara Andryshak, *Twitter, Trump, and the Question of the First Amendment*, SYRACUSE L. REV. (Jan. 21, 2021). https://lawreview.syr.edu/twitter-trump-and-the-question-of-the-first-amendment/ [https://perma.cc/6BQ8-7VH9] ("In response to President Trump getting banned [from Twitter], his supporters have argued that this is a violation of the First Amendment.").

[13] *See generally Twitter Permanently Suspends Trump*, *supra* note 5 (explaining the ban of the former President's account and the site's reasons therefor).

[14] *Id.*

violating their terms on spreading misinformation on COVID-19.[15] Instagram banned Robert Kennedy Jr.'s group, Children's Health Defense, for violating their conditions on vaccine misinformation.[16] Both YouTube and TikTok — two of the most prolific video-hosting platforms on the internet — suspended the accounts of Andrew Tate,[17] an influencer whose content containing "extreme misogyny" once reached millions of viewers.[18] Such suspensions combat the very real danger posed by the promulgation of such messaging.[19] But are these suspensions lawful?

Some critics — overlooking the substance and potential harm giving rise to such action — allege that these suspensions impede upon the freedom of speech, a right guaranteed by the First Amendment to the United States Constitution.[20] At first, refuting this argument seems simple enough — because the text of the First Amendment protects against abridgement of speech by the government, and not by private

[15] *Twitter Bans Personal Greene Account for Covid Misinformation*, POLITICO (Jan. 2, 2022, 6:04 PM EST), https://www.politico.com/news/2022/01/02/twitter-bans-greene-covid-526362 [https://perma.cc/KM4D-SYAK]. *See generally COVID-19 Misleading Information Policy*, TWITTER (Dec. 2021), https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy [https://perma.cc/YJH4-Q3XN] (explaining the site's policy on temporary and permanent suspensions for promulgating COVID-19 misinformation).

[16] *Facebook and Instagram Ban US Anti-Vaccine Group*, LE MONDE (Aug. 19, 2022, 7:31 AM GMT), https://www.lemonde.fr/en/international/article/2022/08/19/facebook-instagram-ban-major-us-anti-vaccine-group_5994026_4.html [https://perma.cc/TDH2-JNU9].

[17] Morgan Sung, *Andrew Tate Banned from Youtube, TikTok, Facebook and Instagram*, NBC NEWS, https://www.nbcnews.com/pop-culture/viral/andrew-tate-facebook-instagram-ban-meta-rcna43998 (Aug. 22, 2022, 2:11 PM PDT) [https://perma.cc/LR6T-RMR5].

[18] Shanti Das, *Inside the Violent, Misogynistic World of Tiktok's New Star, Andrew Tate*, GUARDIAN (Aug. 6, 2022, 12:48 PM EDT), https://www.theguardian.com/technology/2022/aug/06/andrew-tate-violent-misogynistic-world-of-tiktok-new-star [https://perma.cc/59NR-F3GS].

[19] See *infra* Part II.C for a discussion on the dangers posed by the online promulgation of such messaging.

[20] *See, e.g.*, David Keating, *To Protect Free Speech, Social Media Platforms Must Stop Their Overreach*, 56 RIPON F., no. 3, Aug. 2022 (arguing that "much of the [assaults on the culture of free speech] [come] from the major social media platforms").

actors,[21] a free-speech analysis is out of the question here. However, times (and speech) have changed since the Constitution's drafting.[22] Namely, communicative technology and methods have evolved immensely, with the advent of smartphones and social media. These advances have led some in the legal community to suggest that the First Amendment should restrict private entities from abridging the freedom of speech.[23] Emboldened by Justice Kennedy's dicta in the recent case *Packingham v. North Carolina*, this movement calls for a reconceptualizing of the First Amendment to include restrictions on private entities in the same manner as governments with regards to abridging free speech.[24] This Note argues against such expansion.

Part I of this Note will provide background on the law governing this issue.[25] Part I.A will briefly discuss the text of the First Amendment and its applicability to the government, state actors, and private entities.[26] Part I.B will discuss the "State Action Doctrine," which sets out a framework for analyzing whether a private entity acts as a state actor (such that the First Amendment would apply).[27] Part I.C will discuss the "Public Forum Doctrine," which posits that a public entity's power to

[21] *See* Nyabwa v. FaceBook, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at *2 (S.D. Tex. Jan. 26, 2018).

[22] *See* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 HUM. RTS. MAG., no. 4, 2018, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/ [https://perma.cc/U7RL-SZXF] ("But, in 2018, speech takes place online much more so than it does in traditional public forums, such as public parks and streets.").

[23] *See, e.g.*, *id.* (arguing that "[t]he [Supreme Court] should interpret the First Amendment to limit the 'unreasonably restrictive and oppressive conduct' by certain powerful, private entities — such as social media entities — that flagrantly censor freedom of expression").

[24] *See* Joseph C. Best, Comment, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the Era of New Media*, 53 TEX. TECH L. REV. 273, 291 (2021) ("Admittedly, this part of [Justice Kennedy's] opinion is mainly dicta, but it gives us, at the very least, important perspective as to where we are heading as a society.").

[25] *See infra* Part I.

[26] *See infra* Part I.A.

[27] *See infra* Part I.B.

limit speech is severely limited in certain traditional spaces for public speech.[28]

Part II of this Note will examine the State Action and Public Forum Doctrines and assess why they are inapplicable to Companies.[29] Part II.A discusses the most recent Supreme Court case on the State Action Doctrine and suggests that Companies do not meet the qualifications of a "state actor" under that Doctrine.[30] Therefore, the First Amendment is inapplicable as a threshold matter. Part II.B distinguishes the forums of cyberspace from the forums of the physical world, to also render the Public Forum Doctrine inapplicable.[31] This Section looks primarily at the contractual relationship between platform users and platform providers.[32] Part II.C asserts policy reasons that favor great, unilateral power on behalf of Companies to regulate speech.[33] In particular, this Section will examine those characteristics of online speech that make online speech particularly dangerous, looking to various contemporary crises as indicative of such danger.[34]

Finally, Part III of this Note will provide a solution, outside of the First Amendment, for regulating the power of Companies to limit speech.[35] While extending First Amendment restrictions to these Companies is erroneous, the policy reasons underlying the extension are valid and well-founded; namely, that such great unilateral discretion leaves open the possibility for arbitrary suspension. This is troubling when the average person has only social media to communicate with the outside world. This Note proposes that legislation mandating a Company's transparency in interpreting and enforcing its terms of service serve the interests of consumers and Companies better than First Amendment restrictions.[36]

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[28] *See infra* Part I.C.

[29] *See infra* Part II.

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

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

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

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

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

[35] *See infra* Part III.

