First Amendment Inversion

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First Amendment politics have inverted in key areas of speech law. Positions previously associated with legal conservatism have been adopted by liberal ideology, and vice versa. Familiar views have been scrambled not only on the Supreme Court but also in public debate. Two examples support this descriptive claim. First, Florida and Texas enacted statutes regulating digital platforms, and they defended those laws by arguing that they had constitutional leeway to impose antidiscrimination rules on private firms that exerted significant control over the speech environment. Yet under the previous alignment, conservative thought had supported strong speech protections for corporations, including those that hosted the expression of others, and it had opposed state regulations designed to ensure the fairness of the marketplace. Liberal thinking, conversely, championed strong protection of platforms against state regulation, whereas previously it had supported the ability of states to impose antidiscrimination rules on private speech hosts. The opinions in Moody v. NetChoice *illustrate the transposed political positioning. The second example is campus speech, where a similar switch in politics can be seen. While legal conservatism formerly championed free speech on campus, it now calls for antidiscrimination protection against antisemitism, even where that impacts expression. Legal progressivism, meanwhile, is now emphasizing the importance of free speech in university settings. In both contexts, platforms and campuses, the inversions are striking. This Article goes on to argue, however, that the reversals have not been symmetric. Distinguishing between centrist and activist positions reveals that the most prominent legal arguments on the right have been transformed more radically than the leading liberal arguments have. (Nor have the switches been permanent, as there have been some prominent reversions.) The Article concludes that partisan instability around the law of speech hosts can be explained by a mismatch between substantive politics and constitutional doctrine. For conservatives, speech rules will often disrupt traditionalist values. For egalitarians, the effort to craft a First Amendment that ensures equality of speech opportunities will be complicated by precedents that ignore the diversity*

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and dynamism of power over individual expression. Chances to craft rules that promote democratic speech arrangements may arise, but they will be fleeting and opportunistic rather than durable or principled.

Introduction

A new arrangement of First Amendment positions has upturned constitutional discourse in key areas. Familiar perspectives have transposed not only in Supreme Court opinions but also in policymaking and public debate—and some are reverting back. Inversion on important questions of freedom of expression presents doctrinal puzzles and political challenges.

Two examples support this descriptive claim, though more could be offered. First, Florida and Texas enacted laws that regulated social media platforms in various ways, including by prohibiting certain forms of discrimination in the platforms' content moderation policies. In *Moody v. NetChoice*,[1] the Roberts Court turned away the platforms' First Amendment lawsuit, finding that the standard for a facial challenge had not been satisfied, but also endorsing the platforms' main substantive speech claim.[2] Among the opinions, and in the litigation more generally, the turnabout was conspicuous.

1. 144 S. Ct. 2383 (2024).
2. *Id.* at 2394.

Under the previous paradigm, conservative argumentation generally defended strong First Amendment protection for speech hosts.[3] That position entailed formal conceptions of key concepts such as the public-private divide, the state action doctrine, and the conception of rights as negative. Only the government could violate the Speech Clause, and only when it acted in a plainly official capacity. Corporations received full protection, regardless of their practical power over areas of the speech environment. Government redistribution of speech opportunities was anathema, and the baseline for measuring redistribution was set by markets. Details and nuances complicated these positions, of course, but they did not obscure a recognizably conservative view of speech law.

Liberalism, by contrast, allowed for greater government regulation in the service of promoting a fairer allocation of expressive opportunities. That meant accepting some shifting of speech resources, relative to the market baseline, in order to promote equal expressive opportunity and public access to a representative range of viewpoints. It meant a more substantive approach to the public-private divide and a more variegated doctrine of state action. It entailed a conception of rights that could look positive rather than strictly negative, meaning that the Speech Clause sometimes could require the government to take steps to ensure that individuals were not silenced or sidelined by other private actors, especially those backed by economic power. And it involved robust antidiscrimination rules for public accommodations.

Today, that model has become unsettled. On the right, legal thinking is now open to some state regulation of private entities, even those that are in the business of the production of information, knowledge, and opinion. Conservatism has become worried about these institutions precisely because of their outsized influence over the expressive environment, at least when they skew in a liberal direction, and its solutions entail rules of nondiscrimination and antiharassment. New thinking on the right recognizes the power that private actors can have to censor particular views, and it adopts a more nuanced view of the government's responsibility for, and relationship to, private action that distorts debate. Legal conservatism is discovering resources for this project in common carrier laws and in public accommodations regulations that prohibit invidious discrimination.[4] For example, Republican officials in Florida and Texas argued that massive companies like Facebook and YouTube should be subject to antidiscrimination rules.[5]

3. "Speech hosts" or "speech intermediaries" are private parties that transmit the expression of others. Think of newspapers, especially in their opinion pages, but also broadcasters, shopping mall owners, and internet service providers.

4. *See infra* section I(A)(1).

5. *See infra* Part I.

Liberal thinking, by contrast, is warming to free speech protection for speech intermediaries. Even the largest corporations with the greatest economic power and the greatest influence over the expression of others are now seen to be protected by the same speech rules that shield individuals. Sharp distinctions between public and private are drawn and defended, including in state action rules. Positive understandings of rights are receding into the background of liberal discourse, and rules against the redistribution of speech opportunities are moving into the foreground.[6] In Florida and Texas, this meant defending companies like Facebook and YouTube on free speech grounds.[7]

With respect to campus speech, constitutional debate has undergone a similar, if distinct, switch of positions. Under the previous alignment, free speech arguments were marshaled primarily by those who were concerned about the deplatforming of conservative speakers and the "coddling" of oversensitive students.[8] From the 1990s onward in particular, freedom of expression was deployed to defeat campus code provisions that aimed to reduce "hate speech" and harassment against racial, religious, and sexual minorities on campus.[9] More recently, however—since October 7, 2023—conservative political actors have come to embrace antiharassment measures, while progressives have reassociated themselves with core protections for freedom of expression on campus. This transformation has affected not only students, faculty, and administrators, but also federal and state officials who have assumed oversight roles.[10]

These two examples share some features. Both platforms and universities are speech hosts, for one thing.[11] Both settings pit speech protection against antidiscrimination rules, centrally. And both platforms and universities have seen a complexification of political positions on core constitutional commitments.[12]

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6. *See infra* subpart I(D).

7. *See infra* subpart I(A).

8. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATL. (Sep. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/ [https://perma.cc/888X-7NUJ].

9. Several campus hate speech codes were invalidated by courts. Corry v. The Leland Stanford Junior Univ., No. 740309 at 43 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction); Doe v. Univ. of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989); UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–83 (6th Cir. 1995). These decisions contributed to a widespread impression that such rules violate free speech.

10. *See infra* subpart I(C).

11. Again, speech hosts are private entities that facilitate the expression of others but that may themselves have speech rights against government regulation. *See supra* note 3.

12. These two examples of realignment are not alone, however; others exist. In *Murthy v. Missouri*, for example, the Supreme Court considered a claim from Republican state attorneys general that the Biden Administration had pressured social media companies to moderate content

Several caveats temper these claims, though. The turnabout does not affect all aspects of First Amendment law, for one thing, although it does span several. Even where it has taken hold, elements of the old paradigm may persist. One reason is that the new paradigm is selectively invoked to support particular political projects but not others. There have also been some important reversions to previous positions.[13] And finally, real differences separate platforms and universities, and those distinctions are material to the constitutional analysis in several ways. Overall, however, these two examples suggest that something important has shifted in the law and politics of expressive freedom.[14]

Yet to fully understand the realignment, it is necessary to distinguish among different kinds of liberalism and conservatism. On the right, movement actors have split from traditional Republicans (including libertarians) on these issues.[15] On the left, egalitarians diverge from mainstream liberals in important ways.[16] These distinctions are crude, and they neglect further complexity. Still, they generate an important insight, not just or even mainly for Supreme Court Justices, but also for state lawmakers, corporate officers, and university administrators, faculty, and students.

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concerning the pandemic in violation of the First Amendment. 144 S. Ct. 1972, 1981 (2024). The most conservative members of the Court agreed with that claim, as did the Fifth Circuit. *Id.* at 1997–98, 2015 (Alito, J., dissenting). But traditionally, conservatism has long argued for a much stricter conception of state action requirements, while liberalism has advocated for constitutional protection even against less formal exertions of government power. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (turning away a due process claim on state action grounds, where the government did not exercise sufficient coercive power); *id.* (Brennan & Marshall, JJ., dissenting).

13. After the election of President Trump to a second term, for example, Facebook announced that it would draw back on content moderation. Joel Kaplan, *More Speech and Fewer Mistakes*, META (Jan. 7, 2025), https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/ [https://perma.cc/6CHY-9FDG].

14. This Article complements scholarship that points to other aspects of the phenomenon. *See* Genevieve Lakier, *The Great Free Speech Reversal*, THE ATL. (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/3UG7-9UE4] (focusing on platforms and particularly the new conservative argument that their censorship violates freedom of speech despite the state action doctrine); Richard M. Re, *Legal Realignment*, 92 U. Chi. L. Rev. 1 (forthcoming 2025) (manuscript at 19–23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4937024 [https://perma.cc/CN5J-XEWH] (arguing that the right and left are switching legal positions but explaining that switch in terms of personnel changes on the Court and not focusing on the First Amendment); Elizabeth S. Anker, *Left Crit Theory Goes to Washington: The Anti-Liberal Ideology of the Roberts Court*, 27 U. PENN J. CONST. L. 1, 5–7 (2025) (arguing that the Roberts Court has appropriated rhetorical tools formerly associated with progressivism).

15. *See infra* section I(A)(3).

16. *See infra* section I(A)(3). This Article uses the terms movement conservatism and the conservative legal movement for the first group, while referring to the second as mainstream, traditional, or mainline conservatives. Centrist liberal thought is described as mainstream or traditional liberalism, while positions to their left are described as progressive or egalitarian.

Differentiating among positions in this way reveals that the realignment in First Amendment discourse has not been symmetrical.[17] Definitely in the platform context, but also on campus to a significant degree, movement conservatism predominates among decisionmakers on the right, while mainstream liberal positions dominate the defense of platforms and protesters, rather than perspectives further to the left.

In the *Moody* litigation, for example, officials in Florida and Texas argued that their antidiscrimination requirements for content moderation were necessary to prevent massive corporate actors from distorting the speech marketplace.[18] The Fifth Circuit agreed that the Texas law was constitutional.[19] Judge Oldham, writing for the panel majority, held that the law regulated conduct rather than content, that it was necessary to counteract platform censorship, and that it was analogous to common carrier regulations.[20] He even suggested that the platforms were engaged in First Amendment Lochnerism—a trope that until then had exclusively been associated with the left.[21] By contrast, the platforms made straightforward liberal arguments for the protection of "editorial discretion," like that exercised by newspapers.[22] They argued that content moderation was itself a form of expression that was protected because it involved editorial choice.[23]

In the Supreme Court, the *Moody* majority's robust protection of media corporations' core activities, combined with its firm rejection of redistributive government policies, drew support from both liberal and conservative members.[24] Judge Oldham's more radical perspective was largely embraced by Justice Alito, joined by Justices Gorsuch and Thomas.[25] No member of the Court presented an egalitarian perspective on state

17. *See infra* section I(A)(3).

18. Dante Motley & Pooja Salhotra, *Texas' Social Media Law Remains Blocked After U.S. Supreme Court Sends It Back to Lower Court*, TEX. TRIB. (July 1, 2024), https://www.texastribune.org/2024/07/01/supreme-court-texas-social-media-law-content-moderations/ [https://perma.cc/3C9N-5KDK] (quoting Texas Attorney General Ken Paxton as saying "Big Tech censorship is one of the biggest threats to free public discourse and election integrity" and "[n]o American should be silenced by Big Tech oligarchs").

19. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

20. *Id.* at 447–48 (outlining the opinion's holdings).

21. *Id.* at 469, 473, 479, 479 n.33; *see also infra* note 156 (providing citations to the literature on First Amendment Lochnerism).

22. Brief for Petitioners at 18–20, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-555).

23. *Id.* at 46–47.

24. *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2392–93, 2409 (2024) (Kagan, J., joined in full by Roberts, C.J., Sotomayor, Kavanaugh, and Barrett, JJ.; and joined in part by Jackson, J.) (asserting that a state cannot interfere with editorial judgment for the sake of advancing certain points of view).

25. *See id.* at 2422, 2428, 2437–38 (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.) (defending the Fifth Circuit's application of the facial constitutionality test).

antidiscrimination regulation of content moderation—that position was represented only in amicus briefing.[26]

With regard to campus speech, similarly, the most prominent arguments against universities reflect movement conservatism. This is obvious in Congress, where House Republicans led the questioning that grabbed headlines and spurred the departure of university presidents.[27] Laws and regulations that have been proposed and enacted to control universities around these issues likewise have reflected movement politics.[28] On the other side, however, calls to protect campus protesters have sounded in mainstream liberal and libertarian principles of free expression.[29] Students have argued simply that they should be free to engage in demonstrations so long as they do not interfere with the basic functions of the university or the rights of others.

One implication of the asymmetry is that argumentation on the right faces greater tension with the previous paradigm than does argumentation on the liberal side. Those urging stronger regulation of platforms and universities must work harder to distinguish their ideas from conservative positioning in the past, in other words. Another insight is that egalitarianism further to the left has been quiet in both debates. Platforms and campus protesters have instead relied on mainstream free speech arguments.

Understanding the politics of free speech argumentation offers more enduring lessons as well. Pushing beyond the platitude that the Roberts Court is engaged in politics and asking further *what kind* of politics are shaping its decisions on the First Amendment helps to identify the dynamics of constitutional discourse. Studying this moment also illustrates the differences between constitutional politics and quotidian party politics, even at a time when that difference is narrowing. Last, the analysis here shows how First Amendment doctrine clashes with substantive politics, and it generates a prediction that inversions are likely to recur.

Part I defends the descriptive argument that there has been a rearrangement of First Amendment discourse in the courts, focusing on the example of *Moody*. It draws not only on the Justices' opinions, but also on lower court decisions, briefing throughout the litigation, and the arguments of state lawmakers. By comparing the *Moody* debates to examples of the

26. *See* Brief of L. & Hist. Scholars as Amici Curiae in Support of Respondents in No. 22-555 at 30, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-555) [hereinafter Brief of L. & Hist. Scholars] (arguing that the Florida and Texas laws should be upheld in order to preserve the constitutionality of other state antidiscrimination rules).

27. Stephanie Saul & Anemona Hartocollis, *College Presidents Under Fire After Dodging Questions About Antisemitism*, N.Y. TIMES (Dec. 6, 2023), https://www.nytimes.com/2023/12/06/us/harvard-mit-penn-presidents-antisemitism.html [https://perma.cc/JA6E-DGEB].

28. *See infra* subpart II(C).

29. *See infra* subpart II(D).

previous alignment, it is possible to see in a granular way how free speech positions have become complicated.[30] Part I also explains that the swap has not been symmetrical.

Part II contends that a similar realignment has taken place in debates concerning campus speech—with important differences. Previously, the dominant conservative position was that expressive freedom needed to be vigorously defended against progressive attempts to deplatform invited speakers, but today the concern is that student protesters are creating a hostile environment and that universities are not taking sufficient measures to combat harassment. Student demonstrators are now the ones foregrounding freedom of expression, against attempts to deploy federal civil rights laws to cancel or limit student protests in the name of antiharassment.

Part III explains why First Amendment inversion occurs and why it can be expected to recur. At the root of the dynamic is a mismatch between substantive politics and constitutional doctrine, especially as it has become more formalistic. For the far right, antiwoke conservatism dovetails with freedom of speech (or antidiscrimination law) only in select scenarios. At present, movement conservatism supports antidiscrimination regulations for platforms and universities, even at the cost of expressive freedom, but surely only in limited ways and only for a time. For egalitarianism, the basic aspiration is to create conditions under which individuals have equal ability to participate in democratic politics and otherwise express themselves, regardless of social location or economic resources. This aspiration is a mainstay of democratic government, and of a democratic society. Power must be cabined so that it does not squelch speech opportunities.

A serious difficulty for legal design is that power is diverse in its sources and dynamic in its operation. Government poses the paradigmatic threat to freedom of speech, of course. But in speech host cases, nongovernmental actors also regulate speech—often backed by economic might and driven by profit motives. State regulation of *them* in the interest of expressive fairness raises difficult issues for those committed to an egalitarian speech environment. Often the analysis will turn on the *relative* influence of government and business, under contingent and local conditions. First Amendment doctrine, at least as configured in the United States by the Roberts Court, does not have the tools to perform that calculus satisfactorily.

30. As examples of the previous alignment, the Article focuses on two cases, among others. First, Justice Kavanaugh's opinion on net neutrality, written while he was still sitting on the D.C. Circuit, captures the former conservative view on speech hosts. U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). Second, the majority and dissenting opinions in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), exemplify both sides of the old model. Recall, that was the decision exempting a website developer from antidiscrimination law that would have required the company to serve same-sex couples as part of a wedding website business.

It is interesting to ask whether the difficulty of formulating a constitutional law that is adequate to democracy reflects a failure of legal ingenuity or an inherent limit of the First Amendment itself. Regardless, it may be that the best that can be done is to look for contingent opportunities, some of which are explored in closing.

I. Platform Politics

What happens when large digital platforms face off against conservative state governments like those in Florida and Texas? How do arguments concerning the relationship between private property and speech work in that context? And if familiar legal theories are coming from unusual parties, then what does that reveal about the kind of politics that is at work?

The First Amendment issue in these cases is whether the government can regulate speech hosts (sometimes also called speech intermediaries), generally in the name of ensuring fairness of expressive opportunities for users. Constitutional conflict arises when the hosts resist regulation by arguing that they themselves are speakers who are shielded by freedom of speech.[31]

Disputes in this line have included whether newspapers that enjoy significant market power can be required to provide a right of reply to political candidates (no),[32] whether broadcasters can be required to ensure certain forms of fairness toward individual speakers (yes),[33] whether public utilities can be compelled to carry messages of others in their mailings to customers (no),[34] whether a shopping mall can be prohibited from excluding antiwar protesters (yes),[35] whether cable companies can be forced to carry local television stations (yes),[36] whether organizers of the annual Boston Saint Patrick's Day Parade can be prohibited from excluding LGBT groups (no),[37] and whether universities' federal funding can be conditioned on their willingness to host military recruiters (yes).[38] This list is not comprehensive, and it elides important factual differences that are explored in detail below. But it gives a sense of doctrinal context for the *Moody* litigation, where the states tried to constrain platform power through nondiscrimination rules

31. Viewed from today's perspective, speech hosts could be seen as platforms, though they may not always have been understood that way historically. *See generally* Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Common Carriers*, 73 DUKE L.J. 1037 (2024) (contributing to a growing literature on the conceptual connections between common carriers and various types of platforms).

32. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

33. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 385 (1969).

34. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 19–21 (1986).

35. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76–77, 88 (1980).

36. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636, 667–68 (1994).

37. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573–74 (1995).

38. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 69–70 (2006).

intended to benefit users, and where the platforms argued that they themselves were speakers protected against regulation by the First Amendment.

Florida and Texas featured legal interpretations that were strikingly similar to typically *liberal* arguments concerning the ability of intermediaries to exclude the speech of others. The two states were joined in this by other conservative legal actors such as Justice Alito (joined by Justices Gorsuch and Thomas) and judges in the majority on the Fifth Circuit panel. They argued: that the states' platform laws did not interfere with editorial discretion or any other form of expression,[39] that Facebook and YouTube should be considered common carriers that could be required to carry messages consistent with the First Amendment,[40] and that any presumption of invalidity could be rebutted by the states' interests in antidiscrimination and promoting the health of the speech environment.[41] Precedents cited were precisely the same as those used by the other side in earlier cases.

Conversely, the platforms insisted that Florida and Texas were unconstitutionally interfering with the editorial judgment of media companies, that platforms could not be considered common carriers, and that the states' antidiscrimination rules were not tailored to any sufficiently strong government interest.[42] This Part details these inversions, and it shows how they worked in briefing and in judicial opinions.

Here is the background in greater detail. In 2021, Florida and Texas enacted statutes to regulate large digital platforms. Texas's law defined "social media platform" as any internet entity that was "open to the public, allows a user to create an account, and enables users to communicate with other users."[43] It was limited to platforms with more than 50 million monthly active users.[44] Florida's law, similarly, applied to any "social media platform" that had more than 100 million monthly users or $100 million in annual gross revenue.[45]

39. *See infra* subpart I(A).

40. *See infra* subpart I(B).

41. *See infra* subpart I(C).

42. *See infra* subparts I(A) to I(C).

43. TEX. BUS. & COM. CODE ANN. § 120.001(1).

44. *Id.* § 120.002(b).

45. FLA. STAT. ANN. § 501.2041(1)(g) (West 2022). Social media platform was defined in part as an internet entity that "provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site." *Id.* This definition is broad, seemingly broad enough to cover email providers, as was discussed at oral argument. *See* Transcript of Oral Argument at 69–70, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-277), (Justice Alito asking whether the Florida law covered Gmail and Paul Clement responding that "by its terms it could cover Gmail").

The laws were complex and they differed in certain respects.[46] Yet both had a core set of limitations on content moderation, meaning the platforms' practice of policing user posts for consistency with terms of service, including limitations on hate speech and misinformation.[47] Texas's Section 7 prohibited a platform from "censor[ing]" a user based on "the viewpoint of the user" or the post.[48] That provision effectively banned moderation of hate speech, inter alia.[49] Florida's limitations on content moderation were not as broad as Texas's ban on viewpoint discrimination. They prohibited: willfully deplatforming a candidate for office,[50] deprioritizing or "shadow banning" material by or about a candidate,[51] and acting against a "journalistic enterprise" on the basis of content.[52]

Both statutes were motivated by concern over the perceived liberal bias of the platforms and by alarm about their economic power over users. Governor Ron DeSantis said that the purpose of the Florida law was to counteract the "biased silencing [of] our freedom of speech as conservatives by the big tech oligarchs in Silicon Valley."[53] When signing the bill, DeSantis said he wanted to "fight against the big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical

46. Although the statutes also included disclosure requirements and user data protections, see TEX. BUS. & COM. CODE ANN. §§ 120.051–53, §§ 120.101–04; FLA. STAT. ANN. § 106.072 (West 2022), § 501.2041 (2022), the focus here is on content moderation.

47. For example, see Facebook's prohibitions on hate speech, *Hateful Conduct*, META, https://transparency.meta.com/policies/community-standards/hate-speech/ [https://perma.cc/QR66-BMRR], and misinformation, *Misinformation*, META, https://transparency.meta.com/policies/community-standards/misinformation/ [https://perma.cc/HNZ2-24YA]; and YouTube's community standards on hate speech, *Hate Speech Policy*, GOOGLE, https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436 [https://perma.cc/2YAG-ABZ2].

48. TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a)(1). To censor meant not just to block or ban a post or user, according to Texas, but also "to . . . deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1).

49. *Id.* § 143A.002(a)(1). Exceptions allowed platforms to remove unlawful expression, to moderate content pursuant to federal authorization, to fulfill certain requests to prevent sexual exploitation of children or survivors of sexual abuse and harassment, and to remove expression that directly incited criminal activity or specifically threatened violence against people on the basis of certain protected characteristics such as race, disability, religion, and sex. *Id.* § 143A.006.

50. FLA. STAT. ANN. § 106.072(2) (West 2021).

51. *Id.* § 502.2041(2)(h).

52. *Id.* § 501.2041(2)(j). Here too, the prohibited actions include not just removing or deprioritizing posts but also flagging them or appending warnings. *Id.* § 501.2041(1)(b). This prohibition seems to restrict pure speech by the platforms, quite apart from any interference with editorial discretion.

53. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1205 (11th Cir. 2022) (internal quotation marks and alterations omitted) (quoting Press Release, Exec. Off. of the Governor of Fla., Governor Ron DeSantis Signs Bill to Stop the Censorship of the Floridians by Big Tech (May 24, 2021), https://www.flgov.com/eog/news/press/2021/governor-ron-desantis-signs-bill-stop-censorship-floridians-big-tech [https://perma.cc/SLS5-Q9FZ]), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

leftist narrative."[54] In Texas, similarly, Governor Greg Abbott explained that "social media companies were part of a dangerous movement to 'silence conservative ideas [and] religious beliefs.'"[55] As the Supreme Court put it, "officials passed [the law] because they thought [social media] feeds skewed against politically conservative voices."[56]

Against that background, this Part highlights the arguments made for and against the constitutionality of the statutes' content moderation provisions. Three main issues dominated the briefing and decisions: whether the statutes impermissibly interfered with editorial judgment exercised by the platforms in the service of their own expression, whether the platforms should have been seen as common carriers that could be compelled to host the messages of others, and whether any presumption against the statutes could be rebutted by Florida and Texas. On each of these questions, First Amendment politics were inverted.

A. Editorial Discretion as Protected Expression

The main substantive issue was whether the platforms themselves were engaged in expression, such that they deserved First Amendment protection for their content moderation decisions, or whether they were mute conduits for the expression of users. Using the language of earlier cases concerning other types of media, the question was framed as whether the platforms were using editorial discretion to create expression of their own. If they were, then presumptively the states could not foster a fairer speech environment for users by dictating how the platforms edited their pages.

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54. *Id.*

55. Kailyn Rhone, *Social Media Companies Can't Ban Texans Over Political Viewpoints Under New Law*, TEX. TRIB. (Sep. 2, 2021), https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/ [https://perma.cc/TBA8-9FVE]. Governor Abbott also remarked that "silencing conservative views is un-American, it's un-Texan, and it's about to be illegal in Texas." NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021) (internal quotation marks and alterations omitted), *vacated and remanded sub nom.*, NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

56. *Moody*, 144 S. Ct. at 2394; *see also id.* at 2407 (internal citations omitted) ("The [Texas] law's main sponsor explained that the 'West Coast oligarchs' who ran social-media companies were 'silenc[ing] conservative viewpoints and ideas.' The Governor, in signing the legislation, echoed the point: The companies were fomenting a 'dangerous movement' to 'silence' conservatives."); NetChoice v. Paxton, 49 F.4th 439, 452 (5th Cir. 2022) (highlighting that "one amicus brief documents the Platforms' censorship of fifteen prominent celebrities and political figures—including five holding federal elected office"), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

1. Realignment on Editorial Discretion.—In the *Moody* litigation, the platforms took the position that "refusing to carry third-party speech because of its viewpoint is a core First Amendment right."[57] At issue was not just the exclusion of conservative speech, but the exclusion of hate speech, because regulating hate speech had been classified as a form of viewpoint discrimination.[58]

The platforms relied on *Tornillo*,[59] where the Supreme Court invalidated a Florida effort to require newspapers to provide a right of reply to political candidates who were subject to certain forms of criticism.[60] The Court held that the newspapers' exercise of "journalistic discretion" counted as expression that was protected by the First Amendment.[61] In *Moody*, the platforms contended that, just like those newspapers, social media sites were engaged in pervasive content moderation by excluding, deprioritizing, labeling, and otherwise monitoring users' posts for compliance with the platforms' terms of service.[62] The platforms added that they were producing a speech product that could not be altered without triggering a presumption of invalidity.[63]

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57. Brief for Petitioners, *Moody*, *supra* note 22, at 14.

58. R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992).

59. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

60. *Id.* at 258.

61. *Id.*; *see also id.* at 261 (White, J., concurring) ("[T]his law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.").

62. *See* NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1226–27 (11th Cir. 2022) (holding that Florida's restrictions trigger at least intermediate scrutiny and declining to decide whether strict scrutiny applies to some of them because the state cannot satisfy even the lower standard of review), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); *see also* Brief of Amicus Curiae the Knight First Amendment Institute at Columbia Univ. in Support of Plaintiffs-Appellees at 11–14, NetChoice LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355). Here is the key passage from *Tornillo*:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The 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.

Tornillo, 418 U.S. at 258.

63. *See Moody*, 144 S. Ct. at 2408 (holding that the Texas law would require the platforms to alter their "expressive product"); *see also* Jack Balkin, Moody v. NetChoice*: The Supreme Court Meets the Free Speech Triangle*, 2024 SUP. CT. REV. 127, 143–44 (explaining that the Court found that the platforms offer an "expressive product" in their main news feeds), https://ssrn.com/abstract=5104013. *But see* Eugene Volokh, *Treating Social Media Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 405–07 (2021) (arguing that major platforms generally do not provide a coherent speech product).

Florida and Texas responded by denying that the platforms edited content in any meaningful way.[64] Facebook and YouTube existed to facilitate conversations among users, not to communicate their own views.[65] Their content moderation activities, though seemingly extensive when viewed in absolute terms, actually touched a tiny percentage of posts.[66] Moreover, messages they carried were not attributed to the platforms themselves.[67] Everyone understood that platforms were just what their name suggested—delivery systems for the speech of users—not publications (or coherent speech products) in any sense that was, or ought to be, recognized by the First Amendment, according to the states.

In *Moody*, Justice Kagan, writing for the majority, sided with the platforms on the core constitutional question, concluding that their moderation of content on users' main feeds constituted expressive editing.[68] Although *Moody* turned on the platforms' failure to satisfy the technical standard for facial challenges, the majority opinion also addressed the substance and insisted that the Fifth Circuit had erred by holding that the platforms were engaged in conduct, not speech.[69] Justice Kagan emphasized that the platforms prioritized certain content in feeds, they labeled some posts following their community standards, and they removed posts to enforce those standards.[70] Social media companies, for Kagan and the majority, "curat[ed] their feeds" to "create a distinctive expressive offering."[71]

Once the majority determined that the platforms were engaged in expression, it was easy for the Court to conclude that they should be protected. Justice Kagan applied a "core teaching" that she extracted from precedent concerning speech hosts, namely that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."[72] Texas had done just that. Targeting a post because it consisted of hate speech toward a protected group, for instance, constituted viewpoint discrimination of exactly the sort that was banned by the statute. Interfering with that sort of content moderation effectively compelled expression, was presumptively

64. Brief for Respondent at 30–31, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-555).

65. *Id.* at 13 ("Section 7 does not regulate the Platforms' speech; it regulates their conduct, which consists of hosting users' speech.").

66. *Moody*, 144 S. Ct. at 2402 (rejecting Texas's argument that the platforms are not speaking because they "include[] most items and exclude[] just a few").

67. Brief for Respondent, *Moody*, *supra* note 64, at 30–31.

68. *Moody*, 144 S. Ct. at 2405.

69. *Id*. at 2399 ("The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression.").

70. *Id.* at 2404–05.

71. *Id.* at 2405.

72. *Id.* at 2403.

unconstitutional, and could not be justified by the state's aspiration to achieve a fairer speech environment.[73]

Two related points were pressed by the *Moody* majority. First, nothing changed simply because the platforms only acted against a tiny percentage of posts. Even a small portion of posts translated to a huge number in absolute terms because of the massive volume handled by these companies.[74] "In a single quarter of 2021," Justice Kagan explained, "Facebook removed from its News Feed more than 25 million pieces of 'hate speech content' and almost 9 million pieces of 'bullying and harassment content.'"[75] With absolute numbers like these, it was hard to deny that social media companies were regulating content. Put simply, nothing turned on "the ratio of rejected to accepted content."[76]

A second issue that Justice Kagan dismissed was attribution—that is, whether observers attributed users' messages to the company itself. Even if no single post was taken to express the platform's views, the overall culture of the product could be, should be, and likely was associated with the company. In other words, "the platforms may indeed 'own' the overall speech environment."[77] And that made sense, for "this Court has never hinged a compiler's First Amendment protection on the risk of misattribution."[78] Government compulsion to carry a message could be unconstitutional independent of whether observers associated that message with the host.

By contrast, Justice Alito's concurrence in the judgment—which amounted to a dissent on the merits—objected that the platforms were not necessarily engaged in editorial discretion, and they were not themselves communicating any particular message.[79] More precisely, Justice Alito, joined by Justices Gorsuch and Thomas, argued that the platforms had not met their burden of showing that their content-moderation practices were protected.[80] Cases like *PruneYard*[81] established that a host could be regulated

73. *Id.* at 2406.

74. *Id.*

75. *Id.* (internal quotation omitted).

76. *Id.*

77. *Id.*

78. *Id.*; *see also* Abner Greene, *(Mis)attribution*, 87 DEN. U. L. REV. 833, 848 (2010) (arguing that misattribution has not been a decisive consideration for the Court and that "being compelled to utter or carry the government's or someone else's message causes harm, though not of the misattribution sort, or so the Court has held").

79. *Moody*, 141 S. Ct. at 2438 (Alito, J., concurring in the judgment) (arguing that the majority errs by failing to consider how the platforms' news feeds work in order to determine whether they are expressive).

80. *Id.* at 2439 (Alito, J., concurring in the judgment).

81. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

if it did not itself convey some discernable message.[82] Here, Justice Alito contended, Florida and Texas had not shown that "all platforms curate all third-party content in an inherently expressive way."[83] Algorithms might not enforce community standards in an expressive manner, for instance.[84] And because it was impossible for any human being, or even group of humans, to review the "gigantic outpouring of speech" on the largest social media sites, "it is therefore hard to see how any shared message could be discerned."[85]

In an earlier opinion issued during motion practice, Justice Alito also suggested that the platforms were not exercising editorial discretion.[86] He seemed to approve of Texas's arguments that Facebook and YouTube were exercising private power to engage in conduct (not speech) that repressed freedom of speech by individuals.[87] And he concluded that Texas's "representations suggest that the covered social media platforms . . . do not generally convey ideas or messages that they have endorsed."[88]

Unlike the majority, Justice Alito believed that the proportion of moderated content mattered. If the state statutes compelled only "a small amount of discordant speech," then it was difficult to see how that difference "change[d] the overall message" conveyed by the platforms' feeds.[89]

Also unlike the majority, Justice Alito considered attribution. He emphasized that previous decisions like *PruneYard* had upheld the regulation of speech hosts where there was little risk that the messages of users would be identified with the owner.[90] Surely it was relevant to the question of whether the platforms were conveying any messages of their own when they exercised content moderation, Justice Alito suggested, that observers did not associate the overall content of feeds with the expression of the companies.[91]

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82. *Moody*, 144 S. Ct. at 2431–32.

83. *Id.* at 2437.

84. *Id.* at 2438–39.

85. *Id.* at 2438.

86. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716–17, 1717 n.2 (2022) (mem.) (Alito, J., dissenting from grant of application to vacate stay).

87. *Id.* at 1717.

88. *Id.* (internal quotation marks and alterations omitted).

89. *Moody*, 144 S. Ct. at 2438 (Alito, J., concurring in the judgment).

90. *Id.* at 2401, 2432 (discussing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) and Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64–65 (2006)); *NetChoice*, 142 S. Ct. at 1717 (Alito, J., dissenting from grant of application to vacate stay) (stating that Texas's "representations suggest that the covered social media platforms—like the cable operators in *Turner*—do not generally convey ideas or messages that they have endorsed" (internal quotation marks and alterations omitted)).

91. *Moody*, 144 S. Ct. at 2432, 2432 n.18 (Alito, J., concurring in the judgment) (emphasizing the importance of attribution (and the risk of misattribution) to the analysis of the First Amendment rights of speech hosts).

2. The Previous Alignment.—Now compare these arguments to earlier conservative positioning on editorial discretion. In the familiar run of cases, conservative argumentation is where we should expect to see speech hosts depicted as editors. There, the normal view is that private property owners who host the speech of others cannot be forced by government to select content in a particular way. Even antidiscrimination rules in civil rights laws violate the First Amendment when they compel private property owners to include or exclude particular messages, even if the hosts convey only the vaguest kind of message and even if the views of users are very unlikely to be attributed to the hosts. Decisions enforcing the First Amendment like *Tornillo*, *Hurley*,[92] and *PG&E*[93] are usually favored and broadly construed, while decisions allowing state regulation like *PruneYard*, *Turner*,[94] and *Red Lion*[95] are deemphasized or narrowed.

Take *303 Creative*[96] for a recent example of the expected alignment. There, Justice Gorsuch wrote for the majority that an aspiring wedding website designer could not be forced to serve same-sex couples by a state public accommodations law.[97] He relied on factual stipulations by the parties to infer that the company owner, Lorie Smith, was seeking editorial freedom, rather than just serving as a platform for the wedding messages of customers.[98] The normal alignment was even clearer in the briefing for *303 Creative*. Lorie Smith was represented by the Alliance Defending Freedom (ADF), which argued that Colorado impermissibly interfered with her editorial control over the messages she crafted on her websites.[99] *Tornillo* was a leading authority for ADF. Launching a wedding website business that celebrated orthodox unions impermissibly triggered an editorial obligation to include same-sex weddings, just as political criticism triggered a right of reply in *Tornillo*.[100] And that interference violated the First Amendment.

Less recently, but equally relevant, Justice Kavanaugh famously argued for the First Amendment rights of speech intermediaries when he was sitting on the D.C. Circuit. Reviewing the government's net neutrality rules for

92. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

93. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986).

94. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

95. Red Lion Broad. Co. v. FCC., 395 U.S. 367 (1969).

96. 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

97. *Id.* at 2305. Recall that Justice Gorsuch signed Justice Alito's dissent from the stay decision in *NetChoice*. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022) (mem.) (Alito, J., dissenting from grant of application to vacate stay, joined by Thomas and Gorsuch, JJ.).

98. *See 303 Creative*, 143 S. Ct. at 2313 (holding that "the parties' stipulations lead the way to [the] conclusion" that "the wedding websites Ms. Smith seeks to create involve *her* speech").

99. Petition for a Writ of Certiorari at 21, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) (citing Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)); *see also id*. at 5, 13, 29 (emphasizing that Lorie Smith retains "final editorial control").

