SECTION 230 REFORM, LIBERALISM, AND THEIR DISCONTENTS

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ABSTRACT

The Section 230 debate is a proxy for reevaluating constitutional fundamentals. The modern right and the modern left, both attacking Section 230, have abandoned liberalism, together with free speech, public private divide, and the politics of neutrality. Instead of believing in First Amendment value pluralism, each side of the spectrum wishes to realize their own positive normative vision for the political community which, today, is largely defined in the realm of digital culture. Each side recognizes the political other as an enemy to their own utopia, wishing to control, censor, or simply become sovereign thereover. These existential politics of the "culture war" are formally circumscribed by liberal constitutionalism, including the state action doctrine. Regardless of any formal change of the First Amendment interpretation, the government will continue to exercise soft pressures on platforms, thus outsourcing censorship, and creating a novel regulatory dialectic of pressure and cooperation. The government, to become truly sovereign, realize its normative vision, and exclude the other, needs to delegate part of its sovereignty to virtual governments. The Constitution of the United States may thus be undergoing an informal amendment conducted through the private hands of internet intermediaries, which has largely gone unnoticed in the scholarly debate over Gonzalez v. Google, digital sovereignty, and platform regulation.

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INTRODUCTION

Section 230 of the Communications Decency Act (§ 230) shields internet intermediaries from liability for user-generated third-party content (with some notable exceptions).[1] At the same time, platforms can moderate speech online, filtering what users can post.[2] Thus, despite platforms exercising an editorial function, Section 230 protects them from liability for non-removal of objectionable content.[3] Traditionally, this provision had been seen as a foundation of the modern internet[4] and an extension of the First Amendment spirit.[5] It had been lauded as protecting the voices of minorities[6] and recognized as instrumental to the promotion of small businesses, market efficiency, and job creation.[7] Put simply, it

1. 47 U.S.C. § 230(c).

2. 47 U.S.C. § 230(c)(2)(A).

3. Gonzalez v. Google, 598 U.S. 617 (2023). *See also* Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1300–06 (N.D. Cal. 2019); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009). *See generally* Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda Symposium: Terrorist Incitement on the Internet*, 86 FORDHAM L. REV. 605, 606–07 (2017).

4. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019).

5. *See* U.S. CONST. amend. I; *see also* 142 CONG. REC. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Gilchrest); Ron Wyden, Senator Wyden's Speech to the Section 230 Anniversary Conference (Mar. 4, 2011), https://www.wyden.senate.gov/imo/media/doc/Section%20230%20speec.pdf; Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 162 (2017) [hereinafter Cohen, *Platform Economy*]. Several scholars have even argued that Section 230 is redundant, given the breadth of the First Amendment; such a view, however, does not seem justified. *See* Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019). *Cf., e.g.*, Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018); Julio Sharp-Wasserman, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 240 (2018).

6. *See* Elliot Harmon, *In Debate Over Internet Speech Law, Pay Attention to Whose Voices Are Ignored*, THE HILL (Aug. 21, 2019, 11:30 AM), https://thehill.com/opinion/technology/458227-in-debate-over-internet-speech-law-pay-attention-to-whose-voices-are.

7. ELIZABETH BANKER, UNDERSTANDING SECTION 230 & THE IMPACT OF LITIGATION ON SMALL PROVIDERS, CHAMBER OF PROGRESS (2022), https://progresschamber.org/wp-content/uploads/2022/04/CoP_230-report_w1i.pdf; Mike Masnick, *Those Who Don't Understand Section 230 Are Doomed To Repeal It*, TECHDIRT (Dec. 29, 2021, 12:08 PM), https://www.techdirt.com/2021/12/29/those-

was thought to be a staple of liberalism and liberal conservatism. Nonetheless, Section 230 has become politically controversial in recent years, with attacks coming from the "populist right" and progressives alike. Both former President Trump and President Biden have attempted to repeal it, to the dismay of mainstream legal academia.[8]

Both the right[9] and the left[10] place this debate in a broader context of private governance in cyberspace and the struggle with

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who-dont-understand-section-230-are-doomed-to-repeal-it/ (asserting "Section 230 does not provide an outsized benefit to Facebook—instead, it protects everyone else significantly more than it protects Facebook").

8. Eric Goldman & David Levine, *Section 230 Letter from 46 Academics*, SANTA CLARA L. DIGIT. COMMONS (2020), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3164&context=historical. Many authors emphasize that changes should be made cautiously, as they will probably cause more economic, informational, censorial, or freedom of expression harm that will disrupt the status quo. *See, e.g.*, Cindy Cohn, *Bad Facts Make Bad Law: How Platform Censorship Has Failed So Far and How to Ensure that the Response to Neo-Nazis Doesn't Make It Worse*, 2 GEO. L. TECH. REV. 432 (2018); Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money*, HOOVER INST. AEGIS PAPER SERIES NO. 1807 (2018); Christian Sarceño Robles, *Section 230 Is Not Broken: Why Most Proposed Section 230 Reforms Will Do More Harm Than Good, and How the Ninth Circuit Got It Right*, 16 FIU L. REV. 213, 231–32 (2021).

9. *See* Rachel Bovard, *Conservatives Must Tackle the Problems of the Digital Revolution*, NEWSWEEK (June 4, 2021, 7:30 AM), https://www.newsweek.com/conservatives-must-tackle-problems-digital-revolution-opinion-1597373 (noting "a cost to our social order, ways of engagement and even our general understanding of liberty . . . changing the nature of what it means to be free, both as an individual and as one acting in the marketplace"); Oren Cass, *Foreword: Governing After a Revolution*, AM. COMPASS (June 1, 2021), https://americancompass.org/essays/governing-after-a-revolution/ (noting that Section 230 is only a part of the broader problem, Cass writes that "firms controlling these platforms retain the power to censor and promote and obstruct as they see fit, but Section 230 relieves them of the obligation to do so. This indeed seems unfair, though a challenge for reformers is to specify which alternative would be preferable"); Steven Hill, *Should President Biden Revoke Section 230?*, AM. COMPASS (Jan. 28, 2021), https://americancompass.org/the-commons/should-president-biden-revoke-section-230/ (suggesting that "[w]hile revoking Section 230 is not a perfect solution," it may ensure that platforms are "more responsible, deliberative and potentially liable for the worst of the toxic content, including illegal content, that is algorithmically-promoted by their platforms"; Hill adds, however, that "Just like traditional media are already liable . . . *revoking Section 230 will likely not be as impactful as its proponents wish, or as its critics fear*") (emphasis added).

10. *See* Rachel Lerman, *Social media liability law is likely to be reviewed under Biden*, WASH. POST (Jan. 18, 2021, 8:00 AM), https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/ (quoting Jeff Kosseff saying that "[b]oth

"Big Tech."[11] It is conjoined with a fundamental worry of erosion of state sovereignty,[12] since Section 230 has enabled powerful internet platforms[13] to become unaccountable *de facto* legislators online.[14] As shown in Part I, freedom of contract, together with statutory exemptions, has given rise to the "platform economy," where intermediaries impose regulations on human expression. These intermediaries regulate culture, political speech, and an integral part of participatory democracy: the forum. Amid the crisis of liberal democracy,[15] the climax of "culture war" (an existential struggle over the nature and future of the state in the cultural, expressive realm), politics have re-emerged.[16] Today, both sides of the political spectrum

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sides have really used Section 230 as a proxy for their anger at Big Tech"); Lauren Feiner, *Democrats and Republicans Show Rare Unity in Desire to Crack Down on Big Tech Companies,* CNBC (June 16, 2021), https://www.cnbc.com/2021/06/16/democrats-republicans-show-unity-in-desire-for-big-tech-crackdown.html.

11. *See generally* Giorgio Resta, *Digital Platforms and the Law: Contested Issues*, MEDIA LAWS (2019), https://www.medialaws.eu/wp-content/uploads/2019/05/17.-Resta.pdf (examining the potential of different legal avenues such as antitrust, privacy or consumer law to regulate digital platforms in a comparative perspective).

12. Tim Wu, *A Tik Tok Ban is Overdue,* N.Y. TIMES (Aug. 18, 2020) https://www.nytimes.com/2020/08/18/opinion/tiktok-wechat-ban-trump.html. (Noting that we have entered the era of "net nationalism," the paradigm which "views the country's internet primarily as a tool of state power," where "economic growth, surveillance and thought control . . . are the internet's most important functions."). *See generally* Anupam Chander & Haochen Sun, *Sovereignty 2.0,* 55 VAND. J. TRANSNAT'L L. 283 (2022).

13. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 650–57 (2014).

14. This problem has generated a lot of scholarly attention. *See* Cohen, *Platform Economy*, *supra* note 5, at 199 (arguing that "dominant platforms' role in the international legal order increasingly resembles that of sovereign states"); Luca Belli & Jamila Venturini, *Private Ordering and the Rise of Terms of Service as Cyber-Regulation*, 5 INTERNET POL'Y REV. 1, 2 (2016); Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 27 (2019). *See* also Elizabeth D. Levin, *Theoretical Justifications for Government Regulation of Social Media Platforms* 24 VA. J.L. & TECH. 1 (2021) (critically examining several regulatory arguments).

15. Tom Ginsburg & Aziz Z. Huq, *The Pragmatics of Democratic "Front-Sliding,"* 36 ETHICS & INT'L AFFS. 437, 437 (2022) (suggesting that "democracy in the United States today wobbles on the edge of a knife.").

16. *See* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 153 (2018). *See generally* SOTIRIOS A. BARBER, CONSTITUTIONAL

attempt to establish their power to regulate speech on platforms and thus to control the political *other*.

The main difference between today's conservatives and progressives is that the former believe platforms suppress their speech, claiming an "anti-conservative bias" of Big Tech[17] (a claim that has been disputed,[18] with alternative legitimate explanations for platforms' practices offered).[19] In this way, their longstanding narrative that anti-conservatism pervades the mainstream media,[20] workplaces,[21] elite

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FAILURE XVII (2014) (asserting that "[c]onstitutional failure is thus the failure of a culture. And constitutional reform must therefore be nothing short of cultural reform.").

17. Vivek Ramaswamy, *Antitrust Can't Bust a Monopoly of Ideas*, WALL ST. J. (Aug. 5, 2020, 12:06 PM), https://www.wsj.com/articles/antitrust-cant-bust-a-monopoly-of-ideas-11596643591 (suggesting that "[t]he same companies that have improved consumer access to cheap products are increasingly limiting options in the marketplace of ideas and raising the cost of ideological dissent," and further asserting "[t]his isn't price fixing; it's 'idea fixing.' . . . It is time to resist this ideological cartel that now represents a more fundamental threat to the American public than any antitrust violation."). *See also* Max Fisher, *Inside Facebook's Secret Rulebook for Global Political Speech*, N.Y. TIMES (Dec. 27, 2018), https://www.nytimes.com/2018/12/27/world/facebook-moderators.html. *But see* Matt Stoller, *Big Tech Reveals the Flaw in Citizens United*, AM. COMPASS (Aug. 7, 2021), https://americancompass.org/the-commons/big-tech-reveals-the-flaw-in-citizens-united/ (claiming that Ramaswamy's claims are mostly unsubstantiated, and that while it is worrying that "public decisions are being made by unaccountable private actors," the solution lies in antitrust law).

18. *See, e.g.*, PAUL M. BARRETT & J. GRAM SIMS, FALSE ACCUSATION: THE UNFOUNDED CLAIM THAT SOCIAL MEDIA COMPANIES CENSOR CONSERVATIVES, N.Y.U. CTR. FOR BUS. & HUM. RTS. 1, 20 (Feb. 2021), https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/60187b5f45762e708708c8e9/1612217185240/NYU+False+Accusation_2.pdf (noting that there is "no reliable evidence" to support the claim that tech companies are censoring conservative viewpoints, while acknowledging, however, that the question "can't be answered conclusively because the data available to academic and civil society researchers aren't sufficiently detailed").

19. *See* Oliver L. Haimson et al., *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 PROC. ACM HUM.-COMPUT. INTERACTION 1 (2021).

20. *See generally* Hans J. G. Hassell et al., *There is No Liberal Media Bias in Which News Stories Political Journalists Choose to Cover*, 6(14) SCI. ADVANCES (2020).

21. *See generally* Kristen L. Swigart et al., *Working While Liberal/Conservative: A Review of Political Ideology in Organizations*, 46(6) J. MGMT. 1063 (2020).

educational institutions, and science as such[22] has now shifted to social media,[23] reaching its peak in the writings of the "New Right."[24] One of the New Right's disciples, Rachel Bovard, wrote their engagement in the fight against "Big Tech" stems from a "foundational conflict in worldviews,"[25] claiming that the progressive government and big corporations are collaborators.[26] In this narrative, technology has allowed Big Tech to "enforce the supremacy of their own [value] systems," thus actualizing the "high-modernism" fears of conservatives from decades past.[27] Bovard proposes concrete measures, such as

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22. *See generally* ALLAN BLOOM, CLOSING OF THE AMERICAN MIND (1987) (making arguments to this effect regarding academic and scientific institution). The matter has been one of empirical studies and widespread commentary. *See, e.g.*, Edward Burmila, *Liberal Bias in the College Classroom: A Review of the Evidence (or Lack Thereof)*, 54 POL. SCI. & POL. 598 (2021).

23. Richard Hanania, *It Isn't Your Imagination: Twitter Treats Conservatives More Harshly Than Liberals*, QUILETTE (Feb. 12, 2019), https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/.

24. *See* James Pogue, *Inside The New Right, Where Peter Thiel Is Placing His Biggest Bets*, VANITY FAIR (Apr. 20, 2022), https://www.vanityfair.com/news/2022/04/inside-the-new-right-where-peter-thiel-is-placing-his-biggest-bets, for an introduction into this strand of political thought. *See, e.g.*, David Brooks, *The Terrifying Future of the American Right*, THE ATL. (Nov. 18, 2021), https://www.theatlantic.com/ideas/archive/2021/11/scary-future-american-right-national-conservatism-conference/620746/.

25. Rachel Bovard, *The Law vs. The Borg*, AM. MIND (Oct. 12, 2021), https://americanmind.org/features/the-war-against-woke-communism/the-law-vs-the-borg/. *See also* Josh Hammer, *Reclaim Democracy from Technocracy,* AM. COMPASS (Jan. 18, 2021), https://americancompass.org/reclaim-democracy-from-technocracy/.

26. Rachel Bovard, *Big Tech Isn't A Victim In The Biden Regime's Speech Crackdown, It's An Eager Collaborator*, THE FEDERALIST (Nov. 2, 2022), https://thefederalist.com/2022/11/02/big-tech-isnt-a-victim-in-the-biden-regimes-speech-crackdown-its-an-eager-collaborator/ ("[T]his isn't the government 'bullying' or coercing the tech companies to do what they want. It's a partnership . . . .") [hereinafter Bovard, *Big Tech*]; Matthew B. Crawford, *Reclaiming Self-Rule in the Digital Dystopia*, AM. COMPASS (June 1, 2021), https://americancompass.org/reclaiming-self-rule-in-the-digital-dystopia, ("The opposed categories 'private sector' and 'government' would appear to have little utility for understanding the present.").

27. *See generally* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED, 87 (1999). *See also* Rachel Bovard, *How Many Times Must Facebook Be Caught Censoring the Truth?*, N.Y. POST (Nov. 22, 2021), https://nypost.com/2021/11/22/how-many-times-must-facebook-be-caught-censoring-the-truth.

state-level legislation, Congressional reform, or judicial review, as the Supreme Court cases of *Gonzalez v. Google*[28] and *Twitter v. Taamneh*[29] afforded.[30]

Progressives, on the other hand, believe that intermediaries do not moderate enough, arguing that too much speech remains unfiltered, or that conservative content is *promoted*.[31] Platforms are blamed for not dealing with offensive speech, the spreading of disinformation, deep-fakes,[32] and clickbait.[33] They are accused of creating echo chambers impacting minorities, leading to illiberalization and polarization of public debate.[34] This supposedly stems from private moderation being profit-driven, while the social harms it produces are said to undermine the premises of "truth production and technological neutrality" behind Section 230 and the First Amendment.[35] Indeed, the core of progressive critique comes from the fact that in the marketplace of ideas, the bad

28. Gonzalez v. Google 598 U.S. 617 (2023).

29. Twitter, Inc. v. Taamneh, 143 S. Ct. 81 (2022).

30. *See* Rachel Bovard, *By Bridling Section 230, SCOTUS Can Finally Do What Congress Won't: Rein in Big Tech*, THE FEDERALIST (Oct. 7, 2022), https://thefederalist.com/2022/10/07/by-bridling-section-230-scotus-can-finally-do-what-congress-wont-rein-in-big-tech/.

31. *See, e.g.*, FERENC HUSZÁR ET AL., ALGORITHMIC AMPLIFICATION OF POLITICS ON TWITTER, 119(1) PROC. OF THE NAT'L ACAD. OF SCIS. OF THE U.S. https://www.pnas.org/doi/epdf/10.1073/pnas.2025334119; Craig Silverman & Ryan Mac, *Facebook Fired An Employee Who Collected Evidence of Right-Wing Pages Getting Preferential Treatment*, BUZZFEED NEWS (Aug. 6, 2020), https://www.buzzfeednews.com/article/craigsilverman/facebook-zuckerberg-what-if-trump-disputes-election-results; Alexandra Geese, *Why the DSA could save us from the rise of authoritarian regimes, VERFBLOG (Nov. 8, 2022),* https://verfassungsblog.de/dsa-authoritarianism/; Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, WALL ST. J., (Sept. 15, 2021, 9:26 AM) https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215.

32. *See, e.g.*, Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, 23 VA. J.L. & TECH. 1 (2020).

33. Rohit Chopra, *Tech Platforms, Content Creators, and Immunity*, A.B.A. (Mar. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1510713/chopra_-_aba_spring_meeting_3-28-19_0.pdf.

34. *See, e.g.*, Kimberly Grambo, *Fake News and Racial, Ethnic, and Religious Minorities: A Precarious Quest for Truth*, 21 U. PA. J. CONST. L. 1299 (2019); JULIE E. COHEN, BETWEEN TRUTH AND POWER 107 (2019).

35. COHEN, *supra* note 34, at 98.

ideas seem to be doing well,[36] while the equality of persons (legal and natural), together with the nominal freedom of contract, have become practically fictitious.[37]

This Article argues that the political debate over Section 230 concerns the revaluation of the liberal philosophy underlying content moderation, secondary liability, and freedom of speech itself: a philosophy that is radically skeptical, distrusting of the government, formally egalitarian, and established in a firm private-public ontological split,[38] giving rise to the First Amendment civil-libertarian jurisprudence explored in Part II. Indeed, today's discontent with Section 230 and the First Amendment stems from a change in approach to free speech that both the left and the right have undergone. Part III views this identity change through the lens of the history of ideas, showing that both sides have abandoned certain foundational classical liberal beliefs, deconstructing liberal constitutionalist values of neutrality, pluralism, and toleration. In their place, both sides now wish to promote a coherent, positive, normative vision for the political community, and consequently to control the other in the realm of online culture.

Part IV analyzes the internal tensions of liberal democracy through a left-Schmittian prism.[39] It is an apt tool to analyze the so-called

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36. Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. 1017, 1029–30 (2021) (stating the "marketplace . . . does not seem to be furthering large-scale rejection of white supremacy, ethnonationalism, and hate. Rather, it is nurturing them . . . because [of reliance] on probabilistic profiles and engagement metrics to . . . recommend content and communities . . . .") [hereinafter Cohen, *Lex Informatica*]. See Zachary S. Price, *Our Imperiled Absolutist First Amendment,* 20 U. PA. J. CONST. L. 817 (2018), for a critical take on the "assault" on the First Amendment jurisprudence.

37. *See, e.g.*, Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 755 (1981) (reviewing PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979)).

38. *See generally* LUDVIG VON MISES, LIBERALISM: THE CLASSICAL TRADITION (Ralph Raico trans., Cobden Press & The Found. for Econ. Educ., Inc. 1985); James Buchanan, *The Soul of Classical Liberalism,* 5 INDEP. REV. 111 (2000).

39. "Left" philosophers, such as Chantal Mouffe, use some of the ideas of the German legal theorist Carl Schmitt, to analyze liberal democracy critically, emphasizing antagonisms that seemingly exist in modern political systems; they do so without a commitment to the problematic elements of his thought, hence the term "Schmittian." *See* Karolewski et al., *Carl Schmitt and Democratic Backsliding*, 22 CONTEMP. POL. THEORY 407, 407–408 (2023). Of course, Schmitt himself is an

"culture war," an existential struggle over the future of the political community played out in the digital culture worlds. It is especially relevant at a time when liberal institutions and culture have been failing to mediate illiberal, populist drives, and, as we have seen, when there has been a partial, bipartisan departure from classical liberalism in the sphere of ideas. This Article argues that the left and the right wish to become *sovereign* and thus to control or exclude the other from the political culture—which plays out in the digital world.[40]

The struggle over platform liability is thus much more fundamental. The conflict stems from a discontent with the liberal constitutionalism behind the First Amendment and Section 230.[41] In attempting to transform the political community, both political parties are constrained by the law and existence of the political other alike. In this struggle, the online fora are the political battleground, while their private "sovereigns" (that is, the platforms that control and moderate speech) can be either allies or enemies. The friend and enemy—a Schmittian distinction weaponized by populists, purporting to express the general will and redefine the community[42]—are in an existential struggle, while the field of expression, the digital culture, is the battleground. To

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infinitely controversial figure and use of his thought must be done carefully. *See generally* Lars Vinx, *Carl Schmitt*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/schmitt/ (last visited Jan. 31, 2023). For examples of such use among legal and political scholars, see generally LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM (David Dyzenhaus ed., 1998) [hereinafter LAW AS POLITICS]; Richard Bellamy & Peter Baehr, *Carl Schmitt and the Contradictions of Liberal Democracy*, 23 EUROPEAN J. OF POL. RSCH. 163, 163 (1993). *See also* GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2004).

40. While this Article speaks of the Section 230 debate being a proxy for a fundamental reevaluation of the political constitution, of platforms being a necessary part of this process, and of the related concept of "censorship by proxy," there is yet another observation to be made. Perhaps, focusing the political language on platform regulation, platform wrongs, etcetera, even if it ultimately means the political other, the people as such, allows to keep a measure of civility, so that the struggle remains cultural and not actual.

41. *See* Lee C. Bollinger & Donald E. Graham, *Trump's Assault on Twitter is an Attack on the First Amendment*, WASH. POST (Sept. 29, 2020), https://www.washingtonpost.com/opinions/trumps-assault-on-twitter-is-an-attack-on-the-first-amendment/2020/09/29/033033c2-01a7-11eb-b7ed-141dd88560ea_story.html.

42. Mark Dawson, *How Can EU Law Respond to Populism?*, 40 OXFORD J.L. STUDS. 183, 187 (2020).

redefine the community and defeat the enemy, one needs to suspend the rules of the game and create a *state of exception*:[43] whether to suppress fake news, offensive speech, overt contestation of status quo, which liberalism must render dangerous or false, or actual incitements to illiberal acts, such as contestation of an election's legitimacy. Furthermore, the goal is to prevail in a culture war: employing populist rhetoric while not being editorialized, blocked, or censored. This can be accomplished on private internet platforms, which are not constrained by liberal constitutionalism. Thus, the threat to revoke Section 230, wielded by both Presidents Trump and Biden, is one of the means of influencing the political order. This way of reforming the political community is especially attractive now that the borders between the digital and the "real" world have become blurred, while the "constitutions" of "virtual worlds" impact real-world politics.[44]

In this way, the political battle is separate from the jurisprudential debate over doctrinal niceties.[45] It is about who will prevail in controlling the discourse and shaping the community. Both camps are

43. Carl Schmitt famously wrote that "Sovereign is he who decides on the exception." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 1 (George Schwab trans., 2005) (1922) [hereinafter SCHMITT, POLITICAL THEOLOGY]. In other words, the true sovereign in any political community is who can suspend the ordinary rules of the game, that is the liberal rule of law, and act extralegally. *See also* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 314 (1979) (1948) ("No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself."). This is also a conception close to that of Hobbes. David Dyzenhaus, *Introduction* to LAW AS POLITICS, *supra* note 39, at 6 ("The sovereign is legally and politically unconstrained, answerable for his actions not to his subjects but only to Hobbes's laws of nature."); *see* Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005 (2006), for a liberal jurisprudential response.