[36] *See infra* Part III.

I. BACKGROUND

A. The First Amendment: To Whom Does It Apply?

The First Amendment to the United States Constitution reads that "Congress shall make no law . . . abridging the freedom of speech . . . ."[37] The language of the First Amendment appears to restrict only Congress's power to abridge speech, with states unbound by this restriction.[38] This used to be the case.[39] However, through the Due Process Clause of the Fourteenth Amendment,[40] the freedom of speech has been incorporated against the states.[41] Who qualifies as a "state actor" for the purposes of the First Amendment? The Supreme Court of the United States has devised the State Action Doctrine to answer that question.

B. The State Action Doctrine: A Threshold Determination in Imposing First Amendment Restrictions on Private Actors

The facial text of the First Amendment suggests that only governmental actors are subject to its restriction, leaving private actors free to abridge speech on their property.[42] In practice, however, courts have extended First Amendment restrictions to private actors, but only when those private actors act as de facto state actors.[43]

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[37] U.S. CONST. amend. I.

[38] *Id.*

[39] *Cf.* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) ("The Constitution was ordained and established by the people of the United States . . . for their own government, and not for the government of individual States.").

[40] The Fourteenth Amendment reads, in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

[41] Gitlow v. New York, 268 U.S. 652, 664 (1925) ("The precise question presented [is] . . . whether the statute, as construed and applied in this case [which criminalized advocacy of criminal anarchy, or the distribution of materials containing advocacy of the same] by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.").

[42] *See* U.S. CONST. amend. I.

[43] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946) (noting that, for example, "the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely" because "these facilities are built and operated primarily to benefit the public

The seminal case on this issue is *Marsh v. Alabama*.[44] There, Gulf Shipbuilding Corporation ("Gulf"), a private entity, came to own and operate the town of Chickasaw as a company town.[45] Gulf owned Chickasaw's streets, sidewalks, residential buildings, and commercial buildings.[46] Gulf employed a sheriff's deputy to keep the peace, and even leased out space to the United States to use as a post office.[47] Chickasaw was private property, but in all other respects appeared to be like any other town.

One day, Grace Marsh began to distribute religious literature near Chickasaw's post office.[48] Marsh was warned that she could not do so without a permit, but she persisted, arguing that Gulf's rule barring solicitation on company property without a permit was not constitutional.[49] Nevertheless, Chickasaw's deputy sheriff arrested her, and Marsh was charged with criminal trespass for violating Gulf's rule on solicitation.[50]

The issue in the case was whether a private entity, owning and operating a town as private property, was outside of the scope of First Amendment restrictions, such that the entity could abridge freedom of speech therein.[51] The Court held that such an entity was not outside of the scope of the First Amendment, stating that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[52] Gulf (notwithstanding its

and since their operation is essentially a public function," and thus "[they] are subject to state regulation").

[44] *See generally id.* (determining that a private company that owned and operated a town was a state actor, such that that company could not restrict free speech on its property).

[45] *Id.* at 502.

[46] *Id.* at 503.

[47] *Id.* at 502-03.

[48] *Id.* at 503.

[49] *Id.*

[50] *Id.* at 503-04.

[51] *Id.* at 502.

[52] *Id.* at 506.

private character) owned and operated Chickasaw as its municipal government.[53] This, the Court found, was de facto state action.[54]

Since *Marsh*, the Court has devised a framework for analyzing whether a private actor acts in such a way that triggers the state action requirement of the First Amendment.[55] The framework, found recently in *Manhattan Community Access Corporation v. Halleck*, comprises three categories where a private actor could be said to be a state actor: (1) when the private entity performs a traditional, exclusive public function, (2) when the government compels the private entity to take a particular action, or (3) when the government acts jointly with the private entity.[56]

C. The Public Forum Doctrine: Where State Actors Are Limited in Abridging Free Speech

The Public Forum Doctrine posits that certain public spaces are areas where the government's power to control, abridge, or censor speech is severely limited.[57] These areas of limited government regulation are designated "public forums."[58] What constitutes a "public forum?" This depends upon whether the contested forum has been devoted to the exercise of protected First Amendment activities, by either "long tradition or . . . government fiat."[59] Quintessential examples of such spaces are streets and parks, which "have immemorially been held in trust for the use of the public and, . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing

[53] *See id.* at 510 (Frankfurter, J., concurring) ("But a company-owned town is a town.").

[54] *See* Molly Shaffer Van Houweling, Sidewalks, Sewers, and State Action in Cyberspace (2001) (unpublished manuscript), https://cyber.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html [https://perma.cc/5DAS-355F].

[55] *See generally* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (detailing three categories under which a private actor could qualify as a state actor for the purposes of the First Amendment).

[56] *Id.* at 1928.

[57] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

[58] *Id.*

[59] *See id.*

public questions."[60] Importantly, the Public Forum Doctrine likely applies to privately-owned streets and parks, so long as those privately-owned forums are (1) physically indistinguishable from public forums, and (2) function like public forums.[61]

Are social media platforms such spaces? Dicta arising out of the recent Supreme Court case *Packingham v. North Carolina* suggests a direction toward an answer.[62] There, the issue before the Court was whether it was constitutional under the First Amendment for a state to ban sex offenders from accessing social networking sites.[63] The Court held that it was not.[64] Justice Kennedy, writing for the opinion, laid the groundwork for his justifications on the following policy grounds: that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak," and that "[t]he Court has sought to protect the right to speak in this spatial context."[65] As a means of extending the Court's protection of speech from physical spaces to cyberspaces, Justice Kennedy noted that "the most important place[] (in a spatial sense) for the exchange of views" is "cyberspace — the 'vast democratic forums of the Internet' in general, and social media in particular."[66] In Justice Kennedy's view, barring access to these forums "prevent[s] . . . user[s] from engaging in the legitimate exercise of First Amendment rights."[67]

The Court stops short of deeming these spaces "public forums" for the purposes of the Public Forum Doctrine, but the language suggests that the internet could be scrutinized under this doctrine.[68] *Packingham*

[60] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[61] *See* Brindley v. City of Memphis, 934 F.3d 461, 469 (2019) (explaining that if a privately owned street is "physically indistinguishable from public sidewalks" and "functions like a public street," it is a traditional public forum).

[62] *See generally* Packingham v. North Carolina, 582 U.S. 98, 104 (2017) (calling social media websites "the most important places . . . for the exchange of views" within a spatial context).

[63] *Id.* at 101.

[64] *Id.* at 109.

[65] *Id.* at 104.

[66] *Id.* at 104.

[67] *Id.* at 108.