100. *Id.* at 22.

internet service providers (ISPs), he argued forcefully that ISPs were protected against antidiscrimination rules precisely because they exercised "editorial discretion."[101] In response to the argument that ISPs had actually never exercised any such discretion, but instead had operated as pass-throughs for virtually all internet content, Justice Kavanaugh responded that this "use it or lose it" theory had no basis in the First Amendment.[102] Just because a company had not exercised its discretion did not mean that it could not, and would not, be protected in doing so.

Justice Kavanaugh then concluded that the FCC's interest in providing equal access to the internet was insufficient. Citing *Buckley*, Justice Kavanaugh reasoned that "the First Amendment does not allow the Government to regulate the content choices of private editors just so that the Government may enhance certain voices and alter the content available to the citizenry."[103] If the analogy to digital platforms was at all uncertain, Justice Kavanaugh drew the connection himself. He wrote that under the federal government's theory for imposing net neutrality rules, it "could regulate the editorial decisions of Facebook and Google, . . . of YouTube and Twitter."[104] Skepticism like that was typical of conservativism's general approach to government regulation of speech hosts.

For another stark illustration of the turnabout, consider Justice Thomas's views then and now. In the *Moody* litigation, Justice Thomas signed onto Justice Alito's opinion maintaining that the platforms were not exercising editorial discretion.[105] Yet in the earlier era, in the context of cable television, Justice Thomas argued that operators *were* engaged in "editorial discretion" and therefore could not be subject to must-carry provisions

101. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 427–28 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). Kavanaugh's opinion has drawn widespread attention, including during his last Senate confirmation hearings. *See, e.g.*, Ariel Shapiro, *Trump's SCOTUS Nominee Thinks that ISPs Have First Amendment Rights, Which Could Spell Bad News for Your Privacy*, CNBC (July 13, 2018), https://www.cnbc.com/2018/07/12/trump-scotus-kavanaugh-isps-first-amendment-rights.html [https://perma.cc/349S-8JG8] (describing Kavanaugh's opinion in the net neutrality decision in the D.C. Circuit and exploring its possible implications for other cases).

102. *U.S. Telecom Ass'n*, 855 F.3d 381 at 429 ("The FCC's 'use it or lose it' theory of First Amendment rights finds no support in the Constitution or precedent.").

103. *Id.* at 432 ("As the Supreme Court stated in *Buckley v. Valeo*, in one of the most important sentences in First Amendment history: The 'concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'") (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

104. *Id.* at 491. Justice Kavanaugh asked incredulously: "Can the Government really force Facebook and Google and all of those other entities to operate as common carriers? Can the Government really impose forced-carriage or equal-access obligations on YouTube and Twitter? If the Government's theory in this case were accepted, then the answers would be yes." *Id.*

105. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716–17, 1717 n.2 (2022) (mem.) (Alito, J., dissenting from grant of application to vacate stay).

without violating the First Amendment.[106] He began by noting that the text of the First Amendment did not distinguish among *any* types of media.[107] On that sweeping reasoning, social media outlets definitely would be protected. But even if distinctions among media types were warranted, Justice Thomas continued in that earlier opinion, cable companies did edit content just like newspapers.[108] That was true even though cable operators admittedly did not control the programming of outside stations once they had selected them.[109] Yet in *Moody* the platforms seemed even more engaged in selecting particular content, post by post and minute by minute, than cable operators ever were.[110] Nevertheless, Justice Thomas began voting the other way—he maintained that platforms were simply conduits for the speech of others.

Admittedly, these examples are cherry-picked, and they omit significant complexity that was contained within the old paradigm. Facts mattered, and they sometimes caused alignments to become inverted. *Rumsfeld v. FAIR*,[111] for example, concerned the ability of law schools to turn away military recruiters out of opposition to the "don't ask, don't tell" policy toward gay and lesbian servicemen and servicewomen.[112] There, Chief Justice Roberts wrote for the Court that the law schools were being regulated in their conduct,

106. Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 816–17 (1996) (Thomas, J., concurring in part and dissenting in part).

107. *Id.* at 812–13.

108. *Id.* at 813–14.

109. *See Turner*, 512 U.S. at 628–29 ("Although cable operators may create some of their own programming, most of their programming is drawn from outside sources . . . . Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.").

110. On a related question, Justice Thomas has suggested that digital platforms are conduits for the public's speech, unlike newspapers. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (mem.) (Thomas, J., concurring) ("In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers."). Conceivably, cable companies could be seen as providers of content, rather than conduits. However, cable operators also operate public access channels and otherwise are open to expression by the broader public. Justice Thomas has also pointed out in another context that digital platforms have unlimited space, and he has suggested that cable companies do not. *Id.* at 1226 ("[T]he space constraints on digital platforms are practically nonexistent (unlike on cable companies)."). But this is hard to understand—cable operators are not subject to the same degree of spectrum constraints as over-the-air broadcasters. And in any event, Justice Thomas did not draw either of these distinctions in the context of editorial discretion. Even accepting that cable operators are less open to the public and face greater space constraints, they do not seem to exercise greater editorial discretion than digital platforms.

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

112. *Id.* at 52; Laura Chang & Kelly McRobie, *Rumsfeld v. Forum for Academic and Institutional Rights*, LEGAL INFO. INST., https://www.law.cornell.edu/supct/cert/04-1152 [https://perma.cc/XJY8-P353] (noting that the American Association of Law Schools (AALS) has, since 1990, "required its members to withhold placement assistance or use of the schools' facilities from employers who discriminate on the basis of sexual orientation" and that "AALS believes that the military violates this policy as a result of the military's 'don't ask, don't tell' policy").

not expressive content, and they enjoyed no speech protection.[113] But overall, decisions protecting private speech hosts had a conservative valence—think of *Tornillo*, *Hurley*, and *PG&E*—while decisions allowing states to impose nondiscrimination rules on speech hosts had a liberal valence—examples included *PruneYard*, *Turner*, and *Red Lion*. So today it is striking to see authorities like *PruneYard* being read broadly by judges on the right; it is also striking to see prominent use of arguments central to those decisions, like the importance of attribution to the protection of editorial discretion.

3. Asymmetry.—On closer inspection, however, it turns out that the turnabout does not affect all of conservative thought in the same way. Once a distinction is drawn between, on the one hand, moderate conservatives or libertarians and, on the other hand, movement conservatives or MAGA Republicans, it is possible to see that the inversion affects the latter more powerfully than the former. Justices Alito, Gorsuch, and Thomas, along with states like Florida and Texas, have endorsed a set of arguments and authorities on this issue that generate greater conflict with the previous paradigm. And their arguments are more prominent in the litigation and in the discourse defending the statutes.

Consider traditional conservatism first. Someone like Justice Kavanaugh can explain his vote for the platforms in *Moody* easily by pointing out that he has always supported protection for speech intermediaries. Remember that Justice Kavanaugh objected strenuously to upholding net neutrality rules, and he did so precisely on the ground that ISPs retained editorial discretion and were protected by the First Amendment.[114] And of course social media platforms are engaged in far more content moderation than ISPs were contemplating.[115] So conservatism of this stripe normally is firmly protective of editorial discretion by media companies, even when it is not actually exercised. Without much friction, it also supports the conclusion that Florida and Texas violated the First Amendment, at least by applying their new laws to content moderation of users' main feeds.

Much the same goes for the circuit court judges who voted to invalidate the Florida and Texas laws. Although all the judges on the *NetChoice* panels

113. *Rumsfeld*, 547 U.S. at 61–65. Even if the *O'Brien* standard applied, the Court reasoned further, it would be satisfied by the government. *Id.* at 67–68.

114. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 427–28 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

115. In response to the argument that ISPs were not actually seeking editorial power, Justice Kavanaugh argued that nothing depended on whether a media entity actually exercised editorial discretion by blocking content—all that mattered is whether they had that power. *Id.* at 428. He explained that while "[i]t may be true that [several] Internet service providers have chosen not to exercise much editorial discretion, and instead have decided to allow most or all Internet content to be transmitted on an equal basis," they remained protected because "that 'carry all comers' decision itself is an exercise of editorial discretion." *Id.* at 429.

in both the Fifth and Eleventh Circuits were appointed by Republican presidents,[116] they were sharply divided in their free speech philosophies. In sum, the judges who concluded that the state laws were unconstitutional encountered far less dissonance with traditional conservative speech proclivities.

The Eleventh Circuit applied heightened scrutiny to provisions of the Florida law that prohibited social media companies from deplatforming or deprioritizing political candidates and journalistic enterprises.[117] The court's sense was that platform decisions about content constituted something like journalistic discretion—and that the resulting product was expression itself.[118] Prohibiting, say, viewpoint discrimination by the platforms not only interfered with their judgment about how to shape their media product, but it relied on a determination about the substance of how they exercised that judgment. Applying the prohibition therefore would mean determining whether they were in fact regulating something like hate speech, false speech, etc. Deciding the case that way required the Eleventh Circuit simply to draw on mainstream authorities like *Tornillo* and *Hurley*—which had always been supported by conservative thought.

By contrast, the lawyers and judges leading the defense of the Florida and Texas laws took more radical positions. Recall that Justice Alito, writing in *Moody* for Justices Gorsuch and Thomas as well, was pressed to rely on authorities like *PruneYard* and *Turner*, which had long been disfavored on the right.[119] With regard to editorial discretion, Justice Thomas had argued earlier that cable companies were engaged in editorial discretion and

116. On the Eleventh Circuit panel that upheld the Florida platform law, Judge Kevin C. Newsom was nominated by President Donald Trump, Judge Gerald Bard Tjoflat was nominated by President Gerald Ford, and Judge Edward Earl Carnes was nominated by President George H.W. Bush. *See* Judges, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, https://www.ca11.uscourts.gov/judges [https://perma.cc/79Y6-84V6] (listing current active judges); *see also* Newsom, Kevin Christopher, FED. JUD. CTR., https://www.fjc.gov/history/judges/newsom-kevin-christopher [https://perma.cc/FT4S-VQ5A] (identifying the nominating president); Tjoflat, Gerald Bard, FED. JUD. CTR., https://www.fjc.gov/history/judges/tjoflat-gerald-bard [https://perma.cc/X3E8-XEPE] (same); Carnes, Edward Earl, FED. JUD. CTR., https://www.fjc.gov/history/judges/carnes-edward-earl [https://perma.cc/SN46-UYLM] (same). On the Fifth Circuit panel, the author of the majority opinion, Judge Oldham, was appointed by President Trump and had previously worked for Texas Governor Greg Abbott. Oldham, Andrew Stephen, FED. JUD. CTR., https://www.fjc.gov/history/judges/oldham-andrew-stephen [https://perma.cc/9BE7-PLZE]. Judge Edith Jones was nominated by President Reagan. Jones, Edith Hollan, FED. JUD. CTR., https://www.fjc.gov/history/judges/jones-edith-hollan [https://perma.cc/GAB2-GUBM]. Judge Leslie Southwick, the dissenter, was nominated by President George W. Bush. Southwick, Leslie, FED. JUD. CTR., https://www.fjc.gov/history/judges/southwick-leslie [https://perma.cc/XH7X-8ZGF].

117. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1222 (11th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

118. *Id.* at 1213.

119. Moody v. NetChoice, 144 S. Ct. 2383, 2432 (2024) (Alito, J., concurring in the judgment) (relying on *PruneYard*); *id.* at 2433 (relying on *Turner*).

therefore were protected from regulation—a position that was hard to square with his later view that platforms could be regulated.[120] And Justice Gorsuch held for the Court in *303 Creative* that a website designer who wanted to create wedding sites on behalf of couples was engaged in pure speech of her own when she edited their content.[121] That case could be distinguished from *Moody*, but it would take some work—and that work went undone in the Alito concurrence he later signed.

Judge Oldham, who wrote the Fifth Circuit majority opinion, was confronted with similar contradictions. He contended that the Texas law did not interfere with editorial discretion because the platforms were simply speech conduits, not speakers themselves. Drawing on *PruneYard*, Judge Oldham denied that anyone would attribute the speech of users to Facebook or YouTube.[122] Any risk of attribution could be counteracted with disclaimers by the platforms, just as in *PruneYard*.[123] Relatedly, Judge Oldham held that Texas was regulating conduct, not speech.[124] Yet that was an argument that had been deployed for liberal purposes in the wedding vendor litigation, where Colorado maintained that its antidiscrimination laws regulated the conduct of commercial enterprises, not their expression. It also was the main theme of Justice Sotomayor's dissent in *303 Creative*.[125]

Movement conservatism was in a tricky position in *Moody*. It was trying to reconcile its support of the Texas law with a longstanding antipathy to government regulation of corporations and other property owners that hosted the speech of others. It risked contradicting conservative positions that had

120. *See supra* text accompanying notes 106–10 (discussing Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 812–14 (1996) (Thomas, J., concurring in part and dissenting in part)).

121. *See supra* text accompanying notes 96–100 (discussing *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023)).

122. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 459–60 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) ("Let's start with compelled speech . . . . It is no answer to say, as the Platforms do, that an observer might construe the act of hosting speech as an expression of support for its message. That was the precise contention the Court rejected in both *PruneYard* and [*Rumsfeld*] . . . .").

123. *Id*. at 462. Judge Oldham explained:

> [T]he Platforms are free to say whatever they want to distance themselves from the speech they host. The Supreme Court has been very careful to limit forced-affiliation claims by speech hosts. After all, *any* speech host could *always* object that its accommodation for speech might be confused for a coerced endorsement of it. But the Court rejected that forced-affiliation argument in *PruneYard* . . . .

Id.

124. *Id.* at 448.

125. *303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting) ("As I will explain [in this dissenting opinion], the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent."); *see also* Brief on the Merits for Respondents at 13–15, *303 Creative*, 143 S. Ct. 2298 (No. 21-476) (arguing that the Colorado law regulated conduct, not speech).

been taken in standard cases concerning the First Amendment rights of property owners that host the speech of others.

On the platforms' side, however, the leading arguments were mainstream, fitting together with centrist thinking on freedom of expression. This is the asymmetry, in sum: The political inversion in free speech discourse has more seriously affected legal conservatism, which is relying on movement arguments to defend the state laws, than it has affected legal liberalism, which is content to rest on traditional principles. Mainstream liberalism has long supported strong protection for editorial discretion, even against state antidiscrimination rules. Justices selected by Democrats supported the outcomes in *Tornillo*, *Hurley*, and *PG&E*—in fact, there was only one dissenting vote across the three cases.[126] When it comes to media companies in particular, mainline liberalism backs strong First Amendment protection. Justice Kagan's opinion on the substance of the First Amendment in *Moody* therefore drew unproblematic assent from centrist thought on both sides of the aisle, while Justice Alito's contrary opinion (on the substance) depended on a more radical view that ran up against conservative argumentation in the previous paradigm.

B. Common Carriers and Market Power

Another important issue was whether to analogize platform legislation to common carrier regulation. If digital platforms were similar in relevant ways to common carriers like telephone operators and shipping companies, the argument went, then they could be required by the government to carry all messages on a nondiscriminatory basis without offending the First Amendment. Though the analogy was important in the lower courts, it was ignored by the Supreme Court majority in *Moody*.

Political inversion affected this argument too, and likewise in an asymmetric way. Florida and Texas argued that social media platforms could permissibly be treated as conduits for the messages of others, such that they could be prohibited from discriminating against messages they disliked. That move was endorsed by the Fifth Circuit, and it was taken seriously by Justices Alito, Thomas, and Gorsuch,[127] though formerly it had been anathema to

126. Justice Stevens wrote alone in *PG&E*. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 35 (1986) (Stevens, J., dissenting).

127. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1717–18 (mem.) (2022) (Alito, J., dissenting from grant of application to vacate stay); *Moody*, 144 S. Ct. at 2413 (Thomas, J., concurring in the judgment) ("[T]he common-carrier doctrine should continue to guide the lower courts' examination of the trade associations' claims on remand."); *see also* Response to Petition for Writ of Certiorari at 19, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-555) (mentioning that "HB 20 is the modern-day analogue to rules deemed permissible at the time of the founding," and that "[f]or centuries, common carriage principles have structured the transportation and communications industries. Thus, entities like FedEx, AT&T, and Western Union have never had a right to act as a censor of public or private morals . . . ." (internal quotation marks and citations omitted)).

legal conservatism concerning speech intermediaries. The platforms, by contrast, simply maintained that media companies were protected regardless of their market power.[128] And that position generated little friction with mainstream constitutional thought, whether liberal or conservative.

Here is the background on common carriers. Certain businesses like telephone companies provide essential infrastructure to the public and therefore they can be compelled to carry messages without discrimination, consistent with the First Amendment.[129] Even though telephone companies provide a service that consists of pure speech, they can be prohibited by the government from discriminating among messages on the basis of content and viewpoint. Similarly, FedEx and UPS ship books, among other expressive and nonexpressive items, and yet they can be required not to exclude particular viewpoints, however hateful or extreme.[130] These entities operate under rules that obligate them to serve everyone without regard to viewpoint, and they are not protected from that kind of regulation by the Constitution.

Social media platforms belong in the same category, on this view—and requiring them to carry messages that violate their terms of service therefore is constitutionally permissible. Judge Oldham for the Fifth Circuit found that Texas could determine that the platforms were common carriers because (1) they are communications firms, (2) they offer their services to the public generally, and (3) they are "affected with a public interest."[131] With respect to the last criterion, it mattered to the Fifth Circuit that the platforms wielded market power that allowed them to shut users out of important communications environments—though the relevance of market power to the common-carrier analogy was contested.[132]

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128. Brief for Petitioners, *Moody*, *supra* note 22, at 44 ("The Fifth Circuit majority suggested that HB20-covered websites' 'market dominance and network effects make them uniquely in need of regulation.' But the First Amendment protects the editorial-discretion rights of private entities, even if they allegedly have a 'monopoly of the means of communication.'" (internal citation omitted) (quoting Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 250 (1974))).

129. *See* Title II of the Communications Act, 47 U.S.C. § 202(a) (prohibiting discrimination by phone companies); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–17 (2021) (describing how "common carrier and quasi-common carrier law[s]" like § 202 of the Communications Act "protect free speech values and interests, but do so by non-First Amendment means"); Volokh, *supra* note 63, at 377 (describing the "plausible (though far from open-and-shut) argument that [political influence] concerns can justify requiring [social media] platforms not to discriminate based on viewpoint").

130. *See* 49 U.S.C. § 13101(a)(1)(D) (prohibiting most discrimination by shipping services); Volokh, *supra* note 63, at 379.

131. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 471 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

132. *Id.* at 472 (describing the importance of market power in the historical cases); *id.* at 476 ("The Platforms' entrenched market power . . . further supports the reasonableness of Texas's determination that the Platforms are affected with a public interest."). By contrast, Volokh points out that common carrier laws can be applied without regard to market power. *See* Volokh, *supra* note 63, at 384–85 (explaining that regardless of market power and competition, "companies that

Justice Thomas repeatedly raised the common-carrier analogy as well. In *Moody* itself, he argued that, on remand, the lower courts should continue to address whether the platforms should be treated as common carriers, "given their many similarities."[133] And in an earlier case, he reflected on the market power of digital platforms and their consequent control over speech. "If part of the problem is private, concentrated control over online content," Justice Thomas reasoned, "then part of the solution may be found in doctrines that limit the right of a private company to exclude," including the common-carrier precedent.[134] When a business serves the public interest, and perhaps when it enjoys dominant market power, it can be required to serve all comers.[135] Justice Thomas then suggested that might be true of digital platforms, alongside other "communications networks."[136]

Similarly, Justice Alito implied that the common-carrier argument had force in the *NetChoice* cases. Joined by Justices Gorsuch and Thomas in a stay opinion, he noted that the Texas statute only applied to large platforms—those with 50 million active users domestically—and he seemed to agree with Texas that it thereby was limited to entities that possessed something like the control of common carriers.[137] He noted the effects of private market power on the freedom of expression of other private citizens, and he signaled support for Texas's law for that reason.[138] Justice Alito also believed that Texas's statute might "be a permissible attempt to prevent 'repression of the freedom of speech by private interests,'" quoting *Associated Press v. United States*.[139] That was a case where the Court upheld the application of antitrust

provide communications infrastructure should provide the infrastructure, not control what may be communicated on it").

133. *Moody*, 144 S. Ct. at 2413 (Thomas, J., concurring in the judgment) ("[T]here is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers given their many similarities." (internal quotation marks omitted)).

134. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

135. *See id.* ("Some scholars have argued that common-carrier regulations are justified only when a carrier possesses substantial market power.").

136. *Id.* at 1223.

137. *See* NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1717 (mem.) (2022) (Alito, J., dissenting from grant of application to vacate stay) ("Texas argues that the law applies to only those entities that possess some measure of common carrier-like market power and that this power gives them an opportunity to shut out disfavored speakers." (internal quotation marks and alterations omitted)); *see also Moody*, 144 S. Ct. at 2438 (Alito, J., concurring in the judgment) (highlighting "the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old 'public square'—should be viewed as common carriers" and insisting that this argument "deserves serious treatment").

138. *See NetChoice*, 142 S. Ct. at 1717 (Alito, J., dissenting from grant of application to vacate stay) ("Texas argues that the law applies to only those entities that possess some measure of common carrier-like market power and that this power gives them an opportunity to shut out disfavored speakers." (internal quotation marks and alterations omitted)).

139. *Id.* (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)) (internal alterations omitted).

laws to the Associated Press (AP).[140] The New Deal Court held that the AP could be prohibited from limiting its services to member newspapers while empowering existing members to block competitors from membership.[141] Freedom of speech from government interference, the Court reasoned, could not "sanction repression of that freedom by private interests."[142] In the later *Moody* opinion, similarly, Justice Alito protested against the majority's "conspicuous failure" to consider whether Facebook and YouTube should be treated as common carriers.[143] That argument "deserves serious treatment," he said.[144]

Now compare those arguments to conservative thinking in the previous alignment. A representative example, again, was Justice Kavanaugh's opinion in the ISP case. There, he insisted that internet service providers—and, in dicta, social media companies—could *not* be considered common carriers.[145] "Can the Government really impose forced-carriage or equal-access obligations on YouTube and Twitter? If the Government's theory in this case were accepted, then the answers would be yes."[146] Justice Kavanaugh observed, rightly, that the net neutrality rules reflected a fear that private corporations would have the power to threaten freedom of speech and information, a fear that the government believed justified its intervention.[147] But he responded that the First Amendment applied only against "*the Government*," and that it thereby protected media companies from public control.[148] Justice Kavanaugh did not leave the deregulatory implications implicit. He spelled out that "the traditional laissez-faire model still reflects the basic tenor of the Supreme Court's First Amendment jurisprudence," and "that approach to the First Amendment seems to have grown only stronger in recent decades."[149] Justice Kavanaugh's conclusion was that treating a

140. Associated Press v. United States, 326 U.S. 1, 13–14, 19 (1945).

141. *See id.* at 4, 19 (affirming the lower court's holding that the AP's "By-Laws unlawfully restricted AP membership, and violated the Sherman Act.").

142. *Id.* at 20.

143. Moody v. NetChoice, 144 S. Ct. 2383, 2438 (2024) (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.).

144. *Id.*

145. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 433 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("Can the Government really force Facebook and Google and all of those other entities to operate as common carriers?").

146. *Id.*

147. *Id.* at 434 (explaining that "[t]he net neutrality rule reflects a fear that the real threat to free speech today comes from private entities such as Internet service providers, not from the Government," and that "[f]or that reason, some say, the Government must be able to freely intervene in the market to counteract the influence of Internet service providers").

148. *Id.* at 434.

149. *Id.* at 434 n.14.

private entity as a common carrier would be exceptional, and that internet platforms did not fall into the exception.[150]

Similarly, Justice Alito customarily has supported the laissez-faire model, which sharply limits the ability of government to regulate private companies in order to enhance the speech opportunities of individuals.[151] It is remarkable to see him now arguing that government can police markets even when the regulated businesses have cognizable free speech interests in resisting government regulation, and even when they have not been found to constitute actual monopolies like the old Associated Press. Justice Alito emphasized, for instance, that the Texas law only applied to large platforms, which had significant "market power" that gave them the ability "to shut out disfavored speakers."[152] That such a consideration of market power mattered, where it would not have formerly, shows how far Justice Alito has come in his appreciation of economic pressure on private speech.

Justice Thomas, for his part, never argued that cable television companies ought to be considered common carriers. On the contrary, he maintained that they were protected by the First Amendment because they exercised editorial discretion over their content, even though they intervened in a far less granular way than the platforms.[153] Yet, in *Moody*, he embraced the common-carrier analogy, as described above.[154] Under the previous alignment, in short, conservative thought maintained that the First

150. *Id.* at 435 ("[A]bsent a showing of market power, the Government must keep its hands off the editorial decisions of Internet service providers.").

151. For a sample of Justice Alito's normal view, see for instance *Pfizer, Inc. v. Giles*, 46 F.3d 1284 (3d Cir. 1994). When he was sitting on the Third Circuit, Justice Alito ruled that Pfizer enjoyed First Amendment protection against conspiracy and concert of action claims. Pfizer allegedly had marketed unsafe asbestos together with a trade group called the Safe Buildings Alliance. Justice Alito ruled that Pfizer was protected by a Supreme Court precedent guaranteeing the right of civil rights protesters to boycott discriminatory businesses. *Id*. at 1289 (ruling under NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)). *See also* Pitt News v. Pappert, 379 F.3d 96, 105–08 (3d Cir. 2004) (invalidating a state law that prohibited college newspapers from being paid for ads related to alcoholic beverages because it unnecessarily restricted commercial free speech); Janus v. AFSCME, 585 U.S. 878, 884–87 (2018) (striking down an Illinois law that forced public-sector employees to pay agency fees to unions because it "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern"). That said, Justice Alito has supported certain speech regulation in the service of social morality. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 482 (2010) (Alito, J., dissenting from a decision invalidating a statute regulating videos depicting animal cruelty); Snyder v. Phelps, 562 U.S. 443, 463 (2011) (dissenting from a decision invalidating a tort judgment against a hateful funeral protest). In cases not concerning such moral questions, however, Justice Alito has supported the deregulatory approach to the Speech Clause that Justice Kavanaugh described in *U.S. Telecom*.

152. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1717 (mem.) (2022) (Alito, J., dissenting from grant of application to vacate stay) (internal alteration and citation omitted).

153. Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 812–13 (1996) (Thomas, J., concurring in part and dissenting in part).

154. *See supra* text accompanying notes 133.

Amendment insulated market dynamics from government redistribution.[155] It is striking to see these Justices taking precisely the opposite position by way of the common-carrier analogy.

In a related rhetorical turnabout, the Fifth Circuit accused the platforms of promoting First Amendment Lochnerism.[156] Judge Oldham emphasized that the only time the Court had invalidated regulation of common carriers

155. *See* Michael C. Dorf, *Could Clarence Thomas Be Right About Twitter?*, VERDICT, JUSTIA (Apr. 14, 2021), https://verdict.justia.com/2021/04/14/could-clarence-thomas-be-right-about-twitter [https://perma.cc/L4WM-M6HF]. Arguing the Roberts Court is unlikely to restrict the speech rights of powerful private actors, Dorf asks:

> Would Justice Thomas and the other conservatives on the Roberts Court accept the progressive argument for constraining the speech (in the form of editorial discretion) of concentrated private power in order to enhance the speech of individual natural persons? Almost certainly not. To do so would require not only going against their ideological druthers but disregarding much modern free speech jurisprudence.

Id.

156. On First Amendment Lochnerism, see *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (warning that the Court had "weaponiz[ed] the First Amendment, in a way that unleashes judges . . . to intervene in economic and regulatory policy") and *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) ("At worst, [the majority] reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."). *See also, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORN. L. REV. 527, 529–33 (2015) (arguing that the conservative legal movement is on the verge of reembracing *Lochner*); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179–80 (2018) (emphasizing the far-reaching consequences of using the First Amendment to invalidate socioeconomic legislation); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207 (2015) (pointing out that business interests are making free speech claims structurally similar to *Lochner*-era claims); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 (2016) (explaining how, to critics, civil libertarian challenges to economic regulations recalled the substantive due process doctrine of *Lochner*); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 181–82 (2015) (asserting that a First Amendment doctrine that fails to distinguish between public discourse and other forms of speech threatens to revive *Lochner*); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 198–203 (2014) (describing how a "neoliberal, marked-fixated" reading of the Constitution encourages courts to "declare that spending is speech, advertising is argument, and [that] the transfer of marketing data is a core concern of the First Amendment"); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEXAS L. REV. 1329, 1334 (2016) (identifying the similarities between *Lochnerism* and the "constitutional political economy" of the Roberts Court); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135–36 (2016) (highlighting the parallels between *Lochnerism* and contemporary constitutional deregulation under the First Amendment); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) ("[T]he First Amendment has become the new *Lochner*."); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, THE NEW REPUBLIC (June 2, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/C29W-PCFE] ("Once the patron saint of protestors and the disenfranchised, the First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint.").

was during the *Lochner* era.[157] According to this theory, history had decisively rejected the constitutional arguments that the platforms were making. *Lochner* judges were the ones who took positions such as "a state may not by legislative fiat convert a private business into a public utility."[158] Like the infamous Four Horsemen of the 1930s, the platforms "asked for the . . . drastic remedy of invalidation of an economic regulation—a remedy the federal courts have not been in the business of providing since the *Lochner* era."[159] Texas's law was an ordinary nondiscrimination requirement for a dominant market actor, akin to economic regulations that were routinely upheld after the New Deal, according to the Fifth Circuit.[160] This language from Judge Oldham was pretty far from Justice Kavanaugh's "traditional laissez-faire model" of the First Amendment.[161]

Judge Oldham's argument was not totally implausible, however. Platforms *were* seeking to invalidate government regulations on constitutional grounds, and they were doing so using market metaphors that worked to naturalize the economic dominance of large social media corporations.[162] Like other decisions accused of First Amendment Lochnerism, Judge Southwick's dissent in the Fifth Circuit found speech to be implicated in activity that the state characterized as purely economic.[163] Moreover, he depicted the platforms as engaged in "private" expressive activity that belonged to the unruly contest among ideas envisioned by the framers.[164] And the Eleventh Circuit, invalidating Florida's platform law,

157. Lochner v. New York, 198 U.S. 45 (1905); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 473 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024). Judge Oldham also mentioned the Court's invalidation of state laws requiring racial neutrality in common carriage, which happened during the same era. *Id.* ("The Court deviated from this path only briefly and only during an ignominious period of history marked by racism and the now-discredited theory of [*Lochner*].").

158. *NetChoice v. Paxton*, 49 F.4th at 479 (quoting the platforms' brief, in turn quoting Nebbia v. New York, 291 U.S. 502, 555 (1934) (McReynolds, J., dissenting)).

159. *Id.* at 479 n.33.

160. *Id.* at 479.

161. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 434 n.14 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

162. *See* Brief of Appellees at 44, NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178) ("[G]overnment cannot regulate private speech to enhance the relative voice of others or to level the playing field." (internal quotation marks and citations omitted)); Brief for Petitioners, *Moody*, *supra* note 22, at 44 ("The Fifth Circuit majority suggested that HB20-covered websites' 'market dominance and network effects make them uniquely in need of regulation.' But the First Amendment protects the editorial-discretion rights of private entities, even if they allegedly have a 'monopoly of the means of communication.'" (internal citations omitted)).

163. *See NetChoice v. Paxton*, 49 F.4th at 476 (Southwick, J., concurring in part and dissenting in part) ("We simply disagree about whether speech is involved in this case.").

164. *Id.* (embracing "the wide-ranging, free-wheeling, unlimited variety of expression—ranging from the perfectly fair and reasonable to the impossibly biased and outrageous—that is the picture of the First Amendment as envisioned by those who designed the initial amendments to the Constitution"). Somewhat similarly, the Knight First Amendment Institute depicted the First

rejected the market-power argument by citing *Tornillo* to the effect that "the Supreme Court has squarely rejected the suggestion that a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the marketplace and hits it big."[165] Precisely that move from *Tornillo* was foundational for First Amendment Lochnerism.

Notice that here too the switch was skewed rather than symmetric. Florida and Texas—along with the lawyers and judges who support them—were deploying arguments and authorities to support regulation that put them in direct conflict with the conservatism of the old alignment. Extending the common-carrier model to digital platforms pushed against laissez-faire interpretations of the Speech Clause and allowed nondiscrimination rules to reorder the market baseline in pursuit of fairer speech opportunities.[166]

NetChoice and the platforms, by contrast, rejected the common-carrier analogy for reasons that put them comfortably within the mainline speech tradition. They challenged the analogy from two directions. First, quintessential common carriers like telephone companies were marked not only by their market dominance, but also by the circumstance that they did not exercise editorial control over the content transmitted by users.[167] That was partly because they were not *allowed* to do so by statutes regulating

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Amendment as shielding "speakers' autonomy" and as "protecting public discourse from government intervention." Brief of Amicus Curiae the Knight First Amendment Institute at Columbia Univ., *supra* note 62, at 10–11. Knight argued that "[t]he protection that the Court conferred on editorial judgment in *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley* is vital" and it cited cases like *Buckley v. Valeo*, 424 U.S. 1 (1976), a key instance of First Amendment Lochnerism. *Id.*

165. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1222 (11th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

166. Normally, liberal actors, if anyone, are the ones seeking to extend the common-carrier analogy. *303 Creative*, for instance, exemplified the ordinary alignment on the common carrier question. Colorado argued that its public accommodations law was "a modern regulatory counterpart to the common carrier principle adopted at common law—requiring businesses to serve all comers." Brief in Opposition at 24–25, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476). On that view, common carrier regulations and public accommodations laws both stemmed from common law rules that required inns and other businesses open to the public to serve all comers. As Justice Sotomayor explained in her dissent, "[w]hat began with common inns, carriers, and smiths has grown to include restaurants, bars, movie theaters, sports arenas, retail stores, salons, gyms, hospitals, funeral homes, and transportation networks." *303 Creative*, 143 S. Ct. at 2328 (Sotomayor, J., dissenting). For literature on nondiscrimination requirements for common carriers, including their permissibility under the Speech Clause, see Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2317 (2021); Sitaraman & Ricks, *supra* note 31, at 1038–40; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1320–21 (1996).

167. *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1221 ("The State doesn't argue that market power and public importance are alone sufficient reasons to recharacterize a private company as a common carrier; rather, it acknowledges that the 'basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately.'" (quoting Opening Brief of Appellants at 35, NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355)).

common carriers.[168] So there was some circularity in this argument by the platforms. But even independent of regulation, the platforms added, telephone companies did not set out to create special kinds of communicative environments the way social media companies have.[169] And that was important to the judges who upheld common carrier laws against constitutional challenges.[170]

Second, other organizations that *did* exercise significant market power still were held to enjoy First Amendment protection against nondiscrimination laws. In *Tornillo*, for instance, newspapers dominated many local markets, as emphasized in the brief defending the Florida right-of-reply statute. There, Professor Jerome Barron stressed that Miami had only two newspapers, and those two were allowed to collude with each other on pricing because of a special statutory exemption from the federal antitrust laws.[171] Among other factors, that statutory provision sometimes erected an insurmountable barrier to entry for any competing papers. And in *Hurley*, the organizers had complete control over the Boston Saint Patrick's Day Parade, even if they did not always exercise that power rigorously.[172] Although members of GLIB could have spoken elsewhere, or obtained their own license for another parade, those alternatives were hardly equivalent, as the Court itself recognized.[173] Yet, the organizers prevailed. Finally, *PG&E*

168. *Cf. id.* at 1220. Highlighting differing explanations endorsed by the State of Florida as to why common carriers have limited First Amendment rights, the Eleventh Circuit observes:

> [W]e confess some uncertainty whether the State means to argue (a) that platforms are *already* common carriers, and so possess no (or only minimal) First Amendment rights, or (b) that the State can, by dint of ordinary legislation, *make* them common carriers, thereby abrogating any First Amendment rights that they currently possess.

Id.; Brief for Petitioners, *Moody*, *supra* note 22, at 32 ("Texas cannot deprive websites of First Amendment protections by forcing them to *become* common carriers.").

169. Brief for Petitioners, *Moody*, *supra* note 22, at 31 (noting that the platforms "constantly engage in editorial filtering, providing curated experiences" and giving that as a reason to reject the common-carrier analogy).

170. *See, e.g.*, NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 471 (5th Cir. 2022) (explaining that historically, courts deciding whether to apply the common-carrier doctrine would ask, first, whether a provider held itself open to the public without individualized bargaining, and second, whether the firm was affected with a public interest), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024). In fact, the platforms cited the net neutrality case for the proposition that common carriers "hold themselves out as affording neutral, indiscriminate access" and they distinguished their own platforms by pointing to their content moderation activities. Brief for Petitioners, *Moody*, *supra* note 22, at 31 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan, J., concurring in denial of rehearing en banc)).

171. Brief for Appellee at 6–8, Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (No. 73-797) (describing the Newspaper Preservation Act, 15 U.S.C. § 1801).

172. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569–70 (1995) (explaining that the organizers retained control over the parade, even if in practice they were "rather lenient in admitting participants"); *id.* at 574 (noting that the organizers "select[] the expressive units of the parade from potential participants" in a manner "[r]ather like a composer").

173. *Id.* at 577–78 (recognizing as "[t]rue" GLIB's argument that "the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views").

concerned a utility with *actual* monopoly power, an entity that nevertheless was protected against an equal-access rule.[174] Because classic common carriers do not seek to shape their communicative environments, and because speech hosts that enjoy market dominance nevertheless have been protected from redistributive regulation when they do control content, the platforms' argument was that they should not be treated as common carriers.

