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The First Amendment and the Regulation of Speech Intermediaries

Shaun B. Spencer

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THE FIRST AMENDMENT AND THE REGULATION OF SPEECH INTERMEDIARIES

SHAUN B. SPENCER*

Calls to regulate social media platforms abound on both sides of the political spectrum. Some want to prevent platforms from deplatforming users or moderating content, while others want them to deplatform more users and moderate more content. Both types of regulation will draw First Amendment challenges. As Justices Thomas and Alito have observed, applying settled First Amendment doctrine to emerging regulation of social media platforms presents significant analytical challenges.

This Article aims to alleviate at least some of those challenges by isolating the role of the speech intermediary in First Amendment jurisprudence. Speech intermediaries complicate the analysis because they introduce speech interests that may conflict with the traditional speaker and listener interests that First Amendment doctrine evolved to protect. Clarifying the under-examined role of the speech intermediary can help inform the application of existing doctrine in the digital age. The goal of this Article is to articulate a taxonomy of speech intermediary functions that will help courts (1) focus on which intermediary functions are implicated by a given regulation and (2) evaluate how the mix of speaker, listener, and intermediary interests should affect whether that regulation survives a First Amendment challenge.

This Article proceeds as follows. First, it provides a taxonomy of the speech intermediary functions—conduit, curator, commentator, and collaborator—

* Associate Dean for Academic Affairs, Associate Professor, and Director of Legal Skills, University of Massachusetts School of Law. This work was supported by the University of Massachusetts School of Law Summer Research Grant Program. I am grateful for the thoughtful feedback of Dwight Duncan, Lawrence Friedman, and Alan Rozenshtein.

and identifies for each function the potential conflict or alignment between the intermediary's speech interest and the speech interests of the speakers and listeners the intermediary serves. Next, it maps past First Amendment cases onto the taxonomy and describes how each intermediary's function influenced the application of First Amendment doctrine. Finally, it illustrates how the taxonomy can help analyze First Amendment challenges to emerging regulation of contemporary speech intermediaries.

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I. INTRODUCTION

We love to hate social media platforms.¹ There is widespread agreement that they are doing a terrible job, yet sharp disagreement over why.² Some accuse platforms of too much content moderation and propose laws prohibiting platforms from removing speakers or moderating content.³ Others accuse platforms of too little content moderation and propose laws requiring platforms to moderate particular types of speech.⁴

Both types of laws are likely to draw First Amendment challenges. The prospect of these challenges has generated concern that current First Amendment doctrine simply is not up to the task. The most prominent recent advocates of this view are Justices Thomas and Alito.⁵ Justice Thomas stated his position in his *Biden v. Knight First Amendment Institute at Columbia University* concurrence.⁶ That case arose after then-President Donald Trump blocked several Twitter users from his account because those users “post[ed] replies in which they criticized the President or his policies.”⁷ They sued Trump and several White House staff members, and the district court entered a

1. Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/> [https://perma.cc/7HHV-77JM].

2. See Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 305–10 (2021) (discussing contradictory proposals for regulating social media platforms); Clyde Wayne Crews, Jr., *Regulating Social Media Content Moderation will Backfire and Make Big Tech More Powerful*, FORBES (June 28, 2020), <https://www.forbes.com/sites/waynecrews/2020/06/28/regulating-social-media-content-moderation-will-backfire-and-make-big-tech-more-powerful/?sh=12fb96f579ff> [https://perma.cc/YS8C-2NLC] (“The current social media debate centers around competing interventionist agendas. Conservatives want social media titans regulated to remain “neutral,” while liberals tend to want them to eradicate harmful content and address other alleged societal ills.”).

3. Lemley, *supra* note 2, at 308; Zoe Bedell & John Major, *What’s Next for Section 230? A Roundup of Proposals*, LAWFAREBLOG (July 29, 2020), <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> [https://perma.cc/QD5N-CK5N].

4. Lemley, *supra* note 2, at 307; Bedell & Major, *supra* note 3; Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 129 (2021) (referencing “proposals such as requiring platforms to block more falsehoods and hate speech”) (citing Davey Alba, *Facebook Must Better Police Online Hate, State Attorneys General Say*, N.Y. TIMES, Aug. 5, 2020, at B4.).

5. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021); *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715–16 (2022).

6. 141 S. Ct. 1220, 1221 (2021).

7. *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 232 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

declaratory judgment that “the blocking of the individual plaintiffs from the [account] because of their expressed political views violates the First Amendment.”⁸ The Second Circuit affirmed,⁹ but after President Biden’s election, the Supreme Court vacated the Second Circuit’s decision and remanded with instructions to dismiss the case as moot.¹⁰

Justice Thomas began his concurrence by expressing his discomfort with “say[ing] that something is a government forum when a private company has unrestricted authority to do away with it.”¹¹ But his concurrence reached more broadly by questioning how existing doctrines concerning common carriers, places of public accommodation, and government coercion of private speech might permit regulation of social media platforms.¹² Although those broader issues were not raised in the underlying litigation, Justice Thomas wrote that “this petition highlights the principal legal difficulty that surrounds digital platforms—namely, that applying old doctrines to new digital platforms is rarely straightforward.”¹³ He continued,

[t]oday’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.¹⁴

8. *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018).

9. “We . . . conclude . . . that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees.” *Knight First Amend. Inst.*, 928 F.3d at 230.

10. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. at 1220–21.

11. *Id.* at 1221.

12. *Id.* at 1224–27.

13. *Id.* at 1221.

14. *Id.* Justice Alito echoed these arguments in his dissent in *NetChoice, LLC v. Paxton*, in which the Court reinstated a federal district court’s preliminary injunction against a Texas law prohibiting social media platforms from discriminating based on viewpoint. *See NetChoice, LLC v. Paxton*, 142 S. Ct. 1716 (2022) (mem). Justice Alito—joined by Justices Thomas and Gorsuch—observed that “[i]t is not at all obvious how our existing [First Amendment] precedents, which predate the age of the internet, should apply to large social media companies.” *Id.* at 1717 (Alito, J. dissenting). Though he indicated that he had not reached a definitive view on the legal issues, Justice Alito acknowledged the state’s argument that social media platforms “possess some measure of common carrier-like market power and that this power gives them an ‘opportunity to shut out [disfavored] speakers.’” *Id.* (first quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos.*, 515 U.S. 557, 573 (1995); and then citing *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring)).

One reason why First Amendment doctrine is so challenging to apply to platform regulation is that the doctrine developed over the course of many decades in the context of a relatively simple mass communications ecosystem.¹⁵ That ecosystem involved predominantly one-way communication through print media such as newspapers, magazines, and books; over-the-air broadcast media such as radio and television; and wired media such as cable television.¹⁶ The status of intermediaries such as booksellers and radio and television networks introduced some complexity, but overall was relatively manageable.¹⁷

Today, however, our dynamic communications ecosystem presents a thicket of conflicting speech interests. Digital age communication involves seemingly unlimited channels of communications;¹⁸ broad democratization driven by the low cost of communicating;¹⁹ a vast increase in the speed and volume of communications;²⁰ and increasingly sophisticated algorithmic tools to filter and amplify speech.²¹ In this complex ecosystem, drawing analogies to cases from the pre-digital communications era can prove challenging at best.²²

15. See Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 75 (2021) (“Twentieth-century print and broadcast media were not participatory media; the vast majority of people were audiences for the media, rather than creators who had access to and used the media to communicate with others.”). See generally, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

16. See Balkin, *supra* note 15, at 75.

17. See *id.*

18. See Steven Levy, *How the Propeller Heads Stole the Electronic Future*, N.Y. TIMES MAG., Sept. 24, 1995, at SM58 (stating that the internet is “based on unlimited channels of communication, community building, electronic commerce and a full-blown version of interactivity that blurs the line between provider and consumer”).

19. See James Boyle, *Is the Internet over?! (Again?)*, 18 DUKE L. & TECH. REV. 32, 60 (2019) (arguing that the rise of the modern web “has been the greatest democratization of communicative ability in the history of the species”).

20. See Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1359 (2018) (noting the “ease, speed, and anonymity” of speech on contemporary communications platforms); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SEC. J. 241, 293 (2015) (noting that, due to the digital revolution, “the volume, velocity, variety, and integration of electronic communications were accelerating dramatically”).

21. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1636 (2018) (“The vast majority of [social media content] moderation is an automatic process run largely through algorithmic screening without the active use of human decisionmaking.”); *id.* at 1660 (“[P]latforms also have intricate algorithms to determine what material a user wants to see and what material should be minimized within a newsfeed, homepage, or stream.”).

22. *Id.* at 1609 (“Depending on the type of intermediary involved, courts have analogized platforms to established doctrinal areas in First Amendment law—company towns, broadcasters, editors—and the rights and obligations of a platform shift depending on which analogy is applied.”); *id.* at 1602–03 (examining “how platforms are moderating user-generated content and whether that

This Article attempts to clarify the analytical challenge by examining how First Amendment doctrine has applied to the regulation of speech intermediaries. As Jack Balkin recognized, “If you want to realize [the values that free speech serves] . . . [y]ou need intermediate institutions that can create and foster a public sphere. Without those intermediate institutions, speech practices decay, and the public sphere fails.”²³ However, because they occupy chokepoints in communication from speaker to listener, speech intermediaries are appealing targets for regulation, no matter what the regulatory goal.²⁴ Attempts to regulate obscene, indecent, or otherwise objectionable speech often

understanding can fit into an existing First Amendment framework,” and arguing that “analogy under purely First Amendment doctrine should be largely abandoned”); Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy> [https://perma.cc/LP63-EXA7] (“In debates over tech companies and free speech coverage, neither the gravity of the policy stakes nor the complexity of the things being compared has dampened the willingness of courts and scholars to use tenuous analogies in charting the way forward There are multiple plausible analogies that might be used, each with different First Amendment implications, and none tells us whether the normative considerations underlying free speech coverage for the one apply to the other.”). *But see* Genevieve Lakier, *The Problem Isn’t the Use of Analogies but the Analogies Courts Use*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), <https://knightcolumbia.org/content/problem-isnt-use-analogies-analogies-courts-use> [https://perma.cc/QP2H-SN4T] (“The problem with the decision in *Baidu* need not be seen, therefore, as a consequence of the court’s reliance on analogical reasoning per se. It is better understood as a consequence of the court’s reliance on an overly formal analogy between newspapers and search engines, one that fails to take into account the very different functions that newspapers and search engines play in the contemporary public sphere.”).

23. Balkin, *supra* note 15, at 78.

24. *See* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 378 (2010) (“Private intermediaries’ pervasiveness, combined with the extraordinary power they wield over speech, make them attractive targets for regulators and litigants.”); *see also* NATASHA TUSIKOV, CHOKEPOINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET 7 (2017) (explaining that rights holders want to work with macrointermediaries because they “act as chokepoints with the capacity to exert significant control over the access to and use of essential online sectors, including payment, advertising, search, marketplaces, and domain name services that enable users to access websites”); Balkin, *supra* note 15, at 74 (“Governments and civil society groups often want to use basic internet services and payment systems to go after propagandists, conspiracy mongers, and racist speakers.”).

target intermediaries such as the postal service,²⁵ booksellers,²⁶ broadcasters,²⁷ cable television system operators,²⁸ and internet service providers.²⁹ In addition, attempts to ensure that everyone's voice is heard often try to leverage the position of intermediaries such as newspapers,³⁰ cable television system operators,³¹ and social media platforms.³²

Although past cases have rarely focused on the nature of the speech intermediary, the presence of an intermediary raises the specter of an additional speech interest that can make applying First Amendment doctrine more complex. Clarifying the under-examined role of the speech intermediary can help inform the application of existing doctrine in the digital age. The goal of this Article is to articulate a taxonomy of speech intermediary functions that will help courts (1) focus on which intermediary functions are implicated by a given regulation and (2) evaluate how the mix of speaker, listener, and intermediary interests should affect whether that regulation survives the First Amendment challenge.

25. *Ex parte Jackson*, 96 U.S. 727, 736–37 (1878) (upholding law barring letters and circulars concerning illegal lotteries from the mail); *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 409–16 (1921) (upholding law barring newspapers whose content violated the Espionage Act from second class mail).

26. *Smith v. California*, 361 U.S. 147, 155 (1959) (striking down municipal ordinance imposing strict criminal liability on booksellers found in possession of books with obscene or indecent content).

27. *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978) (upholding FCC determination that radio broadcast of George Carlin's "Filthy Words" monologue on a weekday afternoon violated prohibition on broadcasting broadcast of indecent material).

28. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732–33 (1996) (upholding statutory requirement that cable system operators "segregate and block" sexually explicit leased access channels, upholding statutory provision allowing cable system operators discretion to prohibit programming depicting sexual or excretory activities in a patently offensive manner on leased access channels, and striking down statutory provision allowing cable system operators discretion to prohibit programming depicting sexual or excretory activities in a patently offensive manner on public access channels).

29. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016) (upholding FCC's order imposing net neutrality rules on broadband internet access service providers).

30. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down statute providing political candidate the right to demand that newspapers who published story critical of the candidate print the candidate's reply).

31. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 650–52 (1994) ("*Turner I*") (upholding law requiring cable television system operators to carry a limited number of broadcast channels).

32. *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1231 (11th Cir. 2022) (affirming preliminary injunction against enforcement of Florida law prohibiting social media platforms from, *inter alia*, deplatforming or limiting the exposure of posts by political candidates; deplatforming or limiting the exposure of the posts of journalistic enterprises; or applying its content moderation standards unequally across users).

Before articulating the taxonomy, the Article must address two foundational issues. First, what is a “speech intermediary”? For purposes of this Article, the term simply means one who facilitates the communication of speech from one or more speakers to one or more listeners.³³ Intermediaries may facilitate speech in many different ways. They may pass it along indiscriminately; they may decide which speech to pass along or which listeners to target; they may pass along a digested version of the speech or attach their own commentary to the speech; or they may collaborate with the speaker to edit the speech before passing it along.

Second, we must distinguish two different ways that government may attempt to regulate speech intermediaries: proxy-censor regulations and must-carry regulations. Proxy-censor regulations impose censorship obligations on intermediaries rather than directly censoring speakers.³⁴ For example, the state may prohibit broadcasters or cable system operators from carrying obscene or indecent content.³⁵ Or the state may prohibit booksellers from possessing

33. See, e.g., Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1653 (1998) (defining “speech intermediaries” as “organizations engaged in speech activity that stand somewhere between the individual and the state”); Kate Klonick, *supra* note 21, 1604 n.26 (“Internet intermediaries are broadly defined as actors in every part of the internet ‘stack.’ These include internet service providers, hosting providers, servers, websites, social networks, search engines, and so forth.”) (citing JAMES GRIMMELMANN, *INTERNET LAW* 31–32 (2016)); ORG. FOR ECON. CO-OPERATION & DEV., *THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES* 4 (Apr. 2010) (defining online intermediaries as entities that “bring together or facilitate transactions between third parties on the Internet”); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 382 n.18 (2010) (defining an intermediary as “any entity that enables the communication of information from one party to another”); BLACK’S LAW DICTIONARY 833 (8th ed. 2004) (defining an intermediary as a “mediator or go-between; a third-party negotiator”); OXFORD ENGLISH DICTIONARY 405 (2d ed. 1989) (defining noun “intermediary” as “One who acts between others; an intermediate agent; a go-between, middleman, mediator. Something acting between persons or things, a medium, means; also abstr. Action as a medium, mediation, agency (of something) Something intermediate between others; an intermediate form or stage.”); see also Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1325 n.61 (2005) (noting that “Sullivan uses the term in its usual application to membership organizations and the media, but the concept is equally appropriate in the context of privatized public spaces”) (citing Sullivan, *supra* note 33, at 1653); Nicholas W. Bramble, *Safe Harbors and the National Information Infrastructure*, 64 HASTINGS L.J. 325, 328 n.8 (2013) (citing Klonick, *supra* note 21, at 1604 n.26); Ardia, *supra* note 24, at 382 n.18 (citing Black’s Law Dictionary, *supra* note 33, at 833).

34. See Klonick, *supra* note 21, at 1608 (referring to “collateral censorship” as occurring “when one private party, like Facebook, has the power to control speech by another private party, like a Facebook user. Thus, if the government threatens to hold Facebook liable based on what its user says, and Facebook accordingly censors its user’s speech to avoid liability, you have collateral censorship”).

35. *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732–33 (1996).

obscene or offensive books.³⁶ In contrast, must-carry regulations prevent intermediaries from excluding speakers or from banning or restricting content.³⁷ For example, the state might require newspapers to print the replies of political candidates whom the newspaper criticized.³⁸ Or the state might prohibit social media platforms from censoring content based on political or ideological reasons or from censoring the content of journalists.³⁹

Proxy-censor and must-carry regulations differ in several ways relevant to evaluating First Amendment claims by speech intermediaries. The first difference involves how the regulations affect the total amount of speech. As Frank Pasquale notes, proxy-censor regulations limit the amount of speech in circulation, whereas must-carry regulations increase the amount of speech in circulation.⁴⁰ The second difference involves the potential conflict between the intermediary's speech interest and those of the primary speakers and listeners.⁴¹ As we shall see below, proxy-censor regulations are more likely to involve an alignment between the intermediary's speech interest and the speech interests of the speakers who are censored and the listeners who wish to hear their speech. In contrast, must-carry regulations are more likely to present a conflict between the intermediary's speech interest and the speech interests of the speakers who would be excluded and the listeners who wish to hear their speech.⁴²

With those foundations in place, this Article proceeds as follows. Part II provides a taxonomy of the speech intermediary functions—conduit, curator, commentator, and collaborator—and identifies for each the potential conflict or alignment between the intermediary's speech interest and the speech interests

36. *Smith v. California*, 361 U.S. 147, 155 (1959).

37. See Eric Goldman & Jess Miers, *Online Account Termination/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 193 (2021) (referring to proposals limiting Internet services' discretion to remove content or terminate users as "'must carry' laws because they would require Internet services to provide services to users, and 'carry' user content, when the Internet service would otherwise choose not to").

38. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244–45 (1974).

39. *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1231 (11th Cir. 2022).

40. Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 501 (2016). Pasquale also notes that must-carry regulations are a governmental sovereign's attempt to limit the power of a private "sovereign" to censor private speech, although the other sovereign is merely a private entity rather than the governmental sovereign to which the First Amendment was intended to apply. *Id.*

41. See Sullivan, *supra* note 33, at 1654 ("[W]hen government attempts to restrict the power of private intermediaries to restrict speech, there are usually free speech interests on both sides.").

42. For an argument that must-carry regulations would be disastrous for social media platforms, see Goldman & Miers, *supra* note 37, at 214, arguing that must-carry regulations will lead to Internet services being "overrun by terrible content" and "exit[ing] the user-generated content industry."

of the speakers and listeners the intermediary serves.⁴³ Next, Part III maps past First Amendment cases onto the taxonomy and shows how each intermediary's function influenced the application of First Amendment doctrine.⁴⁴ Finally, Part IV illustrates how the taxonomy can help analyze First Amendment challenges to proposed or potential regulation of contemporary speech intermediaries.⁴⁵

II. A TAXONOMY OF SPEECH INTERMEDIARY FUNCTIONS

The intermediary functions are organized below according to the extent of the intermediary's expressive role. From the least expressive to the most, those categories are: conduit, curator, commentator, and collaborator. This Part will discuss the nature of each intermediary function, offer examples of each intermediary function in practice, and examine how the intermediary's speech interest, if any, may inform the First Amendment analysis of attempts to regulate that intermediary function.⁴⁶ Before turning to each intermediary function, however, there are several points to clarify regarding how to use the taxonomy.

First, we must acknowledge that speech intermediaries can perform multiple functions.⁴⁷ Accordingly, for the taxonomy to be useful in any First Amendment analysis, we must consider only the function that the regulation addresses.⁴⁸ For example, Facebook can act as a curator (by deciding which

43. See *infra* Part II.

44. See *infra* Part III.

45. See *infra* Part IV.

46. For a contrary argument that companies serving as speech intermediaries should not enjoy independent First Amendment interests, see Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 357–60 (2021), distinguishing companies' attempts to vindicate their users' First Amendment rights from companies' flawed claims to their own First Amendment rights.

