Journal of Business & Technology Law

Volume 18 | Issue 2 Article 2

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ABSTRACT

On January 6, 2021, in the wake of the Capitol Hill uprising, Facebook suspended then-President Donald Trump's Facebook and Instagram accounts, citing the contract law principle of breach of contract for violating each company's terms of service; namely, Community Standards and Community Guidelines, respectively. Similarly, on January 8, 2021, Mr. Trump's Twitter account, @realDonaldTrump, was permanently suspended for violating the platform's Glorification of Violence policy. This left many asking whether the First Amendment's free speech clause, instead of contract law, should control user content on digital platforms. Put another way, if a social media platform was an intersection, should contract law or free speech have the right-of-way with respect to user content? This paper argues that while free speech has garnered significant attention recently, contract law properly has the right-of-way when it comes to controlling user content on social media platforms. In addressing the right-of-way question, this paper looks at arguments favoring contract law, arguments favoring free speech, and the available roads ahead.

KEY WORDS: assent, contract law, Facebook, First Amendment, free speech, social media platform, terms of use, Twitter

INTRODUCTION

In 1952, United States Supreme Court Justice William O. Douglas commented that "[r]estriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."[1] On January 6, 2021, in the wake of the Capitol Hill uprising, Facebook suspended then-President Donald Trump's Facebook and Instagram accounts based on the contract law principle of breach of contract for violating each company's terms of service;

1. William O. Douglas, *The One Un-American Act*, Banned and Challenged Books, (December 3, 1952), https://www.ala.org/advocacy/bbooks/one-un-american-act.

namely, Facebook's Community Standards and Instagram's Community Guidelines.[2] Similarly, on January 8, 2021, Mr. Trump's Twitter account, @realDonaldTrump, was declared permanently suspended for violating the platform's Glorification of Violence policy.[3] Arguably reminiscent of Justice Douglas' quote, this left many asking whether the First Amendment's free speech clause, instead of contract law, should control user content on digital platforms.[4] Put another way, if a social media platform was an intersection, should contract law or free speech have the right-of-way with respect to user content?

This paper argues that while free speech has garnered significant attention recently, contract law properly has the right-of-way when it comes to controlling user content on social media platforms. In addressing the right-of-way question, Part I of this paper looks briefly at the history of social media, social media platform terms of use, and social media account suspensions, including Mr. Trump's suspensions from Facebook and Twitter. Part II looks at arguments favoring contract law controlling user content on social media platforms, including the validity of the sign-in wrap assent format used by Facebook and Twitter and the applicability of Section 230 of the Communications Decency Act to contract law. Part III looks at arguments favoring free speech; specifically, social media platforms as the modern public square and social media platforms as common carriers and as public accommodations. Part IV looks at the available roads ahead with respect to

2. *Oversight Board Upholds former President Trump's Suspension, Finds Facebook Failed to Impose Proper Penalty*, OVERSIGHT BOARD, (May 2021), https://oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/; Facebook, of course, is now owned by Meta; *see e.g.*, *Introducing Meta: A Social Technology Company,* META, (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta/. For consistency, this paper will refer to Facebook as a social media platform and as a company (as opposed to switching between Facebook as a platform and Meta as a company).

3. *Permanent Suspension of @realDonaldTrump,* TWITTER, INC, (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension. On November 19, 2022, Mr. Trump's account was reinstated by Twitter. See discussion *supra* at Part IV.C.2.

4. *See e.g.,* Sarah E. Needleman and Georgia Wells, *Twitter, Facebook and Others Silenced Trump. Now They Learn What's Next*, WALL STREET JOURNAL (Jan. 10, 2021), https://www.wsj.com/articles/twitter-facebook-and-others-silenced-trump-now-they-learn-whats-next-11610320064 ("The actions against Mr. Trump … illustrate more starkly than ever the companies' influence over conversation online …. While lauded by many, ejecting the president and some of his supports also infuriated others who said it amounts to censorship."); Poppy Noor, *Should We Celebrate Trump's Twitter Ban? Five Free Speech Experts Weigh In*, THE GUARDIAN (Jan. 17, 2021), https://www.theguardian.com/us-news/2021/jan/17/trump-twitter-ban-five-free-speech-experts-weigh-in ("Last week, as Twitter permanently banned Trump from its platform, critics … have been quick to blame … tech companies for a crackdown on free speech."); Tara Andryshak, *Twitter, Trump, and the Question of the First Amendment*, Syracuse L. Rev. (Jan. 21, 2021), https://lawreview.syr.edu/twitter-trump-and-the-question-of-the-first-amendment/ ("In response to President Trump getting banned, his supporters have argued that this is a violation of the First Amendment. His son, Donald Trump Jr., tweeted, as a response to his father's ban, 'Free-speech no longer exists in America.'").

controlling user content on platforms; namely, the judicial route, the legislative route, and the "build it or buy it yourself" platform route.

I. OVERVIEW

A Brief History of Social Media

Six Degrees is considered to be the very first social networking site.[5] Founded in May 1996 by Andrew Weinreich, the site launched the following year and combined features such as profiles, friends lists, and school affiliations in one platform.[6] Over the next few years, additional social media sites arose including Friendster in March 2002, LinkedIn in May 2003, and MySpace in August 2003.[7]

In February 2004, Facebook, "one of the most controversial websites in history,"[8] was launched by Mark Zuckerberg. Facebook is "a social networking site that allows users to publicly connect with other users and to distribute content publicly."[9] The site was initially exclusive to Harvard students but was eventually introduced to the public in September 2006.[10] In its third quarter 2022 investor earnings report, Facebook reported having an average of 1.98 billion daily active users in September 2022.[11]

Twitter was created in March 2006 and launched four months later in July 2006.[12] "Twitter is a social networking service that allows users to publicly connect with other users and to distribute content publicly by posting tweets."[13] In Twitter's second quarter 2022 earnings report, it noted a second quarter average of 237.8 million daily active users.[14]

Of course, several other social media platforms exist today; for example, Instagram, Pinterest, Snapchat, WhatsApp, and YouTube. Across all platforms, there were 4.70 billion social media users worldwide in July 2022; approximately 59

5.*See* Chenda Ngak, *Then and Now: A History of Social Networking Sites*, CBS NEWS, (July 6, 2011), https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/.

6.*See id*.

7.*See id*.

8.*Id*.

9.Gonzalez v. Google, LLC, 2 F.4th 871, 83 (9th Cir. 2021).

10.*Id* at 951 n.8.

11.*Meta Reports Third Quarter 2022 Results*, META INVESTOR RELATIONS, (Oct. 26, 2022), https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Third-Quarter-2022-Results/default.aspx.

12.Cortney Moore, *The History of Twitter: How the Social Media Platform Has Grown*, FOX BUSINESS (Nov. 30, 2021), https://www.foxbusiness.com/technology/twitter-history-social-media-growth.

13.*Gonzalez, 2 F.4th at 883.*

14.*Twitter Announces Second Quarter 2022 Results,* TWITTER, (July 22, 2022), https://s22.q4cdn.com/826641620/files/doc_financials/2022/q2/Final_Q2'22_Earnings_Release.pdf.

percent of the total global population.[15] For concision, this paper will focus primarily on Facebook and Twitter, two of the more popular social media platforms in the United States.[16]

Social Media Platform Terms of Use

Typically, social media platforms contain terms of use (or similar) which "control (or purport to control) the circumstances under which … visitors to a public Web site can make use of that … site."[17] For example, Facebook's Terms of Service state:

> *These Terms govern your use of Facebook, Messenger, and the other products, features, apps, services, technologies, and software we offer.*
> *….*
> *We employ dedicated teams around the world, work with external service providers, partners and other relevant entities and develop advanced technical systems to detect potential misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community, including to respond to user reports of potentially violating content. If we learn of content or conduct like this, we may take appropriate action based on our assessment that may include – notifying you, offering help, removing content, removing or restricting access to certain features, disabling an account, or contacting law enforcement.*
> *….*
> *If we determine, in our discretion, that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular the Community Standards, we may suspend or permanently disable your access to Meta Company Products, and we may permanently disable or delete your account.*[18]

Similarly, Twitter's Terms of Service state:

> *These Terms of Service ("Terms") govern your access to and use of our services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services, and our other covered services.*

15.Simon Kemp, *Digital 2022: July Global Statshot Report*, Kepios (July 21, 2022), https://datareportal.com/reports/digital-2022-july-global-statshot.

16.Brooke Auxier and Monica Anderson, *Social Media Use in 2021*, PEW RESEARCH CENTER (April 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/.

17.Mark A. Lemley, *Terms of Use*, 624 MINN. L. REV. 459, 460 (2006).

18.Meta, *Terms of Service*, FACEBOOK, (last visited July 26, 2022), https://www.facebook.com/terms.php.

> *….*
> *We reserve the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations or other intellectual property misappropriation, impersonation, unlawful conduct, or harassment.*
> *….*
> *We may also remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the Services, suspend or terminate users, and reclaim usernames without liability to you.*
> *….*
> *We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including but not limited to, if we reasonably believe: (i) you violated these Terms or the Twitter Rules and Policies …, (ii) you create risk or possible legal exposure for us; [or] (iii) your account should be removed due to unlawful conduct.*[19]

As shown above, terms of service typically provide social media companies with a range of available responses when user content runs afoul of the platform's standards. As discussed next, the most frequent response is suspending the infringing user's account.