Consequently, liberal Justices could reject (or ignore) the common-carrier analogy, as they did in *Moody*, without significant tension. Orthodox liberalism was already defending the speech rights of media companies, regardless of market power, in the decisions just mentioned. Egalitarianism further to the left would have to face the inversion, but that perspective was largely absent from the litigation. Moreover, conservatives who joined the majority opinion in *Moody* likewise escaped serious contradiction because mainstream jurisprudence on the right had already supported the exercise of judicial review to resist market reordering that sought a more egalitarian speech environment.

C. Overcoming the Presumption

If heightened scrutiny is triggered by the Florida and Texas laws, can it be satisfied? According to the Supreme Court, Texas's interest was "to correct the mix of speech that the major social-media platforms present."[175] In particular, sponsors of the state law "explained that the 'West Coast oligarchs' who ran social-media companies were 'silencing conservative viewpoints and ideas.'"[176] Is a state's interest in ensuring a fair speech environment sufficient to overcome a presumption of unconstitutionality?

No, answered the Court. Justice Kagan wrote that Florida and Texas could not regulate the platforms simply in order to protect conservatives from discrimination in content moderation. "[A] State may not interfere with private actors' speech to advance its own vision of ideological balance," in short.[177] For support, the Court quoted the campaign-finance case *Buckley v. Valeo*, where Chief Justice Burger wrote that the government cannot "restrict the speech of some elements of our society in order to enhance the relative

174. *See* Brief for Petitioners, *Moody*, *supra* note 22, at 32 ("Even true common carriers and government-franchised monopolies retain the 'right to be free from state regulation that burdens' their decisions about which speech to disseminate." (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 17–18, 17 n.14 (1986))).

175. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2407 (2024).

176. *Id.* (alterations omitted).

177. *Id.*

voice of others."[178] That proposition was reinforced in the speech-host cases *Tornillo*, *PG&E*, and *Hurley*.[179]

In response, Texas cited *Turner*, the decision that upheld the government's requirement that cable operators carry local television stations.[180] Texas offered the decision as confirmation that governments could require media companies to carry content under certain circumstances, despite First Amendment scrutiny. But the *Moody* majority replied that the government's interest in *Turner* was not to achieve balance of content, but instead to shield the local broadcast industry, which was threatened economically by the arrival of cable television.[181] Therefore, its interest was unrelated to any suppression of free expression.

It was striking to see Florida and Texas argue that private companies' dominance over a media market was sufficient to justify the imposition of antidiscrimination laws. In the past, market power (short of formal monopoly) did not matter much in conservative constitutional discourse on these questions. In *Hurley*, again, the proposed alternatives to participating in Boston's Saint Patrick's Day Parade were hardly commensurate, a fact that was simply acknowledged by the Rehnquist Court.[182] Moreover, newspapers' dominance of local markets was insufficiently concerning in *Tornillo*, even though it was bolstered by an exception in federal antitrust law.[183] And today, alternatives to Facebook and YouTube do exist.[184] Where

178. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam)).

179. *Id.* at 2408. The *Buckley* Court relied on *Tornillo*, among other cases. *Buckley*, 424 U.S. at 50–51 (discussing Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–57 (1974)); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011) (holding that "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction").

180. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 652 (1994).

181. *Moody*, 144 S. Ct. at 2408 n.10.

182. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 577–78 (1995) (implying that other fora were not as attractive since "the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views").

183. Chief Justice Burger acknowledged in *Tornillo* that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible," and he noted in a footnote to that sentence that "newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of 'failing' newspapers for joint operations." Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251, 251 n.16 (1974) (citing 15 U.S.C. §§ 1801–04).

184. President Trump has helped to start a social media company, Truth Social, which markets itself as friendly to conservatives, joining other platforms designed to appeal to those on the political right. Mike Isaac & Kellen Browning, *Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html [https://perma.cc/BXU5-334C] (identifying alternatives to Facebook and YouTube). *But see* Ben Goggin, *Conservative Influencers Aren't Sold on Trump's Social Media Platform and Other Alternative Apps*, NBC NEWS (Mar. 26, 2022), https://www.nbcnews.com/tech/tech-news/conservative-influencers-arent-sold-trumps-social-media-platform-alter-rcna18328 [https://perma.cc/XC2X-KLC7] (confirming President Trump's affiliation with Truth Social and illustrating doubts that conservatives have regarding alternative platforms).

the *irrelevance* of market alternatives was urged by conservatives in cases like *Tornillo*, in other words, the *relevance* of market alternatives was important to Florida and Texas in the platform context.[185]

On the liberal side, the platforms argued that a government interest in ensuring equal speech opportunity was insufficient. "Put simply," the Eleventh Circuit wrote in invalidating Florida's law, "there's no legitimate—let alone substantial—governmental interest in leveling the expressive playing field."[186] In their briefing, the platforms argued much the same thing, namely that it was "crystal clear from First Amendment precedent" that the government could not legitimately undertake "efforts to level playing fields."[187] And they quoted *Sorrell*[188] for the rule that "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction."[189]

Nor did the state have a sufficient interest in ensuring the dissemination of information from a diverse array of sources, according to the platforms and the Eleventh Circuit. Unlike in *Turner*, where that interest justified requiring cable companies to carry local television stations, users like political candidates and journalistic outlets "have numerous ways to communicate with the public besides any particular social-media platform that might prefer not to disseminate their speech—e.g., other more-permissive platforms, their own websites, email, TV, radio, etc."[190] No analysis of the effectiveness of these alternative channels was necessary. Even if blogs and emails were not as successful as tweets and snaps, the Eleventh Circuit concluded, the state could not restrict the platforms' expression in order to "enhance the relative voice" of candidates and journalists.[191]

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185. In *303 Creative*, but not the platform cases, the government asserted an interest in avoiding dignitary harm or status degradation for people protected by civil rights laws. ADF responded that the interest in equal citizenship standing was insufficient in *Hurley* and *Dale*, where public accommodations laws were said to be supported by a similar interest but were ordered to yield to the speech rights of the hosts. Reply Brief for the Petitioners at 20, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476).

186. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1228 (11th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024). The court continued, "[n]or is there a substantial governmental interest in enabling users—who, remember, have no vested right to a social-media account—to say whatever they want on privately owned platforms that would prefer to remove their posts." *Id.*

187. Brief for Appellees at 48, NetChoice v. Att'y Gen., Fla., 34 F.4th 1196 (No. 21-12355) (citing Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

188. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

189. Brief for Appellees at 41, *NetChoice v. Att'y Gen., Fla.*, 34 F.4th 1196 (No. 21-12355) (quoting *Sorrell*, 564 U.S. at 578–79).

190. *NetChoice v. Att'y Gen., Fla.*, 34 F.4th at 1228.

191. *Id.* (quoting *Buckley*, 424 U.S. at 48–49). On tailoring, the Eleventh Circuit concluded that Florida's regulations were too broad. With regard to political candidates, they would disallow platforms from regulating candidates even if they were engaged in the worst forms of "obscenity,

In the old alignment, legal liberalism often worked differently. For Justice Sotomayor dissenting in *303 Creative*, for instance, Colorado could satisfy heightened scrutiny, even assuming it applied, because its civil rights laws were animated by government interests of the highest order.[192] Just as the Court found in *Jaycees*[193] that the state had a compelling interest in applying its public accommodations law to a commercial organization in that case, the *303 Creative* Court should have found that Colorado had sufficient interest in enforcing the very same type of law against a website design business, an entity that was even more clearly commercial than the Jaycees.[194] State interests in enforcing public accommodations law included (1) maintaining equal citizenship status, and (2) ensuring equal economic opportunities.[195] Both of these had repeatedly been found to be compelling.[196] Additionally, those interests were narrowly tailored, for Justice Sotomayor, even when the market provided nondiscriminatory alternatives.[197] Harmful social stratification could be generated by invidious discrimination, even where other businesses were willing to serve.[198]

But on this issue too, inversion on free speech argumentation has not been equally intense on both sides. Florida and Texas had to work hard to

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hate speech, and terrorist propaganda." *Id.* at 1229. With regard to journalistic enterprises, the state would disallow even YouTube Kids from excluding "soft-core pornography posted by PornHub, which qualifies as a 'journalistic enterprise' because it posts more than 100 hours of video and has more than 100 million viewers per year." *Id.* at 1229.

192. 303 Creative, LLC v. Elenis, 143 S. Ct. 2298, 2337 (2023) (Sotomayor, J., dissenting).

193. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

194. *Id.* at 625–26; *see also* Pittsburg Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 388 (1973) (illustrating the frailty of commercial speech protections in light of strong state interests).

195. *See 303 Creative*, 143 S. Ct. at 2323–24 (Sotomayor, J., dissenting) (identifying the core purposes of a public accommodations law as ensuring equal access to goods and services and ensuring equal dignity in the common market); Brief in Opposition, *303 Creative*, *supra* note 166, at 33 ("Eliminating 'stigmatizing injury, and the denial of equal opportunities that accompanies it' provides a powerful basis for antidiscrimination laws." (quoting *Jaycees*, 468 U.S. at 625)).

196. Justice Gorsuch himself recognized that in the majority opinion. *303 Creative*, 143 S. Ct. at 2314 ("This Court has recognized that governments in this country have a compelling interest in eliminating discrimination in places of public accommodation." (internal quotation marks omitted)).

197. *Id.* at 2325 (Sotomayor, J., dissenting); *see also* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 131–32 (2015) (critiquing "the reduction of antidiscrimination law to mere market access" and arguing that "[a] competitive market cannot ensure antidiscrimination law's goals of addressing social stigma, constructing equal citizenship, and creating an inclusive society").

198. Although the Tenth Circuit had held that 303 Creative was an effective monopoly because it offered unique services, and that strict scrutiny was satisfied on that basis, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1180–81 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023), its monopoly argument was weak and unnecessary. *See 303 Creative*, 143 S. Ct. at 2326 (Sotomayor, J., dissenting) ("The majority is . . . mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power.").

avoid traditional conservatism and to argue that they had a sufficiently strong interest in prohibiting discrimination in content moderation policies. Figures like Justice Thomas dissented in cases like *Turner*, recall. Mainline liberalism, by contrast, has long agreed that the government cannot easily justify interference with the decisions of speech hosts, especially media companies. So, Justice Kagan could write the majority opinion in *Moody*, where she rejected the states' justifications for the platform laws.[199] Admittedly, it was a bit awkward for her to quote Justice Kavanaugh from the ISP decision, as she did, or to cite *Sorrell*, where she dissented.[200] There is some political dissonance there. But overall, centrist liberalism has agreed that speech redistribution is not a sufficient interest, that a natural divide between public and private obtains, and that opinion formation must be left to the market, however imperfect.[201]

D. Egalitarianism's Difficulty and Its Opportunity

Egalitarianism must work harder than mainline liberalism to justify any conclusion in favor of the platforms. Under the old alignment, after all, it insisted that states could regulate corporate speech hosts in the interest of creating a fairer speech environment for all. Egalitarian critique strove to denaturalize the consensus that speech opportunities should be left to private commercial markets, and it resisted even more strenuously the notion that the First Amendment should be invoked to *constitutionalize* the private ordering of expression against government regulation. Authorities like *PruneYard*, *Turner*, and *Red Lion* were rare moments when the Supreme Court allowed that kind of redistributive policy to survive judicial review.[202] So if egalitarianism were to support the platforms now in their claims against Florida and Texas, it would have to do some creative thinking to escape contradictions with its positions within the previous alignment.

Another possibility was to argue that the state platform laws should be *upheld* as a matter of constitutional principle, even if they were wrongheaded as a matter of policy. That was the strategy adopted by one amicus brief filed in *Moody*. A group of law professors argued that the Florida and Texas laws

199. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2407 (2024).

200. *Id.* at 2407–08. Justice Kagan noted that:

> States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction."

Id. at 2407 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011)).

201. *Id.* at 2407 ("In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market.").

202. Bracketed here is the question of whether regulations like the fairness doctrine were suboptimal as a matter of regulatory policy design.

actually must be upheld on egalitarian constitutional grounds. They wrote that the Court should "preserve a traditional state power—barring unreasonable discrimination by private industry in the exercise of its business operations."[203] Even if the Florida and Texas laws "in certain ways do not represent the policy choices that [the authors] would make," nevertheless "the principle is important."[204] Their main authority was *PruneYard*, which they took to stand for the principle that "generally applicable, neutral nondiscrimination laws aimed at ensuring equal public access to commercial spaces that are open to the public do not infringe their operators' First Amendment rights."[205]

Recall that *PruneYard* was also the leading authority for Florida, Texas, the Fifth Circuit, and Justice Alito, joined by Justices Gorsuch and Thomas.[206] Yet that embrace represented a shift for them, whereas egalitarian ideology had long supported the constitutionality of state laws that redistributed speech opportunities controlled by commercial speech intermediaries open to the public. So, by supporting the state platform laws' constitutionality, these professors were able to maintain consistency with the previous First Amendment alignment.

Another difficulty was generated by this approach, however. Substantively, the major platforms like Facebook and YouTube were using their private power precisely in the *service* of equality, not against it. That is, they were deploying content-moderation policies to redistribute expressive opportunities in the name of fairness—by banning hate speech, by policing harassment, by restricting threats of violence, and by regulating misinformation and disinformation.[207] And they were doing so partly in ways that would be prohibited to the government by the First Amendment.[208] While the platforms had been exercising their authority over content moderation in imperfect ways, without a doubt, they nevertheless were pushing for fairness. Ironically, then, the progressive professors' defense of states' power to impose nondiscrimination rules on industries open to the public operated in this situation precisely to undermine speech

203. Brief of L. & Hist. Scholars, *supra* note 26, at 2.

204. *Id.*

205. *Id.* at 3.

206. *See supra* text accompanying notes 81–91.

207. *See Moody*, 144 S. Ct. at 2404 (describing the types of speech that the platforms regulate under their content-moderation policies).

208. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1199–200, 1210 (7th Cir. 1978) (invalidating a hate speech ban in Skokie, Illinois); United States v. Alvarez, 567 U.S. 709, 719, 722, 729–30 (2012) (explaining that the Court has never held that falsity alone takes speech outside First Amendment protection and invalidating the Stolen Valor Act, which criminalized falsely claiming to have received certain military honors).

egalitarianism. Presumably that is why the professors disclaimed these particular state policies in their brief.[209]

How can egalitarian politics navigate this moment in First Amendment constitutionalism? Any progress is likely to be localized and impermanent because of the mismatch between substantive egalitarianism and First Amendment doctrine, an awkwardness that will persist. Yet limited opportunities may be created by aspects of the inversion, particularly the embrace by some conservatives of antidiscrimination and antiharassment mechanisms, if only with respect to certain vulnerable groups. One pathway forward is suggested by the law professors' amicus brief in *Moody*. It is possible to imagine laws and policies that intervene in market ordering to denaturalize economic power and to reintroduce the concept of positive speech rights, meaning guarantees of affirmative government action designed to promote the ability of all citizens to fully participate in the public discourse necessary to support a real democracy. The realignment opens up political space—however fleeting—for nondiscrimination policies that previously were sidelined in constitutional culture. These openings are explored in Part III. Meanwhile, thinking carefully about campus speech further illustrates the switch in another setting where private organizations can craft speech rules in the service of a more robust democracy.

II. Campus Speech

At roughly the same time that First Amendment politics were shifting around digital platform regulation, they were changing around campus speech as well. In the previous alignment, conservative students and scholars promoted freedom of expression as protection against what they perceived as intolerance toward their viewpoints. Deplatforming was the paradigmatic wrong, meaning the silencing of speakers by campus actors who regarded their viewpoints as regressive, discriminatory, or even hateful. Conservative discourse invoked freedom of speech, independent of the substantive positions of the speakers themselves. Liberal thinking, by contrast, acknowledged expressive freedom but also emphasized the importance of ensuring the equal status of every member of the campus community, along with the need for antidiscrimination commitments to preserve that kind of equality.

After October 7, 2023, these debates over freedom of expression on campus shifted markedly. Suddenly, political argumentation on the right became concerned with the status of Jewish students, staff, and faculty. With demonstrations against the Israeli government gaining force, the articulated

209. Brief of L. & Hist. Scholars, *supra* note 26, at 7 ("There are serious, legitimate public policy concerns with the law at issue in this case. They could lead to many forms of amplified hateful speech and harmful content.").

worry was that a hostile environment was alienating Jewish members of educational communities.[210] Hostile environment claims were raised in the opposite direction as well, by Palestinian and pro-Palestinian students and faculty. Yet predominantly, the call for freedom of expression was now being heard from the left, in defense of demonstrators against Israel's military operations.

Several significant differences separate the two contexts, again. First, changes in political valences have different proximate causes, with President Trump's deplatforming by Facebook and Twitter after January 6 an important trigger for one, and the conflict between Israel and Hamas sparking the other. Second, the two conflicts are playing out in different forums, with courts dominating the platform debates but not the campus ones. Courts have started to hand down decisions,[211] and they will continue, but judges are unlikely to ever review many other aspects of university policy on student protests. Third, the two situations feature different actors, for while state legislators have been active in both, congresspeople and federal agencies have influenced universities more directly (along with alumni, donors, faculty, and students).

Fourth and finally, although universities are speech hosts, like platforms, they so far have not resisted regulation primarily by arguing that they themselves are engaged in expression that is constitutionally protected.[212] That difference of emphasis is notable because an institutional free speech defense is available; think of academic freedom and expressive association. At least for now, speech debates on campus mainly pit progressive against conservative constituents, while in the platform context they occur between media companies and governments.

Despite these differences, the similarities are evident and intriguing. Not only did a turnabout happen in these two domains of free speech debate alike, but they concerned private organizations that served as hosts for the speech of other private actors. Whether the host organizations were neutral conduits for their constituents, or whether they had viewpoints distinctive enough to

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210. *See, e.g.*, Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297, 303–04 (D. Mass. 2024) (describing demonstrations against the Israeli government at Harvard University after October 7, 2023).

211. *See, e.g.*, *id.* at 307–10 (denying Harvard's motion to dismiss Title VI claims); *see also* Standwithus Ctr. for Legal Just. v. Mass. Inst. of Tech., 742 F. Supp. 3d 133, 141–43 (D. Mass. 2024) (dismissing a Title VI claim against MIT); President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs., No. 25-cv-11048-ADB, No. 25-cv-10910-ADB, 2025 WL 2528380, at *28 (D. Mass. Sep. 3, 2025) (granting summary judgment to Harvard on its First Amendment claims concerning retaliation, unconstitutional conditions, and unconstitutional coercion).

212. That said, Stanford University did resist California's Leonard Law by arguing that it had a speech right against state regulation. *See infra* subpart II(A) (explaining that Stanford asserted a right of expressive association).

endow them with their own speech rights, were common questions. In both contexts, moreover, antidiscrimination principles predominated on one side of the conflict, while First Amendment norms led on the other.