47. See TUSIKOV, *supra* note 24, at 6 (2017) ("Some intermediaries provide services across multiple sectors. Google, Yahoo, and Microsoft, for example, all operate search engines and digital advertising platforms. Certain intermediaries, such as Visa, MasterCard, and PayPal, can be used in both real world and online environments. Other intermediaries, like domain registrars, exist solely online.").

48. See Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 382, 408 (2021) (distinguishing First Amendment analysis constraints on social media platforms' "hosting" function from analysis of other functions such as "recommending" and "conversation management" functions); Mailyn Fidler, *The New Editors: Refining First Amendment Protections for Internet Platforms*, 2 NOTRE DAME J. EMERGING TECHS. 241, 243 (2021) ("First, the role that a platform is playing in any given moment should determine whether editorial protections operate . . ."); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What the Freedom of Speech Encompasses*, 60 DUKE L.J. 1673, 1702 (2011) ("A webpage that a company creates is speech for purposes of the First Amendment. Note that this does not make the

content to promote to which users), but it can also act as a commentator (by attaching its own message to certain content, such as a message that has failed a fact-checking process). For purposes of a First Amendment challenge, the only intermediary function that should inform the analysis is the function that the government is attempting to regulate.⁴⁹

Second, we must assess the intermediary's function based on the intermediary's standard business practice rather than on some deviation from that standard practice. Otherwise, intermediaries could use their deviation to "choose" a more favorable intermediary function. For example, Cloudflare, a provider of essential but largely invisible internet services to its clients—"the basic plumbing of the internet"—considered itself to be a "neutral utility service."⁵⁰ However, controversy arose over providing its services to the message board 8chan, which was a "breeding ground for violent extremists" and had hosted advance announcements of three mass shootings in a six-month period.⁵¹ Despite its neutral stance, Cloudflare's CEO finally decided to stop serving 8chan because 8chan had "proven themselves to be lawless and that lawlessness has caused multiple tragic deaths."⁵² If that decision to drop 8chan had run afoul of a law imposing a nondiscrimination requirement on companies like Cloudflare, the First Amendment analysis should not treat Cloudflare like a company that screens its clients and decides who is and is not entitled to receive their services. Instead, the analysis should treat Cloudflare as a company that serves all prospective customers indiscriminately, because that was its standard business practice.⁵³ Conversely, if a message board about fly

company a speaker for all purposes: an oil-exploration company is engaged in speech when it creates its webpage, but not when it drills for oil."); see also Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh*, 80 U. PITT. L. REV. 855, 877–78 (2019) (contrasting a "categorical" approach treating ISPs protected speaker in all cases from a "functional approach" "assigns fixed First Amendment rights and duties to each distinct Internet service," and with an "editorial approach" basing First Amendment protection on "the actual exercise of content-based editorial judgments").

49. See Volokh, *supra* note 48, at 382, 408.

50. Evelyn Douek, *The Lawless Way to Disable 8chan*, ATLANTIC (Aug. 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/how-disabling-8chan-became-cloudflares-job/595606/> [https://perma.cc/B6U3-SGUM].

51. *Id.*

52. *Id.*

53. See Christopher S. Yoo, *First Amendment, Common Carriers, and Public Accommodations*, 1 J. FREE SPEECH L. 463, 497 (2021) ("If an entity holds itself out as simply passing through speech created by others and is not perceived as endorsing the messages contained therein, it is a common carrier or public accommodation and not a speaker for First Amendment purposes. Conversely, . . . [i]f they do exercise editorial discretion, they are not considered common carriers or public accommodations with respect to those services, and those services fall outside the justification for according lower levels of First Amendment protection.").

fishing only accepted users whom the message board host determined to be fly fishers, a challenge to a regulation prohibiting the message board from excluding prospective members should have to account for the message board's standard business practice of evaluating prospective members based on their fly fishing experience.

A. Conduit

A "conduit" passes speech from one or more speakers to one or more listeners without engaging with the speech in a way that conveys an expressive message.⁵⁴ Courts and commentators often juxtapose "neutral conduits" with speakers and editors more deserving of First Amendment protection, thus emphasizing the intermediary's absence of engagement with the speech.⁵⁵ Being a conduit does not mean that the intermediary exerts no influence on a communication's path from speaker to listener. But the conduit-intermediary function does not attempt to influence or comment upon the message or choose which listeners receive it.⁵⁶ For example, a broadband internet access provider may slow down the download speeds of companies' services that compete with its own.⁵⁷ An internet service provider may filter out illegal material, like child

54. See *Conduit*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/conduit> [<https://perma.cc/Z3X9-VTNM>] (defining conduit to mean "a means of transmitting or distributing").

55. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995) ("Respondents contend . . . that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely 'a conduit' for the speech of participants in the parade 'rather than itself a speaker. But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 743 (D.C. Cir. 2016) ("[The FCC's net neutrality order] includes only those broadband providers that hold themselves out as neutral, indiscriminate conduits. Providers that may opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content—would not offer a standardized service that can reach 'substantially all' endpoints. The rules therefore would not apply to such providers."); Benjamin, *supra* note 48, at 1686–87 ("Courts have placed common carriers and other mere conduits at the opposite end of the spectrum from speakers, and have held that conduits do not have free speech rights of their own."); Rozenshtein, *supra* note 46, at 363 ("[S]peech platforms constitute a spectrum, from hands-on publishers to neutral conduits").

56. See Benjamin, *supra* note 48, at 1689 ("Mere transmission does not reveal an intent to convey a message, and no message is likely to be understood."); Volokh, *supra* note 48, at 408–09 (distinguishing social media platforms' "hosting" function from their "recommendation" and "conversation management" functions).

57. See Andrew Patrick & Eric Scharphorn, *Network Neutrality and the First Amendment*, 22 MICH. TELECOMM. & TECH. L. REV. 93, 96 n.11 (2015) (noting that the "FCC has cataloged instances

sexual abuse material (CSAM)⁵⁸ or material deemed to violate another's copyright.⁵⁹ Even the United States Postal Service for many years precluded or limited the carriage of obscene materials and lottery circulars,⁶⁰ materials encouraging the violation of federal law,⁶¹ and communist propaganda.⁶²

However, as we shall see below, what distinguishes the conduit-intermediary from the curator-intermediary function is the absence of an expressive message. For example, if a courier service offered preferential treatment to packages sent by or to its affiliates, a law outlawing such distinctions would not raise First Amendment issues. In contrast, if a courier service held itself out as delivering packages only between Republican or Democratic supporters, the nature of the courier's manipulation of the packages it delivered would convey an expressive message—support for Republican or Democratic causes—and would move the courier out of the conduit-intermediary category and into the curator-intermediary category.⁶³

Pre-digital examples of conduits include postal carriers and couriers, telegraphs, and telephones, all of which transmit messages from a speaker to one or more listeners without engaging with the content.⁶⁴ But there are other smaller scale examples of conduits beyond the traditional communications industries. For example, a local print shop or copy center can serve as a conduit for whatever content its customers wish to print. Even some self-publishing

of discrimination, which include a provider blocking online payment services after entering into a contract with a competing service [and] a provider restricting the availability of competing streaming video and VoIP services”).

58. Lauren R. Shapiro, *Online Child Sexual Abuse Material: Prosecuting Across Jurisdictions*, 24 J. INTERNET L., Oct. 2020, at 3, 4 (noting that ISPs “remove Web sites that host online CSAM”).

59. Natalia E. Curto, *EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?*, 11 CASE W. RESERVE J.L. TECH. & INTERNET 84, 94 (2020) (noting that “some ISPs, such as YouTube, have implemented filtering mechanisms allowing the detection and removal of infringing copyrighted content in cooperation with copyright owners”).

60. *Ex parte Jackson*, 96 U.S. 727, 732 (1878).

61. *United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 411 (1921).

62. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 303 (1965).

63. The example is adapted from Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What “The Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673, 1685–86 (2011), comparing FedEx hypothetically giving preferential delivery treatment companies that pay more with a company transmitting to only Republican or only Democratic organizations.

64. See Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. INTER ALIA 1, 2 (2010) (“Conduits for communications—which we call ‘common carriers,’ [include] telephone companies, the postal service, and telegraph companies of old.”).

presses may act as conduits, printing and binding books for their customers without engaging in any way with the content.⁶⁵

The digital age has brought a new cadre of conduits. Wireless telephone companies provide traditional voice communications through a new medium. Internet service providers use telephone lines, cable television lines, or satellites to offer internet service to users across the globe.⁶⁶ And many other companies provide a host of largely invisible services that are essential for the internet to function, such as cloud services, content delivery networks, and domain registrars.⁶⁷ But there are also digital conduits that operate on a smaller scale. For example, digital self-publishing services allow anyone to publish an e-book without any editorial intervention. Like pre-digital self-publishing houses and copy shops, many of these digital printing presses differ from traditional publishing houses in that they do not play any editorial role.⁶⁸

Most of these conduit-intermediaries engage in some way with the content they carry or transmit, but that engagement falls short of adding the intermediary's expressive message. For example, conduits may have terms of service prohibiting certain uses of their facilities,⁶⁹ but enforcing those terms of service does not implement any expressive message on the intermediary's behalf.

Conduit-intermediaries may engage in other ways as well. For example, internet service providers may decide to "throttle" the internet traffic they carry based on the amount of data that certain customers have used, or they may throttle the speed at which they deliver the traffic of services that compete with

65. See, e.g., *About Us*, LIGHTNING PRESS BOOK PRINTING, <https://lightning-press.com/about-us/> [<https://perma.cc/5QAF-H7S8>] (offering self-publishing services).

66. See *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 695 (D.C. Cir. 2016).

67. See Joan Donovan, *Navigating the Tech Stack: When, Where and How Should We Moderate Content?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 28, 2019), <https://www.cigionline.org/articles/navigating-tech-stack-when-where-and-how-should-we-moderate-content/> [<https://perma.cc/5QM6-NNPF>].

68. See, e.g., *Kindle Direct Publishing, Content Guidelines*, AMAZON, https://kdp.amazon.com/en_US/help/topic/G200672390 [<https://perma.cc/3U5A-EGMP>] (imposing only "content guidelines" relating to "illegal or infringing," "offensive," or "public domain" content, or poor customer experience); Barnes & Noble Press, *Author Membership Agreement*, BARNES & NOBLE (Apr. 30, 2021), <https://press.barnesandnoble.com/legal/membership-agreement> [<https://perma.cc/232P-L876>] (requiring author's representation that the work contains no infringing content and is not obscene, libelous, or unlawful).

69. See, e.g., *AT&T Acceptable Use Policy*, AT&T.COM (July 28, 2017), <https://www.att.com/legal/terms.aup.html> [<https://perma.cc/E77V-BRHS>]; Amazon Web Services, *AWS Acceptable Use Policy*, AMAZON, <https://aws.amazon.com/aup/> [<https://perma.cc/7UR4-NS9M>]; Comcast Acceptable Use Policy, XFINITY, <https://www.xfinity.com/support/articles/comcast-acceptable-use-policy> [<https://perma.cc/KV7D-LPX3>].

their own services, such as video.⁷⁰ These practices convey no expressive message; they simply advance the conduit-intermediary's own business interests.

In addition, many internet service providers filter out certain content from their traffic, such as child sexual abuse material or material deemed to infringe on another's copyright.⁷¹ But, as with the other examples above, this alteration lacks an expressive component that the internet service provider attempts to convey to its users. It would be different, of course, if the internet service provider marketed itself as a "family friendly" internet service provider and only connected its users with sites it had deemed not to be obscene or indecent.⁷² That moderation would carry an expressive component that would implicate the curator function described in the next section. But the distinguishing feature of the conduit-intermediary is that the conduit does not engage with the content

70. See, e.g., *U.S. Telecom Ass'n*, 825 F.3d at 739–40; *Madison River Comms., LLC*, 20 FCC Rcd. 4295 (Fed. Comm'n Comm. Mar. 3, 2005) (Order) (finding that a service provider blocked ports on its network that were used by competing services, resulting in a consent decree and fine).

71. See, e.g., Jennifer Lynch, *In U.S. v Wilson, the Ninth Circuit Reaffirms Fourth Amendment Protection for Electronic Communications*, ELEC. FRONTIER FOUND. (Sept. 28, 2021), <https://www EFF.org/deeplinks/2021/09/us-v-wilson-ninth-circuit-reaffirms-fourth-amendment-protection-electronic> [<https://perma.cc/P2RG-Q3TR>] ("Although federal law does not require private parties to proactively search for CSAM, most, if not all major ISPs do, including Google Once one of Google's employees identifies an image as CSAM, the company uses a proprietary technology to assign a unique hash value to the image. Google retains the hash value (but not the image itself), and its system automatically scans all content passing through Google's servers and flags any images with hash values that match it. Once an image is flagged, Google's system automatically classifies and labels the image based on what it has previously determined the image depicts and sends the image with its label to NCMEC, along with the user's email address and IP addresses. NCMEC then sends the images and identifying information to local law enforcement, based on the IP address."); Open letter from Academics and Individuals, NGOs and NPOS, and Companies to Andrus Ansip, Mary Gariel, Vera Jouravá, Andrea Jelinek, Jeremy Godfrey, & Giovanni Buttarelli (May 15, 2019) https://edri.org/wp-content/uploads/2019/05/20190515_EDRiOpenLetterDeepPacketInspection.pdf [<https://perma.cc/X3WJ-589V>] ("DPI allows IAS providers to identify and distinguish traffic in their networks in order to identify traffic of specific applications or services for the purpose such as billing them differently throttling or prioritising them over other traffic."); *How ISPs Block Websites*, FASTESTVPN (May 7, 2020), <https://fastestvpn.com/blog/how-isps-block-websites/> [<https://perma.cc/R9WP-WKTD>] (discussing IP blocking to protect a website from hacking attempts, DNS blocking "by filtering or blocking access to a particular website by restricting that site's IP address instead of the users. DNS blocking is rather straightforward and easy to surpass, in most cases it could just be your firewall protecting you from malicious content"; and "Deep Packet Inspection (DPI) is a method which is known for inspecting the data or information transmitted between networks. This is obviously a clear violation of privacy and internet security since all your content is being watched over without your consent. Normally it is used within antivirus programs to detect malicious content but it is also employed from the bigger ISPs to ensure thorough online censorship.").

72. See *U.S. Telecom Ass'n*, 825 F.3d at 743; Benjamin, *supra* note 48, at 1702–03.

in such a way as to convey its own message to its users. It thus falls short of the curation function discussed in the following section.

Because the conduit-intermediary does not attempt to convey its own message, attempts to regulate the conduit-intermediary do not raise any conflict between the intermediary's speech interest and those of the speakers and listeners using the intermediary's service. Thus, First Amendment analysis of any regulation affecting the conduit-intermediary function should involve straightforward application of existing doctrine.

There may, of course, be non-speech interests raised by the conduit-intermediary function. For example, a proxy-censor regulation imposing liability on a conduit-intermediary for transmitting certain content may lead the conduit-intermediary to over-censor the speech it facilitates in order to minimize the risk of liability,⁷³ which obviously conflicts with the interests of speakers and listeners engaged in the regulated speech.⁷⁴ This concern about chilling effects, however, is present when any law attempts to deter or disincentivize speech, so the conduit-intermediary's interest should not unduly complicate the First Amendment analysis.

Similarly, must-carry regulation of the conduit-intermediary function does not require the consideration of conflicting speech interests because the conduit-intermediary is not advancing a speech interest of its own. Must-carry regulation could, of course, create a conflict between the conduit-intermediary's non-speech interests and the speech interests of its users. The intermediary may have an interest in preserving capacity on its network, and the must-carry regulation may threaten that network capacity.⁷⁵ Or the intermediary may have an interest in increasing its profitability.⁷⁶ These

73. See *Upstream Providers*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/free-speech-weak-link/upstream> [<https://perma.cc/5HX6-SHB2>] ("The further away from the user a service provider is located on the chain, the less incentive that provider has to push back against censorship of the user's speech.").

74. Of course, the interests of those speakers and listeners may be quite low where the regulated speech is of low value or no value. For example, the proxy-censor regulation might prohibit the intermediary from sharing child sexual abuse material or copyright infringing material.

75. See Jay Pil Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECON. 446, 447 (2010) ("ISPs such as Verizon, Comcast, and AT&T oppose network neutrality regulations and claim that such regulations would discourage investment in broadband networks. The logic is that they would have no incentive to invest in network capacity unless content providers supporting bandwidth-intensive multimedia applications pay a premium for heavy Internet traffic.").

76. See Emmanuel Lorenzon, *Zero-rating, Content Quality, and Network Capacity*, 16 INFO. ECON. & POL'Y 1, 3 (2022) ("In a deregulated market, ISPs have incentives to depart from net neutrality because they can generate additional revenues from CPs by offering benefits in return (e.g., prioritization of data or exemptions from users' data allowance), attract new customers from the network effects, and better discriminate among consumers on price and quality.").

interests could conflict with the interests of the speakers that the must-carry regulation prevents the intermediary from excluding, as well as the interests of listeners who wish to receive that speech. However, these non-speech interests would not interfere with the application of existing First Amendment doctrine to a regulation that does not undermine the conduit-intermediary's speech interests.

B. Curator

Intermediaries act as curators when they share or moderate the speech that they carry in a way that involves some expressive component of their own. They may limit what types of speakers may transmit content, what types of content speakers may transmit, or which listeners will be shown which content. The curator function finds support in dictionary definitions emphasizing the intermediary's selection of content for others to view.⁷⁷ As described below, scholars have also emphasized the expressive component of curation.

For example, in her seminal study of content moderation, Kate Klonick quotes a YouTube employee describing the development of YouTube's content-moderation policy: "[Y]ou get to decide what the tone and tenor of your platform look[] like, and that's a First Amendment right in and of itself."⁷⁸ Intermediaries, of course, have multiple interests influencing how they moderate content. Klonick reports that the developers of Facebook's content moderation policies balanced "free speech and democratic values . . . against competing principles of user safety, harm to users, public relations concerns for Facebook, and the revenue implications of certain content for advertisers."⁷⁹

77. "Curated" is defined to mean "carefully chosen and thoughtfully organized or presented." *Curated*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/curated> [<https://perma.cc/2G7Q-PMBT>]. To "curate" is defined to mean "to select things such as documents, music, products, or internet content to be included as part of a list or collection, or on a website." *Curate*, CAMBRIDGE DICTIONARY.COM, <https://dictionary.cambridge.org/us/dictionary/english/curate> [<https://perma.cc/CT6B-MHLU>].

78. Klonick, *supra* note 21, at 1626. Klonick notes that social media platforms "create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users' speech and community norms." *Id.* at 1625. *See also* Volokh, *supra* note 48, at 409–10 (arguing that the case for treating social media platforms as common carriers is strongest as to their "hosting" function, as compared to their "recommendation" and "conversation management" functions); Bhagwat, *supra* note 4, at 111 ("[S]ocial media is not a transparent conduit for speech such as a telephone system or ISPs. To the contrary, platforms famously moderate content extensively, making constant, value-laden choices about what third-party content to permit on their platforms.").

79. Klonick, *supra* note 21, at 1626; *see also id.* at 1627 ("[T]he primary reason companies take down obscene and violent material is the threat of allowing such material poses to potential profits based in advertising revenue.").

Daphne Keller explains that even social media platforms' amplification algorithms have an expressive component.⁸⁰ "Platforms that use algorithms to rank user content effectively set editorial policy and 'speak' through ranking decisions. The message conveyed can be pretty boring: Platforms say things like 'I predict that you'll like this' or 'I think this is what you're looking for.'" ⁸¹ But platforms' algorithms can also convey "more value-laden messages expressed through up- or down-ranking" of user content.⁸² Keller compares social media platforms' expressive element to that of an anthologist who selects a series of essays. The anthology is deemed a "distinct creative work under U.S. copyright law . . . [and] receive[s] its own protection based on the anthologist's selection and arrangement of third-party speech."⁸³

Stuart Minor Benjamin also emphasizes the expressive component that distinguishes the conduit from the curator.⁸⁴ He explains that a "cable operator that secretly blocked content for substantive reasons—say, indecency, or positive references to its competitors—would be engaged in substantive editing, but it would not have sent a message to its users and thus would not have communicated that message."⁸⁵ However, Benjamin contrasted such a conduit with "an [i]nternet access provider that explicitly provided a substantively edited [i]nternet experience (e.g., a service that blocked access to indecent material and presented itself as a 'family friendly' offering)," and explained that this "family friendly" internet service provider would be a speaker "[w]henver an [i]nternet access provider is willing not only to substantively edit but also to make that editing clear—'We block the content you don't want' or 'We edit the [i]nternet for you'—then it is engaged in speech for First Amendment purposes."⁸⁶

The Supreme Court itself hinted at the curator category when recognizing the expressive component inherent in even "the simple selection of a paid noncommercial advertisement for inclusion in a daily paper."⁸⁷ The Court also observed that "[c]able operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."⁸⁸

80. Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 247 (2021).