A Brief History of Social Media Account Suspensions

User account suspensions have followed the growth of social media platforms; specifically, online platforms regularly remove user content that they deem to be objectionable.[20] For example, "Facebook claims it has always banned individuals or organizations that promote or engage in violence and hate, regardless of ideology."[21] Not surprisingly, though, suspensions of high-profile individuals often attract media attention.[22] Among others, Alex Jones, Milo Yiannopoulos, Paul Joseph Watson, Paul Nehlen, Laura Loomer, and Louis Farrakhan have all been removed from Facebook and Instagram.[23] Likewise, Twitter has suspended Courtney Love, Jared Fogle, George Zimmerman, Martin Shkreli, Roger Stone, Alex

19. *Terms of Service*, TWITTER, INC., (last visited June 10, 2022), https://twitter.com/en/tos.

20. *See* Michael Luca, *Social Media Bans Are Really, Actually, Shockingly Common*, WIRED (Jan. 20, 2021), https://www.wired.com/story/opinion-social-media-bans-are-really-actually-shockingly-common/.

21. Charlotte Jee, *Facebook Has Banned a List of "Dangerous" Extremist Celebrities*, MIT TECH. REV. (May 3, 2019), https://www.technologyreview.com/2019/05/03/135506/facebook-has-banned-a-list-of-dangerous-extremist-celebrities/.

22. *See* Daisy Naylor, *Famous People Who Have Been Banned From Twitter*, THE HOOK (last visited Oct. 29, 2017), https://web.archive.org/web/20171029173411/http://thehookmag.com/2017/01/famous-people-banned-twitter-119081/.

23. Jee, *supra* note 21.

Jones, David Duke, and Steve Bannon, among many others.[24] In the first half of 2020 alone, Twitter suspended roughly 925,000 accounts for rules violations.[25]

Perhaps the most high-profile social media account suspension, however, came in the wake of the January 6, 2021, Capitol Hill uprising when Facebook and Twitter indefinitely suspended the accounts of then-President Donald Trump.

Mr. Trump's Facebook Suspension

At 4:21 p.m. Eastern on January 6, 2021, Mr. Trump posted a video on Facebook and Instagram in which he stated:

> *I know your pain. I know you're hurt. We had an election that was stolen from us. It was a landslide election, and everyone knows it, especially the other side, but you have to go home now. We have to have peace. We have to have law and order. We have to respect our great people in law and order. We don't want anybody hurt. It's a very tough period of time. There's never been a time like this where such a thing happened, where they could take it away from all of us, from me, from you, from our country. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel. But go home and go home in peace.*[26]

At 5:41 p.m. Eastern, Facebook removed Mr. Trump's video post for violating its Community Standard on Dangerous Individuals and Organizations.[27] The Standard prohibited, among other actions, "praise or support of people engaged in violence."[28]

At 6:07 p.m. Eastern, Mr. Trump posted a written statement on Facebook: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously viciously stripped away from great patriots who have

24.Joseph De Avila, *The People Permanently Banned From Twitter: See the List*, WALL STREET JOURNAL (Nov. 3, 2022), https://www.wsj.com/story/the-people-permanently-banned-from-twitter-52b85992; Mark Cina, *Courtney Love's Twitter Account Suspended*, THE HOLLYWOOD REPORTER (Jan. 7, 2011), https://www.hollywoodreporter.com/news/music-news/courtney-loves-twitter-account-suspended-69612/; *See also Twitter Suspensions*, WIKIPEDIA (Dec. 30, 2022), https://en.wikipedia.org/wiki/Twitter_suspensions.

25.*See* Luca, *supra* note 20.

26.Oversight Board, *supra* note 2.

27.*See id.*

28.*Id*.

been badly unfairly treated for so long. Go home with love in peace. Remember this day forever!"[29]

At 6:15 p.m. Eastern, Facebook also removed Mr. Trump's written post for violating its Community Standard on Dangerous Individuals and Organizations. Additionally, it blocked Mr. Trump from posting on Facebook or Instagram for 24 hours.[30]

On January 7, after further reviewing Mr. Trump's posts, his recent communications off Facebook, and additional information about the severity of the violence at the Capitol, Facebook extended the block "indefinitely and for at least the next two weeks until the peaceful transition of power is complete."[31] Facebook later stated: "Given the gravity of the circumstances that led to Mr. Trump's suspension, we believe his actions constituted a severe violation of our rules which merit the highest penalty available under the new enforcement protocols. We are suspending his accounts for two years, effective from the date of the initial suspension on January 7 this year."[32]

Mr. Trump's Twitter Suspension

On January 8, 2021, Mr. Trump Tweeted: "The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!"[33]

Shortly thereafter, Mr. Trump Tweeted: "To all of those who have asked, I will not be going to the Inauguration on January 20th."[34]

Twitter responded to these two Tweets with the following:

> *After close review of recent Tweets from the @realDonaldTrump account and the context around them – specifically how they are being received and interpreted on an off Twitter – we have permanently suspended the account due to the risk of further incitement of violence. In the context of horrific events this week, we made it clear on Wednesday that additional violations of the Twitter Rules would potentially result in this very course of action.*

29.*Id*.

30.*See id*.

31.*Id*.

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

33.Twitter Inc., *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

34.*Id*.

> *….*
> *Due to the ongoing tensions in the United States, and an uptick in the global conversation in regards to the people who violently stormed the Capitol on January 6, 2021, these two Tweets must be read in the context of broader events in the country and the ways in which the President's statements can be mobilized by different audiences, including to incite violence, as well as in the context of the pattern of behavior from this account in recent weeks. After assessing the language in these Tweets against our Glorification of Violence policy, we have determined that these Tweets are in violation of the Glorification of Violence Policy and the user @realDonaldTrump should be immediately permanently suspended from the service.*[35]

Twitter's determination was based on a number of factors, including that "the use of the words 'American Patriots' to describe some of his supporters is also being interpreted as support for those committing violent acts at the US Capitol" and that "the second Tweet may also serve as encouragement to those potentially considering violent acts that the Inauguration would be a 'safe' target, as [Mr. Trump] will not be attending."[36] Also, Twitter noted:

Plans for future armed protests have already begun proliferating on and off-Twitter, including a proposed secondary attack on the US Capitol and state capitol buildings on January 17, 2021. As such, our determination is that the two Tweets above are likely to inspire others to replicate the violent acts that took place on January 6, 2021, and that there are multiple indicators that they are being received and understood as encouragement to do so.[37]

It's clear that social media companies can "control (or purport to control)"[38] visitors' use of platforms through terms of use. However, the actions taken by Facebook and Twitter against Mr. Trump's accounts fueled a national conversation about the role of free speech with respect to social media user content.[39] The

35.*Id*.

36.*Id*.

37.*Id*.

38.Lemley, *supra* note 17, at 460.

39.*See e.g.,* Sarah E. Needleman and Georgia Wells, *Twitter, Facebook and Others Silenced Trump. Now They Learn What's Next*, WALL STREET JOURNAL (Jan. 10, 2021), https://www.wsj.com/articles/twitter-facebook-and-others-silenced-trump-now-they-learn-whats-next-11610320064 ("The actions against Mr. Trump … illustrate more starkly than ever the companies' influence over conversation online …. While lauded by many, ejecting the president and some of his supports also infuriated others who said it amounts to censorship.") Poppy Noor, *Should We Celebrate Trump's Twitter Ban? Five Free Speech Experts Weigh In*, THE GUARDIAN (Jan. 17, 2021), https://www.theguardian.com/us-news/2021/jan/17/trump-twitter-ban-five-free-speech-experts-weigh-in ("Last week, as Twitter permanently banned Trump from its platform, critics … have been quick to blame … tech companies for a crackdown on free speech.") Tara Andryshak, *Twitter, Trump, and the Question of the First Amendment*, SYRACUSE L. REV. (Jan. 21, 2021), https://lawreview.syr.edu/twitter-trump-and-the-

remainder of this paper examines arguments favoring contract law controlling user content (Part III), arguments favoring free speech controlling user content (Part IV), and the available roads ahead with respect to controlling user content on social media platforms (Part V).

II. ARGUMENTS FOR CONTRACT LAW

As noted above, social media companies typically present visitors with terms of service which control use on platforms.[40] However, on October 19, 2010, John Roberts, the Chief Justice of the United States Supreme Court, speaking at Canisius College in Buffalo, New York, admitted that even he "doesn't usually read the computer jargon that is a condition of accessing websites."[41] It turns out Chief Justice Roberts isn't alone. A 2017 study conducted by Deloitte found that 91 percent of individuals willingly accept legal terms and conditions without reading them before signing on to online services.[42] For ages 18 to 34, the rate of accepting terms and conditions without reading them reached 97 percent.[43]

If this "jargon"[44] isn't read by over 90% of individuals, including the Chief Justice of the United States Supreme Court, should it be the basis for controlling user content on social media platforms? In addressing this question, the remainder of this Part looks at why contract law is an appropriate fit for controlling user content on social media platforms, including addressing the validity of the sign-in wrap assent format used by Facebook and Twitter and the applicability of Section 230 of the Communications Decency Act to social media platform terms of use.