Moreover, in both arenas the turnabout was lopsided. Critics of campus protests since October of 2023 have had to resort to contentions and court cases that are further outside the mainstream speech tradition in the United States. For example, they have argued for the expansion of harassment law to outlaw general protests on matters of public concern. Defenders of demonstrators, by contrast, have not needed to push beyond familiar libertarian speech principles. They have found it easy to justify their positions on terms that fit comfortably within the dominant American speech tradition.

This Part makes the descriptive case for First Amendment inversion on campuses. It begins by describing the previous paradigm. Subpart A briefly recalls the debates of the 1990s over the regulation of "hate speech." A movement to contain such speech was defeated on free speech grounds. The example offered is Stanford University's 1990 rule, which was invalidated by a state court in an influential opinion. Subpart B addresses conflicts in the 2000s and 2010s, when conservative activists were invited to campuses, resisted by students concerned with the creation of a hostile environment toward disempowered groups, and then successfully defended on free speech grounds. This subpart uses another Stanford example. As recently as March of 2023, Judge Duncan's visit to the law school exemplified the previous paradigm.

Subpart C explains how First Amendment debates on campus have realigned since 2023. It briefly recalls the congressional hearings with university presidents, the wave of new speech codes on university campuses, and the increase in Title VI activity, including administrative action and court decisions. Through these actions, the federal government imposed new restrictions on harassment of protected groups, including hostile environments created by speech alone. Some significant portion of that expression consisted of nontargeted protests on matters of public concern.

Subpart D argues that the transposal has affected the right more than the left, causing greater contradictions for movement conservatives than for student protesters.

A. 1990s Campus Speech Codes

In the late 1980s, Stanford University experienced a spate of discriminatory events. A swastika was painted on the wall of a campus building, a racist caricature was posted on the door of a Black student's

dormitory room, and students were criticized for covering their faces and carrying candles in a manner that evoked rallies by the Ku Klux Klan.[213]

Responding to these events, the university clarified its student code, called the Fundamental Standard.[214] Professor Thomas Grey, a prominent scholar of the First Amendment, drafted an interpretation of the Fundamental Standard that came to be known as the Grey Interpretation.[215] It provided that "prohibited discriminatory harassment" includes "discriminatory intimidation by threats of violence and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[216] Harassment by personal vilification was defined as expression that deployed fighting words, was intended to insult or stigmatize on the basis of a protected characteristic, and was addressed directly to the targeted individual or individuals.[217]

Evidently, the idea was to use recognized categories of unprotected speech—fighting words, and maybe also harassment—to restrict discriminatory utterances within the bounds of the First Amendment. The Grey Interpretation was debated for 18 months in the Student Conduct Legislative Council and was finally adopted in 1990.[218]

Stanford was not alone—many peer institutions also adopted rules against harassing, discriminatory, or hateful speech in the late 1980s and

213. Mini Racker, *Stanford's History with Free Speech*, STAN. DAILY (June 13, 2018), https://stanforddaily.com/2018/06/13/stanfords-history-with-free-speech/ [https://perma.cc/U9PT-DR5W]; Jeff Album, *Vigil Participants Explain Actions*, STAN. DAILY (May 27, 1988), https://archives.stanforddaily.com/1988/05/27?page=1 [https://perma.cc/NP38-FVFM]. The students with face coverings said they were protesting a university disciplinary action, not promoting white supremacy. *Id.*

214. Racker, *supra* note 213.

215. *Id.*; Craig Hymowitz, *Free Speech Movement '90s Style*, NAT'L REV., May 15, 1995, at 8.

216. Corry v. The Leland Stanford Junior Univ., No. 740309 at 2 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction).

217. In the text of the Grey Interpretation, harassment by personal vilification was defined this way:

> Speech or other expression constitutes harassment by personal vilification if it:
>
> a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> c) makes use of insulting or "fighting" words or non-verbal symbols.

Id. at 2, 5. Fighting words or symbols were defined, following the formulation in *Chaplinsky*, as those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace" with the addition that they "are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

218. Hymowitz, *supra* note 215, at 8.

early 1990s.[219] California's legislature took action against such efforts. Republican state Senator Bill Leonard sponsored a statute that became law in 1992.[220] The Leonard Law prohibited California universities from disciplining any student for speech that would be protected by the First Amendment.[221] Where it applied, the Leonard Law effectively required private universities to adhere to constitutional rules in the same way as public universities.[222] In this way, it managed the public-private distinction in the context of university speech hosts.

John Corry, a law student who was described as a "conservative activist," organized a small group to challenge the Grey Interpretation.[223] He argued that "politically incorrect" speech was protected.[224] When Corry first tried to lobby the Student Senate to change its code, Stanford's president, Gerhard Casper, testified for almost an hour in favor of retaining the Grey Interpretation.[225] After failing within the university, Corry sued Stanford in state court.

In an important but unpublished decision, the California Superior Court ruled that Stanford's Grey Interpretation violated the Leonard Law.[226] First,

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219. *Court Overturns University Code Barring Bigoted Speech*, N.Y. TIMES (Mar. 1, 1995), https://www.nytimes.com/1995/03/01/us/court-overturns-stanford-university-code-barring-bigoted-speech.html [https://perma.cc/L52P-2LRJ] (reporting that approximately 150 campuses had tried to regulate hate speech at the time, according to FIRE).

220. Kate Selig, *California's Leonard Law: What It Means for Campus Speakers*, STAN. DAILY (May 20, 2020), https://stanforddaily.com/2020/05/20/californias-leonard-law-what-it-means-for-campus-speakers/ [https://perma.cc/M2DN-SABZ]. The Leonard Law is still in effect today.

221. The Leonard Law provides, in pertinent part:

> No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

Cal. Educ. Code § 94367(a). Notably, section (e) adds that "[t]his section does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected." *Id.* § 94367(e).

222. An opinion piece at the time observed that the invocation of free speech by campus conservatives itself represented an inversion of the civil rights alignment. Editorial, *Conservatives and Free Speech*, S.F. EXAMINER, Mar. 5, 1995, at 12 (recalling conservative opposition to the free speech movement at U.C. Berkeley and noting an "astonishing flip" in which conservatives (in the 1990s) began to champion free speech on campus); *see also* Racker, note 213, at 4–6 (recounting the history of Stanford's free speech movement in the 1960s and 70s).

223. Jeffrey Glesea, *Rob Corry, Speech Code Slayer*, STAN. REV., Feb. 5, 1996, at 4 ("To many, Robert Corry is the quintessential conservative activist."). After graduation, Corry worked for the Pacific Legal Foundation. *Id.*

224. Robert Corry, *Free Speech Will Rightfully Reign Over Stanford*, STAN. REV., Apr. 10, 1995.

225. Hymowitz, note 215, at 8.

226. Corry v. The Leland Stanford Junior Univ., No. 740309 at 43 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction).

it read the Interpretation to proscribe not just fighting words and harassment, but also words that were "commonly understood" to convey "hatred and contempt" on the basis of protected traits.[227] Therefore, the rule was content based and presumptively invalid. Second, even assuming that the Interpretation banned only fighting words, it selected out a *subset* of the category based on content—it banned only those fighting words that would cause people to feel insulted or stigmatized. Under a decision called *R.A.V.*[228] that came down after the Interpretation was adopted but before the decision in *Corry*,[229] the government could not single out speech on the basis of content without triggering strict scrutiny, even if the regulated speech fell within the category of fighting words.[230] For both of those reasons, the *Corry* court applied strict scrutiny, a standard that could not be satisfied by Stanford.[231]

Interestingly, the court also addressed the question of whether the Leonard Law interfered with *Stanford's* First Amendment rights. If a speech host was itself engaged in expression, then it had constitutional protection against government regulation—just as in today's platform cases. Stanford also argued that the statute interfered with its right of expressive association. Citing cases like *Tornillo* and *PG&E*, the university maintained that it could not be required by the state to tolerate discriminatory messages that it had elected to prohibit.[232]

The *Corry* court held that the Leonard Law was not vulnerable to Stanford's arguments. It reasoned that the statute was distinct from the right-of-reply law in *Tornillo* because it did not disincentivize the university from speaking in the first place for fear it would have to carry unwanted messages.[233] Nor did the Leonard Law interfere with Stanford's "editorial control."[234] Nor did academic freedom protect the university, if academic freedom was understood to give the university latitude to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted

227. *Id*. at 9.

228. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

229. Corry v. The Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (order granting preliminary injunction); *see also Stanford University Speech Code Violates the First Amendment*, ENT. L. REP., May 1995, at 21 (describing the unreported decision).

230. *R.A.V.*, 505 U.S. at 391, 395–96.

231. *Corry*, No. 740309 at 12, 18–20.

232. *Id.* at 27–28; *see also* Selig, note 220 (quoting Stanford education professor emeritus Eamonn Callan as arguing that "[t]he Leonard Law made it impossible for us to continue restricting the most egregious kind of hate speech," and that "[w]e have a right as a private university to constrain speech, and I'm inclined to believe the Leonard Law violated that right").

233. *Corry*, No. 740309 at 29–30.

234. *See id.* at 30 (indicating that concerns regarding editorial control were not implicated in the case).

to study."[235] None of those freedoms were abridged by the Leonard Law, according to the court. It insisted that California's statute was "not an attempt by the state to force [Stanford] to permit fighting words on [its] campus," rather the Leonard Law only ensured that "constitutionally protected speech not be restricted."[236]

In response to the *Corry* court's ruling, Stanford President Gerhard Casper issued a statement denouncing the decision but announcing that Stanford would not appeal.[237] Casper, a constitutional law scholar himself, argued that the Grey Interpretation was meant to ensure "civility" within the bounds of the First Amendment.[238] Still, he emphasized that civility would continue with or without the Interpretation, which had never been enforced against a student.[239] He expressed "ambivalence" about the policy, he reported that there were mixed feelings among others on campus as well, and he suggested that he would not appeal for that reason.[240]

Interestingly for us today, Casper also invoked his own background in Germany. "I was born in 1937 in a country where racism had become government policy," and he grew up there after the war amid efforts "to rethink civil society in the wake of the horrors perpetrated by the Nazis" and therefore he had "less certainty about absolute positions than do the plaintiffs in *Corry*."[241] Universities, as private institutions, should have some latitude to experiment with solutions to problems of inequality. Casper therefore criticized the court not only for finding that the Interpretation violated the Leonard Law, but also for not finding that Stanford was protected against the Leonard Law by the First Amendment.[242]

Casper declared that "harassment, intimidation, or personal vilification," which were the targets of the Interpretation, "have no place at Stanford."[243] To the degree these acts exceeded what was protected by freedom of expression, they would be subject to university discipline. To the degree they were protected, however, "we shall continue to do what we always have done," namely, "counter prejudice with reason."[244]

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235. *Id.* at 31 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

236. *Id.*

237. Gerhard Casper, President, Stan. Univ., Statement on *Corry v. Stanford University* (Mar. 9, 1995), in https://web.stanford.edu/dept/pres-provost/president/speeches/950309corry.html [https://perma.cc/KM9P-TH5H].

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

Along with similar decisions from other courts,[245] *Corry* signaled the end of university rules regulating speech that discriminated or denigrated on the basis of religion, race, sex, gender, LGBTQ+ status, or any other protected characteristic. The Leonard Law was unique to California, yet its enforcement against Stanford resonated with a nationwide judicial sentiment. Eugene Volokh commented at the time that "[s]peech codes are in very big trouble" and Tom Campbell, Stanford Law professor and California state senator, declared, "I think it's over."[246]

All of this resonates today, except that now it is conservative activists and politicians who are pushing universities to regulate antisemitism, while progressives and student protesters are invoking the First Amendment. Before getting there, however, consider a more recent example of the previous alignment, also from Stanford University.

B. Deplatforming on Campus

During the 2000s and 2010s, debate over campus speech shifted somewhat from codes regulating hateful speech to conservative speakers, who were invited by student groups and then protested against by other students. Because the debate centered on situations where the outside speaker was shouted down or otherwise prevented from addressing the audience, the issue came to be known as deplatforming.[247] Regardless of the label, such incidents came to dominate public debate over free speech on campus during those years.

In May of 2022, the student chapter of the Federalist Society at Stanford Law School extended a speaking invitation to Judge Kyle Duncan.[248] Appointed by President Trump, Judge Duncan sat on the United States Court of Appeals for the Fifth Circuit. Soon after learning of the invitation, other students protested. They pointed out that when Judge Duncan was working as a lawyer, he litigated against transgender rights in Virginia and North Carolina.[249] Overall, students argued that Judge Duncan had taken positions

245. *See* note 9 (citing cases from the late 1980s through the mid 1990s).

246. Hymowitz, note 215, at 8.

247. The term deplatforming deemphasizes the agency of the student groups who issued the invitations, sometimes simply to provoke a debate about freedom of expression itself. *See* Part II (defining deplatforming in the first paragraph of the Part).

248. Greta Reich, *Judge Kyle Duncan's Visit to Stanford and the Aftermath, Explained*, STAN. DAILY (Apr. 5, 2023), https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/ [https://perma.cc/9ADZ-J934] (citing *Oppose the Confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Nov. 29, 2017), https://civilrights.org/resource/oppose-confirmation-stuart-kyle-duncan-u-s-court-appeals-fifth-circuit/# [https://perma.cc/3EKT-PMLM]).

249. *See id.* (noting Judge Duncan's past work in cases concerning transgender individuals' right to use the bathroom of their choice and linking to articles describing those cases).

that were harmful to "women, LGBTQ+ people and immigrants."[250] Student groups Outlaw and Identity and Rights Affirmers for Trans Equality (IRATE) drafted an email to the Federalist Society, asking for the event to be canceled or moved online.[251] It was signed by ninety-three students.[252]

On March 9, 2023, Judge Duncan spoke in a classroom at lunchtime. Reportedly, protesters outnumbered members of the Federalist Society, and many were holding signs, giving short speeches, and chanting.[253] Judge Duncan walked into the room while videorecording protesters using his phone.[254] After about 30 minutes of speaking, apparently amid tumult, Judge Duncan asked for help from a law school administrator, who delivered remarks.[255] The judge opened the floor for questions, and then ended his talk, seemingly ahead of schedule.[256]

Two days later, a formal apology was extended to Judge Duncan by the president of Stanford and the dean of the law school.[257] On March 22, 2023, Dean Jenny Martinez released a ten-page letter explaining the decision to apologize and setting out next steps.[258] Dean Martinez drew heavily on the First Amendment and on Supreme Court precedents.[259] She invoked the Leonard Law and she argued that freedom of expression does not include the right to disrupt or deplatform other speakers—in fact, it places an obligation on the institution to police heckling so that speakers may be heard by those who wish to listen.[260] Protest is protected as well, but it must be conducted in a manner that does not disrupt invited speakers. An invited speech should be considered a "limited public forum," she argued, and in such a forum content discrimination actually is allowed if it is reasonable in light of the purposes of the forum—here, allowing Judge Duncan to deliver remarks that he was invited to deliver by the Federalist Society student chapter.[261]

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250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* Stanford Law School Associate Dean for Diversity, Equity and Inclusion Tirien Steinbach delivered the remarks, which drew controversy. That part of the event is less important here.

256. *Id.*

257. Letter from Marc Tessier-Levigne, President, Stan. L. Sch., and Jenny Martinez, Dean, Stan. L. Sch., to Judge Kyle Duncan (Mar. 11, 2023), https://law.stanford.edu/wp-content/uploads/2023/03/letter-from-Stanford.pdf [https://perma.cc/J9EH-NNB2].

258. Letter from Jenny Martinez, Dean, Stan. L. Sch., to the SLS Community at 10 (Mar. 22, 2023), https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf [https://perma.cc/4ZNS-TKLN].

259. *Id.* at 2–4.

260. *Id.* at 2 ("[S]ettled First Amendment law allows many governmental restrictions on heckling to preserve the countervailing interest in free speech.").

261. *Id.* at 3.

Familiar characteristics of the previous alignment were on display in the Judge Duncan affair. A conservative student group invited a provocative speaker, liberal students protested, and the university defended the speaker on free speech grounds (as did the student hosts). Alarm was expressed that free speech was under pressure at the university, and the source of the unfreedom was deemed to be radical progressivism. Students on the left, meanwhile, argued that the university was allowing the climate to turn unwelcoming or even harassing toward members of vulnerable groups—here, LGBTQ+ students.

C. Congress's Turnabout

For campus speech, the realignment's signal moment was the hearing called by House Republicans on December 6, 2023. After reports of college students protesting Israel's military action in Gaza, the House Committee on Education heard testimony from the presidents of Harvard, MIT, and Penn.[262] For hours, the presidents defended their universities' actions in terms of free speech law and policy.[263]

Toward the end of the hearing, however, Representative Elise Stefanik asked each of the presidents whether "calling for the genocide of Jews" violated their university's code.[264] The presidents answered that it would depend on the context, on whether the speech amounted to harassing conduct, or on whether the speech was targeted at a particular individual.[265] Representative Stefanik responded: "It does not depend on the context. The answer is yes, and this is why you should resign. These are unacceptable answers across the board."[266]

Ultimately, the presidents of Harvard and Penn did leave their positions.[267] Though the congressional hearing may not have been the only factor in their departures, it appears to have been an important one.[268] As the *New York Times* put it at the time, "they tried to give lawyerly responses to a

262. Saul & Hartocollis, note 27.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the Comm. on Educ. and the Workforce*, 118th Cong. 163 (2023) (statement of Rep. Elise Stefanik).

267. Stephanie Saul, Alan Blinder, Anemona Hartocollis & Maureen Farrell, *Penn's Leadership Resigns Amid Controversies Over Antisemitism*, N.Y. TIMES (Dec. 9, 2023), https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-president-resigns.html [https://perma.cc/8H6L-QDNL]; Zoe Sottile & Eva Rothenberg, *Here's What Led Up to Harvard President Claudine Gay's Resignation*, CNN (Jan. 2, 2024), https://www.cnn.com/2024/01/02/business/timeline-harvard-president-claudine-gay-resignation [https://perma.cc/4TZV-F34U].

268. *See* Saul, note 267 (discussing Magill's resignation); Sottile & Rothenberg, note 267 (discussing Gay's resignation timeline).

tricky question involving free speech, which supporters of academic freedom said were legally correct."[269] Donors and conservative political figures denounced the answers.[270] Having come into their positions during the previous paradigm, the presidents had been trained to defend their universities' protection of freedom of speech. When the paradigm suddenly shifted, they were caught unprepared.

Universities quickly moved to adjust to the new political reality, often with a good deal of experimentation. They started to clarify their stances against student protesters, the most prominent of whom were mobilizing to oppose what they viewed as Israel's disproportionate military response to the Hamas attacks. Demonstrators and their supporters took up the principle of freedom of expression to defend their ability to protest on campuses. Universities began to take the position that demeaning speech toward protected groups could be punished or limited to narrow times and places, whereas student protesters were arguing that such rules violated their freedom of expression. The flip in political ideology from campus debates over hate speech from the 1990s until 2023 was striking even if it was incomplete and even though the new paradigm coexisted with elements of the previous alignment.