81. *Id.*

82. *Id.* at 260.

83. *Id.* at 248.

84. Benjamin, *supra* note 48, at 1701.

85. *Id.*

86. *Id.* at 1702–03.

87. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos.*, 515 U.S. 557, 570 (1995) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 2454, 265–66 (1964)).

88. *Hurley*, 515 U.S. at 570 (citing *Turner Broad. Systems v. FCC*, 512 U.S. 622, 636 (1994)).

We see many examples of the traditional conduit function in traditional media. For example, bookstores choose which authors and titles to sell based on what they believe their customers will want, and even position books on the shelves and in the store in order to maximize customer response.⁸⁹ Radio and television broadcasters and cable television system operators decide what channels to carry or what programs to air.⁹⁰ Newspapers act as conduits when they decide what letters to the editor or advertisements to publish, as long as they do not edit the contents of the letters or advertisements.⁹¹

The curators who stand out more in contemporary debates, however, are social media platforms and search engines. The early internet saw curators like CompuServe, Prodigy, and AOL, which provided not only internet service but a suite of content including chatrooms, message boards, email service, and original content.⁹² The 1990s also saw the rise of search engines, with Google eventually emerging as the dominant player in search.⁹³ Search engines do more than merely connect users with internet content for which they are searching. Instead, as Eugene Volokh and Donald Falk observed, “[S]earch engine results . . . are collections of facts that are organized and sorted using the judgment embodied in the engines’ algorithms, and those judgments and algorithms represent the search engine companies’ opinions about what should be presented to users.”⁹⁴ When they select and arrange materials from the web, and then “add the all-important ordering that causes some materials to be displayed first and others last, [search engines] are engaging in fully protected First Amendment expression.”⁹⁵

89. See *Smith v. California*, 361 U.S. 147, 153–55 (1959).

90. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726, 726–27 (1978); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994).

91. See Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1005 (2008) (“*Sullivan* was a case about the *Times* as intermediary, displaying another entity’s supposedly defamatory ad after only minimal screening. What the actual malice standard protected was not the speech of the *Times* as such, but its business model—accepting the speech of others with only limited fact-checking.”).

92. TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 198–207 (2017).

93. WU, *supra* note 92, at 258; Richard Horvath, *The History of Search Engines*, THEE DIGITAL (March 15, 2010), <https://www.theedigital.com/blog/history-of-search-engines> [<https://perma.cc/N9VR-NAGS>].

94. Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 890 (2014).

95. *Id.* at 891.

Social media platforms engage in a host of curator functions.⁹⁶ Most platforms remove posts that violate their content moderation policies or remove users from the platform if they violate the policy repeatedly.⁹⁷ They also amplify content that their algorithms predict will be most likely to engage other users.⁹⁸ Some platforms also influence what content users see by imposing limits on how many times a message may be forwarded.⁹⁹ Platforms also serve advertisements to their users based on the content of the users' profiles.¹⁰⁰

Given the expressive component inherent in the curator-intermediary function, regulating that function raises the possibility of conflicting speech interests. This conflict is unlikely to arise, however, in the case of proxy-censor regulations. A proxy-censor regulation would likely require the intermediary to change its curation practices. If the regulation applied only to illegal or low-

96. They may also act as conduits (by, for example, letting one user send a message directly to another) or commentators (by, for example, posting warnings about misinformation). *See supra* Section II.A & *infra* Section II.C.

97. *See, e.g.*, Klonick, *supra* note 21, at 1636 (“Ex ante content moderation is the process that happens in this moment between ‘upload’ and publication. The vast majority of this moderation is an automatic process run largely through algorithmic screening without the active use of human decisionmaking.”). One example is using “a picture-recognition algorithm called PhotoDNA” to identify child pornography. Child pornography is illegal under federal law, so sites are obligated to remove it. *Id.* (citing 18 U.S.C. §§ 2251–2252A (2012)). In addition, “[P]otential copyright violations can be moderated proactively through software like Content ID” which “allows creators to give their content a ‘digital fingerprint’ so it can be compared against other uploaded content. Copyright holders can also flag already-published copyright violations through notice and takedown.” *Id.* at 1637.

98. *See Keller, supra* note 80, at 263 (“Algorithmic ranking systems typically draw on aggregate patterns within data sets reflecting human behavior, in order to predict what content users will want to see in new situations.”). Keller defines “amplification” to include platform features “like recommended videos on YouTube or the ranked newsfeed on Facebook, that increase people’s exposure to certain content beyond that created by the platform’s basic hosting or transmission features. I will use the term ‘demote’ to cover any form of deamplification, including decreasing content’s algorithmic ranking or excluding it from features like recommendations.” *Id.* at 231–32. “This definition . . . includes both ‘pull’ models like the search results a user requests from Google and ‘push’ models like YouTube video recommendations.” *Id.* at 232. Examples of how platforms use amplification include “both actions platforms take in response to specific content (like demoting news items identified as false by fact checkers) and global algorithmic changes (like Google’s 2017 shift to reduce ranking of content including ‘hoaxes and unsupported conspiracy theories’).” *Id.*

99. *See, e.g.*, Jon Porter, *WhatsApp Says Its Forwarding Limits Have Cut the Spread of Viral Messages by 70 Percent*, THE VERGE (Apr. 27, 2020), <https://www.theverge.com/2020/4/27/21238082/whatsapp-forward-message-limits-viral-misinformation-decline> [<https://perma.cc/QWE3-VWRK>] (“[A]ny message that’s already been forwarded by five or more people can now only be forwarded to a single person or group.”).

100. *See, e.g.*, Meta for Business, *Ad Targeting: Help Your Ads Find the People Who Will Love Your Business*, META: BUS., <https://www.facebook.com/business/ads/ad-targeting> [<https://perma.cc/GYG9-UR7L>] (describing “Core Audience” services allowing advertisers to target users based on Meta’s information about the users “interests and hobbies” and “consumer behaviors such as prior purchases and device usage”).

value speech, the intermediary might have little if any speech interest in the censored speech. Any broader regulation, however, would likely conflict with the intermediary's speech interest in its own curation practices—the very practices that the government regulation was trying to change. In that case, the intermediary's speech interest would align with the interests of speakers whose speech would be affected by the regulation and with the interests of listeners who wish to receive that speech. In addition, as with a conduit, a curator facing a proxy-censor regulation often has a non-speech interest in overcompliance to avoid liability, and that non-speech interest would conflict with the speech interests of those who use the conduit-intermediary's service.¹⁰¹

On the other hand, a curator-intermediary confronting a must-carry regulation will likely have its own speech interest in excluding the users or content that the law requires it to carry. In that case, the intermediary's speech interest conflicts with the speech interests of the speakers whom the intermediary would otherwise exclude or demote and with the users who wish to hear from those speakers. Thus, applying existing First Amendment doctrine will require courts to account for the interests of speech intermediaries which may not have been accounted for when that doctrine evolved.

C. Commentator

An entity exercising the commentator-intermediary function attaches its own message to the content it transmits from one user to another. The intermediary may also engage in some form of curation, but the commentator-intermediary function is distinct from curation in that the commentator-intermediary publishes its own speech. One might argue that an entity publishing its own speech is not an intermediary at all. However, what defines the commentator-intermediary function is the fact that the intermediary both carries the speech of others and appends its own message commenting on that speech. Given public dissatisfaction about the state of digital communications today, the commentator-intermediary function is increasingly likely to face regulation.¹⁰²

101. See Keller, *supra* note 80, at 240 (“Empirical research has documented considerable over-enforcement by platforms taking down legal speech under [laws granting platforms immunity unless they know about prohibited content] in order to avoid expense or legal risk for themselves.”). “The problem is compounded by ‘heckler’s veto’ attempts by notifiers who submit false legal allegations to platforms.” *Id.* at 240.

102. See *supra* Section I.

We most often see social media platforms engage in the commentator-intermediary function when they attach their own labels to users' posts.¹⁰³ Facebook, for example, "began adding 'Disputed' tags to stories in its News Feed that have been debunked by fact-checkers in December 2016. It used this approach for approximately one year before switching to providing fact-checks in a 'Related Articles' format underneath suspect stories."¹⁰⁴ Facebook itself explains that it attaches a "sharing warning" when "someone tries to share a post that's been rated by a fact-checker"; issues a "sharing notification" if "someone has shared a story that is later determined by fact-checkers to be false"; and applies a "misinformation label" to "content that has been debunked by fact-checkers."¹⁰⁵ The approach is similar at Instagram which, like Facebook, is owned by parent company Meta.¹⁰⁶ Twitter also labels tweets that "contain[] misleading or disputed information that could lead to harm" by "add[ing] a label to the content to provide context. For Tweets containing media determined to have been significantly and deceptively altered or fabricated, [Twitter] may add a 'Manipulated media' label."¹⁰⁷

103. See Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-opt the First Amendment. Courts Shouldn't Let Them.*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/opinion/social-media-first-amendment.html> [<https://perma.cc/U584-8PR3>] ("Like other media organizations, social media companies sometimes make decisions about which content to publish, and they sometimes add their own voices to public discourse—as they do when they attach labels to users' posts.").

104. Katherine Clayton, Spencer Blair, Jonathan A. Busam, Samuel Forstner, John Glance, Guy Green, Anna Kawata, Awhile Kovvuri, Jonathan Martin, Evan Morgan, Morgan Sandhu, Rachel Sang, Ranche Scholz-Bright, Austin T. Welch, Andrew G. Wolff, Amanda Zhou & Brendan Nyhan, *Real Solutions for Fake News? Measuring the Effectiveness of General Warnings and Fact-Check Tags in Reducing Belief in False Stories on Social Media*, 42 POL. BEHAV. 1073, 1075 (2020), <https://doi.org/10.1007/s11109-019-09533-0> [<https://perma.cc/6E3E-Z5KA>] ("Our results indicate that exposure to a general warning about false news modestly reduces the perceived accuracy of false headlines. We also find that adding a 'Rated false' or 'Disputed' tag underneath headlines reduces their perceived accuracy somewhat more.").

105. *How Facebook's Third Party Fact Checking Program Works*, META FOR MEDIA: BLOG (June 1, 2021), <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works> [<https://perma.cc/YZL6-SAAJ>] (explaining that it also engages in curator function by "show[ing] the piece of content lower in [its newsfeed], significantly reducing its distribution" and reducing the distribution of "[p]ages, groups, accounts, or websites [that] repeatedly share content that's been debunked by fact-checking partners").

106. *How is Instagram Addressing False Information?*, INSTAGRAM: HELP CENTER, https://help.instagram.com/2109682462659451/?helpref=related_articles [<https://perma.cc/S4KB-AZFM>] (discussing "Making false information harder to find," "Using technology to find the same false information," "Labeling posts with false information warnings," and "Removing content and accounts that go against community guidelines").

107. *Notices on Twitter and What They Mean*, TWITTER: HELP CENTER, <https://help.twitter.com/en/rules-and-policies/notices-on-twitter> [<https://perma.cc/YCY3-MKC4>]

An entity engaged in the commentator-intermediary function has its own speech interest in what it decides to say and not to say. Proxy-censor regulations could target the commentary function by requiring warnings about false, misleading, or offensive content, while must-carry regulation could prohibit those types of warnings.¹⁰⁸ Any regulation that affects the intermediary's decision to comment or not, or that defines what the intermediary must or cannot say, would plainly affect the intermediary's speech interest. The intermediary's speech interest would be unlikely to conflict with the interest of its users because user speech would still be transmitted, regardless of whether or not the intermediary adds its own commentary. Thus, courts are unlikely to struggle with conflicting speech interests when analyzing First Amendment challenges to regulation of the commentator-intermediary function.

D. Collaborator

Finally, we come to the collaborator function. An intermediary engages in the collaborator function when it plays a role in generating or modifying the speech that it transmits, in collaboration with another author. The collaborator differs from the traditional speaker role only in the sense that there are multiple speakers working together to produce the same content, one of which is the speech intermediary. The Supreme Court in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* recognized that newspapers perform the collaborator-intermediary function by observing that “the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages.”¹⁰⁹ Similarly, the Court in *Simon & Schuster*,

(giving examples of warning labels, “Get the facts about COVID-19” and “Manipulated media”); *see also*, *About Birdwatch on Twitter*, TWITTER: HELP CENTER, <https://help.twitter.com/en/using-twitter/birdwatch> [<https://perma.cc/3RPN-X4AQ>] (“We’re currently testing the option to allow people to write notes that provide additional context on Tweets they believe contain misleading information.”).

108. *See, e.g.*, Social Media NUDGE Act, S. 3608, 117th Cong. § 3 (2022) (proposing regulations requiring social media platforms to implement “content-agnostic interventions”); FLA. STAT. § 501.2041(2)(b), (2)(j) (2021) (prohibiting content-based censorship of journalists and defining censorship to include “post[ing] an addendum to any content or material posted by a user”).

109. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos.*, 515 U.S. 557, 570 (1995) (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)); *accord* David Shipley, *What We Talk About When We Talk About Editing*, N.Y. TIMES (July 31, 2005), <https://www.nytimes.com/2005/07/31/opinion/what-we-talk-about-when-we-talk-about-editing.html> [<https://perma.cc/G93T-M6NX>] (“But deciding what runs in Op-Ed is only part of what we do. We also edit the articles that appear in this space.”). “Just like Times news articles and editorials, Op-Ed essays are edited. Before something appears in our pages, you can bet that questions have been asked, arguments have been clarified, cuts have been suggested—as have additions—and factual, typographical and grammatical errors have been caught. (We hope.)” *Id.* (discussing editing grammar, typographical errors, style, readability, clarity, transitions, usage, and length; fact checking and

Inc. v. Members of New York State Crimes Victim Board recognized that a book publisher performs the collaborator-intermediary function when the publisher and author work together to produce the final published product.¹¹⁰

Like the commentator-intermediary, the collaborator-intermediary allows for straightforward application of existing First Amendment doctrine because both the intermediary and its collaborating partner share the same speech interest in the speech they produce. To the extent that a proxy-censor or must-carry regulation affects the collaborator-intermediary function, the intermediary's interest in producing that speech aligns with the interest of the collaborating speaker and the listeners who wish to receive that speech. Accordingly, courts are unlikely to struggle with conflicting speech interests when analyzing First Amendment challenges to regulation of the collaborator-intermediary.

III. MAPPING FIRST AMENDMENT CASES ONTO THE TAXONOMY OF SPEECH INTERMEDIARY FUNCTIONS

This Part will map past First Amendment cases onto the taxonomy of speech intermediary functions. In the process, this Part will illustrate how the intermediary's function and the interests at play informed the First Amendment analysis. In addition, this Part will identify situations where analyzing proxy-censor regulations may differ from analyzing must-carry regulations depending on the speech interests at issue. Proxy-censor regulation often places the speech

checking assertions). *Accord Media: Op-Eds*, GEORGETOWN UNIV. LIBRARY, <https://library.georgetown.edu/scholarly-communication/faculty-media-op-eds> [https://perma.cc/RW4S-GLBB] (“Your editor will not ask you to change your opinion on your topic but may suggest changes for clarity, flow, style, grammar, and length. You will be given the opportunity to approve all changes before your op-ed is published. If you do not agree with the changes, you can work with your editor to find a mutually agreeable solution, or, if that is not possible, it is always an option to take back your article and submit it to a different publication.”); *see also* Marc Tracy, *James Bennet Resigns as New York Times Opinion Editor*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/07/business/media/james-bennet-resigns-nytimes-op-ed.html> [https://perma.cc/SPG2-UC6F] (taking responsibility for publication of “a much-criticized Op-Ed by a United States senator calling for a military response to civic unrest in American cities,” and acknowledging “a significant breakdown in our editing processes”).

110. *See* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“Whether the First Amendment ‘speaker’ is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forego remuneration for at least five years, the statute plainly imposes a financial disincentive only upon speech of a particular content.”); Zoe Sadokierski, *How Publishing Works: a Book designer’s Perspective*, CONVERSATION (Sept. 28, 2014), <https://theconversation.com/how-publishing-works-a-book-designers-perspective-32211> [https://perma.cc/K2JC-WQCD]; Jane Winters, *What Does an Author Want From a University Publisher?*, 31 LEARNED PUBL’G 318, 322 (2018).

interests of the intermediary (if any) in alignment with those of the speaker and listeners, which makes application of traditional First Amendment doctrine straightforward. In contrast, must-carry regulations are more likely to place the interests of the intermediary in conflict with the original speakers and their listeners, and these conflicting interests can complicate application of the doctrine.

A. Conduit

i. Proxy-Censor Regulations

Early examples of proxy-censor regulations of the conduit-intermediary function involved the postal service. In the late-nineteenth and early-twentieth centuries, the Court confronted challenges to Congressional limitations on what could be sent through the mails. These changes, however, arose before the development of the modern First Amendment doctrine,¹¹¹ so the Court summarily dismissed the First Amendment challenges to those regulations.¹¹²

As the Court's First Amendment jurisprudence developed throughout the twentieth century, the Court applied meaningful scrutiny to regulation of the mail. For example, in *Lamont v. Postmaster General*,¹¹³ the Court struck down on First Amendment grounds a law prohibiting delivery of "communist political propaganda" by mail unless the intended recipient submitted a card asking to have such content delivered.¹¹⁴ The Court emphasized that requiring

111. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 308 (1996) (describing the emergence of contemporary First Amendment jurisprudence from World War I through the 1980s).

112. In *Ex parte Jackson*, for example, the Court upheld against a First Amendment challenge a law prohibiting the postal service from carrying any "letter or circular" concerning lotteries, and authorizing fines for anyone knowingly mailing such a letter or circular. 96 U.S. 727, 728 (1878). The Court reasoned that the power of Congress to regulate what the postal service should carry had never been questioned and that Congress had the power to exclude from the mails any "matter deemed injurious to the public morals." *Id.* at 732, 736; accord *In re Rapier*, 143 U.S. 110, 134–35 (1892) (rejecting First Amendment challenge to federal statutes prohibiting lottery cards or advertisements from the mail, and reasoning that "[t]he freedom of communication is not abridged . . . unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls"). Similarly, in *United States ex rel. Milwaukee Soc. Democratic Publ'g v. Burleson*, the Court rejected a First Amendment challenge to a law excluding from the mails any materials that violated the Espionage Act of 1919. 255 U.S. 407, 416 (1921). Brandeis previewed the subsequent evolution of First Amendment doctrine in his dissent in *Burleson*, where he commented on the "danger[] to [the] liberty of the press . . . [of] the holding that the second-class mail service is merely a privilege, which Congress may deny to those whose views it deems to be against public policy." *Id.* at 431–32 (Brandeis, J., dissenting).

113. 381 U.S. 301 (1965).

114. *Id.* at 303, 305.

recipients to actively request communist political propaganda would have a chilling effect, particularly for those in sensitive positions.¹¹⁵ Although the Court did not discuss the postal service's intermediary function, that would not have changed the analysis because the postal service acted as a mere conduit without any expressive interest of its own in the parcels it delivered, and because the postal service is an independent agency of the federal government rather than a private intermediary with its own private speech interest.

ii. Must-Carry Regulations

Must-carry regulations of the conduit-intermediary function enjoy a long pedigree.¹¹⁶ Common carrier regulation of conduit-intermediaries, like telegraph and telephone services, imposes an obligation to carry communications without discriminating among them.¹¹⁷ “The Supreme Court has defined a common carrier in the communications field as one that ‘makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing’”¹¹⁸ A common carrier “does not make individualized decisions in particular cases, whether and on what terms to deal.”¹¹⁹

An early example of must-carry regulation of the conduit-intermediary function appeared in the common carrier laws enacted to regulate telegraphs. As Genevieve Lakier explained, from the mid-1800s through the turn of the century, dozens of states as well as the federal government enacted laws

115. *Id.* at 307. For additional cases striking down limits on postal carriage on First Amendment grounds, see, for example, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 75 (1983) (striking down, under commercial speech test, a federal regulation prohibiting the mailing of unsolicited advertisements for contraceptives) and *Blount v. Rizzi*, 400 U.S. 410, 419–22 (1971) (striking down on First Amendment grounds two statutory provisions authorizing the postmaster general to deny postal services to purveyors of allegedly obscene materials).

116. Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. INTER ALIA, Dec. 2010, at 2; Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 FORDHAM URB. L.J. 801, 819 n.96 (1985).

117. Nunziato, *supra* note 116, at 2 (“Conduits for communications—which we call ‘common carriers,’ such as telephone companies, the postal service, and telegraph companies of old—have long been under a legal obligation not to discriminate against the communications they are charged with carrying. The telephone company cannot refuse to connect your call because your conversation is racy, nor can the postal service refuse to deliver your mail because it contains unpopular political propaganda.”).

118. Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 FORDHAM URB. L.J. 801, 819 n.96 (1985) (first quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979); and then citing *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (Fed. Comm'n Comm. Oct. 5, 1966) (Report and Order)).

119. Becker, *supra* note 118, at 819 n.96.

requiring that telegraphs “‘operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever.’”¹²⁰ In 1934, Congress passed “one of the more important current common carrier laws, Section 202 of the Communications Act of 1934, which prohibits telephone and telegraph companies . . . from discriminating against consumers because of the content of their speech, their identity, or any other irrelevant characteristic”¹²¹ These laws prohibited the intermediaries from “denying service to customers because they dislike what the customers say or who they are” and from “engaging in discriminatory pricing.”¹²²

These late-eighteenth and early-nineteenth-century common carrier laws, however, drew no meaningful First Amendment challenge because the modern First Amendment had yet to evolve.¹²³ Only relatively recently has the Court considered a First Amendment challenge to a must-carry regulation affecting a conduit-intermediary. As discussed below, the Court’s approach in *PruneYard Shopping Center v. Robins*¹²⁴ and *Rumsfeld v. Forum for Academic and Institutional Rights*¹²⁵ illustrates how the absence of an expressive message by the intermediary distinguishes the conduit-intermediary function from the curator-intermediary function.¹²⁶ Both cases involved an intermediary who facilitated the speech of others but did so in a way that did not involve any expressive component on the part of the intermediary.

In *PruneYard*, a California shopping center brought a First Amendment challenge to the California state constitutional requirement that the shopping center allow members of the public to protest on its property.¹²⁷ The shopping center was “open to the public for the purpose of encouraging the patronizing of its commercial establishments . . . [but] ha[d] a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that [was] not directly related to its commercial purposes.”¹²⁸ A group of high school students “set up a card table in a corner of . . . [the] central courtyard. They distributed pamphlets and asked passersby

120. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2320 (2021) (citation omitted).

121. *Id.* at 2316–17.

122. *Id.* at 2317.

123. See White, *supra* note 111, at 308.

124. 447 U.S. 74 (1980).

125. 547 U.S. 47 (2006).

126. See Rozenshtein, *supra* note 46, at 365 (describing *PruneYard* and *FAIR* as examples of “passive and pervasively available conduits for speech”).

127. 447 U.S. at 78–79.

128. *Id.* at 77.

to sign petitions”¹²⁹ A security guard informed the students that they had to leave because they violated the shopping center’s regulations.¹³⁰ The students left and later sued to enjoin the shopping center from denying them access to the shopping center for the purpose of circulating their petitions.¹³¹ The California Supreme Court held that, under the California constitution, the students had a right to “speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”¹³² The shopping center petitioned for certiorari on several grounds, including their claim that the California Supreme Court’s order violated the shopping center’s First Amendment rights.¹³³

The Court rejected the shopping center’s reliance on two cases, only one of which involved a speech intermediary. The Court first rejected the shopping center’s reliance on the compelled speech case of *Wooley v. Maynard*, which struck down New Hampshire’s requirement that its drivers display the state’s “Live Free or Die” motto on license plates required by law to be attached to private vehicle.¹³⁴ The *PruneYard* Court distinguished *Wooley* for three reasons: (1) the shopping center opened itself to the public as a place of business rather than limiting itself to the owner’s personal use; (2) the California Supreme Court ruling did not require that the shopping center display any specific message on its property; and (3) “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner,” so the shopping center can simply disavow any connection with any messages displayed on its property.¹³⁵

The *PruneYard* Court also rejected the shopping center’s reliance on *Miami Herald v. Tornillo*, which struck down a Florida law requiring a newspaper to publish a political candidate’s reply to the newspaper’s prior critical coverage.¹³⁶ The Court distinguished *Tornillo* because of *Tornillo*’s concern that the Florida statute could dampen public debate by deterring newspaper from publishing controversial political content and interfering with the

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 78 (quoting *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979)).

133. *Id.* at 85.

134. 430 U.S. 705, 714–17 (1977). *Maynard* is not a speech intermediary case because the individual was not using his license plate, or even his personal vehicle, to facilitate someone else’s message. *Id.*

135. 447 U.S. at 87.

136. *Id.* at 88 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

newspaper's editorial function, whereas there was no such self-censorship concern present in *PruneYard*.¹³⁷

Thus, what was determinative for the *PruneYard* Court was the shopping center's role as a passive conduit with no independent speech interest. The Court emphasized the facts that (1) the shopping center had opened itself up to the speech of others, (2) the shopping center could disclaim any association with the speech of its patrons, and (3) any influence that the shopping center exerted over speech on its premises was not done with any expressive purpose or effect.¹³⁸

The Court also dealt with the conduit-intermediary function in *Rumsfeld v. Forum for Academic and Institutional Rights*, where it rejected a First Amendment challenge that an association of law schools and law faculties brought against the Solomon Amendment's prohibition on federal funding for universities that barred military recruiters from their campus.¹³⁹ The association, Forum for Academic and Institutional Rights (FAIR), consisted of members which had adopted policies expressing their opposition to discrimination based on a number of factors, including sexual orientation.¹⁴⁰ FAIR members wished to restrict military recruiting on their campuses in response to the congressional policy banning homosexual individuals from military service.¹⁴¹ The Solomon Amendment prohibited the Department of Defense from providing certain federal funds to any university "that either prohibits, or in effect prevents" military recruiters "from gaining entry to campuses."¹⁴² The Department of Defense interpreted the policy to require "universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters."¹⁴³ FAIR argued that this "forced inclusion and equal treatment of military recruiters" violated their First Amendment freedom of speech and association.¹⁴⁴

The Court began its analysis by noting that, "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may

137. *Id.* at 88 (citing *Tornillo*, 418 U.S. at 256–58).

138. *Id.* at 87–88.

139. 547 U.S. 47 (2006).

140. *Id.* at 52.

141. *Id.* at 52 (citing Act of Nov. 30, 1993, ch. 37, 107 Stat. 1670, repealed by Don't Ask, Don't Tell Repeal of 2010, ch. 654, § 2(f)(1)(A), 124 Stat. 3516).

142. *Id.* at 52.

143. *Id.* at 53 (quoting *F. for Acad. and Inst. Rts., Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 283 (D.N.J. 2003)).

144. *Id.* at 53.

not say.”¹⁴⁵ The Court then considered and rejected three arguments upon which the Third Circuit had relied to find that the Solomon Amendment regulated speech.¹⁴⁶

First, although the law schools had to engage in some speech of their own in order to comply with the Amendment, such as sending emails or posting notices on behalf of military recruiters, such speech “is a far cry from the compelled speech in [*West Virginia Board of Education v. Barnette* and *Wooley v. Maynard*]” because the amendment “does not dictate the content of the speech at all . . . and is only ‘compelled’ if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.”¹⁴⁷ The Court reasoned that

[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.¹⁴⁸

Second, the Court distinguished prior cases “limit[ing] the government’s ability to force one speaker to host or accommodate another speaker’s message.”¹⁴⁹ The Court distinguished all of those cases because in those cases, the “compelled-speech violation . . . resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”¹⁵⁰ Here, however, there was no such message. “[A]ccommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions,” and “a law school’s decision to allow recruiters on campus is not inherently expressive.”¹⁵¹ In addition, the Court reasoned, “Nothing about recruiting suggests that law schools agree with any speech by recruiters”¹⁵² Thus, just as the mall owner in *PruneYard* could successfully

145. *Id.* at 60 (emphasis in original). The Court explained that, under the unconstitutional conditions doctrine, “the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.” *Id.* at 59.

146. *Id.* at 60–61.

147. *Id.* at 61–62.

148. *Id.* at 62.

149. 547 U.S. at 63 (citing *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 566 (1995); *Pac. Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 20–21 (1986); and *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

150. *Id.* at 63.

151. *Id.* at 64.

152. *Id.* at 65.

disclaim association with the activities of students circulating petitions, the law schools could successfully disclaim support for the military's policies.¹⁵³

Finally, the Court rejected the argument that the law school's conduct bore the expressive component necessary to trigger First Amendment protection.¹⁵⁴ Before the Department of Defense adopted the equal access interpretation of the Solomon Amendment, law schools treated military recruiters differently from other recruiters by locating their interviews in different locations.¹⁵⁵ However, the Court reasoned, such conduct on its own was not expressive; it only became expressive when the law school accompanied it with speech explaining the reason for treating military recruiters differently.¹⁵⁶ "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct in to 'speech' simply by talking about it."¹⁵⁷

In summary, the Court in both *PruneYard* and *FAIR* relied on the absence of an expressive component to justify treating the intermediary as a mere conduit with no independent First Amendment interest. In Sections III.B and III.D below, we will see the Court take a different approach to intermediaries exercising the curator and collaborator functions by recognizing their independent speech interest in its analysis, even if the analysis does not always dictate favorable results for the intermediary.¹⁵⁸

A recent First Amendment challenge to the FCC's "net neutrality" policy required the District of Columbia Circuit in *United States Telecom Association v. FCC*¹⁵⁹ to determine whether broadband cable access providers were mere conduits or something more.¹⁶⁰ The Federal Communications Commission's

153. *Id.*

154. *Id.* at 65–66.

155. *Id.* at 66.

156. *Id.* If law schools had conveyed their own opinions about the military's policies, they would be engaged in the commentary function, and government regulation of that function would require a very different First Amendment analysis. *See infra* Section III.C.

157. 547 U.S. at 66. The Court also considered and rejected the law school's claim that the Solomon Amendment violated their freedom of expressive association under the First Amendment. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 655–59 (2000), the Court upheld the Boy Scouts' claim that a state public accommodation law that required the Boy Scouts to accept a gay man as a scoutmaster "would significantly affect [the Boy Scouts'] expression." 547 U.S. at 68. The Court distinguished the public accommodations law in *Dale* because "the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Id.* at 69 (quoting *Dale*, 530 U.S. at 648). Recruiters, the Court reasoned, are not part of the law school, but instead are outsiders who come to campus for a limited purpose. *Id.* at 69.

158. *See infra* Sections III.B & III.D.

159. 825 F.3d 674 (2016).

160. *Id.* at 741.

order in *In re Protecting and Promoting the Open Internet*,¹⁶¹ known as the Open Internet Order,¹⁶² classified broadband service as a telecommunications service subject to the common carrier regulations under Title II of the Communications Act.¹⁶³ The Open Internet Order promulgated several “open internet rules,” including rules prohibiting broadband providers from engaging in blocking, throttling, and paid prioritization.¹⁶⁴ The open internet rules “generally bar[red] broadband providers from denying or downgrading end-user access to content and from favoring certain content by speeding access to it. In effect, they require[d] broadband providers to offer a standardized service that transmits data on a nondiscriminatory basis.”¹⁶⁵ An association of internet service providers, along with individual service providers and other related litigants, challenged the 2015 Open Internet Order on various administrative law, statutory, and vagueness grounds.¹⁶⁶ In addition, broadband provider Alamo Broadband and edge provider¹⁶⁷ Daniel Berninger challenged the open internet rules on First Amendment grounds.¹⁶⁸

161. 30 FCC Rcd. 5601 (2015).

162. *U.S. Telecom Ass’n*, 825 F.3d at 695. The Open Internet Order was the latest in a series of attempts by the FCC to “compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source.” *Id.* at 689. The D.C. Circuit struck down the FCC’s first attempt to impose net neutrality on the grounds that the FCC failed to rely on any statutory authority to impose net neutrality. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). The FCC then relied on Section 706 of the Telecommunications Act of 1996 to issue an order imposing various net neutrality requirements on broadband providers. *U.S. Telecom. Ass’n*, 825 F.3d at 689. The D.C. Circuit vacated the anti-blocking and anti-discrimination requirements “because the Commission had chosen to classify broadband service as an information service under the Communications Act of 1934, which expressly prohibits the Commission from applying common carrier regulations to such services.” *Id.* Under the Trump Administration, the FCC rescinded its net neutrality rules, but at least one state has attempted to enact its own version of net neutrality. *See ACA Connects v. Bonta*, 24 F.4th 1233, 1239, 1248 (9th Cir. 2022) (affirming district court’s denial of motion for preliminary injunction based on federal preemption).

163. *U.S. Telecom. Ass’n*, 825 F.3d at 689.

164. *Id.* at 696. “The anti-blocking and anti-throttling rules prohibit broadband providers from blocking ‘lawful content, applications, services, or non-harmful devices’ or throttling—degrading or impairing—access to the same. The anti-paid-prioritization rule bars broadband providers from ‘favor[ing] some traffic over other traffic . . . either (a) in exchange for consideration . . . from a third party, or (b) to benefit an affiliated entity.’ ” *Id.*

165. *Id.* at 740.

166. *Id.* at 689.

167. *Id.* at 696. “[T]he internet has four major participants: end users, broadband providers, backbone networks, and edge providers. Most end users connect to the internet through a broadband provider, which delivers high-speed internet access Broadband providers interconnect with backbone networks—‘long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data’ Edge providers, like Netflix, Google, and Amazon, ‘provide content, services, and applications over the Internet.’ ” *Id.* at 690.

168. *Id.* at 739.

The D.C. Circuit began its First Amendment analysis by noting that the FCC had properly classified broadband service as common carriage.¹⁶⁹ The court then reasoned that “[c]ommon carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question. Those obligations affect a common carrier’s neutral transmission of *others’* speech, not a carrier’s communication of its own message.”¹⁷⁰ The court reasoned that common carriers hold themselves out to serve the public indiscriminately, and that the open internet rules merely required that neutral access.¹⁷¹ “Equal access obligations of that kind have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue.”¹⁷² “The absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right.”¹⁷³ Indeed, the FCC found that broadband providers exercise little control over the internet and allow end users “‘to access all or substantially all content on the internet, without alteration, blocking, or editorial intervention.’”¹⁷⁴ The FCC further found that end users expect to obtain access to all content on the internet “‘without the editorial intervention of their broadband provider.’”¹⁷⁵ The FCC concluded that broadband providers act as “‘mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections.’”¹⁷⁶ Thus, the D.C. Circuit reasoned that broadband providers “are not required to make, nor have they traditionally made, editorial decisions about which speech to transmit In that regard, the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users.”¹⁷⁷

169. *Id.* at 740.

170. *Id.*

171. *Id.*

172. *Id.* (citing *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 739 (1996) (plurality opinion) (noting that speech interests in leased channels are “relatively weak because [the companies] act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies”).

173. *Id.* at 741.

174. *Id.* at 741 (quoting *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5869 ¶ 549).

175. *Id.*

176. *Id.*

177. *Id.* at 743.

The D.C. Circuit recognized that, to the extent that a broadband provider offered its own content, such as a news or weather site, the provider's provision of content would receive First Amendment protection.¹⁷⁸ The court explained that a broadband provider might "qualify as a First Amendment speaker" if it "were to *choose* to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience."¹⁷⁹ However, as the court recognized, the FCC's order "itself excludes such providers from the rules" by defining "broadband internet access service" to apply only to those "broadband providers that hold themselves out as neutral, indiscriminate conduits."¹⁸⁰ Thus the 2015 Open Internet Order would not apply to such providers.¹⁸¹ The court also noted that, not only do broadband providers offer their services neutrally, but a subscriber using her broadband service to access internet content "does not understand the accessed content to reflect her broadband provider's editorial judgment or viewpoint."¹⁸² The court concluded, "Because a broadband provider does not—and is not understood by users to—'speak' when providing neutral access to internet content as common carriage, the First Amendment poses no bar to the open internet rules."¹⁸³

Thus, as the Supreme Court and D.C. Circuit opinions above demonstrate, laws regulating the conduit-intermediary function do not implicate the intermediary's speech interest. Even if the intermediary interacts in limited ways with the traffic it carries, that interaction does not involve an attempt to convey any message to the intermediary's users. Once courts recognize that a law regulates the conduit-intermediary function, application of First Amendment doctrine should not be complicated by conflicting speech interests.

B. Curator

i. Proxy-Censor Regulations

An early example of a First Amendment challenge involving the curator-intermediary function is *Smith v. California*.¹⁸⁴ In *Smith*, the City of Los Angeles passed an ordinance making it unlawful for any bookseller to "have in his possession any obscene or indecent writing."¹⁸⁵ The ordinance did not

178. *Id.* at 741–42.

179. *Id.* at 743.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 743–44.

184. 361 U.S. 147 (1959).

185. *Id.* at 148.

require knowledge of the book's obscene or indecent nature; it instead imposed strict criminal liability.¹⁸⁶ The appellant, a bookstore proprietor, was convicted for having in his bookstore a "book found upon judicial investigation to be obscene."¹⁸⁷

The Court acknowledged the intermediary nature of the bookstore, noting that "a retail bookseller plays a most significant role in the process of the distribution of books."¹⁸⁸ The Court then relied on the significant deterrent effect that strict criminal liability would have on the freedom of speech.¹⁸⁹ Although obscene speech was not constitutionally protected, the strict liability imposed by the ordinance "would tend seriously to [constrain non-obscene speech] . . . by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."¹⁹⁰ Because of the strict liability standard, the bookseller "will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."¹⁹¹ "The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."¹⁹²

Thus, the bookseller's status as a curator-intermediary figured prominently in the Court's decision. The ordinance imposing strict liability for possessing obscene or indecent books was a proxy-censor regulation that attempted to leverage the bookseller's intermediary position in order to reduce the dissemination of speech that the government disfavored. As such, the speech interests of the intermediary aligned with the speech interests of its customers, both of which favored the free distribution of books. This alignment of interests is typical of proxy-censor regulation of intermediaries, and it makes applying the First Amendment relatively straightforward.¹⁹³ The proxy-censor regulation created a conflict between the bookseller's non-speech interest in avoiding liability and the speech interests of the bookseller and its customers, leading to the chilling effect that rendered the law unconstitutional. As we shall see below, this "chilling effect" is less likely to appear in the analysis of must-carry

186. *Id.* at 149.

187. *Id.* at 148–49.

188. *Id.* at 150.

189. *Id.* at 150–51.

190. *Id.* at 152.

191. *Id.* at 153.

192. *Id.* at 153–54.

193. *See supra* Section II.D.

regulations, since overcompliance with a must-carry regulation would lead to the intermediary sharing more speech, not less.¹⁹⁴

Another case involving proxy-censor regulation of the curator-intermediary function is *New York Times v. Sullivan*.¹⁹⁵ *Sullivan* illustrates how intermediaries can play multiple functions. A newspaper can be a primary speaker when its own reporters and editors write and publish news stories. However, a newspaper can also play the role of collaborator when it selects and then edits op-ed pieces along with outside authors.¹⁹⁶ In theory, a newspaper could serve as a mere conduit if it allowed anyone to submit a classified advertisement for publication. Finally, we come to the role that the *New York Times* played in this case: a curator for content that advertisers wanted to communicate to the *Times*' readers.

Sullivan, a city commissioner in Montgomery, Alabama, sued the *Times* and four Alabama clergymen for defamation based on the publication of a full-page fundraising advertisement titled "Heed Their Rising Voices."¹⁹⁷ The advertisement described the non-violent demonstrations for civil rights in the south as well as the "wave of terror" that they faced in response.¹⁹⁸ The ad was signed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."¹⁹⁹

Sullivan claimed that several of the ten paragraphs in the advertisement libeled him.²⁰⁰ There were a few admittedly incorrect statements in the advertisement. For example, students demonstrated while singing the National Anthem rather than "My Country 'Tis of Thee," as the advertisement stated.²⁰¹ Similarly, nine students were expelled not for leading the demonstration at the Capitol, as the advertisement stated, but for demanding service at a lunch

194. See Pasquale, *supra* note 40, at 501 (noting that proxy-censor regulations limit speech, whereas must-carry regulation adds to the sum total of speech). One exception, however, would be a situation where the must-carry obligation arose in response to the intermediary's decision to carry or publish speech, which could prompt the intermediary to censor its own speech to avoid triggering the must-carry obligation. See *infra* Section III.D (discussing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

195. 376 U.S. 254 (1964).