[68] For an example of this doctrine being scrutinized in light of Justice Kennedy's opinion, see Best, *supra* note 24.

is a case limited to its facts; nonetheless, some have taken this language to mean that if the private entities owning social media platforms are de facto state actors, then their ability to restrict speech is limited.[69]

II. ARGUMENTS

A. Providing a Forum for Speech Is Not a "Traditional, Exclusive Public Function"

As a threshold matter, if a private actor does not qualify as a state actor for the purposes of the First Amendment, then the First Amendment does not restrict the private actor.[70] This being the case, proponents of extending the First Amendment to social media platforms have employed the State Action Doctrine as a means of establishing these entities as state actors.[71] Namely, that Companies provide a "traditional, exclusive public function."[72] However, this argument is refuted by the Supreme Court's most recent (and most closely on-point) case on the issue.[73]

Halleck is the most immediate Supreme Court case on whether private action constitutes state action, and is indicative of how the Court (or its ideological components) would decide on the issue of Companies as state actors.[74] The issue was whether private operators of public-access television channels were state actors subject to the First Amendment,[75]

[69] *See, e.g.*, *id.* at 293-94 (analogizing social media platforms to the physical public forums of parks, suggesting that, as governments are limited in restricting First Amendment exercise in parks, so too must state actors be limited in restricting First Amendment exercise in online public forums).

[70] *See* U.S. CONST. amend. I.

[71] *See, e.g.*, Best, *supra* note 24, at 291-94.

[72] *See, e.g.*, *id.* at 292 (attempting to argue that the acts taken by private social media entities to police speech constitutes a "traditional, exclusive public function"). If an entity provides a "traditional, exclusive public function," then that entity is a state actor for First Amendment purposes. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).

[73] *See generally Halleck*, 587 U.S. 802 (holding that private owners of public-access television channels were not state actors for the purposes of the First Amendment).

[74] *See id.* at 816-17, 837 (detailing the issues of greatest importance to both the majority and the dissent).

[75] *See id.* at 809-10.

such that their actions in banning individuals from displaying content on those public-access channels constituted a First Amendment violation.[76] If a First Amendment challenge to a social media suspension were to come before the Court, the issue would be analogous. The Court would analyze whether these private operators of internet forums, similarly open to public access, are subject to the First Amendment. On this issue, both the majority and the dissent in *Halleck* are telling — the First Amendment would have no power over them.

Turning first to the majority, a plaintiff would have to prove that government "traditionally *and* exclusively performed the function" of hosting forums akin to social media.[77] Moreover, "[i]t is not enough that . . . government[s] exercised the function in the past, or [it] still does" nor is it enough that "the function serves the public good or the public interest in some way."[78] In this, the Court emphasizes that the government must have traditionally been the only entity to have performed the function.[79] A plaintiff would not be able to overcome this burden of proof.

Focusing on the function of providing social media platforms, this function has largely been the providence of private entities, not governmental ones. The very first online, social-networking platforms were all privately-owned.[80] For example, GeoCities was created by David Bohnett and John Rezner in 1995.[81] GeoCities allowed its users to create their own web pages in thematically organized online "neighborhoods" and allowed other users to view those pages,[82] representing a primitive version of our modern social media. Another example, SixDegrees.com — largely considered to be the "very first

[76] *Id.*

[77] *Cf. id.* at 810 (noting the standard with regards to public-access channels).

[78] *Id.* at 809.

[79] *See id.*

[80] *See infra* notes 81, 83 and accompanying text.

[81] Brian McCullough, *David Bohnett, Founder of Geocities*, INTERNET HISTORY PODCAST (May 11, 2015), http://www.internethistorypodcast.com/2015/05/david-bohnett-founder-of-geocities/ [https://perma.cc/EUW8-MQJF].

[82] Benj Edwards, *Remembering GeoCities, the 1990s Precursor to Social Media*, HOW-TO GEEK (Aug. 24, 2021, 1:31 PM EDT), https://www.howtogeek.com/692445/remembering-geocities-the-1990s-precursor-to-social-media/ [https://perma.cc/D2G8-GJJN].

social networking site"[83] — was created by Andrew Weinreich in 1996 and operated by Mr. Weinreich's private company Macroview.[84] This trend of private ownership is prevalent throughout social media's brief history and continues into the modern day. Myspace and Friendster, two of the most popular progenitors of modern social media, were privately-owned.[85] Finally, the most prominent social media platforms of today — Facebook,[86] Instagram,[87] X (formerly Twitter),[88] YouTube,[89] and Tiktok[90] — are all privately owned and operated. Given this exclusive record of private ownership, the argument that government has "traditionally and exclusively" performed the function of providing online social media platforms surely fails.

Were a plaintiff to assert the function more generally — that the function is providing a public forum, and not merely social media specifically — it cannot be said that this is a function "traditionally and exclusively" performed by the government. In fact, the *Halleck* majority says as much: "Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed," citing examples such as community bulletin boards and "open mic nights" at comedy clubs.[91]

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[83] Chenda Ngak, *Then and Now: A History of Social Networking Sites*, CBS NEWS (July 6, 2011, 4:55 PM), https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/ [https://perma.cc/S44N-525T].

[84] *Id.*; *see* Fahim Arsad Nafis, *World's First Social Media*, MEDIUM (Mar. 25, 2021), https://medium.com/tech-teaser/worlds-first-social-media-1088bc351e01 [https://perma.cc/5Y42-XZ5U] (noting that SixDegrees.com was launched by Macroview).

[85] *See* Ngak, *supra* note 83.

[86] *See* Nathan Reiff, *5 Companies Owned by Facebook (Meta)*, INVESTOPEDIA, https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp (last updated Oct. 16, 2022) [https://perma.cc/U9NV-Y29P].

[87] *See id.*

[88] *See X*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Twitter (last updated Jan. 26, 2024) [https://perma.cc/9ECE-RCJ6].

[89] *See* Michael Arrington, *Google Has Acquired YouTube*, TECHCRUNCH (Oct. 9, 2006, 1:25 PM PDT), https://techcrunch.com/2006/10/09/google-has-acquired-youtube/ [https://perma.cc/3TS3-5UW8].

[90] *See Our Products*, BYTEDANCE, https://www.bytedance.com/en/products (last visited Jan. 19, 2023) [https://perma.cc/Q7XF-5QSU].

[91] Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 812 (2019).

Companies would also fail to qualify as state actors under the standard articulated by Justice Sotomayor's dissent. Justice Sotomayor (joined by three other Justices) instead focused upon the agency relationship existing between the government and the private operator of the public-access channel.[92] Because the private operators were operating the public-access channels in the place of (and at the direction of) the government, and because the government would have necessarily been bound by the First Amendment, the private operators would also have been so bound.[93] This agency relationship between government and private operators is absent regarding social media platforms. These platforms were not conceived at the direction of government, but rather as initiatives by private citizens.[94] The agency relationship between government and a private operator that was so crucial to Justice Sotomayor's dissent is wholly absent regarding Companies. Companies neither perform a "traditional and exclusive" public function nor are agents of government; therefore, it is highly likely that the Court would not find these Companies to be state actors.