Facebook's and Twitter's Sign-In Wraps are a Valid Form of Contract

Assent as Applied to Online Contracts

"Most Americans now do some business over the Internet – whether making purchases or participating in a community at the pleasure of a forum host. When we do, we are almost always presented (clearly or opaquely) with contractual terms

question-of-the-first-amendment/ ("In response to President Trump getting banned, his supporters have argued that this is a violation of the First Amendment. His son, Donald Trump Jr., tweeted, as a response to his father's ban, 'Free-speech no longer exists in America.'").

40.*See* Lemley, *supra* note 17, at 460.

41.Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, ABA JOURNAL (Oct. 20, 2010), https://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print.

42.*See 2017 Global Mobile Consumer Survey: US edition. The Dawn of the Next Era in Mobile* 12, DELOITTE, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf.

43.*See id.*

44.*See supra* note 41 and accompanying text; *see also id.*

governing our use of the site."[45] Importantly, though, the internet "has not fundamentally changed the principles of contract…. And one such principle is that mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."[46] Further, the Ninth Circuit Court of Appeals has pointed out that the assent element of contract formation applies with equal force to contracts formed online and that "if a website offers contractual terms to those who use the site, and a user engages in conduct that manifests her acceptance of those terms, an enforceable agreement can be formed."[47]

Notwithstanding assent being the "touchstone"[48] of online contracts, Professor Mark Lemley, William H. Neukom Professor of Law at Stanford Law School, observed in 2006 that "in today's electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms."[49] Continuing, Professor Lemley noted that the late 1990s and early 2000s brought about a "sea change" in "electronic contracting."[50] Prior to that, courts regularly required affirmative evidence of agreement to form a contract and no court treated a unilateral statement of preferences as a binding agreement. "Today, by contrast," argued Lemley, "more and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if no one agrees to it."[51]

As electronic contracting has become even more commonplace since 2006, four variations of demonstrating assent to terms of use have emerged. The next section briefly reviews these four variations and their general treatment by courts.

Four Common Types of Assent in Online Contracts

Broadly speaking, there are four types of assent in online consumer contracts: browsewrap, clickwrap, scrollwrap, and sign-in-wrap.[52] A synopsis follows:

> *Browsewrap exists where the online host dictates that assent is given merely by using the site. Clickwrap refers to the assent process by which a user must click 'I agree,' but not necessarily view the contract to which she is assenting. Scrollwrap requires users to physically scroll through an*

45.Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 385 (E.D.N.Y. 2015).
46.Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012).
47.Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855-56 (9th Cir. 2022).
48.*Fteja*, 841 F. Supp. 2d at 835.
49.Lemley, *supra* note 17, at 465.
50.*Id.* at 459.
51.*Id*.
52.*See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 394-95 (E.D.N.Y. 2015).

> *internet agreement and click on a separate 'I agree' button in order to assent to the terms and conditions of the host website. Sign-in-wrap couples assent to the terms of a website with signing up for use of the site's services.*[53]

Because of browsewrap agreements passive means of assent, courts closely examine the factual circumstances surrounding a consumer's use. For a browsewrap contract to be binding, platform users must have reasonable notice of a company's terms of use and exhibit unambiguous assent to those terms.[54]

In contrast, "clickwrap agreements necessitate an active role by the user of the website."[55] Generally, courts find them enforceable.[56] These agreements require users to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before they are allowing them to proceed with further website use.[57]

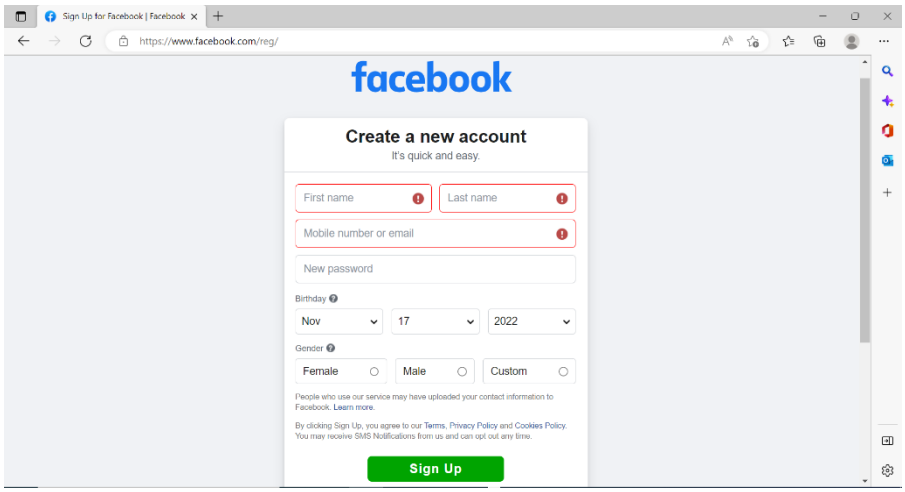
Comparatively, scrollwraps, present agreements that a user must view because of the nature of the website's construction and design.[58] "Some court decisions that use the term 'clickwrap' are in fact dealing with 'scrollwrap' agreements where an internet consumer had a realistic opportunity to review and scroll through the electronic agreement."[59]

Lastly, a sign-in-wrap is a "questionable"[60] form of online contracting that has been used recently. These contracts do not require the user to show acceptance of the terms of use by clicking on a box in order to continue. Instead, the website or platform is designed so that the user is notified of the existence and applicability of the site's terms when proceeding through the website's or platform's sign-in process.[61]

53.*Id.*
54.*Id*. at 395.
55.*Id*. at 397.
56.*Id*.
57.*Id*.
58.*Id*. at 398.
59.*Id*.
60.*Id*. at 399.
61.*Id*.

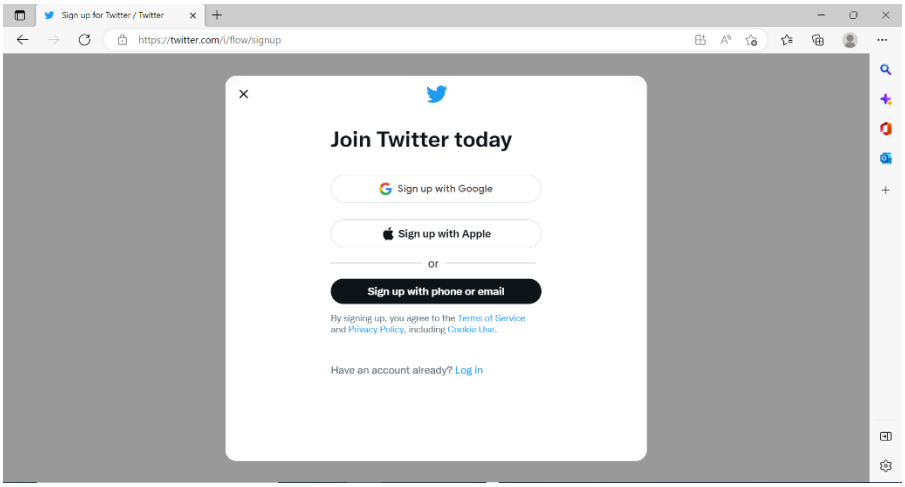
Social Media Platforms

Notably, both Facebook and Twitter utilize sign-in wrap. Facebook notifies potential users that "By clicking Sign Up, you agree to our Terms, Privacy Policy and Cookies Policy. You may receive SMS Notifications from us and can opt out any time."[62] A screenshot of Facebook's Sign Up page is below:



62.*Sign Up for Facebook*, FACEBOOK, https://www.facebook.com/reg/ (last visited Nov. 17, 2022).

Similarly, Twitter notifies potential users that "By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use."[63] A screenshot of Twitter's Sign Up pages is below:



Although sign-in wrap is said to be "a questionable form of contracting,"[64] courts have nonetheless found it permissible for both Facebook and Twitter, which is discussed next.

Courts Have Found Facebook's and Twitter's Respective Sign-In Wrap Assent and Terms of Use to be Acceptable

Facebook

While the enforceability of a social media platform's assent mechanism will be fact specific, the U.S. District Court for the Southern District of New York found that Facebook's sign-in wrap format was acceptable.[65] The court noted:

> *Facebook's Terms of Use have something in common with so-called 'clickwrap' licenses, in which an online user clicks 'I agree' to standard form terms. … (Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of an agreement to the terms of service before he or she is allowed to proceed with further utilization of the website).*

63.*Sign up for Twitter*, TWITTER, https://twitter.com/i/flow/signup (last visited Nov. 17, 2022).
64.*Berkson*, 97 F. Supp. 3d at 399.
65.*See* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 839-40 (S.D.N.Y. 2012).

> *….*
> *Yet Facebook's Terms of Use are not a pure-form clickwrap agreement, either. While the Terms of Use require the user to click on 'Sign Up' to assent, they do not contain any mechanism that forces the user to actually examine the terms before assenting.*
> *….*
> *Thus Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else – click 'Sign Up' – to assent to the hyperlinked terms. Yet, unlike some clickwrap agreements, the user can click to assent whether or not the user has been presented with the terms.*[66]

In indicating its acceptance of Facebook's sign-in wrap format, the court stated that "Facebook appears to be correct" when it asserted that "a putative Facebook user cannot become an actual Facebook user unless and until they have clicked through the registration page where they acknowledge they have read and agreed to Facebook's terms of use."[67]

Summarizing its thinking, the court equated assenting to hyperlinked terms by clicking to turning over an admission ticket, for example, for a cruise, to display the relevant terms. In both cases, the court noted, "the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant."[68] Failure to read a contract before agreeing to its terms doesn't relieve someone of their obligations under the contract. Being informed of the consequences of an "assenting click" and subsequently clicking is enough.[69]

Importantly, no United States' cases have found that Facebook's sign-in wrap method of assent was not enough.[70]

66.*Id*. at 837-38.