196. Shipley, *supra* note 109, *Media: Op-Eds*, *supra* note 109.

197. *Sullivan*, 376 U.S. at 256.

198. *Id.*

199. *Id.* at 257.

200. Sullivan claimed that, since he was a city commissioner, references in the ad to actions taken by the police (ringing a college campus, arresting Dr. King seven times) falsely implied that Sullivan himself took those actions. *Id.* at 257–58. Similarly, he claimed that general statements attributing conduct to an unspecified "they" falsely implied that Sullivan himself engaged in that conduct. *Id.* at 258.

201. *Id.* at 258–59.

counter in the county courthouse.²⁰² In addition, the police did not actually “ring” the college campus; the dining hall was never padlocked; and Dr. King was arrested only four times, rather than the seven claimed in the advertisement.²⁰³ Despite the attenuated nature of the libel claim, the jury awarded \$500,000 in damages against the clergymen and the *Times*, and the Supreme Court of Alabama affirmed.²⁰⁴

The Court described the process in which the *Times* advertising department engaged in accepting the advertisement. The ad cost approximately \$4,800 to run.²⁰⁵ The ad agency that placed the ad with the *Times* included a letter from the Chairman of the Committee, A. Philip Randolph, certifying that everyone whose names appeared in the ad had given their permission, although the four individual defendants testified that they had not authorized use of their name and had been unaware of that use until after the advertisement was published.²⁰⁶ In addition, the *Times*’ Advertising Acceptability Department knew Mr. Randolph to be a “responsible person” and followed its established practice by relying on his letter.²⁰⁷

The manager of the Advertising Acceptability Department testified that he had approved the advertisement because he knew nothing to cause him to believe anything in it was false, and because it bore the endorsement of “a number of people who are well known and whose reputation” he “had no reason to question.”²⁰⁸

No one at the *Times* attempted to confirm the advertisement’s accuracy.²⁰⁹

The Court reversed the decision of the Supreme Court of Alabama and created the actual malice rule—the requirement that a public official may not recover for defamatory falsehoods related to his official conduct without proof that the defendant published the allegedly defamatory statement with actual knowledge of its falsity or reckless disregard for whether it was true or false.²¹⁰ Before reaching that issue, however, the Court first rejected Sullivan’s claim that the First Amendment should not apply because the advertisement was merely commercial speech.²¹¹ The Court reasoned in part that the advertisement

202. *Id.* at 259.

203. *Id.*

204. *Id.* at 256.

205. *Id.* at 260.

206. *Id.*

207. *Id.*

208. *Id.* at 260–61.

209. *Id.* at 261.

210. *Id.* at 279, 292.

211. *Id.* at 265.

was not truly “commercial” within the meaning of the Court’s prior cases; the Court also explained that the fact that “the Times was paid for publishing the advertisement is as immaterial in this context as is the fact that newspapers and books are sold.”²¹² To hold otherwise, the Court reasoned, “would discourage newspapers from carrying ‘editorial advertisements’ of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities”²¹³ The Court thus recognized the important intermediary function that the *Times* served in facilitating the speech of these advertisers. And that intermediary function went beyond acting as a mere conduit, because the *Times* had an entire department committed to reviewing and determining whether to carry ads.²¹⁴ Even today, the *Times* still has an Advertising Acceptability Apartment that reserves the right to fact check claims by outside organizations and rejects ads that are false, misleading, or fraudulent; promote illegal substances or substances that can cause immediate bodily harm; incite violence; are “gratuitously offensive on the grounds of race, religion, gender, ethnicity, or sexual orientation”; contain inappropriate content; or contain editorial sponsored by state-run media organizations.²¹⁵

The Court confronted yet another proxy-censor regulation of the curator-intermediary function in *FCC v. Pacifica Foundation*.²¹⁶ The Pacifica Foundation owned a network of radio stations, one of which broadcast a twelve-minute monologue by comedian George Carlin titled “Filthy Words.”²¹⁷ The monologue related Carlin’s thoughts about words you could not say on the public airwaves and included Carlin repeating each filthy word “in a variety of colloquialisms.”²¹⁸ A man driving with his young son on a weekday afternoon heard the broadcast on the radio and wrote a letter complaining to the FCC.²¹⁹

212. *Id.* at 266.

213. *Id.*

214. *Id.* at 260.

215. *Advertising Resources*, N.Y. TIMES: ADVERT., [https://advertising.nytimes.com/resources/\[https://perma.cc/YRP6-ANN6\]](https://advertising.nytimes.com/resources/[https://perma.cc/YRP6-ANN6]) (click “Ad Acceptability Guidelines” dropdown button, then click “Our principles” link) (“The Times’s Advertising Acceptability Department reserves the right to review ads against established principles designed to ensure our standards are consistently met and applied. The Times retains the right to decline an advertisement offered to us if it violates our principles, our Advertising Acceptability guidelines, or if we determine that there is a separate reason for us to do so. We require two or more business days to review all advertisements. Given the volume of ads reviewed, we do not offer creative revisions for ads that do not meet our standards, nor are we able to provide a detailed explanation when ads are declined.”).

216. 438 U.S. 726 (1978).

217. *Id.* at 729.

218. *Id.*

219. *Id.* at 730.

The FCC issued a declaratory order that Pacifica “could have been the subject of administrative sanctions,” but it instead required the order to be associated with the station’s license file as the basis for possible sanctions in the event of subsequent complaints.²²⁰ The basis for the order was a federal statute prohibiting the use of “any obscene, indecent, or profane language by means of radio communications” and another statute requiring the FCC to “encourage the larger and more effective use of radio in the public interest.”²²¹ The FCC reasoned that Carlin’s language was “‘patently offensive,’ though not necessarily obscene,” and concluded that the inclusion of “words [that] depicted sexual and excretory activities in a patently offensive manner” in the early afternoon, when children were undoubtedly in the audience, was “indecent and prohibited by 18 U.S.C. § 1464.”²²²

After holding that the FCC had the statutory authority to determine that the filthy words broadcast was “indecent” within the meaning of Section 1464,²²³ the Court considered Pacifica’s constitutional challenges. The Court emphasized that the broadcast fell within the First Amendment’s coverage because it was not “obscene.”²²⁴ However, the Court noted that “the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.”²²⁵ When considering whether the restriction was permissible in context, the Court first noted that broadcast media receives the least First Amendment protection because “broadcast media have established a uniquely pervasive presence in the lives of all Americans” and because “indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home.”²²⁶ In addition, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”²²⁷ Second, the Court noted, “broadcasting is uniquely accessible to children, even those too young to read.”²²⁸ While other forms of expression like bookstores and theaters can bar children from indecent content, broadcasters cannot do the same.²²⁹ Finally, the Court emphasized the limited nature of the FCC’s restriction, which

220. *Id.*

221. *Id.* at 731 (first citing 18 U.S.C. § 1464 (1976); and then 47 U.S.C. § 303(g)(1976)).

222. *Id.* at 731–32.

223. *Id.* at 739–41.

224. *Id.*

225. *Id.* at 747.

226. *Id.* at 748.

227. *Id.*

228. *Id.* at 749.

229. *Id.* at 749–50.

relied on a nuisance rationale and emphasized such factors as the time of day when the indecent material was broadcast.²³⁰ Thus, the Court ultimately reversed the Court of Appeals and upheld the FCC's order.²³¹

Pacifica offers another illustration of the relatively simple task that courts have when considering proxy-censor regulation of the curator-intermediary function, because the curator-intermediary's speech interest aligns with the speech interests present in any First Amendment censorship case. Here, the curation was the radio station's choice of what programming to broadcast. The radio station's speech interest in curating a set of programming for its listeners aligned with the speech interest of its listeners in hearing that programming. There were, of course, some listeners who did not want themselves or their children to be exposed to indecent speech during the day. But such a conflict is always present when the government attempts to censor particular speech; the presence of the intermediary does not introduce a new speech interest.

The Court evaluated another proxy-censor regulation of the curator-intermediary function in *Denver Area Educational Telecommunications Consortium v. FCC*.²³² In a series of fractured opinions, the Court dealt with challenges to three different portions of the Cable Television Consumer Protection Act of 1992.²³³ For our purposes, we shall examine only the requirement in Section 10(b) of the Act, which applied only to leased access channels and required cable system operators to segregate "patently offensive" programming on a single channel, to block that channel from viewer access, and to unblock it within 30 days after a subscriber's written request.²³⁴ Section 10(b) thus presented a classic proxy-censor regulation of a curator-intermediary—i.e., the cable system operator deciding what channels to carry on its system.

Despite the fractured plurality opinions on other issues in the case, six justices agreed that Section 10(b) violated the cable system operator's First Amendment rights.²³⁵ Although the government argued that the "segregate and block" requirement was the least restrictive means to achieve its objective to

230. *Id.* at 750–51.

231. *Id.*

232. 518 U.S. 727 (1996).

233. *Id.* at 732–33.

234. *Id.* at 735. The other sections at issue allowed cable system operators to choose whether to allow or prohibit sexually explicit programming. Section 10(a) offered that choice as to "leased access channels" reserved for commercial lease by parties unaffiliated with the cable system operator, and Section 10(c) allowed that choice for "public access channels" required by local governments for public, educational, and governmental programming. *Id.* at 734–35. The Court upheld Section 10(a), *id.* at 753 (plurality), and struck down Section 10(c), *id.* at 766 (plurality).

235. *Id.* at 760.

protect the children’s physical and physiological well-being,²³⁶ the Court rejected the government’s contention for several reasons. First, the law used another means—a so-called “scramble or block” requirement—for programming on any unleased channels “*primarily dedicated* to sexually-oriented programming.”²³⁷ In addition, the law required cable operators to honor any subscriber’s request to block any channel to which they do not wish to subscribe.²³⁸ The Court also noted the expectation that manufacturers would soon have to make television sets with so-called v-chips that would “automatically . . . identify and block sexually explicit or violent programming.”²³⁹ Finally, the Court noted evidence in the record about a “lockbox” that would permit parents to lock out programs or channels that they did not want their children to see.²⁴⁰ Given the absence of evidence why these alternative means would not be adequate alternatives to Section 10(b)’s segregate and block approach, the Court held that Section 10(b) was not narrowly tailored to serve the government’s interest in protecting children and therefore violated the First Amendment.²⁴¹

As with the prior cases, *Denver Area Educational Telecommunications Consortium* offers another example of a proxy-censor law regulating the curator-intermediary function. Again, although the Court recognized the intermediary’s speech interest, that interest was aligned with the traditional audience interest in the free dissemination of speech, so the presence of the additional speech interest did not complicate the First Amendment analysis of whether the state’s interest was compelling and whether the regulation was narrowly tailored to that interest.²⁴²

236. *Id.* at 754–55; Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, §§ 2(10)(a) & (10)(c), 106 Stat. 1460 (1992)).

237. *Id.* at 756 (emphasis in original).

238. *Id.* at 756.

239. *Id.*

240. *Id.* at 758.

241. *Id.* at 760; *see also* *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 826–27 (2000) (striking down proxy-censor regulation of curator-intermediary function—the requirement that cable television operators time-segregate or fully block channels primarily directed to sexually explicit programming—because there were less restrictive means available to accomplish the government’s stated objective).

242. For an argument that existing First Amendment doctrine precludes a judicial focus on how platform regulations affect user speech, and for proposals on how that doctrine could and should evolve, *see* Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 278, 302 (2021).

ii. Must-Carry Regulations

The Court has reached a different result in First Amendment challenges to must-carry regulation of the curator-intermediary function, as opposed to proxy-censor regulation. In *Turner Broadcasting System v. FCC*,²⁴³ the Court considered a First Amendment challenge by cable system operators and programmers to the Cable Television and Consumer Protection Act of 1992.²⁴⁴ In the years before the Act was passed, cable television systems enjoyed several competitive advantages over broadcast television stations.²⁴⁵ First, cable technology eliminated the signal interference sometimes present during over-the-air broadcasting.²⁴⁶ Second, cable technology could transmit many more channels that were available through over-the-air broadcasting.²⁴⁷ Congress found that cable operators enjoyed “undue market power” and had a financial incentive to refuse carriage to broadcasters, drive more customers to cable, and capture advertising revenue from broadcast stations.²⁴⁸ Congress passed the Act because of its concern that, “unless cable operators are required to carry local broadcast stations, ‘[t]here is a substantial likelihood that . . . additional local broadcast stations will be deleted, repositioned, or not carried’ ” and that “ ‘the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.’ ”²⁴⁹

The Act required cable systems over a certain size to “set aside up to one-third of their channels for [local] commercial broadcast stations that request carriage.”²⁵⁰ Smaller cable systems were required to set aside three commercial stations.²⁵¹ The Act imposed similar requirements with regard to “local public broadcast television stations.”²⁵² The smallest cable systems would carry one such station; medium-sized cable systems would carry between one and three; and the largest cable systems would carry every local public broadcast television channel requesting carriage.²⁵³

The Court began its First Amendment analysis with the undisputed premise that cable system operators “engage in and transmit speech” because they

243. *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).

244. *Id.* at 630, 635.

245. *Id.* at 627–28.

246. *Id.* at 628.

247. *Id.*

248. *Id.* at 633.

249. *Id.* at 634.

250. *Id.* at 630.

251. *Id.* at 630–31.

252. *Id.* at 631.

253. *Id.* at 631–32.

“‘exercis[e] editorial discretion over which stations or programs to include in [their] repertoire’” and therefore “‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’”²⁵⁴ Accordingly, they are “‘entitled to the protection of the speech and press provisions of the First Amendment.’”²⁵⁵ The present discussion of *Turner I* focuses on the Court’s treatment of the cable system operators as a curator, rather than a mere conduit, because of this expressive role.²⁵⁶

Despite recognizing the cable system operators’ speech interest, the Court applied intermediate rather than strict scrutiny because the Act imposed only a content-neutral constraint on the cable system operators’ speech.²⁵⁷ The Court reasoned that the Act’s interference with their speech did “not depend upon the content of the cable operators’ programming.”²⁵⁸ The Court further reasoned that, to the extent that the must-carry requirements distinguished between speakers (i.e., cable versus broadcast channels), “they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry.”²⁵⁹ Finally, the Court rejected the contention that the Act’s underlying purpose was to promote favored speech over disfavored speech.²⁶⁰ Although Congress noted that broadcast channels were an “‘important source of local news[,] public affairs programming[,] and other local broadcast services critical to an informed electorate,’”²⁶¹ the Court reasoned that Congress merely acknowledged that broadcast stations make a valuable contribution, and not that broadcast stations were more valuable speakers than cable stations.²⁶²

The Court also distinguished two prior cases applying strict scrutiny to other must-carry regulations—the regulation of the collaborator-intermediary function in *Tornillo*, and the regulation of a company publishing its own

254. *Id.* at 636 (quoting *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986)).

255. *Id.* The Court also recognized, unsurprisingly, that cable programmers engage in speech when they produce original programming. *Id.* And the Court’s description of cable operators recognized that some cable operators also own cable programmers and produce some of their own programming. *Id.* at 628–29.

256. *See id.* at 636.

257. *Id.* at 644, 653.

258. *Id.* at 644.

259. *Id.* at 645.

260. *Id.* at 649.

261. *Id.* at 648 (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 2(a)(11), 106 Stat. 1460 (1992)).

262. *Id.* at 648–49. The Court remanded for the lower court because there were genuine issues of material fact to be resolved that would bear on the application of the intermediate scrutiny test. *Id.* at 668. The lower court subsequently found that the Act survived intermediate scrutiny, and the Supreme Court affirmed. *Turner Broad. Sys. v. FCC*, 520 U.S. 184, 224–25 (1997) (*Turner II*).

newsletter in *Pacific Gas & Electric*.²⁶³ The most obvious distinction was that *Tornillo* and *Pacific Gas & Electric* involved content-based restrictions, whereas the Act in *Turner I* was content-neutral.²⁶⁴ Although the Court could have stopped there, the Court also reasoned that, in contrast to content published in a newspaper, there was “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”²⁶⁵ At first glance, this statement could appear to undermine the Court’s earlier declaration that cable system operators exercise editorial judgment when deciding what channels to include. However, the Court was simply explaining why the Act’s requirement to carry some broadcast channels would not interfere with the cable system operators’ editorial function.²⁶⁶ The Court noted that broadcasters had a legal obligation to identify themselves once per hour and that broadcasters commonly “disclaim[ed] any identity of viewpoint between the management and the speakers who use the broadcast facility.”²⁶⁷ Thus, the Court reasoned that the addition of broadcast channels would not interfere with the cable system operators’ expression.²⁶⁸

The Court evaluated another must-carry regulation of the curator-intermediary function in *Red Lion Broadcasting Co. v. FCC*.²⁶⁹ The challenge involved the FCC’s implementation of the “fairness doctrine,” which had been defined in a long series of FCC rulings.²⁷⁰ A Pennsylvania radio station broadcast a show by the Reverend Billy James Hargis.²⁷¹ Hargis discussed a book critical of Barry Goldwater, and in the course of the discussion alleged that the author had been fired for making false charges against city officials,

263. *Turner I*, 512 U.S. at 653–657 (first citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974), and then *Pac. Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1 (1986)). *PG&E* was not an intermediary case because PG&E simply published its own newsletter in its monthly billing envelopes, and the Court struck down a state requirement that PG&E include a private group’s own content in its billing envelopes. 475 U.S. at 5–7.

264. *Turner I*, 512 U.S. at 655.

265. *Id.*

266. *Id.*

267. *Id.*

268. *See id.* The Court also noted that, unlike the right of reply statute in *Tornillo* that gave newspapers an incentive to self-censor, the Act would not cause any cable system operator to avoid controversy by diminishing the free flow of information. *Id.* at 656. Finally, the cable system operator exercised much more market power than the newspaper in *Tornillo*. The cable system operator enjoys a gatekeeper role “over most (if not all) of the television programming that is channeled into the subscriber’s home.” *Id.* Thus, a cable system operator can silence competing speakers in ways that a newspaper cannot. *Id.*

269. 395 U.S. 377 (1969).

270. *Id.* at 369–71.

271. *Id.* at 371.

had worked for Communist-affiliated publications, had defended notorious spy Alger Hiss, and had attacked J. Edgar Hoover and the Central Intelligence Agency.²⁷² The author demanded free reply time, which the radio station refused, and the FCC declared that the broadcaster licensed to operate the radio station had failed to meet its obligations under the fairness doctrine.²⁷³ The Court consolidated that case with a separate challenge to the FCC's regulations codifying the fairness doctrine.²⁷⁴

The broadcasters challenged the fairness doctrine rule on First Amendment grounds.²⁷⁵ The Court started its analysis by recognizing that "broadcasting is clearly a medium affected by a First Amendment interest."²⁷⁶ This was the entirety of the Court's discussion of the broadcaster's speech interest, but it is consistent with treating a radio broadcaster as carrying out the curator-intermediary function by choosing which programs it chooses to air, similar to the editorial function that the Court ascribed to cable system operators in *Turner I*.²⁷⁷

The Court nevertheless held that the scarcity of the radio broadcast spectrum justified the intrusion on the radio broadcasters' speech interest.²⁷⁸ Given the scarcity of the radio spectrum, "only a tiny *fraction* of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had."²⁷⁹ "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."²⁸⁰ The Court emphasized that the "right[s] of the viewers and listeners" were paramount, not the "right of the broadcasters."²⁸¹ The Court emphasized the importance of speech concerning public affairs to self-government; the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."²⁸² The Court concluded, "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio

272. *Id.*

273. *Id.* at 372.

274. *Id.* at 373–74.

275. *Id.* at 386.

276. *Id.*

277. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994).

278. *Red Lion*, 395 U.S. at 400–01.

279. *Id.* at 388–89.

280. *Id.* at 390.