44. Eldar Haber, *The Digital Samaritans*, 77 WASH. & LEE L. REV. 1559, 1626 (2021) (suggesting that "[i]f the role of the state was once, inter alia, to convey and govern how norms and morality should be shaped in society, this role might partially be privatized by for-profit companies, potentially reshaping the ways social values are constructed."). *See generally* Joshua A. T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L.J. 55 (2012) (discussing the virtual/real border problem).

45. *See, e.g.*, Cameron F. Kerry, *Section 230 reform deserves careful and focused consideration*, BROOKINGS (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/ (arguing that the Section 230 debate "is refracted through a prism of polarization").

willing to utilize forms of private censorship—or *compelled speech*,[46] which explains the largely incoherent legal arguments over Section 230: publish or perish. The insight of Tim Wu is particularly instructive; he once wrote:

> [W]hat the left and right really care about are the content moderation policies of Facebook, Twitter, and so on. Those policies, as it stands, have little to do with Section 230. However, content moderation, as an exercise of editorial discretion, is protected by the First Amendment. And that Congress can't repeal. [47]

In Part IV, this Article argues that the government, to become sovereign over the political other, will employ internet platforms to outsource censorship by exercising various kinds of "soft pressures" or "jawboning". This is difficult not only from a constitutionalist perspective, but also practically, since platforms exercise an increasingly greater control over users' speech and wield a greater political bargaining power vis-à-vis the government.[48] In this way, a novel regulatory dynamic seems to be emerging. To become truly sovereign in a Schmittian rather than a liberal sense, the government *needs* the platforms, which allow the government to avoid the constraints of the First Amendment and liberal constitutionalism at

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46. *See generally* Vikram D. Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1 (2020).

47. Tim Wu, *Liberals and Conservatives Are Both Totally Wrong about Platform Immunity*, MEDIUM (Dec. 3, 2020), https://superwuster.medium.com/liberals-and-conservatives-are-both-totally-wrong-about-section-230-11faacc4b117. *See also* Tal Axelrod, *Graham Introduces Bill to Repeal Tech Liability Shield Targeted by Trump*, THE HILL (Dec. 15, 2020, 5:40 PM), https://thehill.com/homenews/senate/530364-graham- introduces-bill-to-repeal-tech-liability-shield-by-2023.

48. *See* Anupam Chander & Vivek Krishnamurthy, *The Myth of Platform Neutrality*, 2 GEO. L. TECH. REV. 400, 405 (2018) (recognizing that "platforms are explicitly non-neutral with respect to certain issues specified in their community guidelines. These guidelines do not simply recapitulate the law, but rather set out a series of normative commitments. They take sides, for example, by banning hateful speech that, at least in the United States, is lawful.").

large. In this way, a change to the political constitution[49] or an informal constitutional amendment is underway.[50]

The Supreme Court decided not to embark on a Section 230 or First Amendment judicial revolution in *Gonzalez* and *Taamneh*, choosing instead to preserve the legal status quo. This is because the change to the political order is emerging in the realm of practice, not legal doctrine. Indeed, irrespective of whether formal state-level developments discussed in Part I are upheld, a complex informal dialectic of pressure and cooperation between the governments and internet platforms is emerging.[51] It may, in fact, go unopposed in the courts, as a survey of recent challenges to jawboning claims indicates, while a study of the changing identity of modern conservatism and progressivism shows that it may not be politically opposed either. This informal overcoming of First Amendment "Lochnerism"[52] seems inevitable, presenting as an ideological theodicy, necessary to transform

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49. *See infra* Part IV.C.

50. We can define an indirect or quasi-constitutional amendment as follows:

> A quasi-constitutional amendment is a subconstitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance—making it just as durable as a constitutional amendment.

Richard Albert, *Quasi-Constitutional Amendments*, 65 BUFF. L. REV. 739, 740 (2017) [hereinafter Albert, *Quasi-Constitutional Amendments*].

51. Jack Balkin recognized the emergence of such dialectic in his scholarship when he wrote:

> The result is a burgeoning dialectic of governing power and public–private cooperation. Private-infrastructure companies develop ever greater governing capacities. Nation-states attempt to co-opt these capacities through coercion or threats of regulation. This, in turn, causes increased development of governing, surveilling, and regulatory capacities. And this, in turn, makes private-infrastructure owners even more tempting targets for government pressure—because private companies can no longer pretend that they cannot actually do what governments want them to do.

Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2020 (2018) [hereinafter Balkin, *Triangle*].

52. Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1241 (2020) (arguing that the Lochnerian negative notion of freedom of speech should be rethought as a positive right).

the political community into a progressive or a conservative utopia. What place will be left for free speech and the political other remains to be seen.

I. SECTION 230 AND EMERGENCE OF THE SOVEREIGNS OF CYBERSPACE

Section 230 protects websites and other online services from liability for any third-party content, regardless of whether they engage in pre-screening or post-publication reviews.[53] The broad reach of this "safe harbor provision"[54] was confirmed in *Zeran v. AOL*,[55] such that digital platforms are not only shielded from liability for third-party defamatory statements, but also for hosting or taking down terroristic content, regardless of their scienter.[56] Platforms can engage in moderation, and regardless of how extensive or lukewarm their efforts are, they are not exposed to liability.[57] One of the legislative premises

53. Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 159 (Giancarlo Frosio, ed., 2020) ("This means Section 230(c)(1) is equally available to a service that exercises the same level of editorial control as a traditional publisher—or zero editorial control.").

54. Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1170 (9th Cir. 2009).

55. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."). *See also, e.g.*, Doe v. Myspace, Inc., 528 F.3d 413, 418 (5th Cir. 2008); Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016).

56. Fields v. Twitter, Inc., 881 F.3d 739 (9th Cir. 2018). Nonetheless, some limitations on the breadth of Section 230 do exist, even under the orthodox interpretation. *See, e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008); F.T.C. v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009); Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016). *See also* Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1575–80 (2021) (discussing the above cases).

57. *See* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). This has been recognized as the historical intent behind the provision, despite revisionist readings. *Zeran,* 129 F.3d 327, 331 (explaining that Section 230 was designed to "encourage service providers to self-regulate the dissemination of offensive material over their services"); *see also* Shiamili v. Real Est. Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011). Indeed, the co-authors of Section 230, Rep. Chris Cox and Senator Ron Wyden, have submitted that:

of this provision was to protect the internet as a "forum for a true diversity of political discourse,"[58] and despite scholarly criticism,[59] the courts have long interpreted Section 230 through a First Amendment lens, which protects editorial freedom.[60]

Commentators on the right and the left argue that Section 230—created for the early internet—has lost its relevance. Today, the liberal freedom of contract has created a digital reality shaped by private ordering, where an interaction of contracts, licenses, and technological solutions gave rise to digital platforms that effectively legislate through

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Section 230 does not require political neutrality. Claiming to "interpret" Section 230 to require political neutrality, or to condition its Good Samaritan protections on political neutrality, would erase the law we wrote and substitute a completely different one, with opposite effect. . . . [A]ny governmental attempt to enforce political neutrality on websites would be hopelessly subjective, complicated, burdensome, and unworkable. . . . [A]ny such legislation or regulation intended to override a website's moderation decisions would amount to compelling speech, in violation of the First Amendment.

Federal Communications Commission, *Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934*, SANTA CLARA L. DIGIT. COMMONS 1, 17 (2020), https://digitalcommons.law.scu.edu/historical/2316.

58. 47 U.S.C. § 230(a)(3). *See also* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009) (speaking to the "enormous consequences" of section 230 as far as "securing the vibrant culture of freedom of expression we have on the Internet today. . . . Because online service providers are insulated from liability, they have built a wide range of different applications and services that allow people to speak to each other and make things together.") (footnotes omitted).

59. *See generally* Danielle K. Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

60. The Court has held that:

[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974). *See also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121–22 (1973); Pittsburgh Press Co. v. Hum. Rels. Comm'n, 413 U.S. 376, 391 (1973); Assocs. & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971).

terms and conditions.[61] Indeed, platforms have been able to redefine the landscape of legal entitlements and obligations,[62] create their own marketplaces,[63] affect constitutional rights, and pose a general challenge to regulatory theory.[64] They have been mostly self-regulated,[65] with laws such as Section 230 and the Digital Millennium Copyright Act ("DMCA") often found responsible[66] for the emergence of global, transnational private powers regulating the virtual lives of billions of people.[67] Authors have described digital platforms as quasi-sovereignties, recognizing "Facebookistan[s]" akin to nation-states,[68]

61. Belli & Venturini, *supra* note 14, at 2 (suggesting that "contractual agreements may be considered as a kind of private law-making system . . . ."); Niva Elkin-Koren et al., *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 992 (2022) ("In removing content or suspending accounts, platforms exercise discretionary powers conferred under boilerplate contracts. Is there any limit to platforms' discretionary power to terminate accounts or remove content? Currently, under U.S. law, users cannot do much—legally—to protect their rights and interests on social media.").

62. *See* Cohen, *Platform Economy*, *supra* note 5, at 136. Of course, in this regard they seem a disruptive innovation for competition law scholarship. *See generally, e.g.*, Elettra Bietti, A *Genealogy of Digital Platform Regulation*, 7 GEO. L. TECH. REV. 1 (2023); DIGITAL DOMINANCE: THE POWER OF GOOGLE, AMAZON, FACEBOOK, AND APPLE (Martin Moore & Damian Tambini eds., 2018); TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018).

63. *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985 (2019).

64. *See generally* Michèle Finck, *Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy*, 41 EUR. L. REV. 33 (2018).

65. Belli & Venturini *supra* note 14, at 2; Edoardo Celeste, *Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?*, 33 INT'L REV. OF L. COMPUT. & TECH., 122 (2018).

66. *See* Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 626 (2020) ("Section 230 succeeded beyond all expectations.") (footnotes omitted).

67. Kristen E. Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV. 665 (2019) (introducing the concept of "digital Switzerlands," platforms transnational in reach, which are on par with governments rather than subordinate thereto).

68. Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1818 (2012) ("Facebook has leaders who make rules. Facebook interprets these rules and enforces them. Enforcement consists in removing and/or banning individuals or groups for violating Facebook's terms (as determined by Facebook), deleting certain information, or sharing certain information with government authorities."); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online*

or even calling for recognition of "virtual governments" which should be afforded "comity and mutual respect."[69]

Digital platforms effectively operate as autocracies[70] or feudal realms.[71] They regulate human expression automatically, using algorithms that operate in opaque ways governed by an *alegal* logic of probability and profitability,[72] and have technologically unconstrained power.[73] Some semblance of political legitimacy is attempted through the creation of quasi-legal and political structures, such as Facebook's Oversight Board.[74] Platforms can use various means to impact online expression, ranging from the deplatforming of an account through temporary suspension or a permanent ban, to removing, relocating, or directly editing content, adding warnings for readers, disabling comments, or adding alternative perspectives.[75] The recent political

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Speech, 131 HARV. L. REV. 1598, 1599 (2018) (arguing that platforms should be recognized as "systems of governance").

69. Edward Lee, *Virtual Governments*, 27 UCLA J.L. & TECH. 1, 7 (2022).

70. Adrienne LaFrance, *The Largest Autocracy on Earth*, ATL. (Sep. 27, 2021), https://www.theatlantic.com/magazine/archive/2021/11/facebook-authoritarian-hostile-foreign-power/620168/.

71. James Grimmelmann, *Virtual World Feudalism*, 118 YALE L.J. POCKET PART 126, 129 (2009), http://yalelawjournal.org/forum/virtual-world-feudalism.

72. *See* COHEN, *supra* note 34; Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2021).

73. Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHIL. & TECH. 739, 745 (2020) ("[A]lgorithmic censorship potentially brings all communications within reach of platforms' censorship operations" which is distinct from human moderation because "humans can typically only consider a (small) proportion of all content," while "the automated surveillance and analysis inherent in algorithmic censorship would potentially allow for the assessment of all communications at upload, whether they were intended to be public or private." Moreover, "algorithmic censorship allows a more active and interventionist form of moderation by platforms.").

74. *See* Evelyn Douek, *Facebook's Oversight Board: Move Fast with Stable Infrastructure and Humility*, 21 N.C. J.L. & TECH. 1, 1 (2019) ("Facebook's . . . Oversight Board is one of the most ambitious constitution-making projects of the modern era. With pre-existing governance of tech platforms delegitimized in the ongoing 'techlash,' this represents a pivotal moment when new constitutional forms can emerge that will shape the future of online discourse."). *See also infra* note 407 and the accompanying text.

75. Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 23–29 (2021).

debate stems from the conjunction of two distinct phenomena.[76] Around 2016, platforms abandoned their neutrality, substantively altering their content moderation policies in an attempt to foster "'healthy' and 'safe' speech environments online."[77] At the same time, there emerged a "widespread perception that the platforms had tolerated so much dissemination of hateful speech, foreign interference with elections, atrocity propaganda, and hoaxes as to become a threat to democratic institutions."[78] These perceptions became an important problem, given the centralized power of platforms in the Web 2.0 era,[79] leading to a confrontation with the political government.

A. *Confrontation of the Realms*

Former President Donald Trump signed the *Executive Order on Preventing Online Censorship*, observing that social media platforms function as modern equivalents of the public square, and therefore wield considerable power to "shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see."[80] The executive order clarified that Section 230 shields platforms from liability for good faith moderation and not for "pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree."[81] Superficially speaking the language of digital constitutionalism, Donald Trump objected to his own speech being removed from Twitter, in line with the conservative

76. *See* Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2009 (2019).

77. *Id.*

78. *Id.* at 2010.

79. *Id.* at 2011.

80. Exec. Order No. 13925, 85 Fed. Reg. 34079 (May 28, 2020) [hereinafter E.O. 13925] (describing how, pertinently, the Order did not give rise to a right to private action). *See also* Gomez v. Zuckerburg, No. 5:20-cv-633 (TJM/TWD), 2020 WL 7065816, at *1 (N.D.N.Y. Dec. 3, 2020).

81. E.O. 13925.

narrative that "Big Tech is out to get [them]."[82] Ted Cruz[83] and Louie Gohmert threatened to scrap protection if platforms were not neutral,[84] even though neutrality is not compulsory under the language of Section 230, nor does First Amendment jurisprudence require it (as examined in Part II).[85] Along these lines, some have proposed imposing "good faith moderation" requirements, "political neutrality audits,"[86] a removal of filtering by relevance,[87] or even moderating by government

82. *See* Chris Mills Rodrigo, *Jordan Confronts Tech CEOs Over Claims of Anti-Conservative Bias*, THE HILL (July 29, 2020), https://thehill.com/homenews/house/509619-jordan-confronts-tech-ceos-with-claims-of-anti-conservative-bias/ ("Big tech's out to get conservatives. It's time they face the consequences."). *See also* Rebecca Kern, *White House Renews Call to 'Remove' Section 230 Liability Shield,* POLITICO (Sept. 8, 2022), https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771 ("A spokesperson for Rep. Cathy McMorris Rodgers (R-Wash.), the committee's ranking member, said, 'This administration is using Big Tech to silence their opponents so they can advance their own power. Any reforms of Section 230 should lead to more speech, not less.'"). Recently, conservatives have published volumes expressing this sentiment. *See, e.g.*, JOSH HAWLEY, THE TYRANNY OF BIG TECH (2021).

83. *See* Danielle K. Citron & Mary A. Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 62 (2020) (citing Ted Cruz saying "[b]ig tech enjoys an immunity from liability on the assumption they would be neutral and fair. If they're not going to be neutral and fair, if they're going to be biased, we should repeal the immunity from liability so they should be liable like the rest of us."); *see also* Ted Cruz, *Facebook Has Been Censoring or Suppressing Conservative Speech for Years*, FOX NEWS (Apr. 11, 2018), https://www.foxnews.com/opinion/sen-ted-cruz-facebook-has-been-censoring-or-suppressing-conservative-speech-for-years (arguing that "if Facebook is busy censoring legal, protected speech for political reasons, the company should be held accountable for the posts it lets through. And it should not enjoy any special congressional immunity from liability for its actions.").

84. *See* Curbing Abuse and Saving Expression in Technology Act, H.R. 573, 118th Cong. (2023).

85. *See* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency,* 73 HASTINGS L.J. 1203, 1212–18 (2022) (describing how neutrality and transparency requirements are constitutionally problematic) [hereinafter Goldman, *Editorial Transparency*].

86. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

87. *See* H.R. 573; *see also* Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1363, 1376 (2018) (suggesting that platforms' content moderation should be subject to administrative and judicial review based on First Amendment compliance).

agencies directly.[88] Civil libertarians have described these proposals as "frightening,"[89] due to the prospect of over-removal or an obligation to disseminate "fringe views."[90]

Further conservative legal developments in Florida[91] and Texas[92] include state-level legislative attempts to prohibit social media platforms from censoring speech based on speakers' viewpoint. The Florida law has been found likely unconstitutional by the Eleventh Circuit.[93] In Texas, Governor Greg Abott passed legislation protecting against "wrongful censorship on social media platforms" in the wake of social media purportedly trying to "silence conservative viewpoints and ideas."[94] The legislation greatly restricts the ability of large social media platforms to moderate content and imposes certain transparency requirements. Both statutes stem from the modern conservative revaluation of free speech and attempt to grant the government discretionary power to exercise pressure on platforms, influence their editorial discretion, conspicuously engage in the struggle over political dominance, and redefine constitutional fundamentals.[95]

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88. *See* Robles, *supra* note 8, at 221, for an overview of these proposals.

89. James Czerniawski, *A 'Fairness Doctrine' for the Internet Could Backfire on Conservatives*, FEE (July 13, 2020), https://fee.org/articles/a-fairness-doctrine-for-the-internet-could-backfire-on-conservatives/.

90. Wall St. J. Ed. Bd. *Trump vs. Twitter*, FLIP SIDE (May 29, 2020), https://www.theflipside.io/archives/trump-vs-twitter ("The Constitution protects fringe views, but it doesn't require Twitter or Facebook to disseminate them.").

91. FLA. STAT. ANN §§ 106.072, 501.2041 (West 2022).

92. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2023); NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022) (rejecting a challenge to constitutionality of the statute) *cert. granted in part*, No. 22-555, 2023 WL 6319650, at *1 (U.S. Sept. 29, 2023).

93. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022) (finding the content-moderation provisions likely unconstitutional and upholding the preliminary injunction in part) *cert. granted in part sub nom*. Moody v. NetChoice, LLC, 216 L. Ed. 2d 1313 (Sept. 29, 2023), and *cert. denied sub nom*. NetChoice, LLC v. Moody, 144 S. Ct. 69 (2023).

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

95. *See* Moody, 34 F.4th at 1203; Goldman, *Editorial Transparency*, *supra* note 85 at 1212–18.

Although President Biden revoked former President Trump's order,[96] he also wants Section 230 "revoked, immediately" because, in his view, platforms "propagate[e] falsehoods they know to be false."[97] Seemingly now skeptical of the marketplace of ideas[98]—foundational to both American liberalism and constitutionalism[99]—whose supposed truth-promoting and *defining* role has led to illiberal populist victories,[100] President Biden is "calling on Congress to get rid of special

96. Exec. Order No. 14029, *Revocation of Certain Presidential Actions and Technical Amendment* 86 Fed. Reg. 27025 (May 14, 2021) [hereinafter EO 14029].

97. Ed. Bd., *Joe Biden. Former Vice President of the United States*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html.

98. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (speaking of "free trade in ideas" and proclaiming that "the best test of truth is the power of thought to get itself accepted in the competition of the market"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 1 (1984). *See generally* JOHN STUART MILL, ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS (Mark Philp & Frederick Rosen ed., 1947); *see infra* Part II A.

99. Despite academic disillusionment with the "marketplace of ideas," it continues to be a judicially invoked metaphor, designating political assumptions of the First Amendment jurisprudence. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014); United States v. Alvarez, 132 S. Ct. 2537, 2541 (2012); Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2674 (2011); Citizens United v. FEC, 558 U.S. 310, 335 (2010); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 179 (2007); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that the marketplace of ideas provides for a "robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'"); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965). Importantly, it "endures . . . also in the everyday rhetoric of countless free speech and anti-censorship advocates, whether institutional or individual." Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1164-65 (2015). *See infra* Part II.

100. Indeed, many have doubted the veracity of Millian hope that, in the free democratic society, it is the truth which wins:

> People have a right to express themselves freely, even if their expression is erroneous or irrational . . . . Free speech lets the best and brightest produce and consume truth, even if most people hold the truth in disdain. But we can't honestly give free speech a . . . cheer for making truth popular—because *the claim that free speech makes truth popular simply isn't true*.

Bryan Caplan, *How to Believe in Free Speech*, ECONLIB: ECONLOG POST (June 12, 2018), https://www.econlib.org/archives/2018/06/how_to_believe.html (emphasis

immunity for social media companies and impose much stronger transparency requirements on all of them," and to "hold social media platforms accountable for spreading hate and fueling violence."[101] The "falsehoods" that Biden refers to are, on any realist reading, invariably spread by conservative or illiberal speech actors. Progressive criticism of "[i]nternet companies' democracy-damaging actions," such as "exploiting humans' vulnerability to outraging material, creating filter bubbles that exacerbate polarization, programming for virality, and microtargeting" encompasses practices which are "not in and of themselves illegal."[102] Thus, constitutional protections afforded to platforms as self-regulating private powers no longer seem to serve the values of a progressive liberal democracy.

Indeed, further legislative developments imposing mandatory editorial transparency have been passed in California[103] and New York[104] in response to the "lack of oversight, transparency, and accountability" of online platforms, allowing for "hateful and extremist views to proliferate online."[105] For example, Eugene Volokh's

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added). *See also, e.g.*, Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 17 (1996); Ho & Schauer, *supra* note 9, at 1222 (describing an empirical examination of the metaphor's veracity, showing, for example, that "generalities about the marketplace of ideas are unlikely to help us understand its operation in actual settings"); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 912 (2009) (noting the "widespread existence of public falsity") [hereinafter Schauer, *Facts*]; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 15 (doubting the epistemic and moral premises of Holmes dictum) [hereinafter Blasi, *Holmes*]. *But see* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011) [hereinafter Volokh, *In Defense*], for a defense of the truth-seeking justification of the First Amendment.

101. CNBC TELEVISION, *President Biden Delivers a Keynote Speech at the United We Stand Summit—9/15/22*, YOUTUBE (Sept. 15, 2022), https://www.youtube.com/watch?v=KngU5WsTBy4.

102. Weintraub & Moore, *supra* note 6, at 633.

103. A.B. 587 2022 Leg., 2021–2022 Reg. Sess. (Cal. 2022).

104. A.B. A7865A 2021–2022 Reg. Sess. (N.Y. 2022).

105. *See* Press Release, N.Y. STATE ATT'Y GEN, Attorney General James and Governor Hochul Release Report on the Role of Online Platforms in the Buffalo Shooting (Oct. 18, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-and-governor-hochul-release-report-role-online-platforms; *see also* Governor Kathy Hochul, *Governor Hochul Signs Landmark Legislative Package to Strengthen*

complaint, alleging that the New York law attempts to "strong-arm online services into censoring protected speech,"[106] succeeded in the district court, which granted a preliminary injunction, prohibiting enforcement of the law.[107] With laws like the ones in California and New York, one can see reliably Democratic-leaning states imposing internet platform and private speech regulations similar to the conservative proposals. This stems both from a historical change in the approach to free speech undergone by contemporary progressivism and conservatism, as well as an overt engagement in the political struggle to define the political discourse.

It is unclear what legal effect these sub-constitutional developments will have due to the tensions with First Amendment jurisprudence.[108] Nonetheless, they are important insofar as they reflect the bipartisan departure from classical liberal jurisprudence.[109] This departure has resulted in the current power struggle and drive to assert sovereignty over the political other in the realm of digital culture.[110] Finally, these formal developments may be viewed as a part of the change to the political constitution of the United States which is currently unfolding.[111]

II. THE FIRST AMENDMENT AND ITS PHILOSOPHICAL UNDERPINNINGS

Many of the supposed wrongs of Section 230 actually result from the First Amendment and its jurisprudence.[112] "Congress shall make no law . . . abridging the freedom of speech, or of the press."[113] From the Speech and Press Clauses several implications follow. First, apart from a few narrowly defined exceptions, people have a right to publicly

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Gun Laws and Protect New Yorkers, YOUTUBE (June 6, 2022) https://youtu.be/SNrci_ey8L4?t=750.