67.*Id*. at 834.

68.*Id*. at 839.

69.*Id*. at 839-40.

70.While no cases to the contrary were found in the United States, the Supreme Court of Canada found Facebook's terms to present "a gross inequality of bargaining power between the parties. Individual consumers in this context are faced with little choice but to accept Facebook's terms of use." *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751 (Can.).

Twitter

Twitter's Terms of Service have received similar treatment.[71] On June 17, 2018, Twitter suspended a user's account for violating its terms of service; specifically, its "Hate Speech" policy.[72] In response, the user filed suit against Twitter. The court found that the plain language of Twitter's Terms of Service formed a binding contract with users. The court stated that Twitter "requires users of its networking service to abide by its 'Terms of Service' and 'Hate Speech' policy, both of which are contained in [Twitter's] User Agreement."[73] At the time, Twitter's Terms of Service alerted users that they "may use these Services only if [they] agree to form a binding contract with [Twitter]."[74] The court noted that Twitter's Terms of Service clearly provide that Twitter can remove content that it deems to have violated its User Agreement and can even suspend or terminate a user's account at any time for any or no reason.[75] In short, these Terms are a contract that the user has with Twitter.[76]

In summary, the court stated that Twitter's actions are "clearly, and specifically, allowed by the terms of the 'contract' between [the user] and [Twitter]."[77]

Similar to Facebook, no United States' cases have held the contrary.

Even Mr. Trump Didn't Dispute That Online Terms of Service are a Valid Contract

On July 7, 2021, Mr. Trump filed suit against Facebook and Twitter, and their respective Chief Executive Officers, Mark Zuckerberg and Jack Dorsey, claiming he had been wrongfully "deplatformed."[78] In a press conference announcing the lawsuits, Mr. Trump stated: "We're asking the … Court … to order an immediate halt to social media companies' illegal, shameful censorship of the American people."[79]

While the case against Facebook and Mr. Zuckerberg is currently stayed,[80] the United States District Court for the Northern District of California, in dismissing Mr. Trump's case against Twitter, stated plainly that Mr. Trump did "not dispute that the [Terms of Service] is a valid contract between the parties."[81] Moreover, the court commented that there is nothing "cagey or misleading" about Twitter's Terms

71.Cox v. Twitter, Inc., No. 2:18-CV-2573 DCN, 2019 BL 233347 (D.S.C. Mar. 8, 2019).

72.*Id*. at *1.

73.*Id* at *2.

74.*Id*.

75.*Id.* at *4.

76.*Id.* at *5.

77.*Id.*at 4.

78.Complaint at 3, Trump v. Facebook, Inc., No. 21-cv-22440 (S.D. Fla. Nov. 19, 2021). Complaint at 3, Trump v. Twitter, Inc., No. 21-22441 (S.D. Fla. Oct. 26, 2021).

79.Jill Colvin & Matt O'Brien, *Trump Files Suit Against Facebook, Twitter and YouTube*, AP NEWS (July 7, 2021), https://apnews.com/article/lawsuits-business-government-and-politics-c7e26858dcb553f92d98706d12ad510c.

80.Trump v. Facebook Inc., No. 21-cv-09044, 2022 U.S. Dist. LEXIS 138374 (N.D. Cal. Aug. 3, 2022).

81.Trump v. Twitter Inc., 602 F. Supp. 3d 1213, 1226 (N.D. Cal. 2022).

expressly stating that it can suspend or terminate a user, or remove or refuse to distribute any content for any or no reason.[82] In short, the Terms of Service gave Twitter "contractual permission to act as it saw fit."[83]

Simply put, Twitter and Facebook are private companies, and users must agree to their terms of service to use their products.[84] For Facebook, users contractually agree to allow the platform to remove content that, in its discretion, "clearly, seriously or repeatedly breached [its] Terms or Policies."[85] In Twitter's case, users contractually agree to allow the platform to remove content "for any or no reason."[86] And, social media platform users can be bound by provisions in terms of service even if they have not read them and are unaware of their existence.[87]

While "the intuition that major platforms must, somehow, owe it to users to host or transmit lawful speech is widely held … no claim to date has succeeded" [88] in the United States, chiefly because terms of service coupled with contract law controls the speech on those platforms.

The relatively simple argument for contract law controlling user content on social media platforms is strengthened by the plain language of Section 230 of the Communications Decency Act, which is addressed next.

Section 230 of the Communications Decency Act Affords for Contract Law to Control User Content

The argument for contract law controlling user content on social media platforms is strengthened by Section 230 of the Communications Decency Act of 1996.[89] Section 230 allows social media platforms to moderate their services by removing posts that, for instance, violate the services' own standards, so long as they are acting in good faith.[90] "Congress enacted section 230 for two basic policy reasons: to promote the free exchange of information and ideas over the internet and to

82.*Id.* at 1227.

83.*Id.*

84.Colvin & O'Brien, *supra* note 79.

85.*Terms of Service*, META, https://www.facebook.com/terms.php (last visited Feb. 5, 2023).

86.*Terms of Service*, TWITTER, https://twitter.com/en/tos (last visited Feb. 5, 2023).

87.*See* N.A.M.E.S. v. Singer, 153 Cal. Rptr. 3d 472, 473 (Cal. Dist. Ct. App. 1979). *See also* George v. Bekins Van & Storage Co., 205 P.2d 1037, 1046-47 (Cal. 1949).

88.Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech*, HOOVER INSTITUTE 1, 11 (2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf.

89.*See* 47 U.S.C. § 230. Importantly, on October 3, 2022, the Supreme Court of the United States granted the petition for certiorari filed in *Gonzalez* v. *Google*, which held that Section 230 protected websites from liability for content posted by a third party. *See* Gonzalez v. Google, 143 S. Ct. 80, 1 (2022). The Court will consider the scope of Section 230(c)(1), which states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). For additional context, *see infra* Part V.A.

90.Colvin & O'Brien, *supra* note 79.

encourage voluntary monitoring for offensive … material."[91] Effectively, Section 230 provides a statutory safe harbor for a social media company to contractually control speech on its platform through terms of service, so long as such control is done in good faith.

Specifically, section 230 states, in part:

> *No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.*[92]

The statutory catch-all "otherwise objectionable" gives social media companies significant discretion to control user content with terms of service. As noted above, otherwise objectionable user content to Facebook is anything that it determines, in its discretion, to have "clearly, seriously or repeatedly" breached its Terms or Policies.[93] For Twitter, user content can be deemed otherwise objectionable "at any time for any or no reason."[94]

While the arguments for contract law controlling user content on social media platforms appear simple and convincing, questions have been raised about the role free speech plays, or should play, when it comes to user content. Part IV of this paper addresses arguments favoring free speech controlling user content.

III. ARGUMENTS FOR FREE SPEECH

The First Amendment to the United States Constitution states in part that "*Congress* shall make no law … abridging the freedom of speech."[95]

It's recognized that the First Amendment, the terms of which apply to governmental action, ordinarily does not throw into constitutional doubt the decisions of private persons, including companies, to permit, or to restrict speech.[96] Further, "[i]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"[97] and that a "private entity is not ordinarily constrained by the First Amendment."[98]

91.Hassell v. Bird, 420 P.3d 776, 784 (Cal. 2018).
92.47 U.S.C. § 230(c)(1), (c)(2)(A) (emphasis added).
93.META, *supra* note 85.
94.TWITTER, *supra* note 86.
95.U.S. CONST. amend. I (emphasis added).
96.*See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996).
97.Hudgens v. NLRB, 424 U.S. 507, 513 (1976).
98.Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1944 (2019).

Social Media Platforms

Since, as noted above, social media platforms are private entities,[99] it seems straightforward to contend that user content on those platforms is outside the First Amendment's controlling scope.

However, in his concurrence in *Biden v. Knight First Amendment Institute at Columbia Univ.*,[100] Justice Clarence Thomas acknowledged that "the principal legal difficulty that surrounds digital platforms – namely, that applying old doctrines to new digital platforms is rarely straightforward."[101] Justice Thomas went on to state that:

> *Today's digital platforms provide avenues for historically unprecedented amounts of speech…. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.*
> *….*
> *[T]he right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions.*[102]

In 1996, coincidentally the same year that the first social media platform was founded,[103] the United States Supreme Court laid the groundwork for at least addressing the First Amendment's reach into new mediums of expression, which now could include user content on social media platforms.[104] The Court noted that over the years, basic First Amendment principles have been restated and refined to balance competing interests of each unique field of application, while preserving the First Amendment's overarching commitment to protect speech from government regulation.[105] The goal, of course, being to enforce the Constitution's restraints "without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."[106] The Court pointed out that in different contexts, it has consistently held that

99.Colvin & O'Brien, *supra* note 79.
100.141 S. Ct. 1220, 1221-27 (2021) (Thomas, J., concurring).
101.*Id*. at 1221.
102.*Id*. at 1221-22, 27.
103.*See* Ngak, *supra* note 5.
104.*See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740-742 (1996).
105.*See id.*
106.*Id*.

government can directly regulate speech to address "extraordinary problems" uniquely presented by each medium of expression.[107]

Specifically, regarding social media platforms, Daphne Keller, former Associate General Counsel for Google, stated that the platforms have the "unprecedented technological capacity to regulate individual expression. Facebook and other large internet companies can monitor every word users share and instantly delete anything they do not like. No communications medium in human history has ever worked this way."[108] Similarly, Justice Thomas stated: "if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of the private digital platforms."[109] And, as noted by the United States Court of Appeals for the Second Circuit, "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[110]

Given the "interesting and important questions"[111] raised about the First Amendment's applicability to user content on social media platforms, the remainder of this Part looks at three theories that have been offered to bring such content within the First Amendment's free speech clause, even if only secondarily[112]; namely, that social media platforms serve as the modern public forum, that social media platforms act as a common carrier, and that social media platforms are akin to places of public accommodation.