A nontrivial counterargument arises upon close examination of the Court's language concerning the threshold of performing a public function. Namely, the Court notes that "*merely hosting* speech . . . is not a traditional, exclusive public function and *does not alone* transform private entities into state actors subject to First Amendment constraints."[95] Arguably, this qualifying language leaves open the possibility that if a private entity went beyond "merely hosting speech," then that private entity could reach the threshold of state action. Those who argue this point claim that Companies have gone beyond "merely

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[92] *See id.* at 837.

[93] *Id.* at 821-22.

[94] *See, e.g.*, *Facebook Launches*, HISTORY, https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg#:~:text=On%20February%204%2C%2020 04%2C%20a,that%20was%20only%20the%20beginning (last visited Oct. 26, 2022) [https://perma.cc/RJ54-E8QN] ("Mark Zuckerberg launches The Facebook, a social media website he had built in order to connect Harvard students with one another."); Amanda MacArthur, *The Real History of Twitter, In Brief*, LIFEWIRE, https://www.lifewire.com/history-of-twitter-3288854 (last updated Nov. 25, 2020) [https://perma.cc/A6DM-LNMG] ("Twitter began as an idea that Twitter co-founder Jack Dorsey had in 2006").

[95] *Halleck*, 139 S. Ct. at 812 (emphasis added).

hosting speech" by "facilitating and policing [speech]" on their platforms.[96] But even these functions of facilitating and policing speech do not qualify as functions "traditionally and exclusively" performed by government because private entities have done so as well.

As a seminal example, the Supreme Court recognized these practices as committed by private entities in *Lloyd Corporation Limited v. Tanner*.[97] There, Lloyd Corporation owned a large shopping mall in Portland, Oregon.[98] The mall not only contained stores, but also gardens, a skating rink, and most important for the purposes of free speech, an auditorium.[99] Lloyd Corporation rented out its auditorium for use by civic and charitable organizations, and even allowed presidential candidates to speak there,[100] thereby "facilitating" speech. Lloyd Corporation "policed" speech not only by enacting a policy against distributing handbills, but also by "strictly enforc[ing]" it.[101] Facilitating and policing speech (among other conduct) are necessary private property rights.[102] Property rights endow owners of private property with rights incidental to such ownership.[103] Chief among these incidental rights is the right to exclude others from one's property.[104] Necessarily, this right enables a property owner to control what occurs on their property under threat of ejection.[105] Therefore, an owner of private property may facilitate and police what occurs thereupon, including speech.[106] Thus, not even the functions of facilitating and policing speech are the "traditional and exclusive" providence of government.

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[96] *E.g.*, Best, *supra* note 24, at 293.

[97] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972).

[98] *Id.* at 553.

[99] *Id.*

[100] *Id.* at 555.

[101] *Id.*

[102] *See, e.g.*, 63C AM. JUR. 2D *Property* § 31 (2022) (noting that "important rights flowing from property ownership include the right to manage its use by others").

[103] *Id.*

[104] *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 149-50 (2021).

[105] *See* 1 PREMISES LIABILITY 3D § 3L:2 (2022).

[106] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567-68 (1972).

B. Governance by Contract: One Key Difference Between Physical and Cyber Spaces

In his concurrence to *Packingham* — the case in which the Court came close to declaring the internet a public forum — Justice Alito agreed with the Court's ultimate conclusion but criticized its reasoning.[107] Justice Alito noted that the Court's "undisciplined dicta" "equat[ing] the entirety of the internet with public streets and parks" could have far-reaching implications on free speech law where "there are important differences between cyberspace and the physical world."[108] Justice Alito's worry was primarily aimed at the ability of states to regulate sex offenders' access to social media,[109] but the point raised is no less valid on the issue of whether social media platforms constitute public forums.

One key difference between cyberspace and the physical world is the relationship between a platform provider and a platform user. In physical spaces, that relationship is governed by public laws; people must follow such laws.[110] In cyberspace, however, that relationship is voluntary and contractual — in consideration of being able to use a platform, a user agrees to surrender their rights to private moderation.[111] As a relationship governed by contractual terms, it is a relationship also governed by contractual principles. Most important here is a party's freedom-of-contract — that is, the "freedom to determine whether or not to enter into a contractual relationship."[112] This voluntary surrendering of rights over cyberspace, as opposed to the involuntary surrendering of rights that takes place in the real world, is such that would render the Public Forum Doctrine inapplicable.

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[107] Packingham v. North Carolina, 582 U.S. 98, 110 (2017) (Alito, J., concurring) ("I cannot join the opinion of the Court . . . .").

[108] *Id.* at 110, 118.

[109] *Id.* at 114 ("The fatal problem for [the law] is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child.").

[110] *See, e.g.*, *The Consequences of Breaking the Law*, LAWS, https://criminal.laws.com/criminal-law/breaking-the-law (last updated Dec. 22, 2019) [https://perma.cc/932Z-9TTB] (noting that punishments for conviction of a criminal offense include "community service, a fine, or imprisonment").

[111] *See, e.g.*, *X ToS*, *supra* note 7.

[112] *In re* Greater Se. Cmty. Hosp. Found., Inc., 267 B.R. 7, 17 (Bankr. D.C. 2001).

This is because the Public Forum Doctrine (and indeed the First Amendment) is predicated upon the fact that individuals have no choice but to exist in society and be subject to government's laws.[113] The right to free speech represents a necessary safeguard[114] against a power that individuals have no choice but to submit to.[115] By contrast, social media platforms are optional services — one need not use social media if one does not want to.[116] Additionally, if one enters into a contract to use these services and breaches said contract, the breaching party may not cry foul when enforcement of the contract is exercised. Indeed, "the very essence of [the] freedom [to] contract is the right of the parties to strike . . . bad bargains."[117] For example, to a social media user who wishes to espouse racism online, the contract under which they are subsequently banned merely represents a "bad bargain," not an infringement of rights incidental to citizenship. Because social media services are optional, and contracts for their use are freely entered into, the concern of necessary citizenship that underlies rights is absent. Thus, the extension of First Amendment rights to privately-owned cyberspaces is erroneous.