106. Complaint at 7, Volokh v. James, 1:22-cv-10195 (S.D.N.Y. Dec. 1, 2022), https://www.sdnyblog.com/files/2022/12/22-Civ.-10195-2022.12.01-Complaint-Volokh-v.-James.pdf.

107. Volokh v. James, 656 F. Supp. 3d 431 (S.D.N.Y. 2023).

108. *See infra* Part II.

109. *See infra* Part III.

110. *See infra* Part IV.

111. *See infra* Part V.

112. *See* sources cited *supra* note 5.

113. U.S. CONST. amend. I.

say things which are simply awful.[114] Second, the Constitution introduces a strong public-private divide,[115] meaning that while the government cannot regulate speech based on its content,[116] nor limit who can utter it,[117] private outlets such as the internet platforms can. Third, these principles originate in classical liberal thought underpinning the First Amendment, which has lost political currency today, especially in the context of platforms, often dubbed as public fora.[118] Nonetheless, the de-constitutionalization of speech on these platforms is not only preferable since it allows for moderation;[119] it is also instrumental to the emerging informal expressive regulatory dialectic and the consequent transformation of the political constitution examined in Part IV. These threads are tied by the cases of *Gonzalez v Google* and *Twitter v Taamneh,* where both the First Amendment and the Section 230 status quo were preserved, allowing for informal rather than juridical changes to freedom of expression.

A. *The Philosophical Underpinnings*

First Amendment jurisprudence and its justifications are pluralistic and include self-governance, aiding the discovery of truth through the marketplace of ideas, promotion of autonomy, and fostering

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114. Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (June 28, 2022), https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/ (Defining "lawful-but-awful" speech as such which is "offensive or morally repugnant to many people but protected by the First Amendment").

115. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948) ("Private speech, or private interest in speech . . . has no claim whatever to the protection of the First Amendment.").

116. Reno v. ACLU, 521 U.S. 844, 885 (1997) (finding that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

117. Packingham v. North Carolina, 582 U.S. 98, 108–09 (2017).

118. *Id.* at 104 ("While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular.") (citations omitted).

119. *See* Jack M. Balkin, *Free Speech Versus the First Amendment*, 70 UCLA L. REV. 1206 (2023) [hereinafter Balkin, *Free Speech vs. First Amendment*].

tolerance.[120] While it would be a simplification to reduce the law and its normative presuppositions to an ideal type, it is clear that the First Amendment owes debt to the classical liberal philosophy of radical skepticism,[121] where the 'veracity' of normative or political ideas was only to be tested democratically, through free competition of equivalent postulates.[122] It is useful to examine the classical liberal thought to understand the modern departures from this creed and how they impact the First Amendment jurisprudence.[123]

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120. ERWIN CHEMERINSKY, THE FIRST AMENDMENT 6–11 (2nd ed. 2021) [hereinafter CHEMERINSKY, FIRST AMENDMENT].

121. *See* MARK A. GRABER, TRANSFORMING FREE SPEECH (1991). *See generally* ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC (1997); *see also* RANDY BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (2000); RANDY BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016) [*hereinafter* REPUBLICAN CONSTITUTION]; RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014) [hereinafter CLASSICAL LIBERAL COSNTITUTION]; RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

122. Ho & Schauer, *supra* note 99, at 1166 (examining how "Holmes's own epistemological skepticism would have made him at least a bit uncomfortable with the notion of truth defined independently of the political or deliberative process"). Ho and Schauer provide a detailed discussion of Holmes's probable thought processes as motivated by this skepticism:

> Holmes was likely thinking of the competition not among factual propositions, nor even among normative ones whose soundness was subject to widespread agreement, but rather among normative moral, ideological, or political programs (e.g., socialism versus capitalism, democracy versus monarchy, regulation versus laissez-faire) . . . . Holmes [also may] have believed that the value of a political idea or ideological program was simply a function of which ideas were accepted and which were rejected. Ideas were good or bad insofar as they were accepted or rejected in the competition of the market. And that is because the market for political ideas is, or at least may well have been for Holmes, coextensive with the idea of democracy itself, such that democratic political truth is determined by, and, indeed, defined by, the market.

Id. at 1166–67 (footnotes omitted).

123. For the sake of brevity, I forgo an examination of John Milton's 1644 tract, *Areopagitica*. *See* Vincent Blasi, *A Reader's Guide to John Milton* Areopagtitica*, the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273 (2017), for a short overview.

Writing almost two hundred years ago, John Stuart Mill recognized that while the state can justly interfere with the liberty of individuals based on the "harm principle" (to protect other members of the society from being harmed by an individual), it should not infringe with one's freedom of conscience," "thought," "feeling," "opinion," "or expression."[124] In fact, Mill wrote that the "region of human liberty" extends to the "inward domain of consciousness," and demands liberty of conscience, thought and feeling, and an "absolute freedom of opinion and sentiment on all subjects."[125] The same principle establishes the inseparable liberty of "expressing and publishing opinions," even if they are deemed "foolish, perverse, or wrong."[126] Famously, Mill distinguished several grounds on which to defend freedom of speech: we do not know if certain expressions are true, and in fact cannot know, unless we are infallible. Even if the expressed opinions are wrong, they may still contain some kernel of truth or value, and be worth discussing; if they are right, then they need to be defended and contested, so that they do not become dogma, nor is their meaning lost.[127] Indeed, Mill denied the right of both the government and of the civil society to restrict expressive freedoms, even if such restrictions are supported by "all mankind minus one."[128]

In this way, according to liberals, "[n]o supposed truth has any proper claim to special treatment" and any truth can only be partial, provisionally accepted after competition in the marketplace by reasoned debate.[129] All questions were treated as open so as to avoid a society that demanded "orthodoxy, public truth, . . . upon whose validity it is entitled to insist; outside" the private realm in which there cannot be indoctrination.[130] According to Mill, such expressive freedom of individuals, including ideas considered eccentric or uncommon, could

124. MILL, *supra* note 98, at 15.

125. *Id.*

126. *Id.* Mill adds that there "ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered." *Id.* at 19 n.1.

127. *Id.* at 52–3

128. *Id.* at 19.

129. Willmoore Kendall, *The "Open Society" and Its Fallacies*, 54(4) AM. POL. SCI. REV. 972, 975 (1960).

130. *Id.* at 974. As explained below, the First Amendment takes a narrower approach than Mill had envisioned, operating with a strong private-public divide.

not have been subject to custom or even to the goals of progress or improvement.[131] This was the foundational claim of American liberal democracy.[132] Even today, although few academics believe the marketplace of ideas is a place where truth can defend itself,[133] recent dicta proclaim that "[t]ruth needs neither handcuffs nor a badge for its vindication"[134] and that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[135] Cultural, aesthetic, or epistemic truths, were to be private matters, and not of the expert, priestly, or even judicial judgement.

Finally, Mill recognized that the "tyranny of the majority" represents a threat to individual liberty.[136] By this, he meant not only that the democratically elected government can install an oppressive regime, but also that the society itself can be "tyrannical."[137] He wrote individuals need protection against the "tyranny of the prevailing opinion and feeling," the societal tendency to impose its own ideas and practices as rules of conduct on the dissenters.[138] At the same time, both law and custom are necessary social institutions. The essential

131. *Id.*

132. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

133. *But see, e.g.*, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997).

134. U.S. v. Alvarez, 567 U.S. 709, 727–29 (2012).

135. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). Liberal constitutionalism transforms speech from "contemptible" to acceptable:

> Nazis become political speakers, profit maximizing purveyors of sexually explicit material become proponents of an alternate vision of social existence, glorifiers of sexual violence against women become advocates of a point of view, quiet residential streets become public forums, and negligently false harmful statements about private matters become part of a robust debate about issues of public importance.

Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 397 (1989).

136. MILL, *supra* note 98, at 8.

137. *Id.*

138. *Id.*

question, thus, is where to limit the collective opinion's interference with individual independence.[139]

The Millian metaphor of the free marketplace of ideas, together with the liberal philosophy of epistemic neutrality and freedom of speech,[140] was expressly transplanted into the First Amendment jurisprudence by Justice Oliver Wendell Holmes, whose dissent in *Abrams v. United States* is widely seen as constitutive of the legitimizing myth of the First Amendment, henceforth permeating the Supreme Court jurisprudence.[141] There, Justice Holmes proclaimed that the "best test of truth is the power of thought to get itself accepted in the competition of the market."[142] This liberal perspective on freedom of expression continues to be judicially invoked to date,[143] despite a variety of scholarly and political critiques,[144] whose

139. *Id.* at 5.

140. *See also, e.g.*, JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110 (Liberty Fund 1995) (1755) ("Without freedom of thought, there can be no such thing as wisdom; and no such thing as public[] liberty, without freedom of speech: Which is the right of every man, as far as by it, he does not hurt and control the right of another . . . .").

141. Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see* Ingber, *supra* note 98, at 1; *see generally* Robert Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21 (2020).

142. Abrams, 250 U.S. at 630 (Holmes, J., dissenting). This is also how the law came to approach aesthetic questions in copyright. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes J.) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the work of pictorial illustrations, outside the narrowest and most obvious limits.").

143. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 476 (2014); United States v. Alvarez, 567 U.S. 709, 713–17 (2012); Sorrell v. IMS Health Inc., 564 U.S. 552, 582–83 (2011) (Breyer, J., dissenting); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Time, Inc., v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that the marketplace of ideas facilitates a "robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection'"); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965). Importantly, it also "endures . . .in the everyday rhetoric of countless free speech and anti-censorship advocates, whether institutional or individual." Ho & Schauer, *supra* note 9, at 1164–65.

144. *See* sources cited *supra* note 99.

ideological roots and constitutional importance is explored further in Part III and Part IV.

B. *The First Amendment and Content-Based Regulation*

The First Amendment prescribes that the government cannot regulate speech based on its content (i.e., either based on the viewpoint expressed or the subject-matter).[145] While this restriction is not absolute[146] and includes narrow exceptions where speech is unprotected or less protected,[147] in the United States expression of "offensive or

145. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972). The Court opined that:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open [sic]."

Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citations omitted)).

146. Such restrictions are presumptively invalid; however, they can be justified on strict scrutiny (e.g., narrowly tailored to serve a compelling state interest). *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155 (2015).

147. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (noting that "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children"); *see generally* CHEMERINSKY, FIRST AMENDMENT, *supra* note 120, at 123–364; *see also* Roger Kiska, *Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, 25 REGENT U. L. REV. 107, 139–42 (2012) (noting that "[u]nder the current state of the law, there remain only three types of speech that are constitutionally proscribed: obscenity, defamation, and speech that creates 'clear and present danger,'" and that, in the United States, the "so-called 'offensive' speech is protected," even if the offensive speech is premised on an attack of race, ethnicity, religion, or sexual preference, otherwise depicted as "'hate speech.'").

disagreeable" ideas are not prohibited,[148] no matter how "outrageous," or "painful;"[149] this remains a constitutional "bedrock."[150] Political speech, even unpopular or abhorrent, is particularly protected.[151] Liberally, it has been opined that it is the "function of free speech . . . to invite dispute," and that it may "best serve its high purpose" inducing "unrest, creat[ing] dissatisfaction with conditions as they are, or even stir[ring] people to anger."[152]

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148. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); United States v. Eichman, 496 U.S. 310, 318–19 (1990) (reiterating the Court's stance on protecting speech which is offensive and/or disagreeable).

149. Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988)) ("[O]ur own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment'").

150. Snyder v. Phelps, 562 U.S. 443, 460–61 (2011). The Snyder Court emphasizes the power of speech, and the importance of its protection:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow . . . . [W]e cannot react to [the] pain [inflicted] by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Id.

151. Political speech constitutes the "'highest rung of the hierarchy of First Amendment values' and is entitled to special protection." Snyder v. Phelps, 562 U.S. 443, 444 (2011). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, (1969) (calling it "the essence of self-government") (internal quotation marks omitted); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 871 (8th Cir. 2012) ("[p]rotection of political speech is the very stuff of the First Amendment.") (internal quotation marks omitted); *see also* Turner Broad. Sys. v. Fed. Commc'n Comm'n, 512 U.S. 622, 641 (1994).

152. Cox v. Louisiana, 379 U.S. 536, 551–52 (1965); *see* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) ("'The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.'") (alteration in original); N.Y. Times Co. v. United States, 403 U.S. 713, 725–26 (1971) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.") (Brennan, J., concurring).

On this theory, the remedy for speech that is false, fallacious, or evil is never censorship, but more speech.[153] It is also believed that there are no "false ideas,"[154] nor should there be restrictions on permissible subjects of debate.[155] We "do not want the government . . . deciding what is political truth . . . ."[156] Strikingly, the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[157] This is why the First Amendment has protected both Nazis[158] and white supremacists,[159] and the civil rights movement.[160] Some scholars argue that the First Amendment has not as often protected progressive speech and causes,[161] rather being a

153. United States v. Alvarez, 567 U.S. 709, 718 (2012) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."). *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Otto v. City of Boca Raton, Fla., 981 F.3d 854, 862 (11th Cir. 2020) (emphasizing that "[f]orbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee."). For a discussion of the complicated treatment of false speech see Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1 (2018).

154. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("[T]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.").

155. Consolidated Edison Co. of N.Y., Inc. v. Public Service Comm'n., 447 U.S. 530, 538 (1980).

156. Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp.3d 765, 769 (2014).

157. United States v. Stevens, 559 U.S. 460, 461 (2010) (noting the First Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

158. *See* Nat'l Socialist Party of Am. V. Village of Skokie 432 U.S. 43, 43–44 (1977); Collin v. Smith, 578 F.2d 1197, 1198–99, 1210 (7th Cir. 1978).

159. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45, 449 (1969). *But see* Virginia v. Black, 538 U.S. 343, 343 (2003).

160. *See* Shuttlesworth v. Birmingham, 394 U.S. 197 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Bates v. Little Rock, 361 U.S. 516 (1960).

161. Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2230 (2018). Seidman suggests that:

> [i]nstead of providing a shield for the powerless, the First Amendment became a sword used by people at the apex of the American power

weapon of the powerful.[162] Nonetheless, according to the Supreme Court, allowing for hateful speech is at the "heart" of the First Amendment;[163] choosing to treat all speech as protected regardless of viewpoint is a conscious political choice, different from the laws of European jurisdictions.[164]

Finally, there is no compulsion to speak. Government can infringe upon the First Amendment not only by prohibiting certain speech but also by attempting to compel persons to speak.[165] The broad principle, iterated by the Court in *303 Creative LLC v. Elenis*,[166] is that "the government may not compel a person to speak its own preferred messages" or "force an individual to include other ideas with his own speech that he would prefer not to include."[167] While the theoretical contours of this area of the law are still developing,[168] the doctrine extends to the governmental ability to force one speaker to host

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> hierarchy. Among its victims: proponents of campaign finance reform, opponents of cigarette addiction, the LBGTQ community, labor unions, animal-rights advocates, environmentalists, targets of hate speech, and abortion providers.

Id. (footnotes omitted). Likewise, Catharine A. Mackinnon argues:

> Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful. Starting toward the beginning of the twentieth century, a protection that was once persuasively conceived by dissenters as a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers, and corporations buying elections in the dark.

Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1223–24 (2020) (footnotes omitted).

162. Seidman, *supra* note 161, at 2232 (noting that there is an intrinsic relationship between ownership of the medium and the right to speak, and that "[b]ecause speech opportunities reflect current property distributions, free speech tends to favor people at the top of the power hierarchy").

163. Matal v. Tam, 528 U.S. 218, 246 (2017).

164. *See* Kiska, *supra* note 147. *See also infra* note 354.

165. W. Va. State Board of Educ. V. Barnette, 319 U.S. 624, 642 (1943).

166. 600 U.S. 570 (2023).

167. *Id.* at 58687.

168. Amar & Brownstein, *supra* note 46.

another's message,[169] which seems to have a clear bearing on the editorial rights of internet platforms.[170]

C. *The Private-Public Distinction and the State Action Doctrine*

The First Amendment protection of free speech is subject to the state action doctrine, meaning that individuals are protected from government action, but not from that of private actors.[171] Having an almost strictly vertical jurisprudence, the First Amendment allows digital platforms as private entities to exercise editorial freedom and discriminate against anyone.[172] State action doctrine follows from the strong public-private distinction foundational to American legal theory,[173] though just like the rest of liberal constitutionalist orthodoxy, this distinction has become an object of contemporary scholarly and political criticism.[174] Nonetheless, the divide between private (and thus free) and governmental (and thus oppressive) inherent in the doctrine[175]

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169. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63 (2006).

170. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 117 (2021) (suggesting it is "unexceptional that social media platforms are entitled to First Amendment editorial rights.").

171. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1933 (2019) (holding a private organization was "not subject to First Amendment constraints on how it exercise[d] its editorial discretion with respect to the public access channels"); Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); *see also* Bhagwat, *supra* note 170, at 117 (2021).

172. *See, e.g.*, NetChoice, LLC v. Att'y Gen., Fla.**,** 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that it was "substantially likely that social-media . . . 'content-moderation' decisions constitute protected exercises of editorial judgment . . . ."); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2013).

173. *See* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

174. *See generally, e.g.*, *id.*; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987).

175. *See* Seidman, *supra* note 161, at 2240 ("If Facebook takes down posts expressing political views it dislikes, that action is a manifestation of freedom, and the government's decision to do nothing about it raises no free speech concerns. But if the government intervenes to force Facebook to provide fair speech opportunities to all, that action is coercive.").

forms a "spatial metaphor" allowing to categorize and divide up the social world.[176]

Accordingly, the government regulates the public sphere, while the private realm is to be reigned freely by natural and legal persons. Put simply, "[t]here is not a right to use private property owned by others for speech. Because it is private property, the Constitution does not apply."[177] The legal orthodoxy means that "infringements of the most basic values . . . should be tolerated just because the violator is a private entity rather than the government."[178] Even if Section 230 was to be repealed, editorial mandates imposed by the government would be unconstitutional.[179]

Nonetheless, today some argue that platforms are not "squarely private" and should instead be considered analogous to private towns[180] or shopping malls[181] and thus be categorized as public fora. This rationale was recently expressed in *Packingham v. North Carolina*,

176. Peller, *supra* note 173, at 1192.

177. CHEMERINSKY, FIRST AMENDMENT, *supra* note 120, at 411.

178. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (criticizing the doctrine, its political origins, and implications) [hereinafter Chemerinsky, *Rethinking State Action*].

179. *See* Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question; Eric Goldman, *Are Social Media Services "State Actors" or "Common Carriers"?*, TECH. & MKTG. L. BLOG (Feb. 12, 2021), https://blog.ericgoldman.org/archives/2021/02/are-social-media-services-state-actors-or-common-carriers.htm ("Google is protected by the First Amendment's free speech and free press clauses. Thus, any regulatory mandate that Google include or exclude information in its search index is almost certainly unconstitutional.").

180. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946); Amalgamated Food Emps. Union Loc., 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

181. *See, e.g.*, Amalgamated Food Emps. Union Loc. 590, 391 U.S. at 325 (analogizing a shopping mall to the public square, similarly to the private town in *Marsh*). For an overview of this jurisprudence, see e.g., Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989 (2017). For modern references thereto, see Brief of Law and History Scholars as Amici Curiae in Support of Respondents, NetChoice, L.L.C. v. Paxton, 144 S. Ct. 477 (No. 22-555). *But see* Mike Masnick & Brian Frye, *Social Media Isn't A Shopping Mall*, TECHDIRT (Feb. 22, 2024), https://www.techdirt.com/2024/02/22/social-media-isnt-a-shopping-mall.

reasoning that the internet is "the modern public square."[182] For this reason, some would impose common carrier obligations, as Justice Thomas's two recent opinions forcefully propose,[183] or resurrect the long defunct fairness doctrine, which was applied to broadcast licenses: an approach favored today by conservatives,[184] even though it was the Republicans who campaigned for the fairness doctrine's revocation in the 1980s.[185] Some even go so far as to argue that platforms are in fact state actors, due to their perceived public function. Indeed, Justice Thomas's and Justice Gorsuch's recent dissents regarding a reconsideration of the libel standard have hinted at a possible revision of First Amendment jurisprudence.[186]

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182. Packingham v. North Carolina, 582 U.S. 98, 107 (2017) (holding that North Carolina statute impermissibly restricted lawful speech in violation of the First Amendment).

183. Justice Thomas opined:

Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms. . . . *There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.*

Biden v. Knight First Amend. Inst. At Columbia Univ.,141 S. Ct. 1220, 1221, 1224 (2021) (Thomas, J., concurring) (emphasis added). *See* Malwarebytes, Inc. v. Enigma Software Grp., USA, LLC, 141 S. Ct. 13 (2020). *But see, e.g.*, Sarah S. Seo, *Failed Analogies: Justice Thomas's Concurrence in Biden v. Knight First Amendment Institute*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1070 (2022) (critically analyzing Justice Thomas's approach).

184. Indeed, "bring[ing] fairness to Big Tech" was the self-proclaimed justification of former President Trump's Executive Order. Philip M. Napoli, *Back from the Dead (Again): The Specter of the Fairness Doctrine and its Lesson for Social Media Regulation*, 13 POL'Y & INTERNET 300, 301 (2021). While "both proponents and opponents of changes to the regulatory treatment of social media platforms are evoking the fairness terminology[,] . . . conservative proponents are generally avoiding specific references to the Fairness Doctrine." *Id.* at 306.

185. For a very brief overview of the Reaganite campaign against the doctrine and its repeal, see Ian Klein, *Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts*, 42 HASTINGS COMM. & ENT. L.J. 45, 56 (2020).

186. Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting) ("Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. . . . The proliferation of

Nonetheless, both the doctrinal force and policy implications of categorizing platforms as state actors based on their public function (as opposed to the coercion or entanglement exception, discussed in detail in Part IV) make such an application highly doubtful. In recent years, the courts have entertained a plethora of lawsuits alleging as much—and swiftly rejected them all.[187] One commentator remarked that "it is unlikely that federal courts will consider social media companies state actors despite their increasing influence and importance,"[188] while another found that the "legal and policy foundations for extending the

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falsehoods is, and always has been, a serious matter."); *Id.* at 2428 (Gorsuch, J., dissenting); Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022) (Thomas, J., dissenting). See Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in A Post-Sullivan World*, 75 FED. COMM. L.J. 1, 35–38 (2022), for a critical overview of these cases and lower courts echoing Justices Thomas and Gorsuch.

187. *See* O'Handley v. Weber, 62 F.4th 1145, 1156 (9th Cir. 2023) (finding Twitter was neither a public forum nor was it coerced to remove content); Prager Univ. v. Google LLC, 951 F.3d 991, 997 (9th Cir. 2020) (holding that YouTube was a private forum not subject to the First Amendment, despite its popularity) ("YouTube may be a paradigmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'provid[ing] a forum for speech.'") (quoting Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930, 1934 (2019)); *Halleck*, 139 S. Ct. 1921, at 1930 (2019) ("merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints"); *Tanner*, 407 U.S. 551, at 569 (1972) (finding that private property does not "lose its private character merely because the public is generally invited to use it for designated purposes"); Freedom Watch, Inc. v. Google Inc., 816 F. App'x 497 (D.C. Cir. 2020) (finding that Google was not a quasi-state actors capable of being sued for First Amendment violations for suppression of speech); Fed. Agency of News LLC v. Facebook, Inc., 432 F. Supp. 3d 1107 (N.D. Cal. 2020) (finding that Facebook did not engage in any functions exclusively reserved for the government, and thus was not a public forum); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (holding that Facebook's editorial policy did not violate the First Amendment because it is neither a public forum nor do its actions amount to state action, with the claims being barred by Section 230). *See also* Noah Feldman, A*re You Sure You Want a Right to Trump's Twitter Account?*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/opinion/first-amendment-trump-twitter; Alan Rozenshtein, *No, Facebook and Google are Not State Actors*, LAWFARE (Nov. 12, 2019, 8:30 AM) https://www.lawfareblog.com/no-facebook-and-google-are-not-state-actors.

188. Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 MITCHELL HAMLINE L.J. PUB POL'Y & PRAC. 99, 102 (2019).

exception are weak and would require an unnecessary degree of internet exceptionalism as justification."[189]

Most importantly, however, if a platform were to be categorized as a public square, we would need to accept strong First Amendment protection of online expression, including that speech is not to be moderated and that no discrimination of content or viewpoint can take place. This is why Mary Anne Franks wrote that the "extent to which social media forums do resemble physical public squares is no cause for celebration," since it is the public square which has tended to "reinforce legal and social hierarchies of race, gender, class, and ability rather than foster radically democratic and inclusive dialogue."[190] As explored further in Part III, this would be an undesirable result for both the modern right and the modern left because each attempts to control the expressive activity of the other in a way which can be done only by private hands of internet platforms. Instead, this Article argues that the legal status quo will be preserved, while an informal dialectic between government players and private platforms develops. The recent Supreme Court dicta in *Gonzalez v. Google*[191] and *Twitter v. Taamneh*[192] appear to confirm this argument.

D. *The Case Which Did Not Break the Internet*

The conservative and liberal justices' apparent readiness to reinterpret social media obligations provoked uncertainty as to how the Supreme Court would decide *Gonzalez v. Google* and *Twitter v. Taamneh*.[193] Speculating a doctrinal revolution was underway, authors

189. Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH J.L. TECH & ARTS 36, 73 (2019).

190. Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. FORUM 427, 428 (2021). Franks argues for a "digital democracy" modeled on the academy, characterized by its "scholarship, rigor, and norms of civil interaction," the "Enlightenment-Era, European salon," which simply filters out what does not meet this standard. *Id.* at 450.

191. Gonzalez v. Google, 598 U. S. 617 (2023).

192. Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).

193. *See, e.g.*, Etta Lanum, *Supreme Court Grants Certiorari in Gonzalez v. Google and Twitter v. Taamneh: An Overview*, LAWFARE (Nov. 8, 2022, 8:31 AM), https://www.lawfareblog.com/supreme-court-grants-certiorari-gonzalez-v-google-and-twitter-v-taamneh-overview ("It remains to be seen whether the legislature or the

were afraid of the consequences regarding both Section 230 and the First Amendment—dubbing *Gonzalez* as the case which could "break the internet"—it did not.[194]

The cases arose from two claimants' appeals from a 9th Circuit opinion, which concluded that most of the *Gonzalez* claims against Google were barred by Section 230 or otherwise failed to adequately allege proximate cause, while the *Taamneh* claim was found not to reach Section 230 by the circuit court.[195] Both cases concerned the liability of intermediaries for the hosting, and, in the case of *Taamneh,* also recommending to users through algorithmic systems, terroristic content posted online. The shape of online debate, the respective roles of the law and social media platforms, and the future of Section 230 and the First Amendment were all at stake.[196]

Instead of a revolution, the Court decided to preserve the legal status quo and decided the cases narrowly. In a three-page per curiam *Gonzalez* dictum following oral arguments best described as "farcical,"[197] the Court dismissed plaintiffs' arguments for failure to state a claim regarding the alleged aiding and abetting by Google, declining to "address the application of Section 230 to a complaint that appears to state little, if any, plausible claim for relief" or resolve the "viability of plaintiffs' claims as a whole."[198] The Court decided *Gonzalez* via the longer, jointly heard *Taamneh*, which did not

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Supreme Court will address Section 230 first, but this may be the prologue to a watershed moment for the internet and its users.").

194. *See, e.g.*, Kyle Chayka, *The Supreme Court Probably Won't Break the Internet—At Least for Now*, NEW YORKER (Feb. 24, 2023), https://www.newyorker.com/culture/infinite-scroll/the-supreme-court-probably-wont-break-the-internet-at-least-for-now.

195. Gonzalez v. Google, 2 F.4th 871, 880 (9th Cir. 2021).

196. *See generally* Brief of Center for Democracy & Technology, et al. as Amici Curiae in Support of Petitioner, Twitter, Inc. v. Taamneh, 598 U.S. 471 (2022) (No. 21-1496).

197. Kate Klonick, *How 236,471 Words of Amici Briefing Gave Us the 565 Word Gonzalez Decision*, SUBSTACK (May 29, 2023), https://klonick.substack.com/p/how-236471-words-of-amici-briefing#footnote-2-124666236 (presenting a legal realist reading of *Gonzalez*).

198. Gonzalez v. Google, 598 U. S. 617, 622 (2023).

explicitly raise Section 230 issues, and infamously "forgot" the First Amendment,[199] deciding to instead take a narrow approach.

It remains to be seen whether courts will redefine the doctrine independently of any congressional debate and alter the immunities offered by Section 230 or the First Amendment to internet platforms. This is doubtful, despite the concise concurrence of Justice Jackson stressing the fact-specific nature of the rulings,[200] and the further opportunities afforded by both the *Netchoice* litigation[201] and the *Murthy v. Missouri* case[202] pending before the Supreme Court. Rather, an informal change to freedom of expression is underway, as executive and sub-constitutional soft pressures become increasingly common, albeit difficult to grasp in formal constitutional parlance.[203] This includes practices which are cooperative or coercive, ranging from those running afoul of legal doctrine (though difficult to prove) and

199. *See* Genevieve Lakier & Evelyn Douek, *The Amendment the Court Forgot in Twitter v. Taamneh*, HARV. L. REV. BLOG (Mar. 1, 2023), https://harvardlawreview.org/blog/2023/03/the-amendment-the-court-forgot-in-twitter-v-taamneh/ (emphasizing that although "the word "speech" was not uttered a single time during oral argument in Taamneh, and the First Amendment came up only once, in passing . . . Taamneh is a case with speech at its center.").

200. Taamneh, 598 U. S. 471 (2023) (Justice Jackson, concurring) (asserting that "[o]ther cases presenting different allegations and different records may lead to different conclusions.").

201. *See generally* NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1231 (11th Cir. 2022), c*ert. granted in part sub nom.*; Moody v. NetChoice, LLC, 216 L. Ed. 2d 1313 (Sept. 29, 2023), *cert. denied sub nom*. NetChoice, LLC v. Moody, 144 S. Ct. 69, 217 L. Ed. 2d 9 (2023) (striking down the portion of the Florida law which limits the power of platforms to moderate and curate content, but upholding most of the law's disclosure provisions); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022), *cert. granted in part sub nom*. NetChoice, LLC v. Paxton, 216 L. Ed. 2d 1313 (Sept. 29, 2023) (upholding the Texas law in its entirety). The two decisions thus generated a circuit split to be resolved by the Supreme Court. *See* Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. FREE SPEECH L. 1 (2023) (arguing that the First Amendment doctrine had disregarded the risk that transparency laws will become a mechanism for governments to quietly reshape platforms' editorial policies, an issue which may be reassessed in the two pending cases).

202. Missouri v. Biden, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La. July 4, 2023), *aff'd in part, rev'd in part*, 80 F.4th 641 (5th Cir. 2023), *cert. granted sub nom*. Murthy v. Missouri, 144 S. Ct. 7 (2023). See infra Part IV, where the case is analyzed in detail.

203. *See infra* Part IV.

those which are formally legal (though politically unprecedented).[204] Most likely, this complex dialectic will not be stopped by the courts, while the political constitution is changed through private hands.

III. THE CRISIS OF LIBERAL CONSTITUTIONALISM AND FREE SPEECH TRAJECTORIES

The tradition of American liberal constitutionalism, with its decidedly broad protection of expression in the public square, strongly contrasted with the private realm where the owner is king, has come under attack from both the left and the right. In fact, it does not seem to suit the worldview of either the modern left or the modern right who, at a time of crisis of the deliberative liberal democracy, have become increasingly antagonistic and intolerant of the political other. Both sides are waging so-called "culture wars," which transcend the boundary between the private and the public in a way classical liberal tradition did not foresee.

This Part illustrates how both sides of the political spectrum have abandoned the liberal jurisprudential tradition. Conservatives and progressives treat free speech instrumentally, trumped by their positive vision of the community; they have moved away from liberal axiology and its concept of toleration, allowing for the emergence of an existential power struggle to dominate the political other and to decide the future of the political culture and community.[205] This has led progressives and conservatives to employ various jawboning techniques in a bid to pressure platforms into taking particular political stances and influence their editorial decisions. From this emerges a new regulatory dynamic, which *de facto* supplants the formal protections of freedom of expression even if no legal change takes place. Part IV argues that, absent a doctrinal legal revolution, this move from liberal

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204. Bantam Books v. Sullivan, 372 U.S. 58, 71(1963) (finding systems of "informal censorship" unconstitutional). *See also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 16–65 (2006); Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning"*, LAWFARE (July 26, 2021, 3:52 PM), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning (noting that "relatively little attention has been paid to the constitutional question of whether, or rather when, government jawboning itself violates the First Amendment.") [hereinafter Lakier, *Informal Gov't Coercion*].

205. *See infra* Part IV.

to actual sovereignty can only be done with private hands, thus resulting in a dialectic of cooperation and coercion between internet platforms and the government. Part IV concludes this amounts to an informal constitutional change or a change to the political constitution of the United States.[206]

A. *The Paradox of Liberal Tolerance, the Rise of the Illiberal Right and Progressivism*

Liberalism mediates between irreconcilable plurality of conceptions of the good life, religions, ideologies, and political persuasions by being fundamentally neutral.[207] This is the classic account associated with thinkers such as John Rawls, who would allow for a broad public sphere where reasonable disagreement may ensue.[208] In this way, liberalism seeks a "common" or "neutral" ground, necessitated by pluralism, and shies away from expressing a comprehensive doctrine.[209] On this broad foundation, thinkers such as Rawls or Jürgen Habermas base the model in which legitimate decisions are arrived at through collective deliberation, which is inclusive of legitimately divergent perspectives.[210] This necessitates a basic toleration of the other, facilitating legitimate disagreement on matters political. Today, this concept seems to have fallen out of vogue.

Thinkers from within and outside of liberal tradition have found neutrality illusory, because, for all its purported tolerance, liberalism does in fact make non-neutral value and political choices.[211] Going

206. *See infra* Part IV.

207. JOHN RAWLS, POLITICAL LIBERALISM xvi–xviii (1993).

208. *Id.*

209. *Id.* at 192.

210. *See generally*, DEMOCRACY AS PUBLIC DELIBERATION (Maurizio d'Entreves ed., 2006). There are, of course, noteworthy differences between the two philosophers. *See* Christian F. Rostbøll, *Emancipation or Accommodation?: Habermasian vs. Rawlsian Deliberative Democracy*, 34(7) PHIL. & SOC. CRITICISM, 707 (2008).

211. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 12122 (1994) (calling neutrality a "chimerical" concept). *See also* Gerald E. Frug, *Why Neutrality?*, 92 YALE L.J. 1591, 1591 (1983) ("if liberalism actually requires…government value neutrality, then neither the United States nor any other country has had, or could ever have, a liberal government"); Michael J. Perry, *Neutral Politics?*, 51 REV. POLITICS 479 (1989). For responses, see Wojciech Sadurski, *Joseph Raz on Liberal Neutrality and*

further, critics have written that liberalism is not tolerant of the illiberal, thus accepting only itself in the public sphere.[212] Accordingly, despite the Rawlsian-Habermasian promulgation of deliberative democracy,[213] liberalism has led to a "general depoliticization of citizenship and power and retreat from political life itself . . . since political conflicts cannot in fact "be productively articulated and addressed."[214] Even where it does not prescribe a result, substantive political freedom can be limited through social reality.[215] In the realm of expression, inequity has been found by some in liberal formalism's consequences on people of color and women, for example due to the legal protection of hate speech and pornography.[216] Finally, others such as Alexis de Tocqueville, noted such freedom to be illusory if society itself imposes a collectivist discipline: one which pressures the individual to conform with the ideas of the majority not through force, but overpowering in the illusorily free debate, where the unpopular can be ostracized and effectively silenced.[217]

Depoliticization seems to be masked by the conceptual framework of American liberal constitutionalism and its interpretive methods,

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the Harm Principle, 10 OXFORD J.L. STUDS. 122 (1990); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 (1989). Lastly, readers may be familiar with analogous critiques of originalism. *See* Whitley Kaufman, *The Truth about Originalism*, 9 PLURALIST 39, 40 (2019) ("Originalism is anything but neutral; it is in fact a pointedly political program in the disguise of a purely legal, constitutional analysis").

212. *See* Slavoj Žižek, *Against Human Rights*, 34 NEW LEFT REV. 115, 120 (2005) ("The other is welcomed insofar as its presence is not intrusive, insofar as it is not really the other.").

213. *See generally*, DEMOCRACY AS PUBLIC DELIBERATION, *supra* note 210. There are, of course, noteworthy differences between the two philosophers. *See* Rostbøll, *supra* note 210, at 707.

214. WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 89 (2006).

215. *See, e.g.*, Catherine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 6 (2011).

216. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

217. RUSSELL KIRK, THE CONSERVATIVE MIND 218 (1995). *See also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

depriving people of political choice, especially when compared to the European order, which resolves the open-closed society conflicts more openly, if not more successfully.[218] These illusions of neutrality were exposed by thinkers ranging from Karl Marx[219] to illiberal integralists of the modern right.[220] Critics have underlined that genuine political liberty has never concerned the political other,[221] or the systemically oppressed within the political community (such as people of color and women).[222]

Finally, one of the lines which liberalism has to tread is determining which political speech is legitimate. How an open society can defend itself from its enemies without becoming a closed society (i.e., without resorting to illiberal measures) is the perennial question of liberal

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218. *See generally* BRIAN CHRISTOPHER JONES, CONSTITUTIONAL IDOLATRY AND DEMOCRACY 1–28 (2020);
JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

219. *See* KARL MARX, *On the Jewish Question, in* MARX: EARLY POLITICAL WRITINGS 211–41 (Rodney Livingstone & Gregor Benton trans., Penguin Classics 1992) (1975).

220. *See* RYSZARD LEGUTKO, THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES (Teresa Adelson trans.) (2016). *Cf.* Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1043 (2019); Stephen A. Gardbaum, *Why the Liberal State can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1350–52 (1991). *See also* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L.REV. 1341 (2020) (noting how religious anti-liberalism may influence the SCOTUS).

221. MILL, *supra* note 98. The literature on imperialism is abundant. *See, e.g.*, SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR 9, 14, 310 (2021) (Moyn analyzes how the U.S. foreign policy, facially employing a humanitarian narrative, has in fact led to a paradigm of "endless war," one where "global American war [becomes] global American policing," which he calls a new form of slavery."). *See also* PANKAJ MISHRA, AGE OF ANGER: A HISTORY OF THE PRESENT 44 (2017); for a philosophical genealogy; see ERIC T. LOVE, RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 18651900 (2004); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005).

222. *See generally* JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 3rd ed. 2013); Sarah Ahmed, *Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights*, 4 SOC. & LEGAL STUDS. 55 (1995).

constitutionalism.[223] It leads to the paradox of tolerance, famously expressed in Wolfgang Böckenförde's words: the "liberal secular state lives off presuppositions which it cannot itself guarantee. This is the great gamble which it has taken on in the interest of freedom."[224] As shown above, the American gamble was particularly risky, given the breadth of the First Amendment, which does not mandate civility nor is it rooted in protection of the others' dignity, like some rival political[225] and legal conceptions.[226] The question is rather concerning, given the clash in understanding of both equality and liberty as constitutional and political values, and the growing discontent with the classical liberal formalism.[227] Nonetheless, up until recently, liberal institutions have preserved discursive and political stability fairly well, even as they presently may be seen as failing, whether in their effects, or in the perception of both the left and the right, who are in stark disagreement. To explain this change, this Article first maps the evolving identities of the two sides of the political spectrum and their approaches to freedom of expression, then analyzes the current moment of First Amendment anxiety as applied to internet governance.

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223. *See* K. R. POPPER, OPEN SOCIETY AND ITS ENEMIES (photo. reprt. 1947) (1943). *See also, e.g.*, Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986)).

224. Jan-Werner Müller, *What the Dictum Really Meant–And What it Could Mean for Us*, 25 CONSTELLATIONS 196, 196 (2018).

225. *See generally* Teresa M. Bejan, *Free Expression or Equal Speech?*, 37 SOCIAL PHILOSOPHY & POLICY 153, 154 (2020) (critiquing the classical liberal conception of free expression and exploring a theory of "equal speech", a distinct concept, rooted in relational equality of speakers).

226. *See generally* RONALD J. KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (2009) (providing comparative legal analysis of free speech and disputing the American narrative of absolutist free speech importance to democracy).

227. *See* J. Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1072 (2002) ("Many believe that the problem of hate speech is . . . one of balancing the constitutional value of freedom of expression guaranteed by the First Amendment . . . with the value of equal protection guaranteed by the Fourteenth Amendment…"),

B. *Conservative Free Speech Trajectories*

American conservatism has represented three distinct positions regarding free speech and the First Amendment. The "Old Right" was infamously censorial and prone to legislation of morals,[228] opposing universalized absolutes in favor of the common good.[229] This conception, rooted in the classical republican tradition, critiqued the value-pluralist attitude of liberalism, claiming the latter was incompatible with any belief other than in liberalism itself, and thus incompatible with religious and cultural creeds giving rise to a functional community where individuals can live meaningful lives.[230]

Thus, Wilmoore Kendall famously critiqued liberal value pluralism, claiming it was with any belief other than in liberalism itself,

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228. *See*, *e.g.*, ROGER SCRUTON, THE MEANING OF CONSERVATISM 16–17 (1984). Scruton notes that "[l]iberal thinkers have always recognized [that there cannot be absolute free speech]. But they have seen the constraints on freedom as arising only negatively and in response to individual rights. Freedom should be qualified only by the possibility that someone might suffer through its exercise." *Id.* Scruton adds that "the conservative constraint should be upheld, until it can be shown that society is not damaged by its removal. Thus the constraints on freedom arise through the law's attempt to embody . . . the fundamental values of the society which it aims to rule." *Id*. at 17. *See also* Lord Devlin, *Law, Democracy, and Morality*, 110 U. PAPA. L. REV. 635, 638–39 (1962) ("What makes a society is a community of ideas . . . The morals which [criminal law] enforces are those ideas about right and wrong . . . which are necessary to preserve [the society's] integrity.")

229. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); Adrian Vermeule, *Beyond Originalism*, THE ATL. (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good- constitutionalism/609037. Although this Article notes a partial convergence of liberal communitarians and common-good conservatives in their approach to free speech, there are important differences between these strands of progressive and conservative thought. *See generally* Brian Leiter, *Politics by Other Means: The Jurisprudence of Common Good Constitutionalism*, 90 U. CHIC. L. REV. 1685 (2023).

230. Kendall, *supra* note 129, at 977. See also Ingber, *supra* note 98, at 3, for further discussion on the "marketplace of ideas":

> This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas, in Holmes's perspective, ultimately assures the proper evolution of society, wherever that evolution might lead.

Id.

and thus incompatible with religious and cultural creed.[231] Old conservatives recognized that society is not a debate club, that speech can be harmful,[232] and correspondingly, called for the legislation of morals to preserve societal integrity.[233] Otherwise, they thought, the community risked a breakdown of common premises, a narrative upon which society is construed, and ultimately the destruction of the republican mythos.[234] Accordingly, unconstrained free speech was an ideal of a man rejecting community, a paradigm not of "freedom and rights but intolerable aloneness and subjection to demoniac fears and passions," leading to the lonely crowd, where the "confused and resentful masses incline toward any fanaticism that promises to assuage their loneliness," including fascism.[235] These concerns bear striking resemblance to the contemporary communitarian narrative.

Then, a major "ideological drift" took place,[236] and the Reaganite right came to favor free-speech liberalism,

231. Kendall, *supra* note 129, at 977–78.

232. *Id.* at 977. *See also* Ingber, *supra* note 98, at 3.

233. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (photo. reprt. 1975) (1965); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); James Allan, *Revisiting the Hart-Devlin Debate: At the Periphery and By the Numbers*, 54 SAN DIEGO L. REV. 423 (2017).

234. *See generally* THE REPUBLIC, 337d–39a (G.M.A. Grube & D. C. Reeve eds., 1992). *See also* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7–9, 16–19 (1983).

235. KIRK, *supra* note 217, at 483–84. *See also, e.g.*, ROBERT NISBET, TWILIGHT OF AUTHORITY (1975) [hereinafter NISBET, TWILIGHT]; NISBET, COMMUNITY AND POWER: FORMERLY "THE QUEST FOR COMMUNITY" 25 (1962) (1953).

236. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990) (defining the drift as "buttress[ing] comparatively conservative interests" by "comparatively liberal principles"); Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 204–05 (1994). Sullivan elaborates on this ideological change as follows:

> If it used to be that censorship was associated with the right and free speech libertarianism with the left, *today the political poles have switched*. Now we hear new calls from the left for speech regulation and arguments from the right against it . . . . The old scorecard no longer tells us who the players are. Radical feminists team up with family-values fundamentalists to argue for the regulation of sexually explicit speech. And cigarette manufacturer Phillip Morris, accustomed to political support from Senator Jesse Helms, surprisingly finds the ACLU joining in a vigorous argument that tobacco advertising deserves First Amendment protection.

[237] thus influencing doctrinal development and technological policy.[238] Philosophically and rhetorically, Reaganites turned to natural rights individualism, thinking of liberty in negative terms,[239] the role of the state to be minimal, and Constitutional law, a safeguard from governmental encroachment.[240] Individual liberty became a key value of First Amendment jurisprudence,[241] aligning with Meiklejohn and Justice Brandeis, but resting on more individualist grounds.[242] As Mark Tushnet wrote, "[f]rom the 1920s to the 1970s or so, liberals typically supported challenges to speech regulations . . . . Since then, . . . free speech has become conservatives' darling . . . [using] it in the culture wars to challenge hate speech regulation and antidiscrimination laws."[243]

As private property was reenchanted, so were free speech[244] and free association,[245] leading to controversial decisions concerning

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Id. (emphasis added); WAYNE BATCHIS, THE RIGHT'S FIRST AMENDMENT x (Keitj J. Bybee ed., 2016) (discussing how "[t]oday, a critical mass of conservatives both on and off the Supreme Court are much more willing than they have been in the past to agree with their liberal counterparts that speech is deserving of First Amendment protection" and thus the amendment "become[s] an affirmative tool for advancing mainstream conservative policy objectives.").

237. *See generally* BATCHIS, *supra* note 236.

238. *See generally* Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51 (1994). *See also* Klein*, supra* note 185.

239. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties.") (citations omitted).

240. Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 239–243 (2014).

241. For modern defenses of the libertarian approach, see e.g., BARNETT, REPUBLICAN CONSTITUTION *supra* note 121; EPSTEIN, CLASSICAL LIBERAL COSNTITUTION, *supra* note 121; Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335 (2017).

242. Heyman, *supra* note 240, at 261

243. Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 210 (2006).

244. *See* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 145 (1989) (exploring the conflict between expressive and property rights in the shopping centers' context).

245. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

political contributions,[246] and more strikingly, decisions such as *American Booksellers Ass'n v. Hudnut*.[247] In *American Booksellers Ass'n*, the Court struck down an anti-pornography ordinance, despite acknowledging the harm pornography causes women.[248] Similarly in *R.A.V. v. City of St. Paul*,[249] the Court decided to strike down an ordinance which prohibited fighting words relating to "race, color, creed, religion, or gender," concluding it constituted impermissible viewpoint discrimination.[250] Further, the Court emphasized the fundamental nature of free speech rights, which are not to be limited by social interest balancing,[251] and struck down laws targeting violent entertainment[252] or depictions of violence to animals.[253] Finally, in *Alvarez*, the Court underlined that exceptions to free speech protection are narrow and historically defined, unlikely to be extended, and do not include false speech.[254] This turn toward First Amendment liberalism and reversal from the old right's social conservatism reacted to the rise of feminist, communitarian, and egalitarian strands in progressivism.[255]

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246. *See* Citizens United v. FEC, 558 U.S. 310 (2010); McCutcheon v. FEC, 134 S. Ct. 1434 (2014); *see generally* Heyman, *supra* note 240, at 261.

247. Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The court found that what distinguishes the United States from totalitarian governments is the "absolute right to propagate opinions that the government finds wrong or even hateful," even if it is the pernicious beliefs which prevail. *Id.* at 328.

248. *Id.* at 328–29.

249. 505 U.S. 377 (1992).

250. *Id.* at 391–93.

251. United States v. Stevens, 559 U.S. 460, 470 (2010).

252. Brown v. Entertainment Merchants Ass'n (EMA),131 S. Ct. 2729 (2011).

253. United States v. Stevens, 559 U.S. 460 (2010).

254. Alvarez, 567 U.S. 709, 717–718 (2012).

255. Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.C.L. L. REV. 169, 170–71 (1994). Delgado describes these shifting views as follows:

> The old, formalist view of speech as a near-perfect instrument for testing ideas and promoting social progress is passing into history. Replacing it is a much more nuanced, skeptical, and realistic view of what speech can do, one that looks to self- and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system.