The Modern Public Forum

In 1983, the United States Supreme Court noted that public forums are places that the government either has opened for use by the public as a place for expressive activity or which by long tradition have been devoted to assembly and debate.[113] Further, the Court has stated that the public forum has been used for purposes of communicating thoughts between citizens and discussing public questions.[114]

107.*See id*.

108.Keller, *supra* note 88, at 1.

109.Biden v. Knight First Amendment Institute at Columbia Univ., 141 S. Ct. 1220, 1227 (Thomas, J., concurring).

110.Knight First Amendment Inst. v. Trump, 928 F.3d 226, 240 (2d Cir. 2019).

111.*Biden*, 141 S. Ct. at 1227 (Thomas, J., concurring).

112.*See id.* at 1222.

113.*See* Perry Ed. Assn. v Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

114.*See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

Social Media Platforms

Elon Musk, who purchased Twitter on October 27, 2022,[115] stated: "Given that Twitter serves as the de facto public town square, failing to adhere to free speech principles fundamentally undermines democracy."[116]

Beyond Mr. Musk's comments, arguments favoring social media platforms as a public forum or the modern public square have become more common recently.[117] For example:

> *A great deal of speech, including political speech, is conducted online…. Though private entities, the social media giants are the forums in which public discourse takes place. Facebook alone is host to more than two billion users, a larger population than any country. Moreover, the social media entities hold themselves out as public forums where ideas can be freely exchanged.*[118]

Not only are more seeing social media platforms as the modern public forum, but "[a]n increasing number of observers find this private ownership of the public square alarming."[119]

The major difference, of course, with a traditional public forum is the owner. Social media platforms are privately owned whereas a traditional public forum is publicly owned. The question then becomes whether the First Amendment can reach into a privately-owned forum and control user speech.

Social Media Platforms: A Privately-Owned Company Town?

In 1946, the United States Supreme Court addressed the First Amendment's application to speech within the confines of a privately-owned forum; in fact, an entire privately-owned town.[120] At the time, Chickasaw, Alabama, a suburb of Mobile, was wholly owned by the Gulf Shipbuilding Corporation.[121] It was, quite literally, a privately-owned company town. Grace Marsh, a Jehovah's Witness, sought to distribute religious literature on a town sidewalk within Chickasaw. However, Gulf Shipbuilding had posted a notice stating: "This is Private Property,

115.Twitter, Inc., Amendment No. 13 to Schedule (Schedule 13D) (Oct. 27, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000110465922113051/tm2229215d1_sc13da.htm.

116.Elon Musk, *Twitter*, @ElonMusk (Mar. 26, 2022, 1:51 PM), https://twitter.com/elonmusk/status/1507777261654605828.

117.*See* Paul Domer, *De Facto State: Social Media Networks and the First Amendment*, 95 NOTRE DAME L. REV. 893, 893 (2019).

118.*Id*. at 894.

119.Keller, *supra* note 88, at 1.

120.Marsh v. Alabama., 326 U.S. 501, 502 (1946).

121.*See id*. at 502.

and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."[122]

Ms. Marsh was warned that she couldn't distribute the literature without a permit and was told that no permit would be issued to her. She protested that the Gulf Shipbuilding rule violated her constitutional right to distribute religious writings. When asked to leave the sidewalk and Chickasaw, Ms. Marsh declined. The deputy sheriff, paid by Gulf Shipbuilding, arrested Ms. Marsh and charged her with violating an Alabama statute that made it a crime to enter or remain on the premises of another after having been warned not to do so. Ms. Marsh contended that to construe the state statute as applicable to her activities would abridge her First and Fourteenth Amendment constitutional rights.[123]

Ms. Marsh's contention was rejected and she was convicted.[124] The Alabama Court of Appeals affirmed the conviction, holding, in part, that the statute as applied was constitutional because the title to the sidewalk was in the corporation.[125]

While the Alabama Supreme Court denied certiorari,[126] the United States Supreme Court heard the case on December 6, 1945, and narrowed the question presented to the following: "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?"[127] The Court noted: "For it is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms."[128]

The Court did not agree that the corporation's property interests were determinative.[129] In reversing the lower courts, the Supreme Court stated:

> *We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain*

122.*Id*. at 503.
123.*See id. at 503-04.*
124.*See id*. at 504.
125.*See id*.
126.Marsh v. State, 21 So. 2d 564 (1945).
127.*Marsh*, 326 U.S. at 505.
128.*Id*.
129.*See id*.

> *free…. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.*
> *….*
> *When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases weigh the circumstances and … appraise the … reasons … in support of the regulation … of the rights.*[130]

While on its face this seems to support the First Amendment's application to users' speech on privately owned platforms, the Court has since "narrowed this company town doctrine considerably. The rule now … only supports claims against a private entity that owns all the property and controls all the municipal functions of an entire town."[131] Social media platforms and their companies fall short of this description. Importantly, social media platforms do not create – or own – most of the content on their site; it's created and owned by individual users.[132] Fundamentally, platforms serve "as an intermediary between users" and as a "curat[or of] posts into collections of content that they then disseminate to others."[133] Consequently, because *Marsh's* narrowed scope doesn't describe social media platforms like Facebook and Twitter, users' First Amendment free speech claims are unlikely to succeed using the "company town" arguments.[134]

Social Media Platforms: Public Streets and Parks?

Decades removed from the Chickasaw company town, the question now is whether social media platforms are a modern public forum where First Amendment protections apply to user content.[135] Notably, until October 3, 2022, "the [United States Supreme] Court ha[d] not yet taken a case involving free speech on the

130.*Id*. at 507-09.
131.Keller, *supra* note 88, at 15.
132.*See* NetChoice, LLC v Att'y Gen., 34 F.4th 1196, 1204 (11th Cir. 2022).
133.*Id*. at 1204-05.
134.*See* Keller, *supra* note 83, at 15.
135.*See* Domer, *supra* note 117, at 895.

internet in a dispute between private actors."[136] However, seemingly hinting at support for the public forum theory, Justice Kennedy speaking for a majority of the Court in 2017 identified social media as "the most important place[]…for the exchange of views…. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought."[137] Justice Kennedy continued, noting that social media:

> *[Is one of the] principal sources for … speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'[138]*

The Court concluded by stating that social media websites are "integral to the fabric of our modern society and culture."[139]

Interestingly, Justices Alito and Thomas and Chief Justice Roberts concurred in the judgment, calling the Court's public square discussion "undisciplined dicta" and "unnecessary rhetoric," stating that "[t]he Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks…. [C]ontrary to the Court's suggestion, there are important differences between cyberspace and the physical world."[140] Similarly, in *Biden*, Justice Thomas even cast doubt on whether the President's official Twitter account could serve as a public – or government – forum: "it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it…. Any control [the President] exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account 'at any time for any or no reason."[141] Justice Thomas concluded: "[b]ecause unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to [a] complaint of stifled speech."[142]

In short, "Supreme Court precedent dictates that leveling the speech playing field is not a legitimate state interest."[143]

136.*Id*. at 895-96. See *infra* Part V.A.1 for a discussion of Gonzalez v. Google LLC, 143 S.Ct. 80 (2022).

137.Packingham v. North Carolina, 137 S. Ct. 1730, 1735-36 (2017).

138.*Id*. at 1737.

139.*Id*. at 1738.

140.*Id.* at 1738, 1743 (Alito, J., concurring).

141.*Biden*, 141 S. Ct. at 1221 (Thomas, J., concurring).

142.*Id*. at 1222.

143.Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 504 (2021).

Social Media Platforms

Nonetheless, Daphne Keller, in her essay "Who Do You Sue? State and Platform Hybrid Power Over Online Speech," noted:

> *Never before have so many of our communications shared a common infrastructure, and hence a common point of control – and never before have so many of us convened in the same virtual 'public square' to share our creativity, our political opinions, our cat pictures, and all of the other speech we value. We have barely begun to grapple with what this shift means for our communications ecosystem or our constitutional rights.*[144]

Lastly, it's also been noted that social media platforms serve the "same compelling social and community functions" as a traditional public forum; namely "informing the public, encouraging speech and the airing of the different sides to issues of public importance."[145] For its part, Facebook's stated mission "is to give people the power to build community and bring the world closer together."[146] Similarly, Twitter's mission "is to give everyone the power to create and share ideas and information instantly without barriers. Our business and revenue will always follow that mission in ways that improve – and do not detract from – a free and global conversation."[147]

Notwithstanding the increased attention, however, plaintiffs have been arguing at least since the 1990s that internet-based platforms act as public forums and therefore can be compelled to carry users' speech.[148] For example, in 1996, the argument was made, albeit unsuccessfully, that censorship of America Online email violated the First Amendment.[149] Despite decades of challenges, internet-based platforms have won every case.[150]

Consequently, recognizing social media platforms as a public forum is not yet a sustainable argument for controlling user speech. However, "[w]here … private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment."[151] Those other legal doctrines

144.Keller, *supra* note 88, at 27.