Nevertheless, the freedom-to-contract has its limits. Although bad contracts are not *per se* unenforceable, unconscionable contracts may

[113] *See* THOMAS HOBBES, LEVIATHAN 79 (Jonathan Bennett ed., 2017) (1651), https://www.earlymoderntexts.com/assets/pdfs/hobbes1651part2.pdf [https://perma.cc/N79W-WJHY] ("The *only way* to establish a common power that can defend them from the invasion of foreigners and the injuries of one another, and thereby make them secure enough to be able to nourish themselves and live contentedly through their own labours and the fruits of the earth, is to confer all their power and strength on one man, or one assembly of men, so as to turn all their wills by a majority vote into a single will." (emphasis added)).

[114] *See* THE ANTIFEDERALIST NO. 84 (Brutus) ("But rulers have the same propensities as other men; they are as likely to use the power with which they are vested, for private purposes, and to the injury and oppression of those over whom they are placed . . . . It is therefore as proper that bounds should be set to their authority . . . .").

[115] *See* HOBBES, *supra* note 113.

[116] *See, e.g.*, Lucy Fuggle, *Social Media Is Optional — On Deciding to Do Things Differently*, LIVE WILDLY (Mar. 25, 2022), https://www.livewildly.co/blog/social-media-is-optional/ [https://perma.cc/BLU2-B2KQ] ("It's nuts to presume that everyone has to be on social media. And yet, that has become the assumption.").

[117] Gray v. Am. Express Co., 743 F.2d 10, 17 (D.C. Cir. 1984).

be.[118] If a party validly enters into a contract, courts may nonetheless refuse to enforce such an agreement if the agreement is found to be unconscionable.[119] Unconscionability may warrant scrutiny as to the extent that these contracts restrict speech.

To be unconscionable, a contract must be both procedurally and substantively unconscionable.[120] Procedural unconscionability is assessed by examining the contract formation process and the alleged lack of meaningful choice.[121] Factors include looking specifically at whether deceptive tactics were employed, the use of fine print, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power.[122] Substantive unconscionability arises when terms of a contract are "one-sided, oppressive, or unjustly disproportionate."[123] Under these standards, are social media contracts unconscionable? Although an unconscionability analysis is fact-specific,[124] a court would be hard pressed to find unconscionability with regards to the contracts of the most popular social media platforms.

X's terms and services of use, for example, could hardly be said to be substantively unconscionable. X reserves the right to remove "[c]ontent that violates the User Agreement."[125] What type of content violates the User Agreement? Content that, *inter alia*, features "visual depictions of a child engaging in sexually explicit . . . acts,"[126] "threaten[s], incite[s], glorif[ies], or express[es] desire for violence or harm,"[127] or "directly

[118] 8 WILLISTON ON CONTRACTS § 18:1 (4th ed. 2023).

[119] *Id.*

[120] DEFENSE AGAINST A PRIMA FACIE CASE § 2:13 (rev. ed. 2023).

[121] *E.g.*, Ashford v. PricewaterhouseCoopers LLP, 954 F.3d 678, 684-85 (4th Cir. 2020).

[122] *E.g.*, *id.*

[123] *E.g.*, Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 552 (Haw. 2017) (internal quotations omitted).

[124] Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995).

[125] *X ToS*, *supra* note 7.

[126] *Child Sexual Exploitation Policy*, X (Oct. 2020), https://help.twitter.com/en/rules-and-policies/sexual-exploitation-policy [https://perma.cc/66GD-4UZ5].

[127] *Violent Speech Policy*, X (Oct. 2023), https://help.twitter.com/en/rules-and-policies/violent-speech [https://perma.cc/A55K-5BGV].

attack[s] other people on the basis of" identity.[128] X's banning of such behavior is not oppressive — rather, through these terms, it merely attempts to maintain decency on its forums. Nor are these terms "so one-sided that no one in his right mind would agree to" them.[129] Similar terms are found across Facebook[130] and YouTube.[131] These terms, then, on speech are not substantively unconscionable.

But what about procedural unconscionability? Being that many social media users are likely not forced into using social media, as well as there being ample choice in social media platforms, the most relevant factor is whether the clickwrap nature of account creation is unconscionable.[132] Social media websites traditionally do not feature their terms of use on their account creation pages — normally, they provide hyperlinks to their terms of use in their account creation pages.[133] Is this separation between assent to a contract and the contract's terms unconscionable?

Relevant factors for determining assent to such an agreement include conspicuousness of notice of terms, clarity of language indicating that contract terms apply to the service, express assent to terms, and placement of notice of contract terms.[134] Applied to a site like

[128] *Hateful Conduct*, X (Apr. 2023), https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy [https://perma.cc/Y6NE-RNYU].

[129] Sanderson v. Sanderson, 245 So. 3d 421, 427 (Miss. 2018).

[130] *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php (last revised July 26, 2022) [https://perma.cc/PMP6-KHZP].

[131] *See Community Guidelines*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Oct. 28, 2022) [https://perma.cc/67K2-K3MP].

[132] "Clickwrap" refers to an "online agreement that users agree to by clicking a button or checking a box that says 'I agree.'" *Definition: What Is a Clickwrap Agreement?*, IRONCLAD, https://ironcladapp.com/journal/contract-management/what-is-a-clickwrap-agreement/ (last visited Oct. 28, 2022) [https://perma.cc/56MD-XU69].

[133] *E.g.*, *Sign Up*, FACEBOOK, https://www.facebook.com/ (last visited Oct. 28, 2022) [https://perma.cc/8AWS-ZLHU] (an example of a login/account creation page containing a hyperlink for "terms").

[134] *Cf.* Meyer v. Uber Techs., Inc., 868 F.3d 66, 74-75 (2d Cir. 2017) (noting the factors relevant for determining whether a consumer could knowingly assent to a "clickwrap" agreement).

Facebook,[135] it cannot be said that the user did not assent, and thus did not know what they were getting into. In this way, the contract was not procedurally unconscionable. While the conspicuousness and placement of the notice are debatable (the size of the notice is in small font and placed right before the "Sign Up" button) the clarity of language indicating assent and the fact that assent is express weigh significantly in favor of assent.[136] Facebook tells its prospective users that "[b]y clicking Sign Up, [they] agree to our Terms."[137] Users have a duty to read the terms of their agreement, thereby negating an argument that clickwrap agreements do not provide adequate notice of the content of terms.[138] Because there is assent to these terms, such terms are not procedurally unconscionable.

Additionally, Congress's passing of Section 230 of the Communications Decency Act (the "Act") suggests Congress's tacit approval of allowing private forum owners to regulate "objectionable" speech.[139] This provides further support against a finding of unconscionability. This is because the Act shields "provider[s] of . . . interactive computer services[]" from liability for "action[s] voluntarily taken in good faith to restrict . . . availability of material that the provider considers to be obscene . . . excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected."[140] Courts have interpreted "interactive computer services" to include social media platforms and social

[135] *See generally Create a New Account*, FACEBOOK, https://www.facebook.com/reg/ (last visited Oct. 18, 2023) [https://perma.cc/4PV3-GDNJ] (Facebook's sign-up page for account creation).