Id. (footnotes omitted).

Recently, however, another "reversal" took place on the political right. Following the decision by certain popular platforms to ban former President Trump, the right seemingly aligned itself with the progressive concern over the power of private players to moderate or limit free speech,[256] and wished to interpret the constitution not through the prism of the public-private divide, but natural or human rights.[257] Ironically, modern conservative arguments sound just like what Jerome Barron argued in the late 1960s from the left. Barron wrote that the First Amendment ought to address "nongovernmental obstructions to the spread of political truth,"[258] proposing that "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view."[259] While one can see an influence of traditionalist or common-good thought in this point of view, one could also argue that, like the communitarians of the 1960s or 2020s, the "New Right" is making an instrumental argument owing more to Thrasymachus or Schmitt than Thomas Aquinas.[260]

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256. Genevieve Lakier, *The Great Free-Speech Reversal*, THE ATL., (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ (noting that "[w]hen Trump and other conservatives complain that the decision to remove the president from popular platforms violates his freedom of speech, they . . . acknowledge, albeit only implicitly and perhaps opportunistically, that early 20th-century progressives were correct to worry about private power's threat to constitutionally protected liberties.").

257. Adam Serwer, *Why Conservatives Invented a 'Right to Post'*, THE ATL. (Dec. 9, 2022), https://www.theatlantic.com/ideas/archive/2022/12/legal-right-to-post-free-speech-social-media/672406/ [hereinafter Serwer, *Right to Post*]; Adam Serwer, *Trump's Warped Definition of Free Speech*, ATL. (May 29, 2020), https://www.theatlantic.com/ideas/archive/2020/05/trumps-warped-definition-free-speech/612316/ [hereinafter Serwer, *Trump's Warped Definition of Free Speech*]; David French, *Elon Musk and Tucker Carlson Don't Understand the First Amendment*, THE ATL., (Dec. 3, 2022), https://www.theatlantic.com/ideas/archive/2022/12/elon-musk-and-tucker-carlson-dont-understand-the-first-amendment/672352/.

258. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967).

259. *Id.* at 1656. *See also* Brief of the Cato Institute as Amicus Curiae in Support of Plaintiffs-Appellees at 4–5; *see generally* NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1104501.

260. Thrasymachus is known for authoring the concept of justice as the rule of the stronger in Plato's *The Republic*. *See* PLATO, *supra* note 234. It is, indeed, fitting in the post-truth era. *See, e.g.*, Mike Masnick, *Donald Trump Tells the Supreme Court that Social Media Is a Common Carrier; Never Mentions His Own Social Media Site*,

Contemporary conservatism has learned the Schmittian lesson.[261] Recently accused of weaponizing the First Amendment in a SCOTUS dissent,[262] conservatives "rediscovered" the First Amendment, and as a result, made liberals, who "once championed expansive First Amendment rights . . . now uneasy about them."[263] This Article already sketched the evolution of the conservative position on free-speech: from the old right's majoritarian readiness to limit the spreading of corrupt ideas—to the Reaganite embrace of an expansively interpreted

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TECHDIRT (Oct. 27, 2022, 10:45 AM), https://www.techdirt.com/2022/10/27/donald-trump-tells-the-supreme-court-that-social-media-is-a-common-carrier-never-mentions-his-own-social-media-site/.

Speaking of totally hypocritical arguments, it caught my eye that one of the amicus briefs comes from Donald Trump himself. Now, given that he's the owner of his very own social media website, Truth Social, which regularly engages in totally arbitrary viewpoint discrimination, I wondered if perhaps he might actually argue that websites need to have the freedom to moderate as they see fit.

Id.

261. JAN-WERNER MÜELLER, WHAT IS POPULISM? 15–26, 46–53 (2016) (defining populism as "a form of identity politics" resting on "[t]he idea of the single, homogenous, authentic people" that "thrive on conflict and encourage polarization . . . [and] treat their political opponents as 'enemies of the people' and seek to exclude them altogether."). Müller further argues that populists are anti-institutionalists when their views are in opposition to the current establishment, and that when "populists [are] in power [they] are fine with institutions—which is to say *their* institutions." *Id*.

262. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (criticizing the "weaponiz[ation of] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.").

263. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html. See also, e.g., Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994) for an illustration of how conservatives are adjusting their understanding of the First Amendment. Shiffrin highlights how:

Conservatives have recently discovered the First Amendment, and they are beginning to like what they see: a banner for corporations seeking to dominate election campaigns, for tobacco companies to hawk their wares, for shopping centers to exclude demonstrators, for media corporations to resist access, and a club to use against those who seek to regulate racist speech and pornography.

Id. (footnotes omitted).

First Amendment and a thin antitrust policy[264]—and finally to a return of the common-good and fairness of free speech narrative, overcoming the neoliberal public-private divide and embracing an expansive competition policy aimed at "Big Tech."[265]

Today, conservatives decry that we are "living through one of [the] most serious anti-free speech periods . . . due to a rising orthodoxy and intolerance . . . in . . . public debate[.]"[266] For example, the conservative Jonathan Turley supports "heretical and immoral speech" against "majoritarian anger," afraid of "intolerance" and "religious dogma."[267] He observes, however, that the "most damaging anti-free speech movement" comes from the secular "government-mandated or government-encouraged speech controls" exercised by private groups and companies like digital platforms.[268] In this way, conservatives afraid of losing the culture war by being excluded from legitimate debate have become free speech absolutists,[269] ambivalent about First Amendment legalism.[270] Indeed, Turley claims a person's capability to gather their "own facts and reach [their] own conclusions," including on public health matters such as vaccines, is "essential . . . [to] self-governance."[271] Turley also likens "intolerance against conservative voices" to the Red Scare, writing that "harm-based philosophy" and a transformation of progressive prejudice into orthodoxy lead to a

264. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

265. *See generally* BATCHIS, *supra* note 236.

266. Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in The United States*, 45 HARV. J.L. & PUB. POL'Y 571, 571 (2022).

267. *Id.* at 572.

268. *Id.* at 573. *See also id.* at 613–14 (arguing that "[r]ecent years have shown that a uniform system of corporate censorship can be far more effective than the classic model of a central ministry in controlling information," while also expressing concern at "how the use of private companies to impose an extensive censorship system has been embraced by many in academia and the media.").

269. *See generally* MEIKLEJOHN, *supra* at note 115.

270. Turley, *supra* note 266 at 575 ("[F]ree speech values are neither synonymous nor contained exclusively within the First Amendment. . . . [A]ll of *these* public and private forms of censorship undermine free speech values.") (emphasis added).

271. *Id.* at 578.

"narrowing of debate."[272] In this way, today's conservatives advocate for "a right to post," abandoning Section 230 and First Amendment "Lochnerism."[273]

Finally, the modern Right's interpretation of the First Amendment within the platforms-government dialectic needs to be seen in the prism of conservative-populist abandoning of the broadly liberal framework. This Article does not attempt to provide an exhaustive definition of illiberal populism and its clash with constitutionalism, especially given the plethora of scholarly treatments of the topic.[274] It is important to note, however, that the Right's pivot suggests an overtly protectionist turn and the concomitant abandoning of the distinction between the private and the public,[275] while the free speech idealism supporting a "right to post" is seemingly upheld only in the context of internet platforms. Whenever conservatives are in power, however, they appear to have few qualms about suppressing the speech rights of the left, abandoning their idealistic conception.[276] The recent state level legislative proposals to ban "critical race theory teaching" in schools are a clear attempt to exclude the political other, or any "divisive" narratives undermining the right,[277] and diminishing the sphere of legitimate debate.[278] This is inherent in the burgeoning politics of

272. *Id.* at 608–09.

273. Serwer, *Right to Post*, *supra* note 257; Serwer, *Trump's Warped Definition of Free Speech*, *supra* note 257; Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 967–69 (2020).

274. *See* ANTI-CONSTITUTIONAL POPULISM (Martin Krygier, Adam Czarnota, Wojciech Sadurski eds., 2022).

275. *See* David J. Lynch, *As DeSantis Takes Aim at Cruise Industry, Republicans Step Up Attacks on Longtime Allies in Corporate America*, WASH. POST (June 8, 2021, 3:29 PM), https://www.washingtonpost.com/us-policy/2021/06/08/republicans-business-desantis-cruise/.

276. Nathan J. Robinson, *The Right Loves Free Speech—Unless They Disagree with What You Say*, CURRENT AFFS. (Apr. 25, 2022), https://www.currentaffairs.org/2022/04/the-right-loves-free-speech-unless-they-disagree-with-what-you-say.

277. *See, e.g.*, Caroline Mala Corbin, *A Critical Race Theory Analysis of Critical Race Theory Bans*, UC IRVINE L. REV. (forthcoming 2024), https://ssrn.com/abstract=4409726 (last visited Nov. 18, 2023).

278. *See* Vanessa Miller, Frank Fernandez, & Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Educati*on, 88 MO. L. REV. 63 (2023); Joshua Gutzman, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333 (2022); Dylan Saul, *School*

discontent with liberalism, toleration, and the other: manifesting a turn towards a political community which is homogenous and intolerant.

C. *Progressive Free Speech Trajectories and the Birth of Cultural Democracy*

This Article started with a description of classical liberalism as an ideology of neutrality and skepticism, though it is important to note that this description never constituted the entirety of liberal axiology,[279] and is far from the totality of what modern liberalism or "progressivism" stands for.[280] Its concepts are largely devoted to championing positive progress and equality in economic and cultural spheres. The progressive turn in liberal thought saw a primacy of the community over the atomistic individual, believing he is supposed to be shaped in accordance with the values and beliefs of the society.[281] Famously, John Dewey wrote that an individual ought to be educated in the beliefs of liberal democracy and become an integral part of the community in which individuals expresses themselves.[282] Pragmatically, the society

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Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans, 107 MINN. L. REV. 1311 (2022).

279. Shane Courtland et al., *Liberalism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2022), https://plato.stanford.edu/archives/spr2022/entries/liberalism. Courtland elaborates on classical liberal axiology, noting that:

> [a]lthough classical liberalism today often is associated with libertarianism, the broader classical liberal tradition was centrally concerned with bettering the lot of the working class, women, blacks, immigrants, and so on. The aim, as Bentham put it, was to make the poor richer, not the rich poorer. . . . Consequently, classical liberals treat the leveling of wealth and income as outside the purview of legitimate aims of government coercion.

Id. (citations omitted).

280. While this Articles focus on the expressive domain, it is clear that "twentieth century ideological shift from classical liberalism to progressivism [produced] massive legal changes," e.g., in labour law. Stephen J. Ware, *Labor Grievance Arbitration's Differences*, 51 CUMB. L. REV. 275, 281 (2021).

281. *See generally* AMY GUTMAN, DEMOCRATIC EDUCATION (1987).

282. *See generally* John Dewey, *The Ethics of Democracy*, *in* THE EARLY WORKS OF JOHN DEWEY, 1882–1898 (Jo Ann Boydston ed., 1969).

rather than the individual and his ideas, became the point of reference.[283] Progressives:

> viewed individuals as interdependent social beings whose own interests could be harmonized with broader community interests. They were confident that individuality could best be realized in a cooperative society sharing common values that transcended the materialism of capitalism. Instead of perceiving government as a threat to individuals, they believed that an active state could help create a consensual community by providing the resources needed for the actual exercise of positive and not merely formal rights.[284]

Liberalism, too, is a belief in rationalism, as well as scientific and technological progress, attempting to apply their insights in all fields of human activity. It believes in an "activist government that strives to achieve the public good, including the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation,"[285] ready to limit individual rights when they do not support progressive social issues, including the right to free speech.[286] The state seeks to *improve* the collective economic, cultural, and moral human condition. It thus promotes a particular utopia, a normative vision, by transforming basic units of the societal structure and individual right to a heterodox belief, in the spirit of *high modernism.*[287]

In modern society, culture becomes the domain of politics, where the changes in "expressive symbols and forms" are made.[288] The progressive society firmly acknowledges the primacy of culture in

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283. *See generally id.;* JOHN DEWEY, LIBERALISM AND SOCIAL ACTION (1935); BARACK OBAMA, THE AUDACITY OF HOPE (2007).

284. David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 958 (1996).

285. Seidman, *supra* note 161, at 2220.

286. Rabban, *supra* note 284, at 955 ("Though aimed at the evils of economic rights, the progressive position that individual rights should be recognized only to the extent that they contribute to social interests also confined the right of free speech . . . [P]rogressives appreciated free speech . . . But they saw no value in . . . dissent that was not directed at positive social reconstruction.")

287. *See* SCOTT, *supra* note 27.

288. Daniel Bell, *The Cultural Contradictions of Capitalism*, 6 J. AESTHETIC ED. 11, 12 (1972).

generating social change, institutionalizing the avant-garde charged with "constantly turning up something new."[289] Accordingly, the cultural elite drive societal transformation more than the economic sphere; the culture industry, after Adorno, replaces consciousness with conformity.[290] This phenomenon has led to the recognition of a "cultural democracy" that "forms of life, aesthetic values, and conceptions of the good that circulate within a society," and is shaped largely "by the values and beliefs of individuals and communities acting outside of the institutions of formal politics."[291] Such expressive politics, which came to dominate modern society,[292] have gradually transformed into the digitally waged "culture war." For this reason, controlling expression online is of utmost importance for both the left and the right.

Today's liberals go further than the pluralist deliberative democracy of John Rawls, who believed in a politically neutral state.[293] Instead, borrowing from the thinkers of the New Left movement in the 1960s, today's liberals believe in militant democracy both domestically and abroad.[294] For thinkers such as Richard Rorty, even truth itself is subordinate to the needs of democracy,[295] representing a line of thinking which dominates the contemporary progressive movement; it has also sparked concerns.[296] Indeed, Steven Gey wrote in the late 1990s that:

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289. *Id*. at 13.

290. Theodor W. Adorno, *Culture Industry Reconsidered*, 6 NEW GERMAN CRITIQUE 12, 17 (1975).

291. Jonathan Gingerich, *Is Spotify Bad for Democracy? Artificial Intelligence, Cultural Democracy, and Law*, 24 YALE J.L. & TECH. 227, 233–34 (2022). *See* J. M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 173 (1999).

292. *See* Bell, *supra* note 288, at 34.

293. John Gray, *Agnostic Liberalism*, 12 SOC. PHIL. & POL'Y 111, 126 (1995). *See generally* RAWLS, *supra* note 207.

294. *See generally* PAUL STARR, FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM (2007); sources cited *supra* note 221.

295. *See* RICHARD RORTY, *The Priority of Democracy to Philosophy*, *in* OBJECTIVITY, RELATIVISM, AND TRUTH 75–81 (1991); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 37778 (1979).

296. *See* John Gray, *The Problem of Hyper-Liberalism*, TLS (Mar. 30, 2018), https://www.the-tls.co.uk/articles/problem-hyper-liberalism-essay-john-gray/.

> It is an unfortunate sign of our ambiguous times that the First Amendment's free speech protection no longer commands universal support among progressive constitutional scholars and legal activists. . . . Critical race theorists, feminists of the MacKinnon school and civic republicans have, each in their own ways, attacked the old-fashioned left-liberal fixation on the First Amendment and the quaint, if not antiquarian notions of intellectual freedom that the Amendment represents.[297]

Progressive liberalism, identifying its own values with progress itself and the end of history, is in tension with the formal egalitarianism of the First Amendment,[298] which is characterized by politically unconstrained free speech; naturally driven to reduce heterodox beliefs and speech acts to the private sphere.[299] According to Cass Sustein, "in light of astonishing economic and technological changes, we must now doubt whether, as interpreted, the constitutional guarantee of free speech is adequately serving democratic goals."[300] In this way, progressives wish to "allow the government to regulate speech in the democratic public interest in the same way that the judicial revolution of the 1930s limited property and contract rights while upholding New Deal social and economic legislation."[301] Likewise, the modern progressive and the modern conservative normative visions and philosophical commitments are in tension with the classical liberal politics of neutrality and negation. Both strands of thought focus on substantive political and cultural goals simultaneously at odds with tolerating each other. Section 230 critics and the First Amendment consensus would find little space for heterodox pluralism in legitimate discourse.

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297. Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 193 (1996).

298. *See* Rabban, *supra* note 284 (tracing the evolution of the progressive approach to free speech in light of the history of ideas). *See also* Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, THE ATL. (Apr. 27, 2020, 3:15 PM), https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/.

299. *See generally* FRANCIS FUKOYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

300. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xi (2nd ed. 1995).

301. Rabban, *supra* note 284, at 954.

Further, we may see the progressive turn towards epistemic paternalism[302] and openness to exclusion as borrowing from Herbert Marcuse. Recognizing that free speech may benefit only some, he called for "discriminating tolerance," one which can remedy inequities and inequalities by repressing the oppressive political right.[303] If inevitable and virtuous progress exists, then there is no place for philosophy and rational debate,[304] or for the Millian defending of speech rights, now supported only by few among liberals.[305] Thus, for a progressive, it is difficult to support either First Amendment "absolutism," the ideas and form of expressions found on the internet, or their political results.[306] At the same time, unlike some on the right,

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302. Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113, 118–19 (1991) (explaining epistemic paternalism); Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 129–43, (Michael Herz & Peter Molnar eds., 2012) [hereinafter Schauer, *Social Epistemology*].

303. Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81 (Robert Paul Wolff, Barrington Moore, Jr., & Herbert Marcuse eds., 1970). *But see* Goldberg, *supra* note 273 (critiquing progressives' "cynicism" and "lack of faith" in the First Amendment following the Reaganite era).

304. *See* Christoph Kletzer, *Kelsen and Blumenberg: The Legitimacy of the Modern Age*, 25 KING'S L. J. 19, 19 (2014). Indeed, as Holmes said, "[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Of course, he believed such certainty is not possible, that "all life is an experiment," and that the "best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.*

305. Schauer, *Social Epistemology*, *supra* note 302. *See* FRANK FUREDI, ON TOLERANCE: A DEFENCE OF MORAL INDEPENDENCE (2011) (criticizing the demise of personal autonomy and a sense of morality, conscience, or individual reasoning, which transformed into a collectivized cultural difference, policed by zero-tolerance politics); RUSSELL BLACKFORD, THE TYRANNY OF OPINION: CONFORMITY AND THE FUTURE OF LIBERALISM 8, 49 (2018) (opposing "a revisionist liberalism increasingly grounded in identity politics and notable for its ideological purity policing," leading to "the suppression of ideas and opinion by either government action or social condemnation").

306. *See, e.g.*, Brian Leiter, *The Case Against Free Speech*, 38 SYD. L. REV. 407, 417 (2016) (suggesting that despite its potential to "contribute to democratic self-government," speech can also "contribute to fascism, genocide, and even less egregious kinds of injustice" such that "only someone who thought the popular will

progressives value democracy for its own sake.[307] The transformation of liberalism into progressivism and the rise of the illiberal right can be seen as creating or uncovering tensions in the project of liberal constitutionalism and the First Amendment, leading to the reality of political antagonism rather than legitimate contestation we seem to be entering.

D. *The Crisis of Liberal Democracy*

One of the fundamental political and constitutional questions bearing on the scope of freedom of speech is how liberalism and democracy are to be reconciled, together with corollary questions about a particular conception of equality and the roles of property and law in society. Liberals generally thought while the legitimacy of the system is derived from popular will:[308] the Constitution, as the expression of liberal values, performs a limiting function on the people and the government expressing their will. This limitation of the sovereign is how liberals,[309] and constitutionalists at large, define liberal democracy;[310] meanwhile, the dynamic between a particular conception of liberty and that majoritarian will underlies the constitutional debates.[311] More broadly, this limiting power of liberalism and liberal constitutionalism on popular will has been the object of many critiques,[312] while the liberal distrust of the popular will is not only subject to important constitutional theory works,[313] but its pedigree

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had intrinsic value regardless of its basis or its content could possibly think a polity ruled by their fictions and half-truths justified a free speech regime").

307. *Cf., e.g.*, JASON BRENNAN, AGAINST DEMOCRACY 1, 7 (2nd ed. 2017).

308. *See, e.g.*, John Locke*, The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 265, 366–67 (Peter Laslett ed., 1988).

309. *See* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960). *See also* Viktor J. Vanberg, *Liberal Constitutionalism, Constitutional Liberalism and Democracy*, 22 CONST. POL. ECON. 1 (2011), for a short overview.

310. *See, e.g.*, SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY (1991); ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (1999).

311. *See e.g.,* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

312. *See generally, e.g.*, CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al eds., 1993).

313. *See, e.g.*, A. C. GRAYLING, DEMOCRACY AND ITS CRISIS (2018); DAVID RUNCIMAN, THE CONFIDENCE TRAP (2013).

reaches as far back as ancient Athens.[314] Finally, as modern progressivism and conservatism evolve to be positive and coherent ideologies—losing their commitment to toleration and negative freedom and becoming singly critical of particular power structures—their relationship to the political other becomes increasingly difficult.[315]

These insights can be gathered from one of liberal democracy's foremost critics, Carl Schmitt who, read narrowly enough, continues to inspire both the left and the right.[316] Schmittian critics of liberal democracy deployed analyses undermining the liberal democratic regime and the façade of the liberal form.[317] According to Schmitt, liberalism negates democracy, and democracy negates liberalism, an

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314. *See generally* POPPER, *supra* note 223; J. S. MCCLELLAND, THE CROWD AND THE MOB: FROM PLATO TO CANETTI (1989). For a more recent treatment, see SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930) (analyzing the tensions between freedom and demands of modern political culture).

315. *See* Cas Mudde, *Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism (The Government and Opposition/Leonard Schapiro Lecture 2019)*, 56 GOV'T AND OPPOSITION 577, 577, 581 (2021) (arguing that "contemporary populism is an illiberal democratic response to undemocratic liberalism. It is a response to the depoliticization of politics, which has characterized (European) politics for at least four decades now").

316. As Tracy B. Strong wrote:

> [A]ll of the Frankfurt School (especially Walter Benjamin) spoke highly of [Schmitt], often after 1933. More recently, the Italian and French Left, as well as those associated with the radical journal *Telos*, have approvingly investigated his nonideological conception of the political. The European Right, as well as American conservatives of a Straussian persuasion, find in his work at least the beginnings of a theory of authority that might address the suppose failings of individualistic liberalism. Just as interestingly, a number of defenders of liberalism have found it necessary to single out Schmitt for attack.

Tracy B. Strong, *Foreword to* Carl Schmitt, THE CONCEPT OF THE POLITICAL: EXPANDED EDITION ix, x-xi (George Schwab trans., 2007) (1932) [hereinafter THE CONCEPT].

317. CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 13 (Thomas McCarthy ed., Ellen Kennedy trans., The MIT Press 6th ed. 2000) (1923) [hereinafter THE CRISIS] ("The façade is liberal: the state's legitimacy is justified by a free contract. But the subsequent depiction and the development of the central concept, the 'general will', demonstrates that a true state, according to Rousseau, only exists where the people are so homogeneous that there is essentially unanimity."). *See generally*, LAW AS POLITICS *supra* note 39. *Cf.* JAN-WERNER MÜLLER, A DANGEROUS MIND (2nd ed. 2013) (critiquing Schmitt's approach).

idea echoed decades later by the thinkers of the New Left,[318] given that the political struggle occurs between *friends* and *enemies*, *us* and *them*. This struggle, one predicated on a divide between formal and substantive equality, ultimately leads to homogeneity (which, after Gramsci, we can interpret through the cultural lens[319]); it is one of an "utmost degree of intensity of a . . . union or separation . . . ."[320] In it, the public enemy, *hostis*, is the stranger collective negating one's way of life and must be fought to preserve one's form of existence.[321] In this way, the liberal discourse centered on the individual is at odds with democratic creation of homogenous identity.[322] Going further, for Schmitt, equal rights only "make good sense where homogeneity exists."[323] The foundational inquiry is thus who belongs to the *demos*—the people—and who is excluded.