145.Frederick Mostert, *Free Speech and Internet Regulation*, J. INTELL. PROP. L. & PRACT. Vol. 14, Issue 8 (2019).

146.META, *supra* note 85.

147.*Investor Relations FAQ*, TWITTER (last visited Nov. 22, 2022), https://investor.twitterinc.com/contact/faq/default.aspx#:~:text=back%20to%20top,What%20is%20Twitter%27s%20mission%20statement%3F,a%20free%20and%20global%20conversation.

148.*See* Keller, *supra* note 88, at 11 (citing *Cyber Promotions, Inc. v. America Online*, 948 F. Supp. 436 (E.D. Pa. 1996) (rejecting the argument that censorship of email violated the First Amendment)).

149.*Cyber Promotions*, 948 F. Supp. at 438, 447.

150.*See* Keller, *supra* note 88, at 11.

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

include common carrier regulations and public accommodation regulations, which Justice Thomas has called "the principal means for regulating digital platforms,"[152] and are briefly addressed below.

Common Carrier and Public Accommodation Regulations

Justice Thomas has offered that while internet platforms have their own First Amendment interests, regulations nonetheless can affect speech on those platforms.[153] Justice Thomas refers to these regulations as "restricting the exclusion right of common carriers and places of public accommodation."[154] Seeing room for these regulations today, especially where it would not prohibit a social media company from speaking or force the company to endorse speech, Justice Thomas noted that "there is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner."[155]

Common Carrier Regulations

The definition of a common carrier has long proven elusive.[156] However, Justice Thomas, in his concurring opinion in *Biden* v *Knight First Amendment Institute at Columbia University*, commented that our legal system has long subjected common carriers to special regulations, including a general requirement to serve all comers.[157] Expounding on this, Justice Thomas noted that some scholars have argued that common carrier regulations are justified only when a carrier possesses substantial market power, while others have said that no substantial market power is needed so long as the company holds itself out as open to the public.[158] Justice Thomas went on to point out that regulations like those placed on common carriers "may be justified, even for industries not historically recognized as common carriers, when a business, by circumstances and its nature, … rise[s] from private to be of public concern…. At that point, a company's property is but its instrument, the means of rendering the service which has become of public interest."[159]

Justice Thomas also noted that there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers. Telegraphs, for example, because they resembled railroad companies and other common carriers, were bound to serve all customers alike,

152.*Id.* at 1226.
153.*See id.* at 1223.
154.*Id.*
155.*Id*.
156.*See* Yoo, *supra* note 143, at 465.
157.*See Biden*, 141 S. Ct. at 1222 (Thomas, J., concurring).
158.*See id*. at 1222-23.
159.*Id*. at 1222-23 (citing *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914)).

without discrimination.[160] Interestingly, "[i]n many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another … and hold themselves out as organizations that focus on distributing the speech of the broader public."[161]

Further, one of the most frequently posited definitions of common carriers turns on the presence of monopoly power, which may well represent the strongest justification for common carriage regulation.[162] Thus, "[t]he analogy to common carriers is even clearer for digital platforms that have dominant market share…. The Facebook suite of apps is valuable largely because 3 billion people use it."[163] Justice Thomas noted that "[m]uch like with a communications utility, this concentration gives some digital platforms enormous control over speech…. Facebook and Twitter can greatly narrow a person's information flow [by] steering users away from certain content."[164]

Pointedly:

> *It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.*[165]

In sum, "[i]f the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude."[166]

However, as argued by Christopher Yoo, the analogy between common carriers and digital platforms may not be correct:

> *For mass media communications, the Supreme Court has refused to apply common carriage regulation to broadcast and cable television even though both are forms of communications…. The emergence of new technologies has caused increasing pressure on the supposed distinction between mass media and common carriage. The Internet has caused it*

160.*Id. (quoting Primrose v. Western Union Telegraph Co., 154 U.S. 1, 14 (1894)).*
161.*Id.* at 1224.
162.Yoo, *supra* note 143, at 466.
163.*Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring).
164.*Id.* at 1224-25.
165.*Id.* at 1225.
166.*Id*.

> *to collapse entirely, as the same medium can now transmit any form of communications.*
> *The example animating Justice Thomas's concurrence vividly illustrates the difficulties in applying this rationale to boundary cases and emerging technologies. Social media companies are communications firms in some generalized way, but they arguably host content in much the same way as traditional publishers, more than they transmit content in the manner of traditional telecommunications firms. Terms such as transportation or communications provide little help in determining whether social media constitute common carriage.*[167]

In short, Yoo points out that social media platforms have not been considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platforms without any editorial filtering: "[a]lthough a primary function of social-media providers is to receive content from users and in turn to make the content available to other users, the providers routinely manage the content."[168]

Yoo further argues that the common carriage status of social media companies turns on two factors; (1) whether they hold themselves out as serving all members of the public without making individualized business decisions, and (2) whether they exercise editorial discretion over the content carried on their sites.[169] Yoo answered that social media companies "almost certainly" satisfy those factors.[170] With regards to content that's central to the debates over deplatforming, social media companies generally exercise significant editorial discretion and are increasingly being held accountable for the content they convey. Yoo concluded: "Absent a major change in business practices, social media companies exercise too much discretion over the [hosted] content … to be regarded as common carriers."[171]

While common carriers may not be a proper fit for social media platforms, similarities to public accommodations have also been offered as a way to regulate these platforms.

Public Accommodation Regulations

Even if digital platforms are not close enough to common carriers, legislatures might be able to treat digital platforms like places of public accommodation.[172] Public

167.Yoo, *supra* note 143 at 471-72.

168.*Id.* at 503 (quoting *NetChoice LLC v. Moody*, 546 F.Supp.3d 1082, (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded nom sum*.

169.*Id*. at 505-06.

170.*Id.*

171.*Id*. at 505-06.

172.*See Biden*, 141 S. Ct. at 1225 (Thomas, J., concurring).

accommodation statutes largely serve to prohibit discrimination by private citizens who control access to public facilities.[173]

As stated by Justice Thomas: "Although definitions between jurisdictions vary, a company ordinarily is a place of public accommodation if it provides lodging, food, entertainment, or other services to the public … in general…. Twitter and other digital platforms bear resemblance to that definition."[174]

Further, "if part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude…. [G]overnments have limited a company's right to exclude when that company is a public accommodation."[175]

However, courts are split about whether federal accommodations laws apply to anything other than physical locations.[176] And, public accommodation laws are primarily, if not exclusively, focused on protecting against discrimination based on protected classes.[177] At federal places of public accommodations, this currently is limited to race, color, religion, and national origin.[178] Finally, as argued by Yoo, "[t]he government may mandate access to public accommodations only when doing so does not interfere with their expressive activity or force them to associate themselves with a message with which they disagree."[179]

In sum, entities that hold themselves out as not making individualized business decisions about who to serve are regarded as common carriers or public accommodations.[180] Because this runs contrary to the current business practices of social media companies, i.e., they exercise editorial discretion over the speech they carry, the case for social media platforms as common carriers or public accommodations seems to come up short for now.[181]

While arguments currently favor contract law – and not the First Amendment's free speech clause - controlling user content on social media platforms and thereby having the right-of-way at the intersection, Part IV looks at the available roads

173.*See* Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodation Laws*, 72 N.Y.U. L. REV. 1243, 1243 (1997).

174.*Biden*, 141 S. Ct. at 1225 (Thomas, J., concurring) (quoting *Public Accommodations*, BLACK'S LAW DICTIONARY (11th ed. 2019).

175.*See id*. at 1222-23.

176.*See id*. at 1225. ("Compare, e.g., *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (CA7 1999) (Title III of the Americans with Disabilities Act (ADA) covers websites), with *Parker* v. *Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010-1011 (CA6 1997) … (Title III of the ADA covers only physical places)").

177.*See* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 965 (2011).

178.*See* 42 U.S.C. § 2000a.

179.Yoo, *supra* note 143, at 496.

180.*Id*. at 496.

181.*See id*. at 496, 505.

ahead for controlling user content; namely, the judicial route, the legislative route, and the platform route.