[136] *Id.* ("By clicking Sign Up, you agree to our Terms, Privacy Policy and Cookies Policy.").

[137] *Create a New Account*, *supra* note 135.

[138] *See* Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) ("Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms.").

[139] *See generally* 47 U.S.C. § 230(c)(2) (absolving "provider[s] or user[s] of an interactive computer service" from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, *whether or not such material is constitutionally protected*" (emphasis added)).

[140] *Id.*

networks.[141] When these Companies ban users for violating their terms against violence, for example, these Companies are restricting the availability of material they deem to be obscene, excessively violent, or otherwise objectionable, even though such speech may be constitutionally protected. Such is their statutorily-approved prerogative — Congress intended that these Companies have the capacity to "self-police the Internet."[142] Thus, a court would truly be hard-pressed to find the exercise of these powers to be unconscionable.

C. Unilateral Private Action Is Key to Policing Misinformation Online and Mitigating Its Effects

Companies play a vital role in combatting misinformation and mitigating its damaging effects.[143] In an era when it is all too easy to lie online[144] — and too easy to believe those lies[145] — someone must step in to enforce the truth. The government's ability to regulate lies and restrict misinformation is limited.[146] The burden, then, falls upon Companies, as misinformation is spread most prominently on their platforms.

Misinformation is not a new phenomenon — it has long pervaded media.[147] However, the internet (and social media along with it) has

[141] *E.g.*, Caraccioli v. Facebook, Inc., 700 Fed. App'x 588, 590 (9th Cir. 2017).

[142] Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1163 (N.D. Cal. 2017).

[143] *See, e.g.*, Queenie Wong, Andrew Morse & Richard Nieva, *Here's How Companies Are Fighting Election Misinformation*, CNET (Nov. 7, 2020, 10:14 AM PST), https://www.cnet.com/news/politics/heres-how-social-media-companies-are-fighting-election-misinformation/ [https://perma.cc/LS5U-8SRM] (explaining that Companies play a major role in combating election misinformation).

[144] *See* Dan Misener, *Everyone Lies On the Internet, According to New Research*, CBC NEWS (Aug. 24, 2016), https://www.cbc.ca/news/science/misenere-internet-lies-1.3732328 [https://perma.cc/24ZK-YAUW].

[145] *See* Paul C. Bauer & Bernhard Clemm von Hohenberg, *Believing and Sharing Information by Fake Sources: An Experiment*, 38 POL. COMMC'N 647, 663 (2021).

[146] *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) (noting that "[t]he Government has not demonstrated that false statements generally should constitute a new category of unprotected speech").

[147] Dominique Brossard, Isabelle Freiling, Dietram A. Scheufele & Nicole M. Krause, *Believing and Sharing Misinformation, Fact-Checks, and Accurate Information on Social Media: The Role of Anxiety During COVID-19*, 25 NEW MEDIA & SOC'Y 141, 143 (2023).

presented unique challenges that bolster not only the promulgation of misinformation, but also its believability.[148] Several characteristics of the internet contribute to this: social media providing misinformation a large platform;[149] anonymity online;[150] and a lack of user accountability.[151] These factors, combined with the government's limited ability to restrict misinformation, necessitate the kind of unilateral action taken by Companies to tackle misinformation.

Left unchecked, misinformation online leads to real problems offline. Two recent and chilling examples serve this point. First, unsupported lies that the 2020 presidential election was fraudulent gave rise to the January 6 Capitol Riot.[152] The use of the hashtag "#StopTheSteal" preceded the election, peaked on November 5, and was steady leading up to the insurrection.[153] Second, unfounded allegations that COVID-19 was intentionally caused by the Chinese government led to a wave of anti-Asian hate crimes.[154] Anti-Asian posts and hashtags correlate to this

[148] *See id.* at 143-44.

[149] *See* Chris Meserole, *How Misinformation Spreads on Social Media — And What to Do About It*, BROOKINGS INST. (May 9, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/ [https://perma.cc/BW57-L4WG].

[150] Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/ [https://perma.cc/E2H4-7QH2].

[151] Jonathan Greene, *The Lack of Accountability in the Online Writing World Is Mind-Blowing*, MEDIUM (Jan. 24, 2021), https://medium.com/the-death-of-online-writing/the-lack-of-accountability-in-the-online-writing-world-is-mind-blowing-26b2b472785d [https://perma.cc/JZC4-F6UT].

[152] Chris Nichols, *Can You Handle the Truth?: How Misinformation Fueled the January 6 Capitol Insurrection*, CAPRADIO (July 9, 2021), https://www.capradio.org/articles/2021/07/09/can-you-handle-the-truth-how-misinformation-fueled-the-january-6-capitol-insurrection/ [https://perma.cc/6LFC-XER5].

[153] Atlantic Council's DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/ [https://perma.cc/Q6P8-E94N].

[154] *Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide*, HUM. RTS. WATCH (May 12, 2020, 3:19 PM EDT), https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide [https://perma.cc/ZT5B-KNPL].

wave.[155] Both phenomena can be traced as the products of misinformation online. Addressing misinformation means having the mechanisms to remove it and stop its promulgation, as Companies have the unfettered capacity to do.

III. SOLUTION

Stripping Companies of the ability to police speech that the government cannot regulate (e.g., misinformation[156] and potentially inciteful language[157]) is not constitutionally compelled, for the reasons that this Note has already discussed.[158] However, some of the policy reasons underlying the argument for extending the First Amendment to Companies are not without merit. Indeed, the proliferation and accessibility of social media has provided common people with the ability to share information to an audience unprecedented in scope.[159] Billions of people use social media.[160] For many, social media has become the preferred method of social interaction over face-to-face communication.[161] For others, social media may be the only way to connect with the larger world and learn from others' lived experience.[162] With these factors in mind, the unilateral capacity for Companies to ban whomever they choose as a result of disfavored speech raises concerns.

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[155] Andrea Salcedo, *Racist Anti-Asian Hashtags Spiked After Trump First Tweeted "Chinese Virus," Study Finds*, WASH. POST (Mar. 19, 2021, 7:17 AM EDT), https://www.washingtonpost.com/nation/2021/03/19/trump-tweets-chinese-virus-racist/ [https://perma.cc/UF4K-8236].

[156] *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) ("The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech . . . .").

[157] *See* Hess v. Indiana, 414 U.S. 105, 108 (1973).

[158] *See supra* Part II.C.