Although the liberal conception of equality holds that homogeneity can be achieved in a moral vacuum between universalized persons rather than humans, in reality people do not "face each other as abstractions but as politically interested [and] determined persons . . . allied or opponents."[324] Superficially, all human characteristics may seem confined to private life, but while inequality exists in economic relations, it is inevitable that human differences will resurface.[325] Schmitt observed that modern parliamentarism involves not a "question of persuading one's opponent of the truth or justice of an opinion but rather of winning a majority in order to govern with it."[326] If, however, liberalism silences

318. Strong, supra note 316.

319. *See generally* Perry Anderson, *The Antinomies of Antonio Gramsci*, 100 NEW LEFT REV. 5, 78 (1976).

320. SCHMITT, THE CONCEPT, *supra* note 316, at 26. In fact, this is not an analysis foreign to American history of ideas, either. Famously, Oliver Wendell Holmes wrote to Frederick Pollock that "between two groups that want to make inconsistent kinds of world I see no remedy except force." Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 1, 1920), in 2 HOLMES-POLLOCK LETTERS 36 (Mark DeWolfe Howe ed., 1941).

321. *Id.* at 27–28.

322. *See* Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, 10 CANADIAN J.L. & JURIS. 21, 23 (1997).

323. CARL SCHMITT, THE CRISIS *supra* note 317, at 10.

324. *Id.* at 11.

325. *Id.* at 13. *See also* Robert B. Talisse, *Liberalism, Pluralism, and Political Justification*, 13 HARV. REV. PHIL. 57, 58 (2005).

326. Bellamy & Baehr, *supra* note 39, at 171.

all of the political drives of the people, who remain divided by the substantive nature of the Constitution and allegiance to principles entrenched therein, people will be but slaves of such an order. The community, and the Constitution, will gradually dissolve, having nothing in common and nothing to deliberate upon but a *pacta sunt servanda* entrapment in one political community.[327] This is only until the will to prevail and impose a vision of life in an illiberal zero-sum game becomes too strong to be constrained by liberal procedures.[328] The essence of this line of thinking is that:

> democracy subverts rational debate and replaces it with a putative homogeneous popular will. So long as the demos remains relatively circumscribed, the contradiction between the two goes unnoticed. However, the complexity and diversity of modern industrial societies has undermined the basis for a common good on which the rational formation of a general will depends.[329]

Until recently, American political culture mediated these drives well, while existential anxiety over constitutional fundamentals was dismissed.[330] Whether public square-based argumentation functioned well or because civil adversity rather than a genuine conflict otherwise allowed for a sphere of legitimate contestation,[331] today the struggle over the grand questions has resurfaced in an increasingly polarized America.[332] Pertinently, the project of establishing a legitimate spectrum of opinions has been undermined, directly affecting the

327. *See generally, e.g.*, GREENE, *supra* note 218; MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

328. GREENE, *supra* note 218.

329. Bellamy & Baehr, *supra* note 39, at 171–72.

330. *See, e.g.*, Alice G. Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety,* 25 CONST. COMMENT. 431 (2009).

331. See CHANTAL MOUFFE, DELIBERATIVE DEMOCRACY OR AGONISTIC PLURALISM 15 (2000) for Mouffe's attempt to define "the political":

> By 'the political', [sic] I refer to the dimension of antagonism that is inherent in human relations… '[P]olitics' consists . . . in trying to defuse the potential antagonism that exists in human relations . . . [F]rom the point of view of 'agnostic pluralism', [sic] the aim of democratic politics is to construct the 'them' in such a way that it is no longer perceived as an enemy to be destroyed, but an 'adversary'.

Id.

332. *See generally* POLITICAL POLARIZATION IN AMERICAN POLITICS (John Sides & Daniel J. Hopkins eds., 2015).

question of how to regulate digital fora and what kind of speech, both in content and form, is deemed legitimate.

In this respect, it is striking that today the illiberal other is found within the society: heard and presumably radicalized in online spaces, whose bubbles undergo spillovers to the physical world. It includes the former president, who has been classified as fascist, authoritarian, or adjacent thereto,[333] accused of leading an insurrection which was provoked and legitimized by his own online speech.[334] The liberal checks and balances are failing[335] and, seemingly, the culture wars waged over the internet are now the domain of modern existential struggle over the future of both free speech and the constitutional identity of the state.

E. *"Digital Culturalization" of Existential Politics and Redefinition of Sovereignty*

Arguably, the existential nature of political struggle materializes today in the sphere of expressive politics. When "[p]undits and partisans cast everything as a culture war, even those things that have little to do with culture," including "debates that might have otherwise been boring," everything becomes "an apocalyptic battle between the

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333. *See, e.g.*, Jason Stanley, *A Rhetoric of Fascism: How Fascism Works: The Politics of Us and Them*, *in* FASCISM, VULNERABILITY, AND THE ESCAPE FROM FREEDOM: READINGS TO REPAIR DEMOCRACY 357 (2022); MADELEINE ALBRIGHT, FASCISM: A WARNING (2018); TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017); Alex Zhang, *Ostracism And Democracy*, 96 NYU L. REV. ONLINE 235 (Recounting ways in which Trump undermined democracy and proposing ostracism as a solution); William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 24172419 (2021) (writing that the "real enemies of democracy . . . are those who try to ignore the rules of the game after they have already lost it . . . [i.e.,] President Donald Trump and those who fought for him," adding that "[a]fter the 2020 presidential election, the peaceful transfer of power can no longer be taken for granted."). *See also* Udi Greenberg, *Intellectual History and the Fascism Debate: On Analogies and Polemic*, 20 MOD. INTELL. HIST. 571 (2023) (further discussing these analogies).

334. George Petras et al., *Timeline: How A Trump Mob Stormed the US Capitol, Forcing Washington Into Lockdown*, USA TODAY (Jan. 6, 2021, 11:19 PM), https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests-capitol-riot-trump-supporters-electoralcollege-stolen-election/6568305002.

335. *See, e.g.*, Bojan Bugaric, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps"*, 11 HAGUE J. RULE L. 447, 449–50 (2019).

forces of good and evil."[336] This phenomenon is widely known as the "culture war." While scholars remain divided on whether and to what extent it characterizes the current state of U.S. politics, it seems to have already resulted in deep political polarization and a loss of the middle ground.[337]

According to sociologist James Davison Hunter, due to the "politicization of everything," but also "democratization and proliferation of free speech," the culture war has led to a "dangerous sense of winner-take-all conflict over the future of the country."[338] Both sides of the political conflict see the other as an "existential threat to their way of life, to the things that they hold sacred," deconstructing any national myths and sense of community.[339] This fuels both the politics of resentment and radicalization, observable in the "New Right's" "counter-revolutionary" political theology.[340] This theology embraces illiberal political means to realize a shared normative vision, but also the progressive willingness to censor the opponent, whether directly, or at the hands of private parties.

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336. Shadi Hamid, *The Forever Culture War*, THE ATL. (Jan. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/01/republicans-democrats-forever-culture-war/621184/.

337. Alan Abramowitz & Kyle Saunders, *Why Can't We All Just Get Along? The Reality of a Polarized America*, 3 FORUM 1, 1 (2005) ("The culture war is almost entirely an elite phenomenon, driven by a small group of activists on the left and right who exert influence far out of proportion to their numbers. It is the elites and activists who are polarized, not the public."). *Cf.* E.J. Dionne Jr., *Why the Culture War Is the Wrong War*, THE ATL. https://www.theatlantic.com/magazine/archive/2006/01/why-the-culture-war-is-the-wrong-war/304502/ (last visited Nov. 9, 2023). Dionne Jr. asserts that "[t]here always has been and always will be [a culture war,] . . . a deep cultural conflict in the United States." *Id.* She further argues that this culture war "is waged between the fifteen to twenty percent of the country that is both profoundly religious and staunchly conservative and the fifteen to twenty percent that is both profoundly secular and staunchly liberal," adding that, irrespective of the numbers, "those most ardently engaged on both sides of this fight, taken together, do not constitute a majority of Americans." *Id.*

338. Zack Stanton, *How the 'Culture War' Could Break Democracy*, POLITICO (May 20, 2021, 5:30 PM), https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900.

339. *Id.*

340. *Id.*

The culture war has been waged mostly online for several technological and structural reasons already explored,[341] but also practically because so much of contemporary cultural expression takes place digitally.[342] Indeed, the rise of the internet has changed our social epistemology.[343] As people speak freely online, and are not gatekept by traditional media but are instead amplified by algorithms, we observe a proliferation of "cheap speech," the ideas people think are worth spreading, in whatever form they like.[344] Thus, genuine differences between people are rediscovered, and so are the features of the discourse which are not liberally mediated, and thus proliferate unguided by reasoned arguments,[345] fragmented, and tribalist.[346] Therefore, platform editorial policies practically determine the discursive frames, blurring the easy conceptual distinctions between the private and public,[347] the digital and real.[348]

There is a sense in which the internet platforms, unconstrained by liberal constitutionalist doctrines such as the First Amendment, have a greater sovereignty than the government itself. Platforms institute the rules over online speech and the government does not: discriminating freely and unconstrained by popular will (other than through the market process). Platforms not only effectuate the rules of digital democracy

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341. *See supra* Part I.

342. *See, e.g.*, Ben Schreckinger, *A new era for the online culture war*, POLITICO (Dec. 6, 2022, 4:26 PM), https://www.politico.com/newsletters/digital-future-daily/2022/12/06/a-new-era-for-the-online-culture-war-00072613.

343. *See generally* Brian Leiter, *The Epistemology of the Internet and the Regulation of Speech in America*, 20 GEO. J.L. & PUB. POL'Y 903 (2022).

344. Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2306 (2021). *See generally* RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022).

345. Eric Mandelbaum & Jake Quilty-Dunn, *Believing without Reason, or: Why Liberals Shouldn't Watch Fox News*, 22 HARV. REV. PHIL. 42, 42–43 (2015).

346. Jonathan Haidt, *Why the Past 10 Years of American Life Have Been Uniquely Stupid*, ATL. (Apr. 11, 2022), https://www.theatlantic.com/magazine/archive/2022/05/social-media-democracy-trust-babel/629369/.

347. Andrew Keane Woods, *Public Law, Private Platforms*, 107 MINN. L. REV. 1249, 1250 (2023) ("platforms scramble relatively settled notions of public and private").

348. *See* Tom Boellstorff, *For Whom the Ontology Turns: Theorizing the Digital Real*, 57 CURRENT ANTHROPOLOGY 387 (2016).

but also have the power to suspend them, "decide on the exception," and remove the content they find undesirable.[349] Thus, what might be politically untenable in the U.S. (e.g., exclusion of major illiberal candidates and parties from elections or speaking[350]) presents no obstacle to a private platform. This is the non-liberal conception of sovereignty which both the modern right and the modern left would like to adopt to exercise control over the political other, to silence or compel speech.

Indeed, not only can platforms exercise greater control over online speech than the government, but they are also more powerful than other internet infrastructures. For the power to be exercised, there needs to be a central authority capable of wielding it. Thus, while some would like to see a collapse of the sovereigns of cyberspace and a move towards more decentralized, community-governed cyberspace speech environments,[351] others find the platform to be a necessary element of a new constitutional architecture, where there exists a stable authority remedying the dangers of self-governance.[352]

Thus, there are two dimensions of sovereignty at play: (1) sovereignty of government versus internet platforms, and (2) sovereignty of government over the political other. Internet platforms, able to control what is said online, unconstrained by the First Amendment, present a stable onus of power that undermines the relative actual sovereignty of the government.[353] At the same time, if the platforms are coerced or cooperated with by the government, they

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349. *See* SCHMITT, POLITICAL THEOLOGY, *supra* note 43, at 5–6.

350. *See* Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANS'L L. 1321 (2013), for a comparative study. *See also* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1413 (2016). Whether this will happen juridically, while unlikely, is to be determined. The Supreme Court confirmed it cannot happen at the state level. *See* Trump v. Anderson, No. 23-719, slip op. at 6 (U.S.).

351. *See* Alan Z. Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. FREE SPEECH L. 217, 228–229 (2023).

352. *Id.* at 229 ("The main objection to the Fediverse is that what some see as its key asset—its decentralized model—is for others the main bug. Because there is no centralized Fediverse authority, there is no way to fully exclude even the most harmful content from the network"). *Cf.,* Jessica Maddox, *The Hidden Dangers of the Decentralized Web*, WIRED (May 19, 2023) https://www.wired.com/story/the-hidden-dangers-of-the-decentralized-web. (arguing against decentralization).

353. *See supra* Part I.

present a possibility for the government to transcend the liberal conception of sovereignty, potentially allowing the state to sidestep constitutional limitations and become more powerful. Thus emerges a regulatory dialectic of cooperation and coercion, one which redefines the scope of freedom of speech, creating an informal constitutional amendment that will be unopposed by courts. This is a change to the political constitution of the United States, necessitated by the transformation of the modern right and the modern left.

IV. THE SHIFTING BALANCE: OUTSOURCED CENSORSHIP AS A MEANS OF CONSTITUTIONAL CHANGE

It is now uncontroversial to recognize that free speech and the First Amendment are distinct phenomena.[354] Internet platforms, sometimes called the "sovereigns of cyberspace," privately regulate much of the expression taking place online, outside of the reach of constitutional protections of speech.[355] Scholars have noticed the emergence of a pluralist model of speech governance, one where platforms play an important role.[356] To the extent that we consider the law broadly, as a social phenomenon in which infrastructure or code become regulatory modalities,[357] internet platforms play a direct role in the political constitution.

Thus, scholars question whether the First Amendment can be considered obsolete,[358] while others argue that platforms bear a civic responsibility. Prominent voices, such as Cass Sunstein, see internet governance as filling the gaps of the law, particularly the overbroad protection accorded to speech by the First Amendment

354. Balkin, *Free Speech vs. First Amendment*, *supra* note 119, at 2–3.

355. *See supra* Part I.

356. Balkin, *Free Speech vs. First Amendment*, *supra* note 119; Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2340 (2014); *see generally* Balkin, *Triangle*, *supra* note 51, at 2014–15; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1151 (2018).

357. *See generally* LAWRENCE LESSIG, CODE, AND OTHER LAWS OF CYBERSPACE (1999).

358. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. COLUM. U. (Sept. 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete.

jurisprudence.[359] Further, some call for platforms to be considered fiduciaries, others for them to come under greater political control or be broken up.[360]

At the same time, platforms can be targeted by the legislative and executive branches in what has been called "new school regulation,"[361] through either the imposition of liability on the platform to target its users, an imposition of collateral censorship as the means of political change, or digital prior restraints.[362] While platform regulation of speech has come under more stringent legal obligations in Europe,[363] this is not a development that is likely to take hold in the United States absent a judicial revolution in the interpretation of the First Amendment.[364]

Finally, given the ability of internet platforms to control digital democracy and online discourse—and thus, to have a significant impact on the politics—platforms may exercise the kind of sovereignty of which the First Amendment deprives the government. Thus, as the modern left and modern right departed from liberal tenets,[365] we could see the government attempting to influence content moderation of powerful internet platforms and engaging in a novel regulatory dialectic of cooperation and coercion. This Article argues that the bipartisan threats of Section 230 repeal are just that: another form of political

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359. CASS R. SUNSTEIN, LIARS 103 (2021) (observing that "defamatory statements [are] generally protected by the First Amendment," Sunstein argues they could be "downgraded" on social media, through various "modest" means, such as warnings and disclosures, damage caps and schedules, a general right to demand correction or retraction, but also bans and deplatforming).

360. *See, e.g.*, Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

361. Balkin, *Free Speech vs. First Amendment*, *supra* note 119, at 11 (flagging efforts by the government to "surveil and regulate expression by regulating digital infrastructure owners in the different parts of the technology stack" in such a way as "to get *them* to surveil and regulate speech in ways the state likes," and defining this "regulation that aims at digital infrastructure owners to get them to regulate and surveil end-user speech according to the government's purposes as *new-school speech regulation*.") (footnotes omitted) (emphasis in original).

362. *See* Balkin, *Triangle*, *supra* note 51, at 2016–20.

363. See Ioanna Tourkochoriti, *The Digital Services Act and the EU as the Global Regulator of the Internet*, 24 CHI. J. INT'L L. 129 (2023), for a recent overview.

364. *See supra* Part II.

365. *See supra* Part III.

pressure placed on platforms, rather than a genuine calls for reform. The anticlimactic result of *Gonzalez v. Google* seems to confirm this reading. Although jawboning does not fit comfortably within the First Amendment doctrine, it will likely go unopposed by the courts, becoming part of an informal constitutional change.

A. *Jawboning and the Emergence of a Novel Regulatory Dialectic*

Scholars have long written of *jawboning*,[366] noticing a danger of privatizing and outsourcing censorial functions which the government cannot constitutionally exercise.[367] Already a decade ago Yochai Benkler wrote that "informal systems of pressure and approval on market actors" have allowed the government to systemically evade the constraints of the Constitution and attack government's critics extralegally.[368] In this way, the government can establish its sovereignty and redefine the character of the community and its culture, from classical liberal to progressive or conservative, with private hands.

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366. Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015) (providing a detailed taxonomy of jawboning) [hereinafter Bambauer, *Jawboning*].

367. *See generally* Molly K. Land, *Against Privatized Censorship: Proposals for Responsible Delegation*, 60 VA. J. INT'L L. 363 (2020) (detailing different legal and extra-legal measures that governments take to influence platform censorship); Haley Tuchman, *Outsourced Censorship: A Case For Judicial Revival Of The State Action Doctrine's Encouragement Theory*, 93 S. CAL. L. REV. 1039, 1042, 1069–66 (2020) (explaining the government's outsourcing of censorship as a growing threat); Lakier, *Informal Gov't Coercion*, *supra* note 204; Kyle P. Apple, *When the Shield Becomes the Sword: The Evolution of Section 230 from a Free Speech Shield To a Sword of Censorship*, SSRN (Jan. 31, 2022), https://ssrn.com/abstract=4045663 (arguing that "section 230 permits government to indirectly censor speech through social media platforms" and thus should be found unconstitutional).

368. Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 314 (2011). Theoretically, this might implicate the state action doctrine. *See infra* Part IV.B. *But see* Patty, *supra* note 188, at 102 ("[I]t is unlikely that federal courts will consider social media companies state actors despite their increasing influence and importance."); David Greene, *When "Jawboning" Creates Private Liability*, ELEC. FRONTIERS FOUND. (June 21, 2022), https://www.eff.org/deeplinks/2022/06/when-jawboning-creates-private-liability (arguing that government control of speech through social media censorship threatens democracy) [hereinafter Greene, *Jawboning*]. *Cf.,* Chemerinsky, *Rethinking State Action*, *supra* note 178, at 510–11 (explaining private infringements on freedoms as comparable to government violations of constitutional rights).

This process, a conjunction of non-liberal identity of the left and the right with the neoliberal might of the private platform, redefines the expressive paradigm regardless of formal constitutional constraints.

The term jawboning refers to informal governmental pressures on private entities which operate "at the limit of, or outside, that actor's authority."[369] Governments use informal means especially in the context of internet regulation,[370] as formal regulatory action is constrained by Section 230, the First Amendment, and other legal doctrines and statutes such as the DMCA.[371] Attempting a taxonomy, Derek Bambauer distinguished governmental measures as various as expressing an opinion or position without consequence to use of overt threats of action that would have material consequences for internet intermediaries.[372] Such actions may not be problematic; however, the more coercive the pressure, the less legitimacy it possesses. Jawboning proper, Bambauer argued, is present where the state threatens or imposes penalties that lack grounding in law.[373] The constitutional assessment becomes especially difficult in the middle range.[374]

Jawboning is a useful tool for the state since "governments can avoid responsibility for their policy preferences if they force platforms to carry their water."[375] Indeed, one of the difficulties in examining the prominence of this phenomenon, not to mention attempting to challenge it, is epistemological, especially that "platforms have participated in voluntary self-regulatory and co-regulatory initiatives, through which they increasingly instantiate state speech preferences through private ordering."[376] On the other hand, Danielle Citron argued that "no matter how often . . . lawmakers describe the recent changes to private speech practices as 'voluntary' decisions, they can only be reasonably understood as the product of government coercion."[377] This suggests

369. Bambauer, *Jawboning*, *supra* note 366, at 57.

370. *Id.* at 58.

371. *Id.* at 61–63.

372. *Id.* at 88.

373. *Id.* at 91.

374. *Id.* at 89. For an example presenting these difficulties, *see infra* note 429 discussion of *Murthy v. Missouri* and accompanying text.

375. Bloch-Wehba, *supra* note 14, at 30.

376. *Id.* at 43. *See also* Bovard, *Big Tech*, *supra* note 26; Crawford, *supra* note 26.

377. Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1047 (2018).

the emergence of a coercive regulatory dialectic between the state and *virtual governments* where the boundary between pressure and cooperation is blurry, but nonetheless constitutionally worrisome and novel.

Recently, both the U.S.[378] and foreign[379] governments have put new pressures on online platforms (e.g., over control of COVID-19 information). Governments also began quasi-official cooperation with platforms and search engines.[380] Politicians have engaged in hearings

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378. '*They're Killing People': Biden Slams Facebook for Covid Disinformation*, THE GUARDIAN (July 16, 2021, 10:04 PM), https://www.theguardian.com/media/2021/jul/17/theyre-killing-people-biden-slams-facebook-for-covid-misinformation (according to Joe Biden, "social media platforms such as Facebook 'are killing people'" by disseminating "disinformation about coronavirus vaccines . . . on its platform[;] . . . the administration continued "criticizing the company[:]. 'They're killing people . . . . Look, the only pandemic we have is among the unvaccinated. And they're killing people,' the US president told reporters."); Zeke Miller & Barbara Ortutay, *Biden: 'Killing People' Remark Was Call for Big Tech to Act*, ASSOC. PRESS (July 19, 2021, 7:11 PM), https://apnews.com/article/technology-joe-biden-business-health-government-and-politics-0432165e772bd60e8acafc217c086d7f (citing President Biden saying, "My hope is that Facebook, instead of taking it personally that somehow I'm saying 'Facebook is killing people,' that they would do something about the misinformation" and further quoting General Vivek Murthy saying, "We are asking them to step up . . . We can't wait longer for them to take aggressive action").

379. *See Covid-19 Triggers Wave of Free Speech Abuse*, HUM. RTS. WATCH (Feb. 11, 2021, 3:00 AM), https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse.

380. Nandita Bose, *Exclusive: White House Working with Facebook and Twitter To Tackle Anti-vaxxers*, REUTERS (Feb. 19, 2021, 10:28 AM), https://www.reuters.com/article/us-health-coronavirus-white-house-exclus-idUSKBN2AJ1SW; Davey Alba, *The Surgeon General Calls on Big Tech To Turn Over Covid-19 Misinformation Data*, N.Y. TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/technology/surgeon-general-covid-misinformation.html; Vivek Ramaswamy & Jed Rubenfeld, *Twitter Becomes a Tool of Government Censorship*, WALL ST. J. (Aug. 17, 2022, 1:47 PM), https://www.wsj.com/articles/twitter-becomes-a-tool-of-government-censors-alex-berenson-twitter-facebook-ban-covid-misinformation-first-amendment-psaki-murthy-section-230-antitrust-11660732095 ("Alex Berenson was kicked off the site at the White House's urging. That's a violation of the First Amendment."); Amélie Heldt, *Facebook Suspends Accounts of German Covid-19-deniers: Can "Coordinated Social Harm" Be a Justification for Limiting Freedom of Expression?*, VERFBLOG (Sept. 28, 2021), https://verfassungsblog.de/querdenker-suspension-fb/ ("[T]he goal should not be to uphold the 'free marketplace of ideas[,]' no matter what, but to protect the societal

"just asking" for private censorship of Twitter and Facebook executives.[381] Platforms are reported to have made questionable editorial decisions, supposedly affecting presidential elections,[382] in addition to deplatforming former President Trump.[383] Some politicians have attempted to influence platforms into removal of problematic content,[384] while others warned of dangers stemming from "bullying" by the Senate.[385] Administrations of both parties have engaged in these practices,[386] and scholars predict that the use of soft-pressure and outsourced censorship techniques will continue to rise.[387]

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goals enshrined in freedom of speech. And these goals might include the safety of others as well as maintaining the integrity of deliberative spaces.").

381. Kimberley A. Strassel, *'Just Asking' for Censorship*, WALL ST. J. (Feb. 19, 2021, 10:28 AM), https://www.wsj.com/articles/just-asking-for-censorship-11614295623?.