281. *Id.*

282. *Id.* at 390.

frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.”²⁸³

Red Lion and *Turner I* confirm the expressive aspect of the curator-intermediary function, but they offer an important lesson about how the curator-intermediary function can affect the analysis of must-carry regulations. Rather than deny the importance of the intermediary’s speech interest, the Court in each case pointed to a mitigating factor that required upholding the regulation at issue—the scarcity of radio spectrum in *Red Lion* and the content-neutral nature of the law in *Turner I*. In each case, the fact that the law regulated the curator-intermediary function helped the Court identify that mitigating factor.

For example, in *Red Lion*, the only reason that the law at issue helped alleviate the radio spectrum problem was the fact that it targeted the intermediary chokepoint—the broadcaster who held the license to operate the radio station.²⁸⁴ Had the regulated party simply been the programmer of the radio show, the law could not have contributed to solving the scarcity problem, so the scarcity rationale could not have justified the law’s limitation on speech.²⁸⁵ Similarly, in *Turner I*, the only reason that the Court could determine that the law was content-neutral was the fact that the law regulated the cable system operator’s decision about which channels to make available to its users.²⁸⁶ If the law had simply attempted to distinguish between different types of programming (e.g., educational or news programming compared to commercial programming), the law would have been content-based and subject to strict scrutiny.²⁸⁷ Thus, while the speech of a curator-intermediary is not less important, the presence of the curator-intermediary function introduces complexities that are not present when the law directly regulates the primary speakers or listeners.

283. *Id.* at 394. The Court also rejected the argument that the fairness doctrine would trigger self-censorship by broadcasters on controversial public issues. *Id.* at 392–93. First, the Court characterized the argument as “at best speculative.” *Id.* at 393. Second, the Court noted that “[t]he fairness doctrine in the past has had no such overall effect.” *Id.* Finally, the Court emphasized that the FCC has the power to insist that licensees “give adequate and fair attention to public issues” and that licenses must be renewed every three years. *Id.* at 393–94.

284. *Id.* at 387–90.

285. *See id.*

286. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643–48 (1994).

287. *See id.*; accord Bhagwat, *supra* note 4, at 108 (“It is doubtful that [*Turner*] would have come out the same way if the government had attempted to forbid operators from carrying particular channels”); Langvardt, *supra* note 20, at 280 (“[I]t seems doubtful that the [*Turner*] Court would have taken this approach if the FCC’s must-carry rules had required ideological balance rather than carriage of local stations.”).

C. Commentator

Although the Supreme Court has not decided a commentator-intermediary case, the Court recognized the protected nature of the commentator-intermediary function in *Rumsfeld v. FAIR*, when it observed that law schools were free to express their opposition to the military’s “don’t ask, don’t tell” policy.²⁸⁸ It rejected the law schools’ claims that the Solomon Amendment violated their associational rights because “[s]tudents and faculty are free to associate to voice their disapproval of the military’s message; nothing about the statute affects the composition of the group by making group membership less desirable.”²⁸⁹ Had the Solomon Amendment attempted to limit law schools’ commentary on the military’s policies, the Court would likely have reached a different result.²⁹⁰

Several lower courts, however, have confronted recent legislative attempts to regulate the commentator-intermediary function. Florida, for example, enacted SB 7072 in an attempt to regulate social media platforms.²⁹¹ Although the bulk of SB 7072 regulates the platforms’ curator-intermediary function by restricting content moderation, one provision also regulates the commentator-intermediary function.²⁹² That provision prohibits platforms from censoring a user’s content “in a way that violates this part”²⁹³ and defines “censor” to include “post[ing] an addendum to any content or material posted by a user.”²⁹⁴ Thus, SB 7072 prohibits platforms from posting a fact check or other type of content warning in any way that violates the statute’s requirements, two of which are relevant here. First, platforms must apply censorship “in a consistent manner among its users on the platform,” which would potentially prohibit

288. 547 U.S. at 69–70.

289. *Id.*

290. *See id.*

291. SB 7072 sought to prevent social media platforms from: deplatforming a political candidate during an election, FLA. STAT. § 106.072 (2022), applying its “censorship, deplatforming, and shadow banning standards [inconsistently] among its users on the platform,” *id.* § 501.2041(2)(b), using post-prioritization or shadow banning algorithms for content posted by a user known to the platform to be a political candidate, *id.* § 501.2041(2)(h), and censoring, deplatforming, or shadow banning “a journalistic enterprise based on the content of its publication or broadcast,” *id.* § 501.2041(2)(j). Florida’s legislature initially exempted from SB 7072 “any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex.” *Id.* § 501.2041(1)(g) (2021) (repealed 2022). However, the legislature repealed this exception after Disney executives publicly criticized another Florida law. *See NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1206 (11th Cir. 2022) (citing S.B. 6C, 2022 S., 2022C Sess. (Fla. 2022)).

292. *See* FLA. STAT. § 501.2041(1)(b) (2022).

293. *Id.* § 501.2041(2)(d).

294. *Id.* § 501.2041(1)(b).

platforms from posting their own comments or warnings based on the content of some users' speech.²⁹⁵ And second, platforms cannot censor "a journalistic enterprise based on the content of its publication or broadcast."²⁹⁶

The district court entered a preliminary injunction against SB 7072 in its entirety, reasoning that SB 7072 burdened the platforms' speech and could survive neither strict nor intermediate scrutiny.²⁹⁷ While the decision focused mainly on the content-moderation restrictions—which implicate the curator-intermediary function²⁹⁸—the district court also noted the limitation on the commentator-intermediary function.²⁹⁹ The district court distinguished *FAIR* and *PruneYard* by emphasizing that SB 7072 "explicitly forbid[s] social media platforms from appending their own statements to posts by some users . . . This is a far greater burden on the platforms' own speech than was involved in *FAIR* or *PruneYard*."³⁰⁰ Thus, the court distinguished the platforms' commentator-intermediary function from that of the conduit-intermediaries in *FAIR* and *PruneYard*.³⁰¹ Ultimately, the district court relied on both the curator-intermediary and commentary-intermediary functions to find that the platforms enjoyed First Amendment protection.³⁰²

The Eleventh Circuit affirmed the preliminary injunction against SB 7072's content-moderation restrictions but vacated the injunction as to most of the

295. *Id.* § 501.2041(2)(b); accord Rozenshtein, *supra* note 46, at 366 (arguing that SB 7072 "violates the First Amendment requirement that the public be able to accurately tell who supports what speech and that platforms be able to express their own opinions").

296. FLA. STAT. § 501.2041(2)(j).

297. *NetChoice, LLC v. Att'y Gen. of Fla.*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021), *aff'd in part and vacated in part sub nom. NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (affirming preliminary injunction as to all provisions limiting content-moderation, affirming preliminary injunction as to provision requiring detailed explanations of each content moderation decision, and vacating the preliminary injunction as to most provisions requiring disclosures).

298. *See NetChoice, LLC*, 546 F. Supp. 3d at 1090 ("[Social media] providers routinely manage [user] content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding the providers' own content. The plaintiffs call this curating or moderating the content posted by users. In the absence of curation, a social-media site would soon become unacceptable—and indeed useless—to most users.").

299. *NetChoice, LLC*, 546 F. Supp. 3d at 1093.

300. *Id.*

301. *See id.*; *see supra* Section III.A.2 (discussing the Supreme Court's treatment of conduit-intermediaries in *FAIR* and *PruneYard*).

302. *See NetChoice, LLC*, 546 F. Supp. 3d at 1093 ("The Florida statutes now at issue, unlike the state actions in *FAIR* and *PruneYard*, explicitly forbid social media platforms from appending their own statements to posts by some users. And the statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites.").

mandatory-disclosure provisions.³⁰³ Like the district court, the Eleventh Circuit recognized that the portions of SB 7072 limiting platforms’ ability to attach their own addendum to user posts directly limited the platforms’ commentator-intermediary function.³⁰⁴ As the court explained, although platforms do not create most of the content on their sites,

[P]latforms do engage in some speech of their own: A platform, for example, might publish terms of service or community standards specifying the type of content that it will (and won’t) allow on its site, add addenda or disclaimers to certain posts (say, warning of misinformation or mature content), or publish its own posts.³⁰⁵

The Eleventh Circuit relied in part on that conduit-intermediary function to distinguish *FAIR*: “As an initial matter, in at least one key provision, [SB 7072] defines the term ‘censor’ to include ‘posting an addendum,’ i.e., a disclaimer—and thereby explicitly prohibits the very speech by which a platform might dissociate itself from users’ messages.”³⁰⁶

Texas passed a similar law, HB 20, which limits platforms’ content-moderation practices and requires platforms to make disclosures about those

303. *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022). The content-moderation restrictions regulated the platforms’ curator-intermediary role. *See id.* at 1204–05 (noting that “the platforms invest significant time and resources into editing and organizing—the best word, we think, is *curating*—users’ posts into collections of content that they then disseminate to others”). In contrast, the mandatory-disclosure provisions (with one exception discussed below) did not regulate any intermediary function because they did not require the platforms to make (nor did they prohibit the platforms from making) any disclosures linked to some else’s speech. Instead, the Court analyzed the mandatory-disclosure provisions under the *Zauderer* test applicable to laws requiring commercial actors to disclose purely factual and noncontroversial information about their products or services. *Id.* at 1227 (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)). The court held that all of the mandatory-disclosure provision were likely to pass *Zauderer*’s requirement that the provision be reasonably related to the state’s interest and not unduly burdensome, except for one. *Id.* at 1230. The law required platforms to provide users written notice within seven days of every content-moderation action and to include in that notice a “thorough rationale” for the decision and a “precise and thorough explanation of how the social media platform became aware” of the material. FLA. STAT. § 501.2041(2)(d)(1), (3) (2022). Given that the platforms “remove millions of posts per day” and would be subject to “millions, or even billions of dollars of statutory damages,” the Eleventh Circuit held that it was “substantially likely that this provision is unconstitutional under *Zauderer* because it is unduly burdensome and likely to chill platforms’ protected speech.” *NetChoice, LLC*, 34 F.4th at 1230.

304. *NetChoice, LLC*, 34 F.4th at 1218.

305. *Id.* at 1204.

306. *Id.* at 1218.

practices.³⁰⁷ In one respect, HB 20 also appears to regulate the commentator-intermediary function through its ban on viewpoint-based censorship.³⁰⁸ Most of HB 20's definition of censorship targets the curator-intermediary function by defining "censor" to mean to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to . . . expression."³⁰⁹ But the censorship definition also includes to "otherwise discriminate against expression."³¹⁰ One could reasonably interpret to "discriminate" against expression to include posting commentary critical of that expression, such as a fact check or warning about the nature of the content.³¹¹ The district court, however, focused on HB 20's regulation of the curator-intermediary function and reasoned that HB 20's limitations on the platforms' content-moderation practices impacted the platforms' exercise of editorial discretion and was unlikely to survive either strict or intermediate scrutiny.³¹² The Fifth Circuit vacated the preliminary injunction, but it too examined only the way in which HB 20 limited platforms' ability to block or demote user content, rather than their ability to publish their own commentary.³¹³

307. See TEX. CIV. PRAC. & REM. CODE § 143A.002(a) (2021) (prohibiting platforms from censoring content based on viewpoint); *id.* § 143A.001(1) (defining to censor as to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression"); TEX. BUS. & COM. CODE § 120.051(a) (2021) (requiring platforms to disclose information about their "content management, data management, and business practices"); *Id.* § 120.052(a) (requiring platforms to publish their "acceptable use policy"); *id.* § 120.053(a) (requiring platforms to publish biannual transparency reports concerning, in the prior six-month period, the number of instances in which the platform was alerted to illegal or policy-violating content, including detailed information such as how many of each types of actions the platform took in response); *id.* § 120.101 (requiring platforms to provide "an easily accessible complaint system" about illegal content or activity on the platform or decisions by the platform to remove user content).

308. TEX. CIV. PRAC. & REM. CODE § 143A.002 (2021).

309. *Id.* § 143A.001(1).

310. *Id.*

311. See *id.*

312. *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1109–10 (W.D. Tex. 2021). The District Court found that the statute's "disclosure and operational requirements"—which included implementing a system of notice and appeal for content removals and creating a complaint procedure—were likely to fail the *Zauderer* test. *Id.* at 1110. The court reasoned that the "disclosure and operational provisions are inordinately burdensome given the unfathomably large numbers of posts on these sites and apps" and that the severe sanctions for violating these provisions would chill the platforms' protected speech. *Id.* at 1111–12.

313. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 448 (5th Cir. 2022) (reasoning that HB 20 did not regulate platforms' own speech because platforms do not engage in protected speech when they act as mere conduits for the speech of others); *id.* at 495 (Jones, J., concurring) (same); *id.* at 503–07 (Southwick, J., concurring in part and dissenting in part) (reasoning that HB 20 regulated platforms' speech because platforms engage in protected speech when they curate their users' feeds).

D. Collaborator

One example of the Supreme Court addressing a proxy-censor regulation of the collaborator-intermediary function appears in *Simon & Schuster v. Members of the New York State Crime Victims Board*.³¹⁴ New York's "Son of Sam" law required "any entity contracting with an accused or convicted person for a depiction of the crime to . . . turn over any income under that contract" to the state crime victims board, to be held in escrow for five years to satisfy civil judgments in favor of the crime victims as well as other creditors.³¹⁵ This case arose when the board became aware of the book contract between publishing house Simon & Schuster and "admitted organized crime figure Henry Hill."³¹⁶ Hill entered into a contract with an author to write a book about Hill's life and entered into a publishing agreement with Simon & Schuster for the book that was eventually published as *Wiseguy*.³¹⁷ The book depicted "in colorful detail, the day-to-day existence of organized crime, primarily in Hill's first-person narrative."³¹⁸ The book enjoyed favorable reviews and commercial success, and was adapted into the film *Goodfellas*.³¹⁹ When it learned of the book, the state crime victims board determined that Simon & Schuster had violated the Son of Sam law by failing to disclose its publishing contract with Hill and making payments to Hill.³²⁰ The board ordered Simon & Schuster to pay to the board all monies still owed to Hill; the board also ordered Hill to pay to the board all monies he had received to date.³²¹

Simon & Schuster sued under 42 U.S.C. § 1983 seeking a declaration that the Son of Sam law violated the First Amendment and an injunction against enforcement of the law.³²² The district court and court of appeals found the law to be consistent with the First Amendment, and the Supreme Court granted certiorari.³²³

The Court recognized the collaborative nature of the relationship between book publisher and author:

Whether the First Amendment "speaker" is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can

314. 502 U.S. 105 (1991).

315. *Id.* at 109–10.

316. *Id.* at 111.

317. *Id.* at 112.

318. *Id.*

319. *Id.* at 114.

320. *Id.* at 114–15.

321. *Id.*

322. *Id.* at 115.

323. *Id.*

publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.³²⁴

The Court therefore found that the statute imposed a content-based restriction on speech and applied strict scrutiny.³²⁵ Though the Court found that the government had a compelling interest in ensuring that crime victims are compensated by those who harmed them,³²⁶ the Court found that the statute was not narrowly tailored to serve that interest because it was overinclusive.³²⁷

As was the case with proxy-censor regulations above, here the proxy-censor regulation involved an alignment between the interests of the intermediary, Simon & Schuster, and its partner in collaboration, Henry Hill. Thus, the Court was free to apply existing First Amendment doctrine and the strict scrutiny that accompanies content-based regulation of speech.

The Court has also considered must-carry regulation of the collaborator-intermediary function. For example, in *Miami Herald Publishing Co. v. Tornillo*, the *Miami Herald* printed two editorials critical of Tornillo's candidacy for the Florida House of Representatives.³²⁸ Tornillo demanded that the *Miami Herald* print his replies pursuant to Florida's "right of reply" statute.³²⁹ Under that statute, a candidate whose character or official record was assailed by a newspaper could demand that the newspaper print the candidate's reply, free of cost to the candidate.³³⁰ The newspaper's failure to print the reply constituted a first-degree misdemeanor.³³¹ Tornillo sued, and the *Miami Herald* argued that the right to reply statute violated its First Amendment rights.³³² The Florida Supreme Court held that the statute was consistent with the First Amendment, and the United States Supreme Court granted certiorari.³³³

The Court rejected the argument that the concentration of market power in the hands of a relatively small number of newspapers justified the restriction on

324. *Id.* at 116.

325. *Id.* at 116–18.

326. *Id.* at 118.

327. *Id.* at 118, 121–23. The law was overinclusive because it applied to any work that mentioned a crime, no matter how tangentially, and because it defined "criminal" to include anyone who admitted to a crime in the work, even if they had never been convicted or accused of the crime." *Id.* at 121.

328. 418 U.S. 241, 243 (1974).

329. *Id.* at 244.

330. *Id.*

331. *Id.*

332. *Id.* at 245.

333. *Id.* at 245–46.

speech.³³⁴ The Court then considered the law's impact on the newspaper's speech interest.³³⁵ The Court noted that compelled printing of the reply penalized the newspaper for its speech about a political candidate in three ways.³³⁶ First, the newspaper would be put to the "cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print."³³⁷ Second, the prospect of being compelled to print a reply could lead newspapers to censor the news and opinions that they publish in order to avoid controversy.³³⁸ Finally, compelled printing of the reply would interfere with the newspaper's editorial function because "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising."³³⁹ The Court continued, "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."³⁴⁰ Given these intrusions, the Court held that the right of reply statute violated the *Miami Herald's* First Amendment rights.³⁴¹

We see in the Court's rationale the effect that the law had on the collaborator-intermediary function as well as on the newspaper's primary speech. When the newspaper publishes articles by its own reporters or freelancers that it retains, the newspaper is not an intermediary. But when the newspaper selects op-ed pieces for publication and works with authors to edit their content, the newspaper engages in the collaborator-intermediary function. The Court's concern that the right of reply law would cause newspapers to "censor the news and opinions that they publish" thus applied to both the direct speaker function and the collaborator-intermediary function.³⁴²

Decades later, the Court dealt with another must-carry regulation affecting the collaborator-intermediary function. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, a group of gay, lesbian, and bisexual descendants of Irish immigrants alleged that the private organizers of the St. Patrick's Day parade violated Massachusetts' public accommodations law by excluding them from the parade based on their sexual orientation.³⁴³ The state

334. *Id.* at 254.

335. *Id.* at 256.

336. *Id.* at 256–58.

337. *Id.* at 256.

338. *Id.* at 257.

339. *Id.* at 258.

340. *Id.*

341. *Id.*

342. *Id.* at 256–58.

343. 515 U.S. 557, 561 (1995).

courts held that the state public accommodations law prohibited the parade organizers from excluding the group and rejected the parade organizers' argument that the public accommodations law violated their First Amendment rights.³⁴⁴

After granting certiorari, the United States Supreme Court rejected the group's argument that the parade organizer was "merely 'a conduit' for the speech of participants in the parade 'rather than itself the speaker.'" ³⁴⁵ Instead, the Court reasoned, "Rather like a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [parade organizer]'s eyes comports with what merits celebration on that day."³⁴⁶ The Court noted that "every participating parade unit affects the message conveyed by the private organizers," and therefore the lower court's order "essentially require[ed] petitioners to alter the expressive content of their parade."³⁴⁷

The Court also distinguished the parade organizer from earlier intermediaries exercising the conduit and curator functions. The Court distinguished *PruneYard* because the shopping center was open to the public and the solicitations would not be attributed to the owner, who could disclaim any connection simply by posting signs.³⁴⁸ Thus, there was no risk that speech by the shopping center's visitors would affect the shopping center owner's right to speak because the shopping center's decision to allow people onto its property lacked any expressive message of its own.³⁴⁹ And the *Hurley* Court also distinguished the parade organizer from the cable system operators in *Turner I*. It was common practice for broadcasters to disclaim identity of viewpoint with those who produce the programming, whereas "[p]arades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed."³⁵⁰ Moreover, whereas a cable network's programming consists of "individual, unrelated segments" from which audience members can choose, "each parade unit . . . is understood to contribute something to a

344. *Id.* at 563–64.

345. *Id.* at 575.

346. *Id.* at 574 (cited in Benjamin, *supra* note 48, at 1699). As Benjamin explains, "The parade did not have a single, clear message, but—to use the parlance of *Turner I*—the parade's organizers did exercise editorial discretion through which they sought to communicate messages." Benjamin, *supra* note 48, at 1699.

347. *Hurley*, 515 U.S. at 572–73. The Court noted that this freedom was, however, subject to the law of defamation. *Id.* at 574.

348. *Id.* at 579–80.

349. *See id.* at 580.