In subsequent months, Congressional Republicans maintained pressure on the universities. Jason Smith, Chair of the House Committee on Ways and Means, sent several letters to a handful of universities, expressing concern over antisemitism and requesting responses to questions.[271] For example, one letter described a "culture of antisemitism" on campus that has "created a hostile environment for Jews."[272] It pressed the universities to take action, saying "we strongly urge you and your campus to do more to help Jewish students feel safe, secure, and free from discrimination and harassment on campus."[273] It asked the universities to tell the committee what statements they had made that delineate the "difference between protected free speech on campus and unprotected speech that instead amounts to harassment, incitement of violence, etc."[274] Another letter, sent over the summer jointly by Ways and Means and the Committee on Education and the Workforce,

269. Saul & Hartocollis, note 27 ("Will Creeley, legal director at FIRE, the Foundation for Individual Rights and Expression, said that the three presidents were 'legally correct.' 'It does depend on context,' Mr. Creeley said."). The *Times* noted that the Penn president was "a lawyer who joined Penn last year with a pledge to promote campus free speech." *Id.*

270. Donors pressed Penn to dismiss its president. *Id.* Harvard donors did, too. *Id.*

271. Letter from Jason Smith, Chairman, Comm. on Ways & Means, U.S. House of Representatives, to Martha E. Pollack, President, Corn. Univ. at 1 (Mar. 21, 2024), https://gop-waysandmeans.house.gov/wp-content/uploads/2024/03/Antisemitism-Ltr-to-Universities.pdf [https://perma.cc/7CYP-UKBG].

272. *Id.*

273. *Id.* at 2.

274. *Id.* at 5.

similarly expressed concern that Jewish students were not able to "feel safe and receive an education."[275] This openness to making students "feel safe" from speech that targeted them based on protected characteristics, and to exploring the line between harassment and freedom of expression, was notable.

Here too, the two sides did not require the same degree of creativity in their constitutional arguments. Protesters could rely on the mainstream, libertarian free speech tradition to make their points. Within that tradition, public discourse not aimed at particular individuals could constitute illegal harassment only under extraordinary circumstances, as explained in the next section. By contrast, Representative Stefanik's suggestion that antisemitic utterances delivered, say, at an outdoor rally on a campus green could constitute impermissible harassment was a stretch. After the defeat of campus speech codes in the 1990s, movement conservatives like Stefanik had little authority on which to ground their political attacks on protesters.

D. Title VI and the First Amendment

A feature of the new campus zeitgeist is a tension between free speech and Title VI, which prohibits discrimination against protected groups by entities receiving federal funds.[276] Because practically every university receives federal funding, Title VI is widely applicable. That civil rights law requires educational entities not only to avoid direct discrimination, but also to guard against harassment against members of protected classes, and to prevent hostile environments. Colleges must take steps to ensure that students are not effectively rendered unable to pursue their educational programs by persistent patterns of targeted conduct by others on campus.

A hostile environment can be created by speech, so there can be tension between Title VI and freedom of expression. While it is true that harassment sometimes is understood to be an unprotected category of speech,[277] that was not always clear in the past and it has not been definitively established by the Supreme Court even today. Other questions remain open, as well. What

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275. Letter from Jason Smith, Chairman, Comm. on Ways & Means, and Virginia Foxx, Chairwoman, Comm. on Educ. and the Workforce, to Laura Rosenbury, President, Barnard Coll., and Cheryl Glicker Milstein, Chair, Barnard Coll. Bd. of Trs. at 1 (Aug. 22, 2024), https://waysandmeans.house.gov/wp-content/uploads/2024/08/College-Antisemitism-Letterspdf.pdf [https://perma.cc/9P58-CBFC].

276. 42 U.S.C. § 2000d.

277. *Compare Unprotected Speech*, USC, https://freeexpression.usc.edu/about-freedom-of-expression-at-usc/defining-free-speech/unprotected-speech/ [https://perma.cc/47UM-DXPF] (including in a list of categories of unprotected speech "harassment that violates [university policy]"), *with Unprotected Speech Synopsis*, FIRE, https://www.thefire.org/research-learn/unprotected-speech-synopsis [https://perma.cc/GD9Z-MRBM] (contending that "[t]here is . . . no general First Amendment exception for 'harassment'" but noting that harassing speech may be prohibited on campus (under Title IX) and in the workplace (under Title VII)).

constitutes harassment? Is all of it unprotected by the First Amendment? In particular, it is unclear whether speech in public that addresses matters of public concern can be considered harassment that universities must police.

The closest the Supreme Court has come to settling these matters was in *Davis v. Monroe County*,[278] which was decided under another civil rights law, Title IX.[279] In that decision, the Court wrote that "in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." [280] Impliedly, speech that amounts to that kind of "behavior" can be considered harassment. But that is a high bar—it probably would be difficult to show that student demonstrations on a campus quadrangle that address the public on matters of public concern, even if repeated, were effective enough to effectively derail another student's education. And even if public protests could qualify as harassment, it is not clear that the Roberts Court would hold *that* kind of harassment to be unprotected under the First Amendment.[281]

During the last paradigm, Title VI played virtually no role in campus speech debates. Progressive students protesting conservative speakers did not argue that the speakers had to be regulated in order for the university to comply with its obligations under the civil rights law. True, Stanford's speech policy did state that it was "intended to clarify the point at which free expression ends and prohibited discriminatory harassment begins."[282] But it relied on a different category of unprotected speech (fighting words) to attempt conformity with the First Amendment.[283] Stanford's preexisting prohibition on harassment remained in place, but it was not understood to do

278. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).

279. *Id.* at 648. The *Davis* Court relied on cases decided in the context of employment discrimination under Title VII. Because Titles VI, VII, and IX are similar with regard to their prohibitions on harassment and hostile environments, courts have tended to interpret them the same way. *See* Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297, 308 n.8, 308 n.9 (D. Mass. 2024) (applying tests and frameworks from Title VI and VII cases to a Title IX case).

280. *Davis*, 526 U.S. at 652. The *Davis* Court also wrote that "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651.

281. Alternatively, the Court could interpret such speech to not constitute harassment in order to avoid a constitutional violation. In any event, there is no state action problem here, because the university would be regulating speech at the behest of Title VI, a federal statute. *See* Michael C. Dorf, *Does Title VI Require Private Universities to Restrict Student Speech?*, DORF ON LAW (Oct. 16, 2024), https://www.dorfonlaw.org/2024/10/does-title-vi-require-private.html [https://perma.cc/RCY6-KQG7] ("When the government says that a private university must restrict student speech or else face civil liability, it converts the private university into a state actor subject to constitutional limits.").

282. Corry v. The Leland Stanford Junior Univ., No. 740309 at 2 (Cal. Super. Ct. Feb. 27, 1995) (internal quotation omitted) (order granting preliminary injunction).

283. *Id.*

the same work as the adopted policy. Harassment was not the central constitutional category.

Under the current paradigm, however, Title VI harassment has become key to debates over campus expression. Students and student groups have argued in particular that universities' failure to adequately police antisemitic speech has violated the schools' obligations under the federal law.[284] That argument has made some headway, including in the Department of Education's Office of Civil Rights (OCR).

OCR issued several policy documents and decisions after the onset of campus unrest. In one "Dear Colleague Letter," OCR clarified that Title VI is relevant to claims of antisemitism.[285] OCR explained that it did not interpret Title VI to offend the First Amendment, and it said that for harassing conduct to create a hostile environment, including through speech, the activity "must be so severe or pervasive that it limits or denies a student's ability to participate in or benefit from the school's program or activity."[286] Though the implication was that public expression on a matter of public concern would only very rarely count as contributing to a hostile environment, OCR was not completely clear about that crucial matter. And though the agency offered a series of hypotheticals designed to give guidance to schools and students, none drew the line between protest activity and harassment that forms a hostile environment.

In one of those hypotheticals, OCR came close to addressing whether political demonstrations could constitute a hostile environment, consistent with the First Amendment. During the imagined antiwar demonstrations, "protest signs . . . use epithets that stereotype all Jewish people as racist murderers."[287] Additionally, the hypothetical posited that posters were put up around campus "advocating for the genocide of Jewish people and calling them Nazis."[288] OCR concluded that it "would have reason to open an investigation based on this complaint."[289] It seemed to decide that political protests directed toward the public could support a claim of harassment, consistent with the Constitution. However, OCR included other facts that complicated that conclusion. It imagined that protest signs listed specific

284. *See, e.g.*, Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297, 303 (D. Mass. 2024) (noting that Harvard was sued for, inter alia, failure to police harassment against Jewish students in violation of Title VI).

285. U.S. Dep't. of Educ., Off. of C.R., Dear Colleague Letter at 1 (May 7, 2024), https://www.ed.gov/media/document/colleague-202405-shared-ancestrypdf [https://perma.cc/R3Q6-RSHN]. Even though Title VI does not protect against discrimination based on religion alone, it does apply to antisemitism because it also prohibits bias based on "race, color, and national origin." *Id.*

286. *Id.* at 5 (citing authority that in turn relied on *Davis*).

287. *Id.* at 9.

288. *Id.*

289. *Id.*

students by name, it included the fact that Jewish students were blocked from attending class, and it specified that students wearing kippot drew comments from protesters.[290] OCR itself acknowledged that "although political protest on its own does not typically implicate Title VI, protest signs in this instance allegedly also targeted specific Jewish students using ethnic stereotypes, so OCR could find that the protesters engaged in harassing conduct."[291] These circumstances made it harder to say that OCR took a clear position on the line between protected speech and unprotected civil rights violations. Overall, though, it seemed that OCR had become more inclined to find that expressive activity constituted a violation of Title VI, and it was studiously silent on constitutional constraints.

Just a few months later, a federal district court ruled that Harvard University likely had violated Title VI by failing to curb antisemitic speech by student protesters.[292] The plaintiffs had successfully pled the elements of a hostile environment claim because, according to them, Harvard had taken steps that were "at best, indecisive, vacillating, and at times internally contradictory."[293] Although the court emphasized that it was basing its account on the alleged facts because it was deciding a motion to dismiss, it recounted that Harvard had repeatedly taken no action after students complained about incidents of antisemitism by other students.[294] In sum, "the facts as pled show that Harvard failed its Jewish students."[295]

Harvard countered that, in several instances, it could not discipline the student protesters without offending the First Amendment. Interestingly, the district court refused to reach the speech issue on the motion to dismiss, explaining that it was too early in the litigation to make a decision but that it was "dubious" that Harvard could prevail.[296] Though the judge's reasoning was not totally clear, he might have been arguing that Harvard would lose because it was a private institution not bound by the Constitution.[297] Yet that

290. *Id.*

291. *Id.* at 10.

292. Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297, 310 (D. Mass. 2024).

293. *Id.* at 309. According to the court:

> A deliberate indifference claim has five elements: (1) plaintiffs were "subject to 'severe, pervasive, and objectively offensive' . . . harassment"; (2) the harassment "caused the plaintiff to be deprived of educational opportunities or benefits"; (3) the school "knew of the harassment"; (4) the harassment occurred "in its programs and activities"; and (5) the school "was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances."

Id. at 308 (quoting Porto v. Town of Tewksbury, 488 F.3d 67, 72–73 (1st Cir. 2007)).

294. *Id.* at 310 ("[I]n many instances, Harvard did not respond at all.").

295. *Id.*

296. *Id.* at 309.

297. *Id.* The key statement came in a parenthetical:

was almost certainly wrong. If Harvard was being compelled to shut down protests by Title VI, then it was subject to state action and the Speech Clause applied.[298] *How* it applied was the difficult question, not *whether* it did.[299]

Congressional Republicans got involved, as well, by pressuring universities to act against antisemitic harassment. In letters to universities, House Republicans urged administrations to police "harassment" and the "hostile environment for Jews on campus"—clear references to Title VI.[300] The Ways and Means Committee also urged OCR to regulate the universities. The Committee voted for a bill called the University Accountability Act.[301] There, it expressed concern that OCR was only loosely enforcing Title VI against universities; it found that the agency often settled claims, "creating a hollow deterrent for schools" that failed to decisively prohibit antisemitic harassment.[302] To increase deterrence, the bill would have imposed a financial penalty on universities that were found to have violated Title VI, and it would have required the IRS to review the tax-exempt status of any school after three violations.[303] Though the bill was unlikely to become law in that Congress, it showed that Congressional Republicans were pushing for

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> It may be true that, as a policy matter, Harvard has elected not to curtail the protests in the interest of protecting free speech (although as a private institution, it is not constitutionally required to do so). The court consequently is dubious that Harvard can hide behind the First Amendment to justify avoidance of its Title VI obligations.

Id.

298. Michael C. Dorf, *Does Title VI Require Private Universities to Restrict Student Speech?*, DORF ON LAW (Oct. 16, 2024), https://www.dorfonlaw.org/2024/10/does-title-vi-require-private.html [https://perma.cc/4ZRV-X625]. The court noted that the Foundation for Individual Rights and Expression (FIRE) had submitted a brief arguing that it "cannot be that the federal government could require private universities to enforce policies against speech that the government itself could not enforce at a public middle school." *Kestenbaum*, 743 F. Supp. 3d at 309 n.11 (citing Brief for Foundation for Individual Rights and Expression (FIRE) as Amici Curiae Supporting Neither Party at 7–8, Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297 (D. Mass. 2024) (No. 24-10092-RGS)).

299. Only a week earlier, the same judge ruled that MIT had not allowed a hostile environment to develop, even according to facts alleged by the plaintiffs. StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech., 742 F. Supp. 3d 133, 142 (D. Mass. 2024). In contrast to Harvard, MIT escalated its disciplinary measures as events unfolded, and while its reactions were not always ideal, they were reasonable. *Id.* ("MIT took steps to contain the escalating on-campus protests . . . ."). Having found no liability under Title VI, the court had no need to address the First Amendment in the MIT case.

300. Letter from Jason Smith, Chairman, Comm. on Ways & Means, U.S. House of Representatives, to Martha E. Pollack, President, Corn. Univ. at 1–2 (Mar. 21, 2024), https://gop-waysandmeans.house.gov/wp-content/uploads/2024/03/Antisemitism-Ltr-to-Universities.pdf [https://perma.cc/97Y4-FGJH].

301. H.R. 8914, 118th Cong. (2d Sess. 2024); s*ee also* H.R. Rep. No. 118-894, at 11 (2d Sess. 2024) (demonstrating that members of the Ways and Means Committee voted for the bill).

302. *H.R. 8914, The University Accountability Act*, U.S. HOUSE COMM. ON WAYS & MEANS, https://waysandmeans.house.gov/wp-content/uploads/2024/07/H.R.-8914-University-Accountability-Act-One-Pager-1.pdf [https://perma.cc/V93V-9TNL].

303. *Id.*

stricter enforcement of Title VI against universities, at least with respect to antisemitism on campus, without articulated concern for free speech.

How the federal regulation of hostile environments relates to the First Amendment in the context of public demonstrations is a hard issue. Likely the right answer—as a matter of both existing law and normative attractiveness—is that protest activity can in theory contribute to a hostile environment against members of protected classes, but that the bar is high, so that expression would have to be patterned, pervasive, and persistent in order to qualify as hostile. And then there are questions about whether Title VI would simply not apply, whether it would be unconstitutional in any such application, or whether it should be interpreted to avoid invalidity. Interesting and important as those matters are, the point here is different.

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Just a short while ago, and still in some respects today, the popular conservative characterization of campus speech was that it was unfree. Progressive insistence on equality was flattening out ideological difference at universities, subordinating intellectual inquiry to reflexive wokeism. The campaign against hate speech rules in the 1990s was driven by conservatives, as subpart (II)(A) recounted. So was the condemnation of deplatforming in the 2000s, the 2010s, and the early 2020s, a point that subpart (II)(B) illustrated with the case of Judge Duncan. In both the hate speech debates and the deplatforming debates, the argument on the right was that equality concerns, however understandable, could not trump expressive liberty.

More recently, however, conservatism has taken up the cause of antidiscrimination protection for vulnerable students—or at least for certain of them. In the congressional hearings of 2023 and 2024, in the letters sent to universities by the House Ways and Means Committee, in the University Accountability Act, and in investigations and policy pronouncements by OCR that coincided with intensified congressional oversight, it is possible to see politicians pushing to regulate discrimination and harassment that takes the form of antisemitism. Donors and alums have also urged universities to police protests whose content comes too close to antisemitism, as subpart (II)(C) explained.

In the new alignment, campus progressives are the ones taking up the banner of the First Amendment and freedom of expression more generally. They are seeking protection for protests and demonstrations, independent of content. Some protest activity takes the form of civil disobedience, which consciously violates campus rules and accepts punishment. But much of it invokes the First Amendment tradition as a basis for immunity from sanctions. Even libertarian conceptions have been taken up, under which the greatest degree of dissent should be tolerated, limited only by "sticks and stones" harms that approximate conduct. Yet at the very least, liberty for them demands the ability to demonstrate publicly and peacefully.

However, the sides have not switched with perfect symmetry. To argue that antisemitism must be policed, conservative discourse has had to push the boundaries of previous settlements on discriminatory campus speech. Deciding what counts as impermissible bias, and deciding when it should be limited, involves some of the same sort of content discrimination, and even viewpoint discrimination, that courts routinely invalidated during the debates of the 1990s. These are not calls for neutral time, place, and manner regulations (though those have intensified as well). They are calls for taking certain kinds of speech, defined by their content, outside the parameters of the First Amendment. So conservative thought must work creatively in the new paradigm, given precedents that it worked to establish in the old one.

Campus progressives, by contrast, can argue fairly easily that protests and demonstrations fit comfortably within the existing tradition. Statements like the Chicago Principles, formulated before the turnabout, provide strong support for full protection, absent any physical harm or significant damage to property.[304]

Interestingly, given the mainstream appeal of students' constitutional positions, we do not yet see agreement from centrist conservatism, and a divide within conservative thought, the way we do in the platform context. That kind of split may exist, and it may become more visible as additional courts decide cases. Regardless, the upshot is that conservative constitutional argument is more activist on these issues, while liberal constitutionalism can rely on authorities that were settled in the previous paradigm.

Notably, egalitarianism on the left faces a quandary here too.[305] Though that theory has been much more central to campus debates than it has been in the platform context, it cannot comfortably embrace the libertarian speech tradition. Given the left's critique of laissez-faire First Amendment formalism in other contexts, and still in the university context when it comes to persistent debates over deplatforming, it cannot revert to a simple deregulatory conception. Rather, it must rethink a substantive understanding that recommits to communicative rights while also making room for rules and norms that guarantee the equal belonging of all members of the university community. How to do that is not straightforward or obvious.

The pessimistic view is that the moment represents opportunism more than opportunity. Movement conservatives will embrace antiharassment when it comes to antisemitism, but not when it comes to, say, transphobia or Islamophobia. Yet it might be possible to leverage the moment to develop antiharassment rules that draw a line between protected protest and

304. *See generally* COMM. ON FREEDOM OF EXPRESSION, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/Z8FJ-2NLF].