IV. THE AVAILABLE ROADS AHEAD

The Judicial Route

As noted by Justice Thomas, "[w]e will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms."[182]

Section 230

In a sense, that time has now come for the Court. On October 3, 2022, the Court granted the petition for a writ of certiorari in *Gonzales v. Google, LLC*.[183] In this case, the Court will consider whether Section 230(c)(1) of the Communications Decency Act "immunize[s] interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information."[184] The Ninth Circuit held in part that Section 230 protected websites from liability for content posted by a third party.[185]

The plaintiffs in *Gonzalez v Google, Inc.* are family members of individuals killed in separate terrorist attacks in Paris, Istanbul, and San Bernardino and seek damages pursuant to the Anti-Terrorism Act, 18 U.S.C. § 2333.[186] The defendants are Google, Twitter, and Facebook, which plaintiffs allege are directly and secondarily liable for the five murders at issue in the case. The complaints alleged that defendants' social media platforms allowed ISIS to post videos and other content to communicate the terrorist group's message, to radicalize new recruits, and to generally further its mission.[187]

The Ninth Circuit addressed Section 230(c)(1), which states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[188] The court noted that the object of this section is to "encourage providers of interactive computer services to monitor their websites by limiting liability … arising from

182.*Biden*, 141 S. Ct. at 1221 (Thomas, J., concurring).
183.*See* Gonzalez v. Google, Inc., 2 F.4th 871, 80 (2021), *cert. granted*, 214 L. Ed. 2d 12 (U.S. 2022).
184.Gonzalez v. Google, Inc., 2 F.4th 871, 80 (2021), *petition for cert. filed*, (No. 21-1333).
185.*See* Gonzalez v. Google, LLC, 2 F.4th 871, 80 (2021).
186.*See id*. at 879-80.
187.*See id*. at 880.
188.47 U.S.C. § 230(c)(1).

content created by third parties."[189] This limitation of liability served the twofold purpose of promoting the free exchange of information and ideas while encouraging voluntary monitoring for objectionable content.[190]

Also, the court noted that a website that creates or develops content by making a material contribution to its creation or development loses Section 230 immunity.[191] The court observed that "[p]lainly, an interactive computer service does not create or develop content by merely providing the public with access to its platform. A website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online."[192]

The court concluded its discussion by observing that the plaintiffs' claims:

> *[H]ighlight an area where technology has dramatically outpaced congressional oversight…. At the time § 230 was enacted, it was widely considered impossible for service providers to screen each of the millions of postings for possible problems.… But it is increasingly apparent that advances in machine-learning warrant revisiting that assumption…. Section 230's sweeping immunity is likely premised on an antiquated understanding of the extent to which it is possible to screen content posted by third parties.*
>
> *There is no question § 230(c)(1) shelters more activity than Congress envisioned it would. Whether social media companies should continue to enjoy immunity for the third-party content they publish, and whether their use of algorithms ought to be regulated, are pressing questions that Congress should address.[193]*

The Court's decision in *Gonzalez* could re-shape how user content is controlled on social media platforms and the role terms of use play going forward if the immunity provided to social media companies by Section 230 is affected.

Circuit Split

Discussed in more detail in Part V.B.2 *infra*, a circuit split developed in 2022 between the Fifth Circuit and the Eleventh Circuit regarding recent state laws regulating how social media companies handle their users' content. In short, the Fifth Circuit upheld a Texas law prohibiting censorship based on the viewpoint of

189.*Gonzalez*, 2 F.4th at 888.
190.*See id*.
191.*See id*. at 892.
192.*Id.* at 893 (quoting Kimzey v. Yelp!, Inc., 836 F.3d 1263, 1270 (9th Cir. 2016)). *Id.* at 893.
193.*Id.* at 912-13.

the platform user or another person represented in the user's expression.[194] The Eleventh Circuit, however, struck down a similar Florida law that prohibited social media companies from engaging in certain forms of content moderation, including deplatforming a candidate for office.[195] A petition for a writ of certiorari in both cases currently is pending with the U.S. Supreme Court.[196] The circuit split makes it more likely that the Supreme Court will grant the petition and provide valuable guidance regarding how the First Amendment should be applied to state laws regulating user content on social media platforms.[197]

Regardless of how the Court handles Section 230 of the Communications Decency Act and the pending circuit split, another available route to addressing user content on social media platforms is through legislative changes.

The Legislative Route

Federal

In *Biden*, Justice Thomas noted that:

> *The similarities between some digital platforms and common carriers or places of accommodation may give legislators strong arguments for similarly regulating digital platforms. It stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of' digital platforms…. That is especially true because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking…. Yet Congress does not appear to have passed these kinds of regulations. To the contrary, it has given digital platforms immunity from certain types of suits … with respect to content they distribute, 47 U. S. C. § 230, but it has not imposed corresponding responsibilities, like nondiscrimination.*[198]

However, with Republican control of the House beginning again in 2023, they "have already circulated draft bills that focus on hot-button tech issues, such as

194.*See* NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

195.*See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1203 (11th Cir. 2022).

196.*See id*. *petition for cert. filed*, 91 U.S.L.W. 3052 (U.S. Sept. 21, 2022) (No. 22-277); NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *petition for cert. filed*, 91 U.S.L.W. 3157 (U.S. Dec. 15, 2022) (No. 22-555).

197.*See, e.g.*, Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. 361, 361 (2014) ("[A] split of authority is probably the single most important factor in triggering Supreme Court review.").

198.Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

content moderation…. Republicans' most frequent complaint centers on social media's alleged bias against right' leaning users."[199] Some Republican draft bills would chip away at Section 230 of the Communications Decency Act. The party would likely also look into the decisions by Meta and Twitter to suspend Mr. Trump's accounts after the January 6, 2021, attack on the U.S. Capitol.[200]

In introducing the draft legislation, House Energy and Commerce Committee Republican Leader Cathy McMorris Rodgers stated:

> *Big Tech has failed to promote the battle of ideas and free speech by censoring political viewpoints they disagree with…. Big Tech has broken our trust that they can be good and responsible stewards of their platforms…. Guided by our Big Tech Accountability Platform, we are releasing discussion draft bills for Big Tech to be transparent [and] uphold American values for free speech.*[201]

Among other items, the draft legislation calls for preserving constitutionally protected speech by removing liability protections for companies who censor protected speech on their platforms and requiring appeals processes and transparency for content enforcement decisions.[202] Also, the draft legislation seeks to prevent companies from blocking or preventing access to lawful content, as well as degrading or impairing access to such content. Finally, it seeks to require companies to disclose how they develop their content moderation policies.[203]

It's been argued that type of legislation would cause platforms to be "bound to deliver any message at all, or at least any that isn't illegal. Such a standard might leave platforms free to apply content-neutral 'time, place, and manner' restrictions, as the government may in places like public parks and streets."[204]

On the other side of the aisle, Elizabeth Warren, while not yet directly calling for legislation, at least hinted at such during an interview after Elon Musk purchased Twitter:

> *I think that one human being should not decide how millions of people communicate with each other, and it doesn't make any difference who*

199.Anna Edgerton, *Big Tech Braces for Republican Investigations Over Censorship*, BL NEWS (Nov. 9, 2022, 12:12 PM), https://news.bloomberglaw.com/antitrust/big-tech-braces-for-republican-investigations-over-censorship.

200.*See id.*

201.Press Release, Energy & Com. Chair Rogers, E&C Republicans Announce Next Phase of Their Effort to Hold Big Tech Accountable (Jul. 28, 2021), https://republicans-energycommerce.house.gov/posts/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable.

202.*See id.*

203.*See id.*

204.Keller, *supra* note 88, at 13.

> *that human being is. One human being should not be able to go into a dark room by himself and decide, 'Oh, that person gets heard from, that person doesn't.' That's not how it should work.*[205]

While it's unclear whether the Republican-led House will advance any aspect of their proposed social media platform legislation, certain states have already taken such action but also have hit judicial resistance.

State

Since 2021, state legislators in 34 states have introduced more than 100 bills seeking to regulate how social media companies handle their users' content.[206] So far, though, only three of those states – Florida, Texas, and New York – have passed such laws.[207] The laws in Florida and Texas have already been challenged in court and have been blocked from taking effect.[208] While New York's law only recently took effect on December 3, 2022,[209] it, too, likely faces legal challenges.[210]

The Florida Law

The Florida law (SB 7072), in part, prohibits a social media platform (defined as having annual gross revenue in excess of $100 million and at least 100 million monthly individual platform participants globally) from engaging in certain content moderation, including willfully deplatforming a candidate for office who is known by the social media platform to be a candidate, prioritizing or deprioritizing candidate-related posts and messages, and censoring journalistic enterprises based on content.[211] On May 23, 2022, the Eleventh Circuit Court of Appeals, calling Florida's law "a first-of-its-kind," held that it was substantially likely that the law's content moderation restrictions regarding deplatforming, prioritizing, and censoring violate social media platform companies' First Amendment rights and

205.Interview by Hillary Vaughn with Sen. Elizabeth Warren, in D.C. (Nov. 29, 2022), https://www.foxnews.com/media/sen-warren-roasted-saying-musk-should-not-decide-how-run-twitter.

206.Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (July 1, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229.

207.For New York law, *see* Act of Jun. 6, 2022, A7865A, ch. 204, 2022 N.Y. Sess. Laws (McKinney) (codified at N.Y. GEN. BUS. LAW § 394-ccc (McKinney 2022)); for Texas law, *see* Act of Sept. 7, 2021, HB20, ch. 3, 2021 Tex. Gen. Laws; for Florida law, *see* Act of May 24, 2021, S.B. No. 7072, ch. 2021-32, 2021 Fla. Laws, http://laws.flrules.org/2021/32.

208.*See* Kern, *supra* note 206.

209.Act of Jun. 6, 2022, A7865A, ch. 204, 2022 N.Y. Sess. Laws (McKinney), https://legislation.nysenate.gov/pdf/bills/2021/A7865A.

210.*See* Kern, *supra* note 206.