382. John A. LoNigro, *Deplatformed: Social Network Censorship, the First Amendment, and the Argument to Amend Section 230 of the Communications Decency Act*, 37 TOURO L. REV. 427, 433 (2021) ("[S]ocial network censorship has reached a level where it may very well be interfering with U.S. presidential campaigns. There is no question that in recent years high-profile censorship has occurred on political lines.").

383. *Id.* at 439.

384. *See, e.g.*, Adam Schiff et al., *Letter to Alphabet and YouTube on Incel Content* (Oct. 24, 2022), https://schiff.house.gov/imo/media/doc/letter_to_alphabet_and_youtube_on_incel_content.pdf; Robert Menedez, *Letter to Jack Dorsey* (Mar. 7, 2019), https://www.menendez.senate.gov/imo/media/doc/Twitter%20Letter%203D%20guns%203.7.pdf.

385. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior: Hearing Before the Committee on Commerce, Science, and Transportation*, 116th Cong. (2020) (statement of Sen. Schatz at 2:03:30) https://www.commerce.senate.gov/2020/10/does-section-230-s-sweeping-immunity-enable-big-tech-bad-behavior.

386. Tuchman, *supra* note 367, at 1042 (analyzing how Trump "unconstitutionally coerced and influenced the NFL to change its longstanding anthem policy by unleashing a calculated media firestorm, encouraging fans to boycott games, and threatening to revoke the league's tax-exempt status," exemplifying his willingness to disregard constitutional principles and norms in pursuit of unfettered executive control," and setting "a frightening precedent"); Apple, *supra* note 367, at 18 ("President Trump's executive order and pressure from his administration to require interactive computer services to take policy action could fairly be characterized as jawboning.").

387. *See* Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 868 (2012) (arguing that the state is increasingly using "soft" censorship measures on the internet, which lacks legitimacy); *see also* Will Duffield, *Jawboning Against Speech*, CATO INST. POL'Y ANALYSIS NO. 934 (Sep. 12, 2022), https://www.cato.org/policy-

The Trump presidency notoriously engaged in various kinds of soft pressures on internet platforms. Even before issuing his *Preventing Online Censorship* executive order, Trump proclaimed that "Republicans feel that Social Media Platforms totally silence conservative voices. We will strongly regulate, or close them down, before we can ever allow this to happen."[388] Similarly, Senator Dianne Feinstein threatened platform representatives: "You've created these platforms and now they are being misused, and you have to be the ones to do something about it, or we will."[389] Jawboning techniques like these, as opposed to formal legislation, allow "government officials . . . to infringe upon speech while evading constitutional prohibitions on such infringement."[390]

Further, the Trump presidency engaged in acts attempting to suppress citizen speech—such as condemning NFL players for "taking a knee"—which some scholars argue was unconstitutional.[391] Former President Trump also blocked critical voices on Twitter and attacked the "fake news" media.[392] These examples undermine "the central

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analysis/jawboning-against-speech (arguing that the governmental use of informal pressures such as jawboning, "bullying, threatening, and cajoling" is growing).

388. Shannon Bond & Avie Schneider, *Trump Threatens to Shut Down Social Media after Twitter Adds Warning to His Tweets*, NPR, (May 27, 2020), https://www.npr.org/2020/05/27/863011399/trump-threatens-to-shut-down-social-media-after-twitter-adds-warning-on-his-twee.

389. *Social Media Influence in the 2016 U.S. Election: Hearing Before the Select Committee on Intelligence*, 115th Cong. (2017) (statement of Sen. Feinstein).

390. Brief of Amici Curiae for NetChoice, The Pelican Institute, and The Cato Institute in Support of Neither Party, Changizi v. Dep't of Health & Hum. Servs., 82 F.4th 492 (6th Cir. 2023) (No. 22-3573) at *9.

391. Tuchman, *supra* note 367, at 1058. *See generally* Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA L. REV 321 (2018); Robert Post, *Do Trump's NFL Attacks Violate the First Amendment?*, POLITICO (Sept. 27, 2017), https://www.politico.com/magazine/story/2017/09/27/do-trumps-nfl-attacks-violate-the-first-amendment-215650/.

392. *See* Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump's Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311, 313–17 (2019) ("President Trump's distaste for and resulting censorship of both private speakers and the 'fake news' media have resulted in a devastation of the central meaning of the First Amendment") (footnotes omitted). Former President Trump also stated that, "It is not 'freedom of the press' when newspapers and others are allowed to say and write whatever they want even if it is completely false.'" *Id.* at 312.

meaning of the First Amendment" of protecting political speech.[393] Accordingly, Trump used social media "to rally his supporters, and to silence his critics."[394] Finally, he issued Executive Order 13925 which "attempt[ed] [to] circumvent both the text of [S]ection 230 and the Courts' interpretation of the statute by executive and administrative action."[395] Indeed, commentators noted that "Trump used the executive order to benefit his personal interests—a tremendous abuse of power."[396] These tactics have since been endorsed by other Republican politicians, and lent formal force by state legislatures in Florida and Texas.[397] In sum, when Trump was in power, he overreached; but when deprived of power, he championed the "common good."[398]

The government-platform dialectic remains in the public spotlight. For example, Elon Musk released the so called "Twitter Files," which document a series of interactions between the recent Democratic and Republican governments that attempted to have speech removed by the platforms.[399] Indeed, both sides appear willing to engage in such pressure, but conservatives have become notorious for their use of accusations of jawboning to discredit their political opponents[400] further complicating the discourse.

Paradoxically, both sides of the political spectrum conform to the neoliberal paradigm: recognition of any possibility of "the political" and of illiberal sovereignty in the private hands of platforms only. The foundation of American liberalism is in constitutional rights that function as absolute legal entitlements, detached from metaphysical grounding other than the tokenized constitutional text,[401] acting as

393. *Id* at 340.

394. Day & Weatherby, *supra* note 392, at 318.

395. Apple, *supra* note 367, at 18.

396. Jen Keung, *Weaponizing Speech: Analyzing Donald Trump's Executive Orders on Section 230*, 12 WAKE FOREST J.L. & POL'Y 471, 496 (2022).

397. *See* Wall St. J. Ed. Bd, *supra* note 90.

398. *See supra* Part III.

399. Benjamin Wallace-Wells, *What the Twitter Files Reveal About Free Speech and Social Media*, THE ATL. (Jan. 11, 2023) https://www.newyorker.com/news/the-political-scene/what-the-twitter-files-reveal-about-free-speech-and-social-media (explaining the limitations of the platform and its new owner).

400. *Id.*

401. Hendrik Hartog, *The Constitutional Aspirations and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 3, 1013, 1017 (1987).

trumps which remain unbalanced by the public good.[402] Further, constitutional rights embrace the liberal form in such a way that most political questions are precluded, axiological choices are entrenched, and the role of the state is severely limited.[403] It is for this reason that the European approaches are unavailable.[404] Because political questions are privatized, the power of both progressives and illiberals is frustrated: substantive regulation of speech is available to Mark Zuckerberg and Facebook's Oversight Board, [405] but not to Congress or the Supreme Court.[406]

B. *Jawboning, the First Amendment, and Section 230*

The question of when governmental pressure on persons to refrain from First Amendment behavior becomes an infringement falling under the state action doctrine's entanglement or entwinement exception is difficult, since the classic caselaw offers mixed answers when the

402. Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUDS. 1, 309, 313–14 (2000) (describing Dworkin's position that to balance rights against public good is to deny them altogether).

403. *See* Jamal Greene, *The Supreme Court 2017 Term Foreword: Rights as Trumps?*, 132 HARV. L. REV. 1 (2018) (asking whether rights absolute but limited in some circumstances or limited but absolute in some circumstances).

404. *See* Giovanni De Gregorio, DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY 157, 163–64 (Mark Dawson, Dar. Laurence Gormley & Jo Shaw eds., 2022) (explaining *drittwirkung* and digital constitutionalism).

405. Twitter has announced the creation of a similar body. *See* Lorenzo Gradoni, *Twitter Complaint Hotline Operator: Will Twitter Join Meta's Oversight Board?*, VERFBLOG (Nov. 10, 2022), https://verfassungsblog.de/musk-ob/.

406. It is open to discussion if the Board's legitimacy is lesser than that of the SCOTUS per the neoliberal logic. After all, the Oversight Board is a de facto international body, engaged in complex juridical reasoning, with impressive membership. *See generally* Lorenzo Gradoni, *Constitutional Review via Facebook's Oversight Board: How platform Governance Had Its Marbury v. Madison*, VERFBLOG, (Oct. 2, 2021), https://verfassungsblog.de/fob-marbury-v-madison. Indeed, the Board's decisions have procured an impressive jurisprudence. *See, e.g.*, Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020); Ruby O'Kane, *Meta's Private Speech Governance and the Role of the Oversight Board: Lessons from the Board's First Decisions*, 25 STAN. TECH. L. REV. 167 (2022); Laurence R. Helfer & Molly K. Land, *The Facebook Oversight Board's Human Rights Future*, 44 CARDOZO L. REV. 2233 (2023).

government's informal pressures on private actors, such as that internet platforms, could be seen as sufficient to hold the government responsible.[407]

To restate the assumptions behind the doctrine, particular claims of jawboning would need to demonstrate "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[408] State action doctrine can also be triggered if the state exercises its "coercive power."[409] State action can likewise be present where the state provides "significant encouragement, either overt or covert."[410] Finally, state action doctrine applies when a private actor operates as a "willful participant in joint activity with the State,"[411] when the private actor is "entwined with governmental policies," or when government is "entwined in [its] management or control."[412] Thus, within the entanglement exception, we can distinguish cases of compulsion,[413] which are the most straightforward, and government encouragement, which "must be significant enough that the responsibility for the private action is properly attributable to the state."[414] As John L. Watts explained, although "the degree of government encouragement deemed significant will vary, mere approval of, or acquiescence to, the private conduct is not sufficient."[415] Lastly, there are cases of assistance or symbiosis, such as where the relationship between the private actor and the state is one of interdependence.[416]

Moving to the doctrine, First Amendment jawboning was analyzed in the case of *Bantam Books, Inc. v. Sullivan*.[417] There, the Supreme Court reviewed the constitutionality of a state anti-obscenity system

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407. John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1254 (2014).

408. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

409. *Id.* at 296 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

410. *Id.*

411. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982)).

412. *Id.* (quoting Evans v. Newton, 382 U.S. 296, 299, 301 (1966)).

413. *See, e.g.*, Peterson v. Greenville, 373 U.S. 244, 248 (1963).

414. Watts, *supra* note 407, at 1255.

415. *Id.* (footnotes omitted).

416. Jackson v. Pantazes, 810 F.2d 426, 430 (4th Cir. 1987).

417. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

encompassing identification of "objectionable" books; writing to sellers to urge not to have them available; informing of possible legal action; and including police officers' visits to bookshops. The majority identified a heavy presumption against the constitutionality of such systems,[418] ultimately finding it unconstitutional, even though the books were not legally banned, nor were the prosecutions undertaken. The government cannot do informally what it likewise cannot do formally.

The *Bantam* decision remains good law and was applied recently in *Okwedy v. Molinari*[419] and *Backpage.com, LLC v. Dart*.[420] In *Okwedy*, the court elaborated that the fact that a public official lacks direct regulatory or decision-making authority over a private actor is not dispositive of claims by itself; instead courts look to "the distinction between attempts to convince and attempts to coerce."[421] Thus, a public body which "threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decision-making authority over the plaintiff, or in some less-direct form."[422] Applying the standard to the facts, the court found that the implicit threat of economic retaliation found in letters sent by a Staten Island borough to a private company to take down offensive billboards was enough to run afoul of the doctrine.[423]

More recently, the Seventh Circuit applied this rationale in *Dart.* In an effort to stop credit card companies from cooperating with a website which hosted ads deemed problematic, a sheriff threatened those companies, attempting to coerce Backpage.com, LLC, into silence or bankruptcy.[424] The court found that the letters sent by a sheriff, "clothed in what in the absence of any threatening language would have been a permissible attempt at mere persuasion," ultimately amounted to

418. *Id.* at 70.
419. Okwedy v. Molinari, 333 F.3d 339, 343–44 (2d Cir. 2003).
420. Backpage.com, LLC v. Dart, 807 F.3d 229, 235–36 (7th Cir. 2015).
421. *Okwedy*, 333 F.3d at 343–44.
422. *Id.*
423. *Id.*
424. *Dart*, 807 F.3d at 230, 232–33.

"unauthorized, unregulated, fool proof, lawless government coercion."[425] Thus, the threats amounted to prior restraints on speech.

Yet another strand of jawboning jurisprudence is the state action coercion analysis, starting with the case of *Blum v. Yaretsky*.[426] There, the majority established a different standard: the state to can be held responsible for private decisions "only when it has exercised coercive power or has provided such significant encouragement," whether overt or covert, so that the choice „must in law be deemed to be that of the State."[427] On the facts of *Blum*, private actors were not deprived of their decision-making power, even if they coerced to deprive customers of their constitutionally protected rights, it did not amount to state action.[428] The analysis thus requires courts to distinguish between permissible "encouragement" and impermissible "significant encouragement": a difficult distinction to make, especially without considerable guidance.[429] This standard was applied in *Meese v. Keene*, where the government labeled certain Canadian films as "political propaganda," which the Court did not consider a violation of the First Amendment.[430] The Court reached its conclusion by determining such a label did "nothing to place regulated expressive materials 'beyond the pale of legitimate discourse.'"[431]

The determination of which test the courts should ultimately rely on in assessing jawboning claims presents the first difficulty.[432] The

425. *Id.* at 237–38. In its analysis, the Court emphasizes the language of the letters: "[n]otice 'demand,' not request; notice 'compels,' not persuades; notice 'sever ties,' not 'refuse to make payments for ads in the adult section of the Backpage website.'" *Id.* at 232.

426. *See generally* Blum v. Yaretsky, 457 U.S. 991 (1982).

427. *Id.* at 1004.

428. Lakier, *Informal Gov't Coercion*, *supra* note 204 (highlighting the how the incongruous approaches taken by these two decisions has complicated "the problem of distinguishing unconstitutional government coercion from entirely permissible government pressure or encouragement").

429. Brief of Electronic Frontier Foundation and Center For Democracy & Technology as Amici Curiae in Support of Neither Party, Murthy v. Missouri, 144 S. Ct. 7 (2023) (No. 23-411) at *15.

430. Meese v. Keene, 481 U.S. 465, 480 (1987).

431. *Id. See* CHEMERINSKY, FIRST AMENDMENT, *supra* note 120, at 120 (writing that the government's actions "created obvious pressure against showing such movies.")

432. Lakier, *Informal Gov't Coercion*, *supra* note 204.

differences between these two tests is, of course, the nature of coercion and cooperation generally, and balancing the government's First Amendment protection of its own speech doctrinally.[433] The difficulties do not end there. Jawboning is difficult to constrain, partially because it is hard to detect; the boundary between a threat and speech is difficult to delineate conceptually and politically, and the factual determination of whether cooperation is voluntary or not is made more difficult by the fact that private actors may lack incentives for legal complaint.[434]

Crucially, jawboning understood as an informal pressure, a socio-legal phenomenon, need not be formally illegal to effectively ensure compliance of tech giants with the political will of the government.[435] Indeed, the emerging platform-government dialectic will likely be largely judicially unopposed. The point is not that it lacks legal or political legitimacy, but rather that it redefines the political constitution in regard to free speech. By its very nature, an allegation of jawboning can be politically weaponized, as it has been recently by the political right's attempt to delegitimize the Democratic government through a series of lawsuits.[436]

The jawboning allegations that implicate the state action doctrine or Section 230 have almost uniformly failed, based as they are on doubtful evidence or obvious political motivations, though the courts so far have opted to preserve the legal orthodoxy by routinely entertaining and dismissing jawboning claims.[437] The bulk of legal

433. CHEMERINSKY, FIRST AMENDMENT, *supra* note 120, at 121.

434. Bambauer, *Jawboning*, *supra* note 366, at 103–107.

435. Greene, *Jawboning*, *supra* note 368 (arguing that even where a platform is not coerced within the meaning of the state action doctrine, it should report governmental demands for content moderation, any government involvement in formulating or enforcing editorial policies, or flagging posts).

436. See *supra* Part I for an examination of the modern right-wing populist rhetoric. According to Eric Goldman, "jawboning cases against Internet services are a legal dead-end," and a primary "example of MAGA trying to weaponize the rule of law to produce a fundamentally unlawful result." Eric Goldman, *Ninth Circuit Easily Rejects Jawboning Claims Against YouTube–Doe v. Google*, TECH. & MARKETING L. BLOG (Nov. 19, 2022), https://blog.ericgoldman.org/archives/2022/11/ninth-circuit-easily-rejects-jawboning-claims-against-youtube-doe-v-google.htm [Hereinafter Goldman, *Jawboning*].

437. *See, e.g.*, Rutenberg v. Twitter, Inc., 2023 WL 376838, at *13–14 (Cal. App. Ct. June 2, 2023); Hart v. Facebook Inc., 2023 WL 3362592, at *10 (N.D. Cal.

commentary similarly suggests that, although jawboning may well occur, difficulty remains in challenging its constitutionality,[438] since even if there exists evidence of persuasion by the executive, such persuasion may not cross the boundary into coercion.

The recent Ninth Circuit case of *O'Handley v. Weber* illustrates these issues well.[439] There, the court applied this state action distinction, opining that "[a] private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message," as long as the platform remains "free to disagree with the government and to make its own independent judgment about whether to comply with the government's request."[440] Thus, the court found that the government officials, not having threatened adverse consequences to the intermediary, did not violate the First Amendment.[441] Similarly, comments by the Congresspeople,

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May 9, 2023); Kennedy v. Warren, 66 F.4th 1199, 1212 (9th Cir. 2023); Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff, 23 F.4th 1028, 1035 (D.C. Cir. 2022); Informed Consent Action Network v. YouTube LLC, 582 F. Supp. 3d 712, 78, 724 (N.D. Cal. 2022); Huber v. Biden, No. 22-15443, 2022 WL 17818543, at *1–2 (9th Cir. Dec. 20, 2022); Doe v. Google LLC, No. 21-16934, 2022 WL 17077497, at *10 (9th Cir. Nov. 18, 2022). *See* Goldman, *Jawboning*, *supra* note 436.

438. See Patty, *supra* note 188, at 102, 125126 (2019) for a discussion of the difficulty of extending the state action doctrine to social media platforms and the implications for First Amendment protection against viewpoint discrimination:

[d]ue to the highly fact-specific nature of the state action doctrine and its exceptions, a finding of state action through the entwinement exception is clearly an uphill battle, but it is one that appears to be increasingly likely . . . [W]ithout legal recourse under the First Amendment . . . [d]isputes will be resolved under the contractual relationships established by social media companies who are free to limit (or extend) the scope of expression in comparison to the First Amendment or discriminate based on viewpoint.

Id. See *also* Amar & Brownstein, *supra* note 46, at 23 (noting that while "judicial intervention against the commandeering of individuals" is sometimes necessary, "most state action requiring expressive activities involves much more limited and less intrusive mandates."); Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 134 (2014) (asserting that "a narrow and formalist construction of the state action doctrine could prevent the protection of communications that so vigorously embody First Amendment values.")

439. O'Handley v. Weber, 62 F.4th 1145, 1162–1164 (9th Cir. 2023).

440. *Id.* at 1158.

441. *Id.* at 1163. *See also* VDARE Found. v. Colorado Springs, 11 F.4th 1151, 1160–68 (10th Cir. 2021).

lacking the force of law, were found incapable of coercing YouTube.[442] Instead, the right of a platform's editorial discretion has a strong constitutional foundation,[443] and the courts are not willing to undermine the protections afforded by Section 230 and the First Amendment.

Before developing the argument that this process amounts to an informal constitutional change, it is important to the recent *Murthy v. Missouri* (formerly *Missouri v. Biden*) litigation, which is a significant development.[444] The attorneys general of the states of Missouri and Louisiana together with several other individuals initiated the litigation, alleging that various government agencies and officials unlawfully pressured platforms into censoring constitutionally protected speech. In a rather unexpected development,[445] the district court judge granted a preliminary injunction, prohibiting the government from contacting internet platforms at large. In the following months, the Fifth Circuit further narrowed the holding, nonetheless finding constitutional violations; and later, the preliminary injunction was stayed by the Supreme Court, which granted the petition for a writ of certiorari.[446]

Significantly, the initial order found that the plaintiffs were likely to succeed on the First Amendment merits in establishing that the government had "used its power to silence the opposition," including in relation to conservative speech regarding particular policies, such as the COVID-19 vaccine mandates.[447] The district court issued a long and

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442. Doe v. Google, LLC, 2022 WL 17077497, at *2 (9th Cir. Nov. 18, 2022). *See* Hart v. Facebook Inc., 2022 WL 1427507, at *8 (N.D. Cal. May 5, 2022); *see also* Children's Health Def. v. Facebook Inc., 546 F. Supp. 3d 909, 933 (N.D. Cal. 2021).

443. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930–31 (2019).

444. Missouri v. Biden, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La. July 4, 2023), *aff'd in part, rev'd in part*, 80 F.4th 641 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

445. *See* Cat Zakrzewski, *Judge blocks U.S. officials from tech contacts in First Amendment case*, WASH. POST (July 4, 2023, 4:22 p.m.), https://www.washingtonpost.com/technology/2023/07/04/biden-social-lawsuit-missouri-louisiana (noting the ruling "could undo years of efforts to enhance coordination between the government and social media companies.")

446. Murthy v. Missouri, 144 S. Ct. 7 (2023).

447. Memorandum Ruling on Request for Preliminary Injunction at 154, Missouri v. Biden, 3:22-CV-01213 (W.D. La. July 4, 2023) 2023 U.S. Dist. LEXIS 114585.

strongly worded order, described by some as overtly political,[448] containing "pretty significant departures from precedent,"[449] and treating evidence of communications which are innocent and worrisome as one in kind.[450]

Interestingly, the threats to revoke or reform Section 230, whether implicit or explicit, were treated as instances of jawboning by the plaintiffs, who claimed that depriving the platforms of said immunity, together with other political reform measures, "motivate[d] the social media companies to comply with Defendants' censorship requests."[451] The district court went on to say that the bipartisan nature of the threats did not diminish their coercive nature as they were amplified by the exercise of political power in the legislature and the executive, together with "emails, meetings, press conferences, and intense pressure."[452] Indeed, the district court remarked that the dismissal of the plaintiff's claims in *Gonzalez v. Google*, clarifying platforms' protection from liability for users' speech, made Section 230 ever more valuable to the

448. *See* Mike Masnick, *The Good, The Bad, And the Incredibly Ugly in the Court Ruling Regarding Government Contacts with Social Media*, TECHDIRT (July 6, 2023, 09:33 AM), https://www.techdirt.com/2023/07/06/the-good-the-bad-and-the-incredibly-ugly-in-the-court-ruling-regarding-government-contacts-with-social-media/ [hereinafter Masnick, *Good, Bad, & Ugly*].

449. Debra Cassens Weiss, *Judge curbs US effort to battle disinformation on social media; will ruling withstand appeal?*, ABA J. (July 6, 2023) https://www.abajournal.com/news/article/judge-curbs-us-effort-to-battle-disinformation-on-social-media-will-ruling-withstand-appeal (quoting Genevieve Lakier).

450. Masnick, *Good, Bad, & Ugly*, *supra* note 448; Jen Patja Howell et al., *A Louisiana Judge's Dramatic Jawboning Decisio*n, LAWFARE (July 12, 2023, 8:00 AM), https://www.lawfaremedia.org/article/a-louisiana-judge's-dramatic-jawboning-decision.

451. Memorandum Ruling on. Request for Preliminary Injunction, *supra* note 447, at 8. *See* Jeff Kosseff @jkosseff, TWITTER (July 5, 2023, 1:10 PM) https://twitter.com/jkosseff/status/1676639674478067721 ("[T]he strongest evidence in support of the ruling were the implicit and explicit threats to change/repeal 230 unless the platforms do what the [government] wants" because such threats raise "huge [First Amendment] issues" regardless of whether they come "from the right or the left, when it involves . . . protected speech . . . Threatening to repeal or limit a vital technology protection—either because the platforms moderate too much or too little—is a huge problem.").