305. See above subpart I(D) for an analysis of the left's challenge in the platform context.

unprotected targeting that makes the university constructively unusable for some members.[306] The next Part suggests some solutions that draw on ground-level developments.

III. Accounting for Inversion

So far, this Article has identified a transposal in First Amendment discourse concerning speech hosts, particularly platforms and universities. Constitutional positions once associated with conservatism are subsequently taken up by liberalism, and vice versa. By differentiating between types of conservatism and liberalism, additionally, it is possible to see that the most prominent arguments on the right are associated with movement ideas, while on the other side, the most prominent liberal arguments are traditional. One manifestation of this complexity is that conservatism is fractured on the issue of platform regulation, with judges appointed by Republican presidents disagreeing about the constitutionality of Florida and Texas's regulation of speech hosts.

Lawyers on the left differ among themselves as well, though their disagreements may be less visible. Egalitarianism has largely been missing from the platform debates, perhaps because of an ambivalence. On the one hand, egalitarianism maintains that government ought to have the ability to impose antidiscrimination regulations on institutions with significant economic and social power. Concomitantly, it resists First Amendment arguments by corporate actors against the application of civil rights laws. On the other hand, this school of thought also supports many of the substantive speech policies adopted by the platforms, such as prohibitions on discriminatory speech and on disinformation. To preserve these policies, egalitarianism must argue that the Florida and Texas laws are unconstitutional or otherwise invalid. So it is experiencing a tension.

With regard to university speech, that is true as well. On the one hand, of course, freedom of expression is a central value for the left, one that is tested by university administrators across the country as they confront student protesters. On the other hand, antiharassment law is seen as an important source of protection for students who are exposed to various forms of structural injustice. Egalitarianism's defense of student protesters therefore generates greater dissonance with its previous positions than does support of protesters by mainstream liberalism, which traditionally emphasizes protection for discriminatory speech.

This Part seeks to account for the inversion phenomenon. At root, inversion occurs because of a mismatch between substantive politics and

306. In thinking along these lines, it is important to avoid rehashing old debates over hate speech laws. Those have been closed in ways that should be taken to be fixed features of constitutional culture. Continuing them is unlikely to be generative.

constitutional doctrine. Antiwoke conservativism supports freedom of speech when that position resonates with its defense of traditional social structures. That has meant robust embrace of expressive freedom for campus conservatives and opposition to campus hate speech codes during the previous alignment, but more recently it has meant the enforcement of antidiscrimination rules against antisemitism and concomitant restriction of student protest.

Egalitarianism, for its part, seeks evenhanded speech opportunities for all individuals, regardless of social standing or economic distribution. That commitment is seen to be fundamental to democracy, not only insofar as it supports cooperative government, but also insofar as it creates and sustains a democratic culture that allows freedom of personal expression for everyone, not limited to political speech as such. It is a central component of the aspiration of free and equal citizenship.

Oftentimes, First Amendment doctrine will line up with this kind of democratic politics. When government engages in censorship of individuals, the negative conception of the speech right combines with the state action doctrine unproblematically. For example, government silencing of communists based on viewpoint, absent a risk of imminent danger, is now agreed to be unconstitutional.[307] State regulation of speech on the basis of content is presumptively impermissible.[308] Conditioning government resources on unrelated expression undertaken using private resources is prohibited as well.[309] And so forth. In these kinds of cases, egalitarian political thought lines up with First Amendment doctrine.

But in other kinds of cases, there will be inevitable discrepancy between legal doctrine and egalitarian commitments, given the way that the doctrine has long been configured. Interference with freedom of expression can come from the exercise of power of various types beyond state coercion, for this school of thought. Business corporations, media companies, landowners, universities, and many other nongovernmental actors can influence the speech opportunities of individuals in consequential ways. Yet, because the state action doctrine holds that the First Amendment does not apply to nongovernmental action, and because speech rights are understood to provide only negative restraints on the state rather than positive obligations,

307. *Cf.* Columbia Broad. Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 154–55 (1973) (Douglas, J., concurring in the judgment) (reviewing the history of McCarthyism and referencing a consensus that targeting communist speech for regulation is unconstitutional).

308. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

309. USAID v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2085–86 (2020) (citing USAID v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013)).

constitutional law is almost useless against private power. This, among other difficulties, yields a fundamental incongruity with egalitarian thought. Generally, however, that alone will not generate political oscillation, but rather stable opposition to censorship by the government and by corporations, aligned with the doctrine as to the former, and critical of it as to the latter.

Yet in situations where the government itself voluntarily regulates private actors in order to enhance equality of speech opportunities, egalitarian commitments can divide, and its conclusion can become contingent on the silencing dynamics of the particular situation. Civil rights law is the obvious example of government action that is designed to constrain private power in the service of combatting structural disadvantage, but it is not the only example.[310] Regulation of media companies can also work to redistribute speech opportunities in an attempt to make them fairer.[311] In these sorts of circumstances, where government power squares off against nongovernmental power in the name of fairness, the egalitarian position may be highly situational.

First Amendment doctrine is not well designed to capture this sensitivity to variegated power dynamics among public and private actors. Formalistic rules concerning state action and content discrimination, in particular, will have difficulty capturing ideal outcomes. Speech doctrines as currently configured are insufficiently nuanced to account for the relative and shifting strength of public and private entities over the practical speech opportunities of real individuals operating under real-world conditions. Consequently, those on the left, like those on the right who are pursuing their own substantive vision of justice, will find themselves selectively invoking constitutional rules, depending on their assessment of the dynamics at hand.

An important implication is that First Amendment inversion is likely to be an iterated feature of constitutional law. People in both political camps will struggle to align their political morality with available legal doctrine, and they will find themselves taking inconsistent legal positions in the service of a consistent political morality. Inversion is particularly evident under today's historical conditions of extreme political disagreement, and it is more apparent nearer to the ends of the ideological distribution. But it also is persistent, having regularly occurred in the past, and it will prove durable into the future. Thinking of inversion as the result of a mismatch makes sense

310. This dynamic affects speech host cases, but not only those kinds of cases. It also affects conflicts between civil rights law and freedom of expression where the private entity being regulated is not itself claiming to be expressive. Most of the recent campus speech examples are like that, where the university is not itself asserting speech rights.

311. Examples include the FCC's fairness doctrine, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369 (1969), or the requirement that cable companies carry local television stations, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 632–33 (1994).

of these observed phenomena and it gives us reason to expect the pattern to continue.

To a significant extent, divergence between speech law and substantive politics can be seen in the speech-host cases themselves, which are fractured in ways that are difficult to rationalize using only internal doctrinal tools. Recall that one line of cases protects the rights of speech hosts—*Tornillo*, *Hurley*, *PG&E*, and now *Moody*—while another upholds government regulation—*Red Lion*, *PruneYard*, *FAIR*, and *Turner*. The Court has synthesized these decisions as protecting "editorial discretion" that yields a "distinctive expressive" product without regard to a risk of misattribution.[312] Yet it is hard to reconcile them. Not every individual Justice signed onto every decision, of course, but many feature vote lineups that break with familiar liberal-conservative voting patterns, including *Moody* itself. Very likely, the best explanation for each decision can be sourced in the individual Justices' views of the best substantive outcome, resulting in scrambled doctrine.

No principled resolution is likely, given the vagaries of public and private power and the way both interact with existing constitutional doctrine surrounding freedom of speech. It is simply too difficult to generalize about whether privileging public or private influence will promote expressive justice across instances. Consequently, egalitarians will continue to advocate for or against the ability of government to use antidiscrimination law and other regulatory tools, even in the face of countervailing speech interests, depending on whether public or private power is a greater threat to equality of expressive opportunity in that instance.

At best, local and temporary advances may be possible. Some openings may present themselves for partial advances under present circumstances. Because of new openness to antidiscrimination rules on the right, there may be a chance to shore up equal belonging, without sacrificing freedom of expression. In both contexts—digital platforms and campus speech—instability of political positions on the longstanding tension between equality and expression may allow for some creativity. That said, any advances are likely to be provisional.

The remainder of this Part offers suggestions. They are not comprehensive, and they are revisable. But they convey a sense of what is imaginable, starting with campus speech and then turning to digital platforms.

312. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2403, 2405 (2024) (noting that a digital platform's curation of each user's feed is a form of editorial discretion that creates a distinct product); *id.* at 2406 (noting that even a low risk of misattribution does not remove the First Amendment protections of a speech host given their editorial control).

A. Universities

Maybe the most intriguing feature of the campus realignment is the new amenability on the right to civil rights protections, especially Title VI's prohibition on harassment and hostile environments. This embrace of antidiscrimination rules seems to extend to certain groups and not others. But it might provide leverage to those who have long sought to guarantee that campuses welcome people and groups that have been subject to social and economic stratification.

As discussed above, tension can arise between freedom of expression and the prohibition of harassment that is inflicted through speech.[313] That strain is greatest where the expression is not directed against a particular individual or even against a defined group, but where it is meant for the public at large and where it addresses a matter of public concern. Some of the most contested campus speech has fallen into this category.

A guiding principle behind harassment law is that no individual should be effectively excluded from a basic social good because of bias. Of course, it is possible to understand this commitment in traditional equality terms, as protecting against the subordination of members of groups that have historically been subjected to structural injustice. But there is another way to understand harassment laws: in terms of liberty. What Title VI and similar laws guarantee is not equal standing—they tolerate significant stratification—but instead a particular freedom, here the ability to attain an education. Harassment law only prohibits behavior that effectively drives students from campus, rendering it impossible for them to continue their studies. True, it recognizes that members of historically subordinated groups are particularly vulnerable to this sort of unfreedom. But conceived this way, its concern is with their ability to access a basic social good, not their membership standing.

Reframing the conflict this way, in terms of liberty, alters the debate in two ways. First, it limits the potential reach of Title VI claims, as compared to regulations that seek to preserve equal membership status and concomitantly limit the expression of discriminatory views. Second, it pits liberty against liberty—freedom of expression against freedom to pursue an education—in a manner that may facilitate resolution. If the task is to maximize the basic freedoms of each student, consistent with the basic freedoms of other students, a solution may become more attainable—politically and perhaps also conceptually—than resolving the tension between free speech and equal membership has proven so far in the United States.

313. *See* subpart II(D).

Applying that approach to antiharassment here, and combining it with the principle of free speech, the result is that only demonstrations that effectively drive members of protected classes from the community should be prohibited by civil rights law. That is a high bar, and it protects almost all speech on matters of public concern that is directed toward the public. Factors that matter to that determination include the severity of the speech, its subjective motivation, whether it is objectively discriminatory or at least likely to be perceived as such by a significant number of affected students, whether it is repeated or patterned, and how easily it can be avoided by affected students.

OCR guidance has roughly tracked this approach, even if it has applied its own guidance in ways that are insufficiently protective of student demonstrations. As already discussed, the agency maintained that conduct could create a hostile environment, but only if it was subjectively and objectively offensive and so pervasive that it effectively made it impossible for someone to participate in the life of the university.[314] Conduct could take the form of speech, it did not need to be directed at a particular person, and it could consist of a single incident, in theory—though ordinarily pure expression that was directed toward the public would not be sufficient to show harassment or a hostile environment.[315] That an expression was isolated would also make it hard to establish that it created a hostile environment.[316] Again, OCR did not always adhere to its own guidance. It suggested that universities could face enforcement actions even where the alleged harassment consisted of protest activity on political issues.[317] But in theory, OCR drew a line that could be helpful.

The hope here is that the ideal of liberty—especially as to basic goods like education, and with respect to fundamental rights, such as freedom of expression—will not be restricted to antiharassment for certain students, or freedom of speech for particular protesters, but will extend to all groups and

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314. OCR has explained:

> Generally, unwelcome conduct based on race, color, or national origin creates a hostile environment under Title VI when, based on the totality of the circumstances, it is:
>
> - subjectively and objectively offensive; and
> - so severe or pervasive that it
> - limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Fact Sheet: Harassment Based on Race, Color, or National Origin on School Campuses, U.S. DEP'T OF EDUC. OFF. FOR C.R. at 1 (July 2, 2024), https://web.archive.org/web/20250210183312/https://www.ed.gov/media/document/ocr-factsheet-race-color-national-origin-202407pdf-33843.pdf [https://perma.cc/YT72-JJBY] (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639–44 (1999)).

315. *Id.* at 1–2.

316. *Id.* at 2.

317. *See* subpart II(D).

all causes. Again, there is good reason for pessimism. But the politics of the moment make it somewhat harder for conservatives to resist such moves, and so current historical circumstances hold some promise for students who have gone without substantial protection from discriminatory speech since the court rulings of the 1990s.

B. Digital Media

Momentary ideological overlap may now exist in the digital speech environment as well. That agreement, however partial and impermanent, creates a space of possible policymaking within constitutional bounds.

States are the most promising authors of such regulations. Because governments have become politically bifurcated across state lines due to partisan geographic sorting and other factors, and because partisan differences have widened nationally, cooperation will probably not come within state legislatures, with agreement happening between members of opposing parties, but instead between state legislatures and courts reviewing their regulations of social media companies.

The main opportunity comes from a subtler public/private distinction. To a new and greater degree, conservative thought is appreciating a more complicated divide between governmental and nongovernmental actors. Though this is more of a conceptual advance than a practical one, it nevertheless is potentially important. Appreciating that private corporations and property owners can censor speech, and otherwise distort the expressive environment virtually as effectively as government, was anathema to conservatism in the previous paradigm. Softening that resistance, and adding nuance to legal thinking on this question, opens up space for new solutions, at least for the moment and in certain contexts.

In the opinion for the Fifth Circuit that was reviewed in *Moody*, for example, Judge Oldham upheld the Texas law because it did "not chill speech; if anything, it chill[ed] censorship."[318] This was a theme of the opinion, arguably its central theme. In another place, Judge Oldham complained that "the platforms offer[ed] a rather odd inversion of the First Amendment," which they interpreted not to protect speech but to protect "a corporation's . . . right to *muzzle* speech."[319] And in still another place, he reiterated that he "reject[ed] the Platforms' efforts to reframe their censorship

318. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 448 (5th Cir. 2022), *vacated and remanded sub nom.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); *see also id.* (holding that the overbreadth doctrine does not apply because "if [Texas's law] chills anything, it chills *censorship*"); *id.* at 450 (holding that the Texas statute "does not chill *speech*; instead, it chills *censorship*"); *id.* at 452 ("In short, Section 7 chills no speech whatsoever. To the extent it chills anything, it chills *censorship*.").

319. *Id.* at 445.

as speech."[320] The term censorship appeared in the opinion more than one hundred times, always applied to the platforms. Under the old formalism, conservative judges would have insisted that constitutional law only constrains the government, and that only the government can engage in censorship in the relevant sense.[321] So to see the Fifth Circuit using the term censorship to mean interference with freedom of expression by corporate speech hosts—private property owners—was notable.

A related blurring of the divide can be seen in arguments for the common-carrier analogy. There, people like Justice Thomas have been pressing for government power to regulate platforms on the model of telephone operators and shipping carriers.[322] Crucial to this move is the contention that digital platforms are "affected with a public interest"—that they are serving a critical social function.[323] Common carrier regulations, like public accommodations laws, thus restrict the right to exclude that otherwise would be enjoyed by private property owners, and that exclusion is constitutionally permissible, despite freedom of association, freedom of speech, religious freedom, and property rights. It thereby complicates the public/private divide.

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320. *Id.* at 455.

321. Directly rebuking the Fifth Circuit, Justice Kagan writes for the *Moody* majority:

> States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from tilting public debate in a preferred direction. It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. And that is so even when those actors possess enviable vehicles for expression.

Moody, 144 S. Ct. at 2407 (quotation marks, alterations, and citations omitted). Later, she says it a different way:

> The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included. To describe that interest, the State borrows language from this Court's First Amendment cases, maintaining that it is preventing "viewpoint discrimination." But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey.

Id. at 2408 (internal citations omitted).

322. *Id.* at 2413 (Thomas, J., concurring in the judgment) ("[T]he common-carrier doctrine should continue to guide the lower courts' examination of the trade associations' claims on remand."); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (mem.) (Thomas, J., concurring in grant of certiorari) (observing that "[t]here is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated" without drawing heightened scrutiny under the Speech Clause).

323. *NetChoice v. Paxton*, 49 F.4th at 471 (citing Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1090 (1930)). Other requirements, noted above, include that they are open to the public without individualized bargaining and that they serve an infrastructural role, such as communications.

That private actors can work to constrain expression in a constitutionally cognizable manner has been a mainstay of left theorizing, of course. It is closely connected to the conviction that sometimes the government has a constitutional obligation to take steps to ensure the robustness of democratic discourse, not just to refrain from censorship. That kind of complexity can be seen in the heckler's veto cases, which require the police to take steps against private censorship, and in scattered other places throughout the doctrine.[324] To see it embraced on the right, if only in movement thinking, suggests a new conceptual overlap that could be leveraged. And that could be true even if mainstream liberalism and conservatism continue to police the formal divide.

Conclusion

Constitutional politics on questions of freedom of speech have shifted. In two of the most visible and important speech issues of the day—whether platforms can be regulated to improve the speech environment and whether universities can be required to impose antiharassment rules on student protesters—argumentation on the left and right is relying on principles and precedents that had formally been associated with the other side. The inversion presents challenges to legal actors, who must rationalize their new arguments with positions they have taken, and continue to take, in the older paradigm. This Article has argued that those challenges are particularly acute for movement actors on the right, who are leading the constitutional fights on both questions. Commonly, those defending platforms and protesters have relied on mainstream positions that have been shared by liberalism and conservatism and are not subject to serious contradiction in the new climate.

Explaining the turnabout is a fundamental mismatch between substantive politics and constitutional rules. For movement conservatism, the attack on perceived wokeism only fits with First Amendment doctrine in certain situations, such as the defense of conservative speakers on campus. In other situations, such as the attempted regulation of social media by red states, speech rules cut in the opposite direction.

Egalitarians, for their part, are finding that First Amendment rules are inadequate to the task of ensuring a fair speech environment for all members of the political community. Power can be used to skew or silence debate in diverse ways, and it can emanate from diverse sources: not only government, but also economic actors like digital platforms and social gatekeepers like

324. *Cf.* Macklin W. Thornton, Comment, *Laying Siege to the Ivory Tower: Resource Allocation in Response to the Heckler's Veto on University Campuses*, 55 SAN DIEGO L. REV. 673, 703–08 (2018) (arguing that the heckler's veto cases create a positive right to government assistance).

universities. At least as it has long been configured, constitutional doctrine is unlikely to track a substantive democratic conception of public debate. At best, political inversion on important constitutional questions like whether to protect speech hosts will create opportunities that are particularized and impermanent. Wherever possible, those chances should be capitalized on, in the hope of building a more democratic expressive infrastructure.