

Data Governance's First Amendment Opportunity

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The conventional wisdom says that the First Amendment stands as an insurmountable hurdle to most forms of data-based regulation. Though scholars disagree about what exactly makes free-speech doctrine excessively deregulatory, most agree that it is.

This Article challenges that conventional wisdom by showing how the current Supreme Court has proven unexpectedly receptive to laws that burden profit-motivated information processing, and it guides policymakers who wish to enact the future of data governance.

In three recent First Amendment cases, the Court's conservative majority pointedly declined technology companies' invitation to invalidate laws that seriously interfered with their businesses' information-processing activities. These decisions all narrowly characterized the challenged laws' burden on expression. That critical and unexpected move limited the First Amendment's coverage, lowered scrutiny, helped laws survive that scrutiny, and dampened industry's ability to easily invalidate large swaths of informational regulation. Together, the decisions mark a sharp methodological break—abandoning the categorical rules and sweeping rhetoric of the early Roberts Court and instead embracing a calibrated, discretionary approach.

This is not to suggest that the Court will characterize all future speech burdens so narrowly, as a deregulatory First Amendment paradigm continues to govern corporate-speech cases and those involving the specter of coercive ideological conformity. But Silicon Valley executives gambled that the Court would mechanically apply *laissez-faire* principles to unshackle their businesses from meddlesome policymakers, and that was a grave miscalculation.

The implications for information-age reform are profound. The circuit courts are already operationalizing narrowed burdens to rebuff industry's facial challenges and sustain youth-safety regulations from red and blue states alike. The Court's new approach is thus breathing new life into efforts to ameliorate addictive digital design, address dangerously sycophantic chatbots, increase transparency and oversight, restrict minors' access to social media, and more. Because a discretionary regime provides latitude rather than guarantees, this Article offers concrete guidance to policymakers seeking to seize data governance's First Amendment opportunity.

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INTRODUCTION

Technology companies today perpetuate novel harms at an almost unimaginable scale. To name just a few: Social-media platforms pervasively surveil their users and employ that data to design slot-machine-like services that peddle scams and produce harmful and compulsive use.¹ Those platforms are built on digital devices that degrade the educational outcomes, physical fitness, and wages of their heaviest users, and those effects spread like a contagion to hapless bystanders.² Artificial-intelligence chatbots are spurring mania, psychosis, dependency, and antisocial behavior among their users.³ The effortless availability

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1. See, e.g., Second Amended Complaint ¶¶ 76–80, In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, No. 4:22-MD-3047 (N.D. Cal., Dec. 15, 2023) (“TikTok will at times delay a video it knows a user will like until the moment before it anticipates the user would otherwise log out. Instagram’s notification algorithm will at times determine that a particular user’s engagement will be maximized if the app withholds ‘Likes’ on their posts and then later delivers them in a large burst of notifications.”); Plaintiffs’ Corrected Omnibus Opposition to Defendants’ Motions for Summary Judgment at 18, In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, No. 4:22-MD-3047 (N.D. Cal., Nov. 21, 2025) (“Internally, Meta researchers minced no words: ‘IG is a drug... We’re basically pushers.’ ‘Teens are hooked despite how it makes them feel. Instagram is addictive, and time-spend on platform is having a negative impact on mental health’” (citations omitted).); *id.* at 76 (“Internally, employees were nothing short of disgusted at Meta’s express interest in the tween market: ‘oh good, we’re going after <13 year olds now? [Z]uck has been talking about that for awhile... targetting [sic] 11 year olds feels like tobacco companies a couple decades ago (and today). Like we’re seriously saying “we have to hook them young here”’” (all alterations in original).); Jeff Horwitz & Engen Tham, *Meta tolerates rampant ad fraud from China to safeguard billions in revenue*, REUTERS (Dec. 15, 2025), reuters.com/investigations/meta-tolerates-rampant-ad-fraud-china-safeguard-billions-revenue-2025-12-15/ (finding that Meta openly