452. Missouri v. Biden, No. 3:22-CV-01213, at *99–100 (W.D. La. July 18, 2023).

platforms, allowing for reasonable interpretation of the governmental actions as "implied threats"[453] amounting to coercion.[454]

As mentioned above, the litigation has been described as politically controversial and shrouded in doctrinal doubts.[455] On the one hand, initial order did not adequately distinguish between different forms of contacts and spoke broadly,[456] perhaps due to the judge's sympathy towards the plaintiffs.[457] On the other, the case saw an unprecedented amount and type of evidence,[458] such as correspondence using the language of partnership, bringing new transparency[459] and raising legitimate doubts.[460]

A deposition uncovered evidence supporting the plaintiff's allegations, revealing "emails, private portals, meetings, and other means to involve itself as 'partners' with social media platforms."[461] Communications between the government and social media companies contained numerous references to "partnership" and being "on the same team." Twitter instituted a "Partner Support Portal" to review governmental requests expeditiously, while Facebook began "flagg[ing]" certain posts as "alleged disinformation."[462]

The Fifth Circuit agreed that some of the accused federal officers coerced social media platforms into censoring certain social media

453. *Id.* (citing Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94, 114 (N.D.N.Y. 2018)).

454. *Id.*

455. *See* Rob Pegoraro, *A Judge Says Biden Can't Scold Social Media Firms. That Makes Zero Sense*, NEW REPUBLIC (July 7, 2023) https://newrepublic.com/article/174098/louisiana-judges-anti-biden-social-media-order-makes-zero-sense.

456. Genevieve Lakier & Evelyn Douek, *Government Platform Communication, Jawboning, and the First Amendment*, MODERATED CONTENT (July 8, 2023), https://open.spotify.com/episode/1ZVho9x5MI1CKxpdAt8yWl?si=TDJa8INRRfS39af0XglOZg, at 10:05.

457. *Id.* at 13:05 ("clearly very sympathetic to plaintiffs' claims.")

458. *Id.* at 13:15.

459. *Id.* at 13:15–20:21.

460. *Id.* at 19:20–20:22.

461. Missouri v. Biden, No. 3:22-CV-01213, at *100 (W.D. La. Jul. 18, 2023).

462. *Id.*

content in violation of the First Amendment.[463] Unlike the trial court, it distinguished between different officials—the White House, and various agencies, such as the Centers for Disease Control and Prevention—each engaging to a different extent with the platforms, and thus evaluated differently in light of the First Amendment.

The appellate court applied the "significant encouragement" test, which requires a "close nexus" in order to deem the government "*responsible*" for the challenged decision.[464] This responsibility requires active exercise of meaningful control on the part of the government over the private party's challenged decision, whether through entanglement or direct involvement in carrying out the decisions.[465] The court also applied the coercion analysis, which requires governmental compulsion;[466] noting that this is usually, though not always, more difficult to identify.[467] Significantly, it was found that the White House, acting in concert with the Surgeon General's office, both "likely . . . coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences" and "significantly encouraged the platforms' decisions by commandeering their decision-making processes," both violating the First Amendment.[468]

The circuit court concluded that the officials went beyond mere advocacy, which is constitutionally protected. Instead, officials coerced platforms into direct action via "urgent, uncompromising demands to moderate content," asking with "persiste[nce] and ang[er]." Most importantly, the court found that the officials "threatened . . . both expressly and implicitly . . . to retaliate against inaction . . . [throwing]

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463. Missouri v. Biden, 83 F.4th 350, 359 (5th Cir. 2023). It is worth noting that the 5th Circuit is widely considered an especially conservative court. *See, e.g.*, Lydia Wheeler & Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is Stumbling at US Supreme Court*, BLOOMBERG L. (June 26, 2023, 10:48 AM), https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court.

464. *Id.* at 374.

465. *Id.* at 373–75 ("[O]n one hand there is persuasion, and on the other there is coercion and significant encouragement.")

466. *Id.* at 377.

467. *Id.* at 377–78 (citing National Rifle Ass'n v. Vullo, 49 F.4th 700 (2d Cir. 2022)).

468. *Id.* at 381–82.

out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply."[469] In this respect, the court identified that the White House "kept the pressure up" by emphasizing "that the President 'has been a strong supporter of fundamental reforms to achieve that goal, including . . . to [S]ection 230, enacting antitrust reforms, [and] requiring more transparency . . .' Per the officials, their back-and-forth with the platforms continues to this day."[470] In this way, the court largely affirmed the analysis of the Section 230 reform debate herein.

The Fifth Circuit affirmed the finding of several officials having likely coerced or significantly encouraged platforms to moderate, rendering those decisions state actions that likely violated the First Amendment, emphasizing the "limited reach" of the decision.[471] The court did not extend the injunction to those officials who permissibly exercised government speech, suggesting that "the state-action doctrine is vitally important to our Nation's operation," which is why "the Supreme Court has been reluctant to expand the scope of the doctrine."[472] In this way, the Fifth Circuit did not suggest a major revision of the doctrine, nor should it be inferred that forms of legitimate cooperation will be estopped.[473] This action by the court thus modified the overly broad and vague injunction, prohibiting the enjoined defendants from coercing or significantly encouraging a platform's content-moderation decisions—which, includes "threats of adverse consequences," even those which "are not verbalized and never materialize,"—so long as "a reasonable person would construe a government's message as alluding to some form of punishment."[474]

The Supreme Court decided to stay the injunction, granting certiorari, thus further undermining the direction taken by the district court. While we await final decision, it seems unlikely that the First Amendment doctrine will be changed or, more importantly, that the

469. *Id.* at 382.

470. *Id.* at 364.

471. *Id.* at 392.

472. *Id.*

473. Indeed, the court remarks "we do not take our decision today lightly[,]" underlining the exceptional character of the facts of the case, describe as a "coordinated campaign of [such] magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life." *Id.* at 392.

474. *Id.* at 397.

practices of the governments and the regulatory dialectic examined in this Article will be stopped. This prediction is supported by the dissenting judgement, which concludes: "what the Court has done, I fear, will be seen by some as giving the Government a green light to use heavy-handed tactics to skew the presentation of views on the medium that increasingly dominates the dissemination of news."[475]

Most importantly, *Murthy* provides concrete evidence that we have entered a new paradigm, one where governments and platforms cooperate (e.g., to stop potentially harmful but lawful content), but also where the former coerces the latter; which redefines the First Amendment practice and is difficult to tackle utilizing existing legal doctrine. Precisely because the difference is difficult to discern, is highly facts specific, and because both the left and the right have demonstrated the political will to exert control over platforms, the development of the dialectic of coercion and cooperation is unlikely to be stopped judicially, *Murthy v. Missouri* notwithstanding.

Given the growing doubts regarding the legitimacy of the courts and of judicial review—an issue which has always been a thorn in liberal constitutionalism[476]—becoming a popular concern due to the supposed politicization of the courts in general,[477] and of the Supreme Court in particular[478]—one may doubt if they should intervene at all, and if so, how far their legitimacy extends. Thus, while the lack of a

475. Murthy v. Missouri, 144 S. Ct. 7, 9–10 (2023) (Alito J., Thomas J., and Gorsuch J. dissenting).

476. *See generally* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018)); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2006). See MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2021), for a recent comprehensive critique.

477. *See generally* Mark Lemley, *Red Courts, Blue Courts*, SSRN (Nov. 2, 2022), https://ssrn.com/abstract=4266445.

478. *See generally* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181 (2020–2021); Samuel Moyn, *The Court is Not Your Friend*, DISSENT MAG. (2020), https://www.dissentmagazine.org/article/the-court-is-not-your-friend; Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 LOY. U. CHI. L.J. 91 (2023); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323 (2021); Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. 32 (2018); David Leonhardt, *Supreme Court Criticism*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/2023/05/22/briefing/supreme-court-criticism.html.

clear judicial standard enables "censorship," as it was traditionally understood,[479] the question remains if the new paradigm of private-public cooperation in regulation of speech could be stopped at all, and whether it should. Leaving the normative question aside, this Article predicts that the dialectic will continue its march absent a counter-majoritarian intervention. This can be seen as a change to the political constitution or an informal constitutional amendment, marking a decay of the liberal constitutionalist freedom of speech conception.

C. *Changing the Constitution Informally*

Constitutional law scholarship is paying increased attention to the ways in which sub-constitutional law and practice can change the operation of constitutional norms.[480] Such scholarship traces the changes to the political,[481] invisible or unwritten,[482] or the "what actually happens" constitution.[483] In other words, constitutionalism studies the legal norms, the context which animates the interpretation of the written Constitution,[484] and the empirical reality of prevailing political conditions.[485] We thus speak of constitutional conventions,[486]

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479. *See* Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 685 (1968) ("Vague standards . . . encourage erratic administration whether the censor be administrative or judicial.")

480. Oran Doyle, *Informal Constitutional Change*, 65 BUFF. L. REV. 1021, 1021 (2017). *See also* Albert, *Quasi-Constitutional Amendments*, *supra* note 50. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 2, 21, 120–25 (2010).

481. *See generally* Graham Gee & Grégoire Webber, *What Is a Political Constitution?*, 30 OXFORD J.L. STUDS. 273 (2010).

482. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) [hereinafter Strauss, *Irrelevance of Constitutional Amendments*]. *See generally* AMENDING AMERICA'S UNWRITTEN CONSTITUTION (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022).

483. Thomas Poole, *Tilting at Windmills? Truth and Illusion in 'The Political Constitution'* 70 MOD. L. REV. 250, 256 (2007).

484. Antonin Scalia, *Is There an Unwritten Constitution*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989).

485. DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 3 (2016) (explaining the empirical and normative meanings of constitutions).

486. *See* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United* States, 2013 U. ILL. L. REV. 1847 (2013).

or more broadly norms,[487] which are informal, may not necessarily be judicially enforceable, and yet define what is proper public behavior. These norms are both changeable and capable of being broken—the latter being a charge often aimed at the Trump presidency domestically and the backsliding democracies abroad.[488]

Moreover, scholars frequently note that constitutions, including the American Constitution, can be changed informally. This concept refers not just to a change of the political constitution's norms, but also amendments to the "master-text."[489] Scholars note that the laws, practices, and conventions constituting the governance apparatus of the state can be changed informally.[490] Such changes can be made by "executive action, major legislation, judicial interpretation, [or] political practice."[491] In other words, informal constitutional amendments occur when "the enforceable meaning of the constitution changes without altering the constitutional text."[492]

Even the hardest of positivists, such as Hans Kelsen, recognized that "there is no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called "written" constitution."[493] Scholars have long observed that Article V of the U.S. Constitution made formal

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487. Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018) (defining constitutional norms as "informal norms that regulates the public behavior of actors who wield high-level governmental authority, thereby guiding and constraining how these actors 'exercise political discretion.") Chafetz and Pozen further assert that "[m]any such norms overlap with what Commonwealth theorists refer to as constitutional conventions, or the 'unwritten norms of government practice' that emerge in a decentralized fashion and 'are regularly followed out of a sense of obligation but are not directly enforceable in court.'" *Id.* (footnotes omitted).

488. *Id. See also* Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018).

489. *See generally* Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 187 (2015) [hereinafter Albert, *Unwritten Constitutional Norms*].

490. Doyle, *supra* note 480, at 1023.

491. *Id.*; Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 642–43.

492. Albert, *Unwritten Constitutional Norms*, *supra* note 489, at 187–188.

493. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 259 (1945) [hereinafter KELSEN, GENERAL THEORY].

amendments extraordinarily difficult.[494] Some of the "fundamental changes in the constitutional order have occurred by means other than the amendment process. They have occurred without amendments."[495] Indeed, Richard Kay remarked that "most of what now goes under the caption 'constitutional law' in the United States is attributable to extraconstitutional, "off-the-books" developments."[496] At the same time, informal constitutional change is increasingly studied in a comparative context, especially in countries which are backsliding from liberal democracy.[497]

The novel dialectic of coercion and cooperation between platforms and governments where jawboning plays a distinct role clearly constitutes a change of the political constitutional norms. Scholars have described former President Trump's use of soft pressure as "shackling political speech and undermining the central meaning of the First Amendment,"[498] thus violating or *changing* the president's role. Jawboning, however, is not a phenomenon limited to backsliding during the populist presidency. Rather, jawboning will become more ubiquitous with the executive, state legislatures, and some prominent

494. *See* Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 34–35 (2004).

495. Strauss, *Irrelevence of Constitutional Amendments*, supra note 482, at 1505. *See also* Richard Albert, *Constitutional Change without Constitutional Amendment*, 59 ALTA. L. REV. 777 (2022).

496. Richard S. Key, *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMPAR. L. 243, 260 (2018). *See also, e.g.*, Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929–33 (2007) (explaining the process of informal Constitutional amendments); Andrea Scoseria Katz, *Why Write? The Desuetude of Article V and the Democratic Costs of Informal Constitutional Amendment*, 30 IND. INT'L & COMP. L. REV. 365 (2020).

497. *See generally* Huq & Ginsburg, *supra* note 16 (exploring different threats of democratic backsliding and using comparative law to demonstrate paths of democratic decay); *see also, e.g.*, WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); ANTI-CONSTITUTIONAL POPULISM *supra* note 274 (a comparative volume on backsliding in Poland, Venezuela, Brazil, and others); Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31 (2018) (examining "stealth" transitions from secularism to theocracy in Indonesia, Sri Lanka, Turkey, and Bangladesh); THE LAW AND POLITICS OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ASIA (Rehan Abeyratne & Ngoc Son Bui eds, 2022).

498. Day & Weatherby, *supra* note 392, at 317.

politicians using "sovereigns of cyberspace" to avoid constitutional constraints and to change the constitutional status quo.

Informal change resulting from jawboning is especially intriguing as a novel, non-liberal regulatory paradigm, used by governments and platforms, engaged in a dialectic of pressure and cooperation to redefine the character of the political culture and community. At the same time, some forms of jawboning, such as *censorship by proxy,* may be formally unconstitutional practices.[499] They will likely go unchallenged because jawboning legal claims have been considered either frivolous or unsupported by evidence—a practical limitation for the foreseeable future. Rather, this Article argues that a juridical revolution is unlikely. Courts will preserve the status quo, rather than analogize platforms to private towns and common carriers. If this proves to be the case, a further disjoint between *de jure* and *de facto* freedom of expression will emerge. The indirect constitutional change may also be seen as even more fundamental, since both the modern right and left wish to become Schmittian rather than liberal sovereigns, altering some of the fundamental constitutional tenets.

Repeated threats to revoke Section 230 may not be realistic proposals for reform—which, completely separately, may indeed happen—but are instead instances of jawboning. Such threats are aimed at redefining the realm of digital expressive politics, and thus evince a change to the political constitution. Moreover, the informal amendment process encompasses not only federal executive or Congressional action, but also state-level developments and litigation briefly examined in Part I. Each of the bills, proposed or enacted, engaged in a power struggle with platforms and attempted to control the political enemy. Attorney General Paxton, who began explicitly retaliatory investigations after threatening platforms with serious consequences and promises to fight them with "all he's got,"[500] can be viewed as manifestations of this power struggle. They are not simply *breaking* the liberal political constitution; they are actively changing it.

The argument presented here bridges the gap between scholarship on digital sovereignty and constitutionalism. Scholars have long noticed that "digital sovereignty . . . allows a government to assert enormous powers over its own citizens, and thus deserves exacting

499. *See supra* Part II.

500. Goldman, *Editorial Transparency*, *supra* note 85, at 1226.

scrutiny," for it increases the risk of totalitarian control, especially by illiberal governments.[501] Thus, for example, Anupam Chander and Haochen Sun welcome digital sovereignty as long as it adheres to the liberal constitutionalist framework.[502] As we have seen, however, modern American political discourse has departed significantly from fundamental liberal tenets. The dominant conceptions of both free speech and toleration have changed among those on the left and those on the right. Along with presenting coherent visions of political utopias, modern political movements are redefining the concept of sovereignty itself: from liberal to Schmittian, to ultimately transform the state.

Furthermore, this development may constitute an informal constitutional amendment. Is it only the "small c" political constitution, a practice of social or political, rather than formally legal character, which is undergoing change—or is the legal norm itself changing? Some forms of jawboning, defined broadly, are within the scope of the First Amendment's protections. On the other hand, more overt forms of "censorship by proxy," while possibly possessing political currency on both the right and the left, may fall afoul of the state action doctrine. In addition to these informal measures, the constitutional development is also influenced by the Texas, Florida, and New York legislation examined in Part I, and the acts of the executive which have been labelled "harassment," such as those of Attorney General Paxton, examined above.[503] Finally and most importantly, if both the left and the right, the communitarian and the common good strands, attempt to redefine the constitutional character of the political community, is this not one of the transformative moments, akin to those described by Bruce Ackerman?[504]

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501. Chander & Sun, *supra* note 12, at 287, 307.

502. *Id.* at 290.

503. Goldman, *Editorial Transparency*, *supra* note 85, at 1226. *See also* Application for Review of Starlink Services, L.C, Rural Digital Opportunity Fund, Rural Digital Opportunity Fund (Auction 904), Viasat Auction 904 Application for Review, WC Docket No. 19. 126, OEA Docket No. 20-34, GN Docket No. 21-231. Order on Review (Brendan Carr, dissenting) (speaking of "regulatory harassment").

504. For a short introduction, see Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J. L. & HUMAN. 531 (1993) (review BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

Bruce Ackerman is the most famous scholar of non-Article V constitutional amendments. A dualist democrat, he famously argues that there are two modes of doing politics: normal politics, where the constitutional status quo is preserved, and constitutional politics, consisting of those extraordinary moments where the constitutional is redefined.[505] It is beyond the scope of this Article to lay out the whole of Ackerman's theory. If, however, the changing identity of modern politics, the collapse of both liberal constitutionalism and the sphere of legitimate contestation were correctly identified,[506] while the trend to redefine the nature of free speech through private hands (thus altering the conception of sovereignty itself) continues, then the U.S. may be in early stages of a constitutional moment. It remains to be seen if the courts will intervene in the novel regulatory dialectic at all. In so doing, they may redefine the doctrine to provide legal legitimacy to acts of jawboning, tipping the scales one way or the other in the struggle for dominance between platforms and government.

What seems crucial in this assessment, however, is the proxy fight through the proposal of Section 230 reform. Ackerman wrote that in the so-called modern system of constitutional law-making, the "decisive constitutional signal is issued by a president claiming a mandate from the people. If Congress supports this claim by enacting transformative statutes that challenge the fundamentals of the preexisting regime, these statutes are treated as the functional equivalent of a proposal for constitutional amendment."[507] We have already seen two presidential Executive Orders; meanwhile Section 230 reform continues to be debated in public and in Congress, buffeted by bipartisan efforts to redefine the status quo. Will these efforts succeed? It is telling that Ackerman himself sees the upcoming 2024 presidential election as the divisive moment, where the United States will be divided into states that disqualify Donald Trump's candidacy or not.[508] At the

505. *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991). *See also* Mark Tushnet, *Living in a Constitutional Moment: Lopez and Constitutional Theory*, 46 CASE W. RSRV. L. REV. 845, 487 (1996) (exploring Ackerman's theory of constitutional moments).

506. *See supra* Part III.

507. ACKERMAN, *supra* note 505, at 266–268.

508. Bruce Ackerman & Gerard Magliocca, *Biden vs. Trump: The Makings of a Shattering Constitutional Crisis*, POLITICO (Feb. 1, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/02/01/biden-trump-constitutional-

time of this Article's writing, this question had led to litigation in most states,[509] put to an end by the Supreme Court in Trump v. Anderson,[510] at least on the Insurrection Clause grounds.[511] Irrespective of the electoral question, it is likely that the scope of freedom of expression will be redefined informally, in the non-liberal regulatory paradigm, with an ever greater disjoint between *de jure* and *de facto* freedom of expression.[512]

While there may be merit in reforms to Section 230,[513] with piecemeal changes possibly coming, an outright revolution regarding Section 230 or First Amendment protections is unlikely. Rather, politicians are more inclined to brandish the proxy power of the sovereign, unconstrained by the rules of the game, to silence the enemy. Private platforms do not share the politicians' difficulty of appearing to prescribe to certain morals. They just do, unconstrained by the constitution in the way the government is. Perhaps the outsourcing of the *political* to private platforms, which wield their private might where the liberal form cannot act, is not only legitimate, but necessary. After all, if we believe that law is both merely positive[514] and ideologically

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crisis-00003959. *See also* Tom Ginsburg, Aziz Z. Huq & David Landau, *The Law of Democratic Disqualification*, 111 CALIF. L. REV. 1633 (2023).

509. *See* Hyemin Han et al., *Tracking Section 3 Trump Disqualification Challenges*, LAWFARE, https://www.lawfaremedia.org/current-projects/the-trump-trials/section-3-litigation-tracker (last visited Feb. 24, 2024).

510. Trump v. Anderson, No. 23-719, slip op. at 6 (U.S.) (holding that "States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.")

511. As the minority opinion pointed out, "Today, the Court departs from [the] vital principle [of judicial restraint], deciding not just this case, but challenges that might arise in the future… They decide novel constitutional questions to insulate this Court and petitioner from future controversy."). Trump v. Anderson, 601 U. S. ____ (2024), at 1 (Sotomayor, Kagan, and Jackson JJ., concurring).

512. "De jure" means "from the law" (that which the law deems true), while "de facto" means "from the fact" (that which is true in practice). *De jure*, LAW DICTIONARY, https://thelawdictionary.org/de-jure/ (last visited Feb. 25, 2024); *De facto*, LAW DICTIONARY, https://thelawdictionary.org/de-facto/ (last visited Feb. 25, 2024).

513. *See generally*, Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

514. *See generally* Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science*, II W. POL. Q. 481 (1949); KELSEN, GENERAL THEORY, *supra* note 493.

constructed,[515] while traditional ontology and axiology are hardly within secular reach,[516] then we need to find someone both willing and able to act from the "emptiness of law."[517] Private platforms may be willing to fulfil that role. Whether such action is an informal constitutional amendment or a change to the political constitution is merely a question of taxonomy. The paradigm is shifting.

CONCLUSION

An amendment of the political constitution is underway: the novel regulatory dialectic of governmental soft pressures and internet platform cooperation regarding editorial policies is redefining freedom of expression, while the legal status quo remains unchanged. Both the political right and left have long abandoned the values and principles underpinning the liberal constitutionalist framework, including the First Amendment, the limits of the state, and a strong public-private divide. Today, each side presents a positive, normative vision for the political community, a concrete utopia; consequently, becoming increasingly intolerant of the political other. The Section 230 debate is thus a proxy for an existential struggle over cultural democracy—the realm of expressive politics which takes place online, on the territory of internet platforms, virtual autocracies unconstrained by liberal constitutionalist framework. To win the culture war, and to become truly sovereign in the Schmittian rather than liberal sense, the government needs online platforms.

As we have seen, the Supreme Court was unwilling to offer a radical reinterpretation of Section 230 in the *Gonzalez* and *Taamneh*

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515. *See, e.g.*, NICOLA LACEY, *Feminist Legal Theory Beyond Neutrality, in* UNSPEAKABLE SUBJECTS, 188 (1998); Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 30 FEMINIST REV. 30, 61 (1988).

516. *See* Kletzer, *supra* note 304 ("To many it seems plausible, or at least inconsequential, to accept the idea that our concept of normativity is but a secularized version of a fundamentally theological idea"; however there is a "difficulty concern[ing] not only normativity and validity, but all core concepts of the conceptual inventory of the modern age—autonomy, personality, reason, community, history and progress, to mention just a few.").

517. SCHMITT, POLITICAL THEOLOGY, *supra* note 43, at 6. *See generally* LAW AS POLITICS, *supra* note 39; HAYEK, SCHMITT AND OAKESHOTT ON THE RULE OF LAW (David Dyzenhaus & Thomas Poole eds., 2015).

cases. If a judicial revolution is coming, the Supreme Court will need to reevaluate much of the First Amendment jurisprudence as well; thus, it is unlikely that further caselaw, including *Murthy v. Missouri*, will see it realized either. Rather, internet intermediaries will be jawboned into exercising censorial functions, which is an effective change to the political constitution. Given the platforms' significant power in mediating online expression, the line between coercion and cooperation is blurry. This is a dimension of digital sovereignty, of the Section 230 debate, and American constitutionalism which has thus far remained underexplored. Regardless of any Section 230 reform or formal change in First Amendment interpretation, governments and platforms will continue to redefine the expressive paradigm and the political culture informally. *Plus ça change, plus c'est la même chose*.[518]

518. "The more things change, the more they stay the same." (Translated from French).