[159] *See* Stefan Stieglitz & Linh Dang-Xuan, *Social Media and Political Communication: A Social Media Analytics Framework*, 3 SOC. NETWORK ANALYSIS & MINING 1277, 1277 (2013).

[160] Chaffey, *supra* note 2.

[161] *See, e.g.*, Roger Patulny & Claire Seaman, *"I'll Just Text You": Is Face-to-Face Social Contact Declining in a Mediated World?*, 53 J. SOCIO. 285, 298 (2017) (finding that "[f]ace-to-face contact is declining as mediated contact is increasing," at least in Australia).

[162] *See, e.g.*, *How Rural Adolescents Can Benefit from Social Media*, SOVA (July 11, 2019), https://sova.pitt.edu/social-media-guide-how-rural-adolescents-can-benefit-from-social-media [https://perma.cc/JTN4-CCG3] ("Sometimes, it can feel like living in small towns or rural areas can be kind of lonely. The Internet has changed that.").

One such concern are bans that may be arbitrary or capricious.[163] The process by which users or their content is banned is an opaque one.[164] For one, the process for determining account violations is, in part, a human one — "Decisions of whether a post or account has violated some code of conduct rests with a handful of fallible humans."[165] Also, neither guidance nor justification are provided regarding "how rules are interpreted and the reasoning behind why posts violate" social media rules.[166] These characteristics of the decision-making process leave moderators with great discretion to suspend accounts they may find to violate rules of their platforms, even when a user has not violated any such rules.[167] Thus, a legitimate concern arises: Companies can ban users or their content under color of enforcing their guidelines, even when such users or their content are contextually innocuous or even valuable.[168] Furthermore, Companies may suppress users or their content without notifying those users (a practice known as "shadowbanning"), a practice that disproportionately impacts marginalized communities.[169] This problem, however, can be addressed

[163] *See* Tyler Lane, *The Public Forum Doctrine in the Modern Public Square*, 45 OHIO N.U. L. REV 465, 473 (2019).

[164] *See* Katie Stoughton & Paul Rosenzweig, *Toward Greater Content Moderation Transparency Reporting*, LAWFARE (Oct. 6, 2022, 8:01 AM), https://www.lawfaremedia.org/article/toward-greater-content-moderation-transparency-reporting [https://perma.cc/3P95-98QD].

[165] Lane, *supra* note 163.

[166] *Id.*

[167] *See, e.g.*, Samantha Cole, *Instagram Apologizes for Randomly Suspending Accounts*, VICE (Oct. 31, 2022, 8:32 AM), https://www.vice.com/en/article/z348m4/instagram-suspended-banned-account-lost- [https://perma.cc/6746-A2AJ] ("Nuking accounts without clear cause is a common occurrence for marginalized Instagram users, especially sex educators and sex workers, even when they haven't broken any guidelines.").

[168] *See, e.g.*, Abigail Moss, *"Such a Backwards Step": Instagram is Now Censoring Sex Education Accounts*, VICE (Jan. 8, 2021, 6:56 AM), https://www.vice.com/en/article/y3g58m/instagram-rules-censoring-sex-educators [https://perma.cc/UZG7-AKAT] (providing an example of a social media site banning users for providing informational content, here sex education).

[169] Callie Middlebrook, The Grey Area: Instagram, Shadowbanning, and the Erasure of Marginalized Communities (Feb. 17, 2020) (unpublished paper) (on file with the Social Science Research Network), https://deliverypdf.ssrn.com/delivery.php?ID=661105029067074099077094127125103075036068033079045035081064017018024120 12

through greater transparency. Companies can exercise greater transparency in their moderation policies to decrease arbitrary or capricious bans while still regulating content in their current capacity.

Mandating transparency for how Companies interpret and enforce their policies would serve the interests of consumers (in not being subject to arbitrary bans) and Companies (in being able to self-police the internet). For Companies, transparency laws would merely mandate, for example, providing detailed explanations of content moderation practices to regulators generally[170] or explaining to a user in "thorough" detail the reason for their ban and how the Company was made aware of it.[171] In fact, Florida already requires that Companies provide a "thorough rationale" to users when they are censored.[172] Transparency mandates would not, by contrast, force Companies to make certain moderation decisions in violation of their First Amendment rights.[173] Transparency mandates would also not restrain Companies in the way that the First Amendment restrains government. Rather, the "light-handed government action" of mandating transparency[174] would be a relatively unobtrusive way of regulating Companies for the sake of consumer protection, while still allowing Companies to police their platforms in the way that they wish.

For consumers, mandatory transparency would serve two notable functions: providing notice to consumers about the specifics of policy enforcement and providing moderators with guidance as to appropriate policy enforcement. Disclosing the details of moderation policy (either

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[170] *See, e.g.*, A.B. 587, ch. 269, 2021–2022 Reg. Sess., 2022 Cal. Stat. 4632, 4634 (mandating an annual report from social media companies to the California Attorney General that provides, *inter alia*, a "detailed description of content moderation practices used by the social media company for that platform").

[171] FLA. STAT. § 501.2041(3)(b)-(d) (2023).

[172] *Id.*

[173] *See* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1205 (2022) (noting that the option to tell internet services what they "must, can, or cannot publish" is "unconstitutional").

[174] ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 5-6 (2007).

before or after a moderation action is taken) will provide users with notice as to: 1) specific potential conduct or speech that is subject to moderation;[175] or 2) why their content or account was moderated.[176] Notice is absent from current moderation processes,[177] and detailed explanations as to why a moderation action was taken (such as X's explanation of its suspension of Donald Trump) are the exception, not the rule.[178] In addition, Companies recording detailed rationales as to why moderation actions are taken serve the purpose of providing moderators with moderation standards. This is another issue that plagues moderation and lends itself to the feeling that bans may be arbitrary or capricious.[179] By having to provide detailed rationales as to why moderation actions will be or were taken, these notices may provide the functional equivalent of a judicial opinion or administrative guidelines. That is, notices provide moderators with quasi-precedential guidelines regarding moderation action. These two characteristics of having to provide notice would work to rectify the perceived arbitrariness that currently underlies moderation.[180]

Admittedly, mandating that a Company provide "thorough" notice (as required by Florida's transparency law[181]) could become onerous on a Company, given the sheer volume of content moderation decisions it is forced to make. This burden could be lessened if AI and automation were incorporated into the "providing notice" stage of content

[175] TEX. BUS. & COM. CODE ANN. § 120.052 (2023).

[176] FLA. STAT. § 501.2041(3)(b)-(d) (2023).

[177] Lane, *supra* note 163.