350. *Id.* at 576 (quoting *Turner Broad. Sys. V. FCC*, 512 U.S. 622, 655 (1994) (*Turner I*)).

common theme . . . and . . . the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”³⁵¹

The Court’s careful distinction from *Turner I* illustrates the difference between a curator and a collaborator. The curator exercises editorial judgment in deciding what speech to make available to listeners. Those listeners, however, understand that the curator itself is not generating all of the content. As television viewers switch channels and Twitter users scroll through tweets, they may be limited to the speech that the curator decides to facilitate, but they also decide for themselves what speech they wish to explore. In contrast, the collaborator works together with the speakers whose speech it facilitates to produce a cohesive speech product, like a parade or a newspaper op-ed. Listeners who engage with that work enjoy the fruits of their combined labor of two speakers, an “overall message” in which listeners perceive individual pieces as “part of the whole.”³⁵² The fact that the collaborator-intermediary’s speech interest inheres in the unified whole makes it more likely that must-carry regulation of the collaborator-intermediary function will face strict scrutiny than must-carry regulation of the conduit-intermediary function.³⁵³

IV. APPLYING THE TAXONOMY TO EMERGING REGULATION OF SPEECH INTERMEDIARIES

The goal of this Article’s taxonomy of speech intermediary functions is to clarify the application of applying longstanding First Amendment doctrine to emerging regulation of speech intermediaries. By identifying which intermediary function and which type of regulation are at issue, courts will be in a better position to identify potentially conflicting speech interests and reach a result that best applies the doctrine. This Part previews that analytical task with regard to several types of regulation: (1) laws imposing neutrality obligations on social media platforms and on companies further down the technology “stack”; (2) laws denying social media platforms immunity under Section 230 for certain types of content; and (3) laws requiring social media platforms to provide information or warnings intended to curb the online manipulation and misinformation.

351. *Id.* at 576–77.

352. *Id.* at 577; *accord* Volokh, *supra* note 48, at 405 (distinguishing social media platforms from newspapers, magazines, and specific television channels (as opposed to entire cable systems) because the platforms do not provide listeners with an “aggregate speech product”).

353. *See supra* Section III.B.

A. Neutrality Obligations for Social Media Platforms and Companies Further Down the “Stack”

Florida and Texas were the first states to pass legislation requiring that social media platforms apply their content moderation practices neutrally.³⁵⁴ Florida’s SB 7072 prohibits platforms from (1) deplatforming or moderating political candidates, (2) moderating journalistic enterprises based on their content, and (3) applying their content moderation standards inconsistently.³⁵⁵ Texas’ HB 20 prohibits platforms from censoring users’ expression or their ability to receive the expression of others based on viewpoint.³⁵⁶ Senator Josh Hawley suggested a similar approach in his proposed Stop Internet Censorship Act, which would remove social media companies’ Section 230 immunity unless an FTC audit found that the platform “does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint.”³⁵⁷ In light of the publicity surrounding the refusal to provide services to conservative social media platform Parler by the major cloud service platforms,³⁵⁸ such neutrality legislation could also be proposed against companies further down the technology “stack” than social media platforms. This section considers how the speech intermediary functions would impact First Amendment challenges to such regulation.

When this type of must-carry regulation targets companies on the lower level of the technology stack, it will likely involve only the conduit-intermediary function. Companies near the bottom of the stack provide services which are invisible to most consumers but are essential to the internet’s function.³⁵⁹ For example, cloud service providers such as Amazon Web Services, Microsoft Azure, and Google Cloud offer users “a cloud-based platform, infrastructure, application, or storage services.”³⁶⁰ “Content delivery networks . . . speed up websites” and “provide protection from malicious

354. See VALERIE C. BRANNON, FREE SPEECH CHALLENGES TO FLORIDA AND TEXAS SOCIAL MEDIA LAWS, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/LSB/LSB10748> [<https://perma.cc/3A9J-L5QR>].

355. FLA. STAT. § 106.072 (2022) (SB 7072).

356. TEX. CIV. PRAC. & REM. CODE § 143A.002(a) (2021) (HB 20).

357. S. 1914, 116th Cong., § 2(a)(1) (2019).

358. See Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021) <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html> [<https://perma.cc/NK3A-LXKS>].

359. See Donovan, *supra* note 67.

360. *What is a Cloud Service Provider?*, MICROSOFT: AZURE, <https://azure.microsoft.com/en-us/overview/what-is-a-cloud-provider/> [<https://perma.cc/8S5C-CXPH>]; *Cloud Functions*, GOOGLE, <https://cloud.google.com/functions/#section-3> [<https://perma.cc/B7UM-72NG>]; AMAZON WEB SERVICES, <https://aws.amazon.com/> [<https://perma.cc/46ET-GPMB>].

access attempts” such as distributed denial of service attacks.³⁶¹ Without the protection of a content delivery network, “websites are vulnerable to political or profit-driven attacks.”³⁶² And domain registrars facilitate the registration of domain names (such as google.com) as well as the assignment of IP addresses to those domain names, which make it much easier to find websites than remembering numeric addresses.³⁶³

If a legislature enacted a neutrality requirement on cloud service providers, content delivery networks, or domain name registrars, the First Amendment analysis would likely mirror that in the D.C. Circuit’s net neutrality decision. In *United States Telecom Association v. FCC*, the court held that broadband internet service providers served as neutral conduits linking their customers with information on the internet and were not engaged in their own expression.³⁶⁴ The same analysis would apply to companies like cloud service providers, content delivery networks, and domain name registrars. Those companies are not attempting to convey any expressive message in the course of their business. Although on rare occasions they might deny service to a controversial user, like 8chan or Parler, in their standard business practices, they do not present any expressive message to their customers.³⁶⁵ For that reason, they act as conduit-intermediaries, like the internet service providers in *United States Telecom*, and requiring neutrality in their decisions about which customers to serve would not infringe on their speech.³⁶⁶

When neutrality obligations are imposed on social media platforms, however, the regulations will target the platforms’ curator-intermediary function. As discussed above, when the platforms decide what content to promote, demote, and prohibit, they convey an expressive message, even if they

361. Donovan, *supra* note 67.

362. *Id.* For example, Cloudflare’s refusal to continue service to 8chan effectively silenced 8chan, at least temporarily. *Id.* But see Rachel Guy, *Nation of Men: Diagnosing Manospheric Misogyny as Virulent Online Nationalism*, 22 GEO. J. GENDER & L. 601, 623 (2021) (“[I]n 2019, when the service provider Cloudflare stopped supporting 8chan, one of the most heinous platforms of the manosphere, Gab.com seamlessly collected thousands of new users a day, presumably from 8chan. And, 8chan was back up and running on another domain just days later, under the moniker 8kun.”).

363. *What is a Domain Name Registrar?*, CLOUDFLARE, <https://www.cloudflare.com/learning/dns/glossary/what-is-a-domain-name-registrar/> [<https://perma.cc/C9EP-ELG6>] (“Domain names are simply “alphanumeric aliases used to access websites; for example, Google’s domain name is ‘google.com’ and their IP address is 192.168.1.1.”); Donovan, *supra* note 67.

364. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 744 (2016).

365. See, e.g., Douek, *supra* note 50 (noting Cloudflare’s perception of itself as a “neutral utility service”).

366. See *U.S. Telecom Ass’n*, 825 F.3d at 744; accord Balkin, *supra* note 15, at 73 (arguing that “enforcing non-discrimination rules” for companies providing “[b]asic internet services” should not violate the First Amendment).

are not delivering a single, unified speech product.³⁶⁷ So the First Amendment analysis must account for the platforms' speech interest, which conflicts with the speech interests of the users whose content they would moderate, as well as with the speech interests of other uses who wish to receive that content.³⁶⁸

The recent Texas and Florida laws restricting social media platforms' content moderation have brought the curator-intermediary function into sharp relief.³⁶⁹ The states passed the laws to prevent platforms from excluding or minimizing the speech of certain users, but those laws infringe upon platforms' freedom to curate the content they display to their users.³⁷⁰ How should the First Amendment analysis account for these conflicting speech interests? The nature of platforms' curator-intermediary function should help locate the case along the spectrum of past First Amendment cases.

The Eleventh Circuit partially adopted this approach in *NetChoice, LLC v. Attorney General of Florida*, which affirmed the district court's preliminary injunction against Florida's SB 7072, which restricted social media platforms' ability to moderate content.³⁷¹ The court recognized that *PruneYard* and *FAIR* were distinguishable because the targets of the regulation in those cases were not engaged in their own speech.³⁷² Although the court did not use the term conduit-intermediary, the court's analysis recognized that *PruneYard* and *FAIR* involved regulation of precisely that role.³⁷³

The remainder of the Eleventh Circuit's analysis of the content-moderation restrictions conflated two different intermediary function—the curator-intermediary function at issue in *Turner I* and the collaborator-intermediary function at issue in *Tornillo* and *Hurley*.³⁷⁴ The court described *Tornillo*,

367. See *supra* Section II.B.

368. See *supra* Section II.B.

369. See *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) ("The question at the core of this appeal is whether the Facebooks and Twitters of the world—indisputably 'private actors' with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms."). The statutes also imposed disclosure obligations on the platforms. FLA. STAT. § 501.2041(2) (2021); TEX. CIV. PRAC. & REM. CODE § 120.051 (2021). The Fifth Circuit upheld HB 20's disclosure requirements under the Supreme Court's *Zauderer* test for compelled commercial speech. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485–88 (5th Cir. 2022). The Eleventh Circuit upheld some of SB 7072's disclosure requirements and struck down others, also under the *Zauderer* test. *NetChoice, LLC*, 34 F.4th at 1230–31.

370. *NetChoice, LLC*, 34 F.4th at 1217; *NetChoice, LLC v. Paxton*, 49 F.4th 439, 503–07 (5th Cir. 2022) (Southwick, J., concurring in part and dissenting in part).

371. *NetChoice, LLC*, 34 F.4th at 1203.

372. *Id.* at 1215.

373. See *id.*

374. See *supra* Sections III.B.2 & III.D.

Hurley, and *Turner I* as cases where private entities exercised editorial judgment by deciding whether and how to disseminate third-party-created content.³⁷⁵ But grouping these three cases together disregards the two different intermediary functions involved in those cases. A newspaper engages in the collaborator-intermediary function when it selects op-ed pieces for publication and works with authors to edit their content.³⁷⁶ Similarly, a parade organizer engages in the collaborator-intermediary function when it selects which units may participate, because “the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”³⁷⁷ In contrast, a cable television system operator does not collaborate in the production of programming, nor does it review the programs that will be aired; it simply decides what channels will be available to subscribers.³⁷⁸ The failure to recognize this distinction and compare the social media platforms to the cable system operators in *Turner I* overlooks the different ways in which conduit-intermediaries and collaborator-intermediaries exercise what the court called “editorial discretion.”³⁷⁹

Like the social media platforms, the cable system operator in *Turner I* acted as a conduit-intermediary, choosing what channels to include in its network and make available to its subscribers.³⁸⁰ While the Court recognized the speech interest of the cable system operator, it was the curator-intermediary nature of that speech interest that allowed the Court to find that the law at issue was content-neutral and therefore apply intermediate scrutiny.³⁸¹ Although the must-carry rules interfered with the cable system operators’ discretion to choose what channels to carry, “the extent of that interference does not depend upon the content of the cable operators’ programming.”³⁸² That holding was possible only because of the nature of the cable system operators’ speech interest. They did not present a single expressive unit for users to peruse and

375. *NetChoice, LLC*, 34 F.4th at 1212. The court also included *PG&E* in the same discussion, but *PG&E* was not an intermediary case because the utility company simply published its own newsletter in its monthly billing envelopes, rather than facilitating anyone else’s communications. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 5–6 (1986).

376. *See supra* Section III.D.

377. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576–77 (1995).

378. *See Turner Broad. Syst. v. FCC*, 512 U.S. 622, 655 (1994) (reasoning that requiring cable system operators to carry broadcast stations “would not impair cable system operators’ editorial function” because there was “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator”).

379. *Id.* at 643–44.

380. *Id.*

381. *Id.* at 642–47.

382. *Id.* at 644.

experience, like a book, a newspaper, or a parade.³⁸³ If that had been the nature of the cable system operator's speech interest, then prohibiting the operators from excluding broadcast channels would have imposed a content-based restraint.

In theory, the same content-neutrality argument could apply to narrowly drawn laws requiring neutral or nondiscriminatory content moderation by social media platforms. Florida's SB 7072 precluded such an approach because its explicit prohibition against moderating certain content—speech by political candidates and journalistic enterprises—rendered the law content-based.³⁸⁴ The Stop Internet Censorship Act suffers from the same defect because it would single out the platforms' treatment of political content.³⁸⁵

Texas' HB 20 prompted conflicting opinions on whether it affected the platforms' speech interests at all and whether the law was content-based or content-neutral. HB20 prohibits platforms from moderating content based on the user's viewpoint or on the viewpoint represented in the content.³⁸⁶ In the district court, the Western District of Texas treated the platforms as curators when it preliminarily enjoined HB 20.³⁸⁷ The court found that platforms “curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial discretion over their platform's content.”³⁸⁸ Accordingly, prohibiting the platforms from applying their content-moderation policies required them to alter the “expressive content” of their messages and targeted their “editorial judgments.”³⁸⁹ The court reasoned that HB 20's prohibition on viewpoint-based moderation was content-based because it singled out a class of speakers—large social media

383. *Id.*

384. *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1223 (11th Cir. 2022); *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021) (“The Florida statutes at issue are about as content-based as it gets.”); *accord* Bhagwat, *supra* note 4, at 126 (arguing that SB 7072's “blatant preference for politicians over the general public” foreclosed any neutral justification).

385. Stop Internet Censorship Act, S. 1914, 116th Cong., § 2(a)(1) (2019).

386. TEX. CIV. PRAC. & REM. CODE § 143A.002(a)(1)–(2) (2021). HB 20 also prohibits platforms from moderating content based on the user's geographic location in Texas. *Id.* § 143A.002(a)(3). The Fifth Circuit noted, however, that the platforms did not challenge the ban on geography-based moderation as a First Amendment violation. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 449 n.4 (5th Cir. 2022).

387. *See NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1108–09 (W.D. Tex. 2021), *stay of preliminary injunction granted*, 2022 WL 1537249 (5th Cir. 2022), *stay of preliminary injunction vacated*, 142 S. Ct. 1715 (2022), *preliminary injunction vacated*, 49 F.4th 439 (5th Cir. 2022).

388. *NetChoice, LLC*, 573 F. Supp. 3d at 1109.

389. *Id.*

platforms—and denied them the right to advance their own viewpoint through content moderation.³⁹⁰

On appeal, however, two members of the Fifth Circuit panel took a different view of the platforms' intermediary function when they vacated the preliminary injunction.³⁹¹ Judge Oldham's opinion for the court noted that "the Platforms, unlike newspapers, are primarily 'conduit[s]' for news, comment, and advertising.'" ³⁹² For that reason, in Judge Oldham's view, HB 20 did not affect the platforms' own speech, and the law therefore did not violate the First Amendment.³⁹³ Judge Jones echoed this reasoning in her concurrence, reasoning that the platforms "[f]unction[ed] as conduits for both makers and recipients of speech" and therefore when they "prevent[ed] disfavored speech from reaching potential audiences . . . they [were] not themselves 'speaking' for First Amendment purposes."³⁹⁴

In contrast, Judge Southwick's partial dissent characterized the platforms as curator-intermediaries.³⁹⁵ "Platforms compile, curate, and disseminate a combination of user-submitted expression, platform-authored expression, and advertisements."³⁹⁶ For that reason, when platforms engaged in content moderation they were "exercising their editorial discretion."³⁹⁷ Given this understanding of the platforms as curator-intermediaries, Judge Southwick opined that HB 20 regulated the platforms' speech, that it should be subject to at least intermediate scrutiny, and that it failed intermediate scrutiny.³⁹⁸

Judge Southwick's dissent accurately captured the platforms' role as curator-intermediaries.³⁹⁹ In contrast, Judge Oldham's opinion strained to characterize the platforms as "exercis[ing] virtually no editorial control or judgment."⁴⁰⁰ This framing misses the mark. The platforms surely do not play the same role that newspapers play when deciding which op-eds to print. But Judge Oldham's opinion wrongly assumes that there is no middle ground between a conduit and a traditional newspaper editor. Instead, recognizing the platforms' curator-intermediary function creates the opportunity to apply intermediate scrutiny, an approach better suited than strict scrutiny to account

390. *See id.* at 1110, 1114.

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

392. *Id.* at 456 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 416 U.S. 241, 258 (1974)).

393. *Id.* at 456–69.

394. *Id.* at 494 (Jones, J., concurring).

395. *Id.* at 496–97 (Southwick, J., concurring in part and dissenting in part).

396. *Id.* at 497.

397. *Id.* at 501.

398. *Id.* at 501–04.

399. *Id.*

400. *Id.* at 459.

for the conflicting speech interests raised by platform-neutrality laws like HB 20.⁴⁰¹

Once the platforms are understood to be curator-intermediaries, the most apt comparison is to *Turner I*, where Congress required cable television system operators to carry a limited number of local, over-the-air broadcast channels.⁴⁰² To decide what level of scrutiny to apply, the Court considered whether the must-carry law was content-based or content-neutral.⁴⁰³ The Court held that the law was content-neutral because the law made no reference to the content of the programming that would air on the cable television systems.⁴⁰⁴ And, although the law distinguished between speakers, it did so “based only upon the manner in which speakers transmit their messages to viewers, [and] not upon the messages they carry.”⁴⁰⁵ Similarly, HB 20 does not on its face ban the platforms from moderating any particular viewpoint; it simply prohibits platforms from moderating viewpoints that they disfavor.⁴⁰⁶ Such a law could, therefore, be deemed content-neutral, in which case intermediate scrutiny would apply.⁴⁰⁷ Courts will uphold a content-neutral law if it furthers an

401. See Alan Z. Rozenshtein, *The Fifth Circuit’s Social Media Decision: A Dangerous Example of First Amendment Absolutism*, LAWFAREBLOG (Sept. 20, 2022), <https://www.lawfareblog.com/fifth-circuits-social-media-decision-dangerous-example-first-amendment-absolutism> [<https://perma.cc/C3CR-SKYR>] (“[The Fifth Circuit’s] holding that, to the extent [HB 20] does implicate the First Amendment, the proper standard of review is intermediate scrutiny, is a promising avenue for analyzing content moderation laws. Intermediate scrutiny is the closest that American law has toward the flexible, fact-based proportionality review that is best suited to resolve the complex questions of constitutional law and policy.”).

402. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 630–31 (1994) (*Turner I*).

403. *Id.* at 642.

404. *Id.* at 643–44.

405. *Id.* at 645.

406. See TEX. CIV. PRAC. & REM. CODE § 143A.002 (2021); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 480 (5th Cir. 2022) (holding in the alternative that HB 20’s platform-neutrality requirement is content-neutral because it “in no way depends on what message a Platform conveys or intends to convey through its censorship”).

407. See *NetChoice, LLC*, 49 F.4th at 480 (holding in the alternative that, assuming HB 20 implicated the platform’s speech rights, the law was content-neutral because “Section 7’s burden in no way depends on what message a Platform conveys or intends to convey through its censorship . . . [and] Section 7 applies equally regardless of the censored user’s viewpoint, and regardless of the motives (stated or unstated) animating the Platform’s viewpoint-based or geography-based censorship”). The platforms also argued that, even if HB 20 was content-neutral on its face, the Texas legislature’s purpose in enacting HB 20 was to protect “conservative speech” on the platforms. Brief of Appellees at 8, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1046833. The Fifth Circuit rejected this argument, reasoning that the platforms presented “no real evidence of the Texas legislature’s alleged improper motives.” *NetChoice, LLC*, 49 F.4th at 482; accord *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1224-25 (11th Cir. 2022) (rejecting the platforms’ argument that legislators’ statements about the platforms’ perceived bias against conservatives rendered the

important or substantial government interest unrelated to the suppression of expression, and if the incidental restriction on protected expression is no greater than is essential to further that interest.⁴⁰⁸

Under the intermediate scrutiny test, however, HB 20 should still fail. In *Turner II*, when the must-carry rules affecting cable television system operators returned to the Court, the plurality opinion and Justice Breyer's concurrence recognized that the must-carry rules advanced the government's interest in "promoting the widespread dissemination of information from a multiplicity of sources."⁴⁰⁹ Although the must-carry regulations affected cable system operators' discretion by requiring them to carry some broadcast channels that they might not have otherwise carried, that limitation did not relate to the content or viewpoint of any speaker's message.⁴¹⁰ Instead, that restriction focused on the medium, not the message, by requiring carriage of a small number of local, over-the-air television channels.⁴¹¹ Accordingly, the government's multiplicity-of-sources purpose was unrelated to the suppression of expression.⁴¹² In contrast, HB 20 directly targets the platforms' own viewpoints by preventing them from moderating viewpoints with which they disagree. In Judge Southwick's words, this restraint on the platforms' expression "is both the purpose and the price" of HB 20, and HB 20 therefore cannot survive intermediate scrutiny.⁴¹³ The majority of the Fifth Circuit panel disagreed and held that HB 20's platform-neutrality mandate was unrelated to the suppression of speech because its purpose was "to protect individual speakers' ability to speak."⁴¹⁴ That position, however, overlooks the Supreme Court's admonition that the government "'may not burden the speech of others in order to tilt public debate in a preferred direction.'"⁴¹⁵ The Eleventh Circuit

entirety of SB 7072 content-based, regardless of whether particular provisions were facially content-neutral).

408. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994).

409. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*) (plurality opinion); *id.* at 226 (Breyer, J., concurring). The Court recognized two other purposes behind the must-carry rules: "preserving the benefits of free, over-the-air local broadcast television" and "promoting fair competition in the market for television programming." *Id.* at 189 (plurality opinion).

410. *See Turner I*, 512 U.S. at 643–45.

411. *Id.*

412. *See Turner II*, 520 U.S. at 189–90; *id.* at 226 (Breyer, J., concurring).

413. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 504 (5th Cir. 2022) (Southwick, J., concurring in part and dissenting in part) (citing Justice Breyer's concurrence in *Turner II*, 520 U.S. at 226).

414. *Id.* at 483.

415. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011) (quoted in *NetChoice, LLC*, 49 F.4th at 504 (Southwick, J., concurring in part and dissenting in part)).

agreed with Judge Southwick that there is “no legitimate—let alone substantial—government interest in leveling the expressive playing field.”⁴¹⁶

The result might well be different, however, for laws that function like traditional public accommodation laws by prohibiting platforms from discriminating based on protected classifications such as race, ethnicity, gender, sexual orientation, religion, and even political affiliation.⁴¹⁷ Such a case would differ from *Hurley*, which struck down the nondiscrimination provision of a state law prohibiting discrimination in public accommodations. In *Hurley*, where the parade organizer performed the collaborator-intermediary function, the parade organizer had a speech interest in the parade carrying an overarching, expressive message.⁴¹⁸ In contrast, the social media platform does not have a similar speech interest in a single, cohesive speech product.⁴¹⁹ In contrast, the platform’s speech interest is more atomized, consisting instead of an interest in delivering content that will engage and interest its users.⁴²⁰ Accordingly, such a nondiscrimination obligation in content moderation would likely not be content-based, which would allow the analysis to proceed under intermediate scrutiny as in *Turner I*. And under intermediate scrutiny, the state’s interest on protecting against discrimination on traditionally protected classifications would be unrelated to suppression of the platforms’ expression, allowing the

416. *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1228 (11th Cir. 2022). This split between the Fifth and Eleventh Circuits could reach the Supreme Court. Florida’s Attorney General has already petitioned for a writ of certiorari, and NetChoice recently filed an unopposed motion seeking a stay of the Fifth Circuit’s decision while NetChoice seeks a writ of certiorari. Petition for a Writ of Certiorari, No. 22-277, 2022 WL 4467452 (Sept. 21, 2022); Appellees’ Unopposed Motion to Stay the Mandate Pending Petition for Writ of Certiorari, *NetChoice, L.L.C. v. Paxton*, No. 21-51178 (Sept. 29, 2022), https://netchoice.org/wp-content/uploads/2022/09/NetChoice-CCIA-Unopposed-Motion-to-Stay-Mandate_Sep292022_Filed-1.pdf [<https://perma.cc/EM66-QTL3>].

417. *See, e.g.*, SAFE TECH Act, S. 299 117th Cong., § (2) (2021) (proposing an expansion of the carveout from Section 230 immunity for “any action alleging discrimination on the basis of any protected class . . . under any Federal or State law”); CAL. LAB. CODE § 1101 (West 2022) (prohibiting employer from “controlling or directing, or tending to control or direct the political activities or affiliations of employees”); *accord* Volokh, *supra* note 48, at 384 n.17 (referencing laws that ban “discrimination based on party affiliation” or “discrimination based on broader political beliefs”).

418. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos.*, 515 U.S. 557, 580-81 (1995).

419. *See* Volokh, *supra* note 48, at 405 (distinguishing platforms from newspapers, magazines, and television channels because the platforms do not provide users with an “aggregate speech product”).

420. *See Hurley*, 515 U.S. at 576–77 (stating that, whereas a cable network’s programing consists of “individual, unrelated segments” from which audience members can choose, “each parade unit . . . is understood to contribute something to a common theme . . . and . . . the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole”); Volokh, *supra* note 48, at 405 (arguing that newspapers produce an “coherent speech product” while social media platforms simply engaged in hosting users’ posts do not).

law to survive so long as the restriction on platforms' curator-intermediary function is no greater than what's essential to further the state's interest.

B. Social Media Platform Liability for Various Types of Harmful Content

Many proposals are in play to expand the liability of social media platforms that host or amplify certain types of content. Under Section 230 of the Communications Decency Act, social media platforms, like other "interactive computer services," may not be treated as the publisher or speaker of content provided by an "information content provider" such as one of the platform's users.⁴²¹ Section 230 contains a "carveout" from the immunity it provides and leaves platforms liable for violations of federal criminal law, intellectual property violations, violations of the Electronic Communications Privacy Act of 1986, and certain civil and criminal sex trafficking offenses.⁴²²

Proposals to expand this immunity carveout to more types of content would function as proxy-censor regulations affecting the platforms' curator-intermediary function.⁴²³ The SAFE TECH Act, for example, would expand the immunity carveouts for discrimination based on a protected classification; stalking, cyberstalking, harassment, cyberharassment, or intimidation based on specified protected classifications; and violation of "the law of nations or a treaty of the United States," or actions for wrongful death.⁴²⁴ Others have proposed further expansion of the immunity carveout, to reach incitement to violence, hate speech, and disinformation.⁴²⁵

Because the proxy-censor regulations would implicate the platforms' curator-intermediary function, the platforms' own speech interest in how they curate their user experience would align with the interests of their users.

421. 47 U.S.C. § 230(c)(1). *See generally* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2018).

422. 47 U.S.C. § 230(e). *See generally* Goldman, *supra* note 421 (discussing Section 230 immunity and carveouts).

423. *See, e.g.*, Megan Anand, Kiran Jeevanjee, Daniel Johnson, Quinta Jurecic, Brian Lim, Irene Ly, Matt Perault, Etta Reed, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Brady Worthington, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/M2HB-7W4N>]. On the other hand, carveouts for activities like discrimination against protected classes would likely regulate only conduct, not speech, and would not raise First Amendment problems.

424. SAFE TECH Act, S. 299 117th Cong., § (2) (2021).

425. HARV. KENNEDY SCH. MOSSAVAR-RAHMANI CENT. FOR BUS. & GOV'T: FACULTY WORKING PAPER SERIES 2021-02, RECOMMENDATIONS TO THE BIDEN ADMINISTRATION: ON REGULATING DISINFORMATION AND OTHER HARMFUL CONTENT ON SOCIAL MEDIA 7 (2021) https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/FWP_2021-02.pdf [<https://perma.cc/W6H8-YUPN>].

Accordingly, analyzing a First Amendment challenge to such a regulation would not involve conflicting speech interests. Instead, the First Amendment analysis would proceed just as in any other attempt by the government to censor particular categories of speech.

A law denying social media platforms immunity from liability for specific types of speech would surely be content-based and therefore subject to strict scrutiny. Demonstrating that the law was narrowly tailored to serve a compelling state interest would be difficult indeed. The best chance of survival would go to carveouts that apply to speech that furthers illegal conduct, which is one of the arguments in favor of the Fight Online Sex Trafficking Act (FOSTA) and its expansion the Section 230 immunity carveout to include the facilitation of sex trafficking.⁴²⁶ On the other hand, targeting undesirable speech

426. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018) (creating a new federal crime for knowingly facilitating or participating in sex trafficking). For cases finding and articles arguing that FOSTA is consistent with the First Amendment, see *United States v. Martono*, No. 3:20-CR-00274-N-1, 2021 WL 39584, at *1–2 (N.D. Tex. Jan. 5, 2021) (“In this case, ‘promotes’ and ‘facilitates’ . . . do not stand alone and without context. FOSTA specifically criminalizes owning, managing, or operating a computer service with the intent to promote the prostitution of another person or the intent to facilitate the prostitution of another person FOSTA does not obviously criminalize speech promoting prostitution generally Thus, the Court determines here that the use of the word “promotes” in FOSTA does not appear substantially to restrict protected speech . . . [and] the Court holds that it is not unconstitutionally overbroad.”); *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 201 (D.D.C. 2018) (“Plaintiffs also insist that, by virtue of the language ‘own, manage, or operate an interactive computer service,’ Section 2421A impermissibly targets speech. I disagree. It is black-letter law that speech that ‘is intended to induce or commence illegal activities’ is not protected by the First Amendment.”), *rev’d* 948 F.3d 363 (D.C. Cir. 2020); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rel.*, 413 U.S. 376, 388–89, (“We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”); Abigail W. Balfour, Note, *Where One Marketplace Closes, (Hopefully) Another Won’t Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2504 (2019) (“FOSTA does not violate the First Amendment because the Supreme Court does not extend First Amendment protection to speech used to solicit crimes.”); Alexandra Sanchez, *FOSTA: A Necessary Step in Advancement of the Women’s Rights Movement*, 36 TOURO L. REV. 637, 660 (2020) (“FOSTA has not restricted the use of any speech that advocates for prostitution or sex-trafficking. Instead, FOSTA has restricted speech that is integral to commit the crimes of prostitution or sex trafficking. FOSTA merely holds that online service providers are accountable when their users engage in speech that is integral to commit a crime under federal law.”). For arguments that FOSTA violates the First Amendment, see Scott Memmel & Christopher Terry, *Constitutive Choices: Section 230 and First Amendment Values Versus FOSTA and President Trump’s Executive Order*, 39 CARDOZO ARTS & ENT. L.J. 99, 101 (2021) (“This paper argues that FOSTA is unconstitutionally overbroad and implicates large quantities of protected speech, therefore failing to survive strict scrutiny review.”); Emily Morgan, Note, *On FOSTA and the Failures of Punitive Speech Restrictions*, 115 NORTHWESTERN U. L. REV. 503 (2020) (arguing that FOSTA violates the First Amendment); Lura Chamberlain, Note, *FOSTA: A Hostile Law with A Human Cost*, 87 FORDHAM L. REV. 2171, 2175 (2019) (arguing that FOSTA violates the First Amendment because of its overbreadth

like misinformation and hate speech seems likely to fail, just as it has failed in past cases involving hate speech and indecent speech.⁴²⁷ The presence of a conduit-intermediary would not make it any easier for such a law to survive strict scrutiny. On the contrary, the presence of a conduit-intermediary with an incentive to over-censor to avoid potential liability only makes the law more likely to violate the First Amendment.⁴²⁸

C. Mandatory Social Media Platform Notices and Warnings

Other proposed legislation takes a very different approach to the challenges presented by social media platforms today. The Social Media Nudge Act proposes a study of potential “content-agnostic interventions” that social media platforms could implement to mitigate the viral spread of harmful content.⁴²⁹ The Act would also require the FTC to draft regulations specifying which content-agnostic interventions social media platforms must implement.⁴³⁰ The Act’s findings identify three different examples of content-agnostic interventions: nudges to users such as “screen time alerts . . . which may reduce addictive platform usage patterns and improve user experiences online”; prompts to “help users identify manipulative and microtargeted advertisements”; and alerts requiring users to read user-generated content before sharing it.⁴³¹

The inevitable First Amendment challenges to these interventions would turn on whether each intervention fell within the relatively permissive *Zauderer* standard applicable to requirements that commercial actors include “purely factual and uncontroversial information” in their advertisements or

because its “criminalization of any internet discussion that ‘promotes or facilitates prostitution’ ultimately prevents consensual sex workers and their advocates from sharing health and safety information—dialogue that constitutes protected speech,” and that “FOSTA could proscribe political speech that advocates for more permissive legal treatment of prostitution”); Regina A. Russo, Note, *Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship*, 68 CLEV. ST. L. REV. 314, 336–37 (2020) (arguing that FOSTA violates the First Amendment because it “is so broadly-written that internet intermediaries do not know what is allowed and what is not,” which forces online entities to “shutter[] websites completely or censor[] certain speech that could be dubbed as ‘promoting’ or ‘facilitating’ prostitution”).

427. See *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 826–27 (2000); *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 849 (1997).

428. See *Smith v. California*, 361 U.S. 147, 153–54 (1959).

429. S. 3608, 117th Cong. § 3 (2022).

430. *Id.* § 4.

431. *Id.* § 2(4).

packaging.⁴³² *Zauderer*, however, only applies to regulation of commercial speech.⁴³³ Determining whether the content-agnostic interventions regulate commercial speech would require close attention to the platforms' intermediary function.

The platform users' posts would not constitute commercial speech because they neither propose a commercial transaction nor relate solely to the economic interests of the users.⁴³⁴ Thus, the *Zauderer* test could not apply unless the interventions were deemed to regulate some aspect of the platforms' function that could be deemed to involve commercial speech. The government's strongest commercial speech argument would be to analogize the portions of the platforms on which the interventions would appear to product packaging or in-store displays.⁴³⁵ This analogy would emphasize that the interventions related solely to the platforms' conduit-intermediary function, in which the platforms lack any speech interest, and did not affect the platforms' roles as either curator-intermediaries or commentator-intermediaries.

Even if the interventions are deemed to relate to the platforms' commercial speech, *Zauderer* will not apply if that commercial speech is "inextricably intertwined" with non-commercial speech on the platforms.⁴³⁶ Close attention to the relevant intermediary function will help resolve this issue as well. The Supreme Court considered this inextricably intertwined issue in *Riley v.*

432. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). Under *Zauderer*, such labeling requirements are upheld unless they are unduly burdensome or not reasonably related to the state's interest. *Id.* at 651. If *Zauderer* did not apply, the regulations would fall under the Court's far stricter review of compelled speech.

433. *Id.* at 651.

434. *See* *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 427 U.S. 748, 762 (1976) (defining commercial speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (same).

435. *See* *Ent. Software Ass'n v. Balgojevich*, 469 F.3d 641, 651–53 (7th Cir. 2006) (applying *Zauderer* to government requirement that businesses selling or renting sexually explicit video games place a large "18" on the video game packaging and post in-store displays about rating system, and holding that the requirement failed the *Zauderer* test); *Video Software Dealers' Ass'n v. Schwarzenegger*, 556 F.3d 950, 965–67 (9th Cir. 2009) (applying *Zauderer* to government requirement that businesses selling or renting violent video games include a large "18" on the video game packaging, and holding that the requirement failed the *Zauderer* test).

436. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) ("Ordinarily, we would initially decide whether video game packaging constitutes separable commercial speech or commercial speech that is 'inextricably intertwined' with otherwise fully-protected speech However, . . . the labeling requirement fails even under the factual information and deception prevention standards set forth in *Zauderer*."); *see* *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795–96 n.9 (1988) (assuming without deciding that "a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking . . . we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech").

National Federation of the Blind of North Carolina.⁴³⁷ In *Riley*, the state required professional fundraisers to make certain disclosures when they were soliciting donations for their charitable clients.⁴³⁸ The Court decided whether the fundraisers' commercial speech was inextricably intertwined with the non-commercial speech of the charities by examining "the nature of the speech taken as a whole and the effect of the compelled statement thereon."⁴³⁹ The Court held that the fundraisers' speech was inextricably intertwined with the speech of the charities because "solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and . . . without solicitation the flow of such information and advocacy would likely cease."⁴⁴⁰ Framed in the terms of this Article, the Court determined that there was no way to disentangle the fundraiser's collaborator-intermediary function—passing along the charity's message—from the fundraiser's direct solicitation.

In contrast to *Riley*, the content-agnostic interventions could be disentangled from the platform users' non-commercial speech. In *Riley*, the same speakers—professional fundraisers—delivered the commercial and non-commercial messages in the same communications.⁴⁴¹ In contrast, the three types of interventions contemplated under the Nudge Act would be separable from the platform users' non-commercial speech. First, disclosures to users about their own screen time would be distinguishable from users' non-commercial speech. Second, unless the regulations were very poorly drafted, mandatory prompts helping users identify manipulative and microtargeted content would also be distinguishable from the users' posts. Finally, even reminders advising users to read content before sharing it would be separate from the users' posts. In each of these examples, the intervention would not affect the platform's curator-intermediary function because the platform remains free to decide whether and how to distribute content to its users. Nor would the intervention impair the platform's commentator-intermediary function because the platform remains free to publish its own commentary about any of the content that it distributes to users. Finally, the interventions would not even relate to the platform's conduit-intermediary function because the interventions would not prohibit the platform from transmitting the users' posts.

In contrast to the hands-off approach of the Nudge Act, legislation that restricts the platforms' commentator-intermediary function would likely fall to

437. 487 U.S. 781 (1988).

438. *Id.* at 786.

439. *Id.* at 796.

440. *Id.*

441. *Id.*

a First Amendment challenge. For example, as discussed above, Florida prohibited social media platforms from censoring “a journalistic enterprise based on the content of its publication or broadcast.”⁴⁴² To “censor” includes “post[ing] an addendum to any content or material posted by a user.”⁴⁴³ Thus, posting a fact check or other type of content warning on a journalistic enterprise’s post would violate the statute. This ban directly undermines the speech interest inherent in the platform’s commentator-intermediary function. The Eleventh Circuit properly upheld the district court’s preliminary injunction of this and many other aspects of the Florida legislation in *NetChoice, LLC v. Attorney General of Florida* because they could survive neither strict nor intermediate scrutiny.⁴⁴⁴

V. CONCLUSION

Given the heated debates over whether and how social media platforms should moderate content, we can expect to see more attempts to regulate the platforms—both by limiting their ability to moderate content and by requiring them to moderate more. The inevitable First Amendment challenges accompanying these laws will require courts to apply longstanding doctrine to a complex new digital communications ecosystem that flows through speech intermediaries. This Article has offered a taxonomy of the speech intermediary functions—conduit, curator, commentator, and collaborator—and identified for each function the potential conflict or alignment between the intermediary’s speech interest and the speech interests of the speakers and listeners the intermediary serves. The Article has also mapped past First Amendment cases onto the taxonomy and described how each intermediary’s function influenced the application of First Amendment doctrine. The taxonomy presented above

442. FLA. STAT. § 501.2041(1)(j) (2022).

443. *Id.* § 501.2041(2)(b).

444. *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1208 (11th Cir. 2022). Texas passed a similar law which was also the subject of a First Amendment challenge. *See NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1108–09 (W.D. Tex. 2021), *stay of preliminary injunction granted*, 2022 WL 1537249 (5th Cir. 2022), *stay of preliminary injunction vacated*, 142 S. Ct. 1715 (2022), *preliminary injunction vacated*, 49 F.4th 439 (5th Cir. 2022). Most of the law regulated the curation function by limiting platforms’ ability to “block, ban, remove, deplatform, demonetize, de-boost, restrict, [or] deny equal access or visibility to . . . expression.” TEX. CIV. PRAC. & REM. CODE § 143A.001(1) (2021). However, to censor also included to “otherwise discriminate against expression,” and one could conceivably interpret “discriminate against expression” to reach a platform’s commentary on users’ posts. *See id.* § 143A.001(1). Neither the Fifth Circuit nor the parties in their Fifth Circuit briefs discussed the possibility that HB 20 could restrict the platforms’ own commentary. *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022); Brief for Appellant, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 717286; Brief for Appellee, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 717286.

will help courts analyze which intermediary functions are implicated by a given regulation, whether the intermediary has a speech interest of its own, and whether that interest conflicts with the speaker and listener interests that First Amendment doctrine has evolved to protect, all of which will mitigate the inevitable analytical complexities.