211.S.B. No. 7072. The law deems deplatforming to occur when a candidate has been deleted or banned from a platform for more than fourteen days. *Id.*

unconstitutionally burdens their protected exercise of editorial judgment.[212] In doing so, the court granted a preliminary injunction prohibiting enforcement of the law's content moderation provisions.[213] A petition for a writ of certiorari currently is pending with the Supreme Court.[214]

The Texas Law

The Texas law (HB20), which took effect December 2, 2021, sought, in part, to prohibit social media platforms with at least 50 million active users in the U.S. in a calendar month from censoring user content based on the viewpoint of the user or another person, or the viewpoint represented in the user's expression or another person's expression.[215] Interestingly, HB20 also prohibits "a waiver or purported waiver" of the law's protections "as unlawful and against public policy,… notwithstanding any contract."[216] This seemingly would circumvent the otherwise simple and convincing arguments for contract law controlling user content discussed in Part III of this paper, *supra*, and likely would trigger changes to social media platforms' terms of use.

On May 31, 2022, however, the Supreme Court suspended the Texas law while a case challenging the law moved through the lower courts.[217] That case, *NetChoice, LLC* v. *Paxton*, contends, among other things, that the Texas law is facially unconstitutional under the First Amendment with respect to the free speech rights of social media companies.[218] Though dissenting from the majority, Justice Alito noted that the Texas law is "novel" and that "[i]t is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies."[219]

However, on September 16, 2022, the Fifth Circuit Court of Appeals held in favor of the Texas law and "reject[ed] the idea that corporations have a freewheeling First Amendment right to censor what people say."[220] Notwithstanding, the Fifth Circuit stayed enforcement of the Texas law pending a petition for a writ of certiorari in the U.S. Supreme Court.[221] Because the Fifth Circuit's holding departed from the

212.*See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1203 (11th Cir. 2022).

213.*See id.*

214.*See* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022), *petition for cert. filed*, 91 U.S.L.W. 3052 (U.S. Sept. 21, 2022) (No. 22-277).

215.*See* H.B. 20, 87th Leg. (Tex. 2021).

216.*Id.*

217.*See* NetChoice, LLC v. Paxton, 213 L.Ed.2d 1010, 142 S. Ct. 1715 (2022).

218.*See id*. at 1716 (Alito, J., dissenting).

219.*Id*. (Alito, J., dissenting).

220.NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

221.Order Grant. Pet'r's Mot. To Stay, *NetChoice*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178); *see also* NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022), *petition for cert. filed*, 2022 WL 16110844 (Oct. 24, 2022) (No. 22-393).

Eleventh Circuit's holding discussed above, a circuit split was created. This split increases the likelihood that the Supreme Court will grant the petitions and ultimately weigh in on state statutes that prohibit social media companies from censoring or deplatforming user content, and thereby help clarify the path forward with respect to the state legislative route.[222]

The New York Law

The New York law (A07865) took effect December 3, 2022, and prohibits "hateful conduct" on social media.[223] According to the law, "hateful conduct means the use of a social media network to vilify, humiliate, or incite violence against a group or a class of persons on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression."[224] The law requires social media networks to provide and maintain mechanisms for reporting hateful conduct on their platform and requires companies to directly respond to anyone who reports such hateful conduct.[225] While New York's law has not yet been challenged in court, concerns already have been raised over the law violating the First Amendment because its definition of "hateful conduct" is too broad and prohibits speech that's protected by the Constitution.[226]

While the legislative route ultimately may or may not bring changes to the treatment of user content on social media platforms, a more expedient route emerged in 2022; namely, creating a new platform or buying an existing one.

The Platform Route

If someone remains unsatisfied with the judicial route and the legislative route, a third available route is simply creating a new platform or buying an existing platform; essentially, the build it or buy it yourself approach to social media platforms. With this, one ensures the opportunity to give First Amendment deference in accordance with personal wishes (absent, of course, new laws to the contrary). Such was the case for Mr. Trump and Mr. Musk in 2022.

Truth Social

On February 21, 2022, roughly one year after being indefinitely suspended from Facebook and Twitter, Mr. Trump launched the social media platform Truth

222.*See*, *e.g.*, Aaron-Andrew P. Bruhl , *Measuring Circuit Splits*, 4 J. L. 361 (2014) ("A split of authority is probably the single most important factor in triggering Supreme Court review.").

223.A.B. 7865, 2021–22 Gen. Assemb., Reg. Sess. (N.Y. 2021).

224.*Id*.

225.*See id.*

226.*See* Kern, *supra* note 206.

Social.[227] According to Truth Social, it "is America's 'Big Tent' social media platform that encourages an open, free, and honest global conversation without discriminating on the basis of political ideology."[228] Similar to Facebook and Twitter, though, Truth Social's Terms of Service notify users that the platform reserves the right to "take appropriate action against anyone who, in our sole discretion, violates the law or these Terms of Service" and to "in our sole discretion and without limitation, refuse, restrict access to, limit the availability of, or disable … any of your Contributions or any portion thereof."[229] Consequently, users can be suspended from Truth Social in the same way Mr. Trump was suspended from Facebook and Twitter.

Twitter

On March 26, 2022, Elon Musk Tweeted "Given that Twitter serves as the de facto public square, failing to adhere to free speech principles fundamentally undermines democracy. What should be done?"[230] A short time later, Mr. Musk Tweeted: "Is a new platform needed?"[231] In response, Simon Weigang (@CRGSimon on Twitter) responded: "Buy Twitter and change it yourself."[232]

That he did. On October 27, 2022, Mr. Musk closed on the purchase of Twitter for $44 billion.[233] Although he didn't revise Twitter's Terms of Service, Mr. Musk Tweeted on November 18, 2022, that the "[n]ew Twitter policy is freedom of speech, but not freedom of reach. Negative/hate tweets will be max deboosted & demonetized, so no ads or other revenue to Twitter. You won't find the tweet unless you specifically seek it out, which is no different from rest of Internet."[234]

Incidentally, on November 18, 2022, Mr. Musk also conducted a 24 hour poll on Twitter, asking simply: "Reinstate former President Trump? Yes. No."[235] After 15,085,458 votes were cast, 51.8% of respondents voted Yes and 48.2% of

227.Nell Clark, *Trump's Social Media Site Hits The App Store A Year After He Was Banned From Twitter*, NPR (Feb. 22, 2022, 12:20 AM), https://www.npr.org/2022/02/22/1082243094/trumps-social-media-app-launches-year-after-twitter-ban.

228.TRUTH SOCIAL, https://truthsocial.com/ (last visited Dec. 5, 2022).

229.*Terms of Service*, TRUTH SOCIAL, https://help.truthsocial.com/legal/terms-of-service/ (last visited Dec. 4, 2022).

230.Elon Musk (@elonmusk), TWITTER (Mar. 26, 2022, 1:51 PM), https://twitter.com/elonmusk/status/1507777261654605828?ref_src=twsrc%5Etfw.

231.*Id*.

232.Simon Weigang (@CRGSimon), TWITTER (Mar. 26, 2022, 1:52 PM), https://twitter.com/CRGSimon/status/1507777500608442370.

233.*Amend. No. 13 to Sched. 13D*, U.S. SEC. & EXCH. COMM'N (Oct. 27, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000110465922113051/tm2229215d1_sc13da.htm.

234.Elon Musk (@elonmusk), TWITTER (Nov. 18, 2022, 1:31 PM), https://twitter.com/elonmusk/status/1593673339826212864.

235.Elon Musk (@elonmusk), TWITTER (Nov. 18, 2022, 7:47 PM), https://twitter.com/elonmusk/status/1593767953706921985.

respondents voted No.[236] The following day, on November 19, 2022, Mr. Musk Tweeted: "The people have spoken. Trump will be reinstated. Vox Populi, Vox Dei."[237] Notwithstanding, Mr. Trump has indicated that he sees no reason for returning to Twitter.[238]

CONCLUSION

User content on social media platforms is routinely governed by the respective platform's terms of use. Traditional and straightforward contract law principles, including assent, apply to such terms, and often are appropriately manifested through a sign-in wrap format. However, the suspension of then-President Donald Trump's social media accounts by Facebook and Twitter in the aftermath of the Capitol Hill uprising on January 6, 2021, drew increased attention to the role free speech plays, or should play, in controlling user content on such platforms. While free speech-related arguments can be made that social media platforms are similar in nature to public forums, common carriers, or public accommodations, such arguments still lack robust legal support. This gives contract law the right-of-way over free speech in controlling user content on social media platforms. Notwithstanding, the road ahead affords free speech principles being made available through judicial means, legislative means, and more directly through "build it or buy it yourself" platform means. As novel avenues continue to develop, free-speech may gain the right-of-way with respect to controlling user content on social media platforms. But, for now, free speech must continue to yield the right-of-way to contract law.

236.*See id*.

237.Elon Musk (@elonmusk), TWITTER (Nov. 19, 2022, 7:53 PM), https://twitter.com/elonmusk/status/1594131768298315777. Incidentally, "Vox Populi, Vox Dei" is a Latin phrase meaning "the voice of the people is the voice of God."

238.*See* Zach Schonfeld, *Trump Says He Has No Interest In Returning to Twitter After Reinstatement*, THE HILL (Nov. 20, 2022, 8:15 AM), https://thehill.com/policy/technology/3743666-trump-says-he-has-no-interest-in-returning-to-twitter-after-reinstatement/.