[178] For an example of a popular social media platform banning users seemingly without notice, see Georgina Smith, *TikTok Users Report Accounts Being Permanently Banned "For No Reason,"* DEXERTO (Oct. 8, 2022, 1:46 PM), https://www.dexerto.com/entertainment/tiktok-users-report-accounts-being-permanently-banned-1953119/ [https://perma.cc/B8EB-YHAM], which reported that multiple TikTok users were banned "for no reason", and that "it's not clear" why the accounts were banned, only that the moderated users received the vague notification that their "account was permanently banned due to multiple violations of our community guidelines."

[179] *See* Lane, *supra* note 163.

[180] *See* Mark MacCarthy, *Transparency Is Essential for Effective Social Media Regulation*, BROOKINGS INST. (Nov. 1, 2022), https://www.brookings.edu/blog/techtank/2022/11/01/transparency-is-essential-for-effective-social-media-regulation/ [https://perma.cc/9GBT-VKYG] (noting that "[d]isclosure and due process are so intimately linked").

[181] FLA. STAT. § 501.2041(3)(b)-(d).

moderation. This is not to claim that AI and automation are not already a part of providing users with notice.[182] However, overhauling that technology so that it can learn, categorize, and (most importantly) reflect to the user why moderation took place could lessen the human cost of providing adequate notice.

Furthermore, although the constitutionality of such mandated transparency has been called into doubt,[183] such criticism is debatable. Indeed, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling" Companies' First Amendment exercise.[184] Moreover, disclosure requirements must be reasonably related to a legitimate state interest.[185] This is not a point of contention — parties litigating the issue of the constitutionality of disclosure requirements generally agree that "enabl[ing] users to make an informed choice" about platform use is a legitimate state interest.[186] That same interest will be assumed to be legitimate here. And while mandatory disclosure requirements could be "unduly burdensome" by "chilling" Companies' First Amendment rights, this is an issue rectified by appropriate tailoring.

For example, in *NetChoice, LLC v. Paxton*, the Fifth Circuit held that the First Amendment is not violated when disclosure requirements are tailored in at least three ways.[187] First, the government may mandate disclosure about Companies' moderation practices because the disclosures themselves would not be unduly burdensome on speech.[188]

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[182] *See, e.g., How Instagram Uses Artificial Intelligence to Moderate Content*, INSTAGRAM, https://help.instagram.com/423837189385631/?helpref=uf_share (last visited Apr. 3, 2024) https://perma.cc/9J4A-H35C ("Artificial Intelligence (AI) technology is central to our content review process").

[183] *See generally* NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021) (A suit initiated by plaintiffs on the grounds that Texas' mandatory disclosure laws for social media violated Companies' First Amendment rights).

[184] NetChoice, LLC v. Paxton, 49 F.4th 439, 485 (5th Cir. 2022) (quoting Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

[185] *Id.*

[186] *See id.*

[187] *See id.* ("Therefore, the only question is whether the State has carried its burden to show that the three categories of disclosures required [by Texas' mandatory disclosure law] are not unduly burdensome.").

[188] *See id.* at 485-86.

Rather, what would chill speech is a Company's fear of litigation pursuant to enforcement of these disclosure laws.[189] Second, the government may mandate transparency reports for the same reason.[190] While no doubt burdensome to Companies in some technical or logistical capacity, transparency reports would also not necessarily chill speech.[191] Finally, the government may impose complaint-and-appeal requirements for moderated users, so long as the requirement is "substantially similar" to what Companies already have in place regarding a complaint-and-appeal process.[192] The *NetChoice* decision, then, provides an insight into the ways in which disclosure requirements could adhere to the First Amendment's Free Speech promise.[193]

Additionally, critics assert that dicta in *Herbert v. Lando* is dispositive: laws that "subject[] the editorial process to private or official examination . . . to serve some general end such as the public interest" would not survive constitutional scrutiny.[194] This ignores key distinctions between Companies here and the respondents in that case. In *Lando*, respondents were "traditional publisher[s]," and that case concerned transparency into how "editor[s] selected, composed, and edited a particular story."[195] Here, however, Companies neither select, nor compose, nor edit "a particular story." They are not "traditional publishers," as were at bar in *Lando*.[196] *Lando*, then, is inapplicable.[197]

Mandating transparency can be an effective regulatory tool when wielded correctly.[198] In the public sphere, it creates accountability.[199] Users know better what they may or may not do, and moderators have

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *Id.* at 487.

[193] *See id.* at 485-87.

[194] *E.g.*, Goldman, *supra* note 173, at 1215.

[195] *Paxton*, 49 F.4th at 488.

[196] *Id.* at 488.

[197] *See id.* ("Put differently, the question in *Herbert* was whether the Court should craft a rule protecting *activities the Platforms do not even engage in* . . . .").

[198] *See* MacCarthy, *supra* note 180 (explaining that without extensive specifications and enforcement governing social media transparency, "disclosures to users might well be useless").

[199] *See id.*

the tools to moderate in an effective and informed manner. Companies under mandated-transparency regimes would be subject to the court of public opinion. If enough users disagree with a given policy or process and exercise their available methods of protest (i.e., posting about it or abstaining from use of the platform), then a Company may feel compelled to rectify its policy or process. In such a scenario, the government plays no part in changing a Company's private guidelines — rather, that change would be solely between a Company and its consumers. Where consumer protection is concerned, a lack of transparency is a disease[200] — to this, "[s]unlight is said to be the best of disinfectants."[201]

CONCLUSION

Extending First Amendment restrictions to Companies is erroneous on three grounds. First, Companies are not "state actors" for First Amendment purposes because they do not perform a "traditional and exclusive public function" in hosting speech.[202] Second, the contractual relationship governing social media users and Companies renders the First Amendment inapplicable because the principle of free-speech rights is not implicated where freedom-of-contract is concerned.[203] Finally, Companies must have a strong, unilateral ability to regulate objectively harmful speech that the government cannot, to combat the real-world effects of such speech.[204] Where there are significant policy considerations regarding the unilateral power of Companies to regulate speech, mandated transparency is a better bulwark against arbitrary restrictions than is extending the First Amendment.[205] Mandated transparency balances the public's interest in protecting themselves

[200] *See, e.g.*, Mekela Panditharatne, *Law Requiring Social Media Transparency Would Break New Ground*, BRENNAN CTR. FOR JUST. (Apr. 6, 2022), https://www.brennancenter.org/our-work/research-reports/law-requiring-social-media-transparency-would-break-new-ground [https://perma.cc/K89Z-7W65] (providing examples of adverse practices by social media companies when there is a lack of transparency).

[201] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

[202] *See supra* Part II.A.

[203] *See supra* Part II.B.

[204] *See supra* Part II.C.

[205] *See supra* Part III.

from arbitrary suspensions, and Companies' interests in being able to regulate objectionable speech.[206]

[206] *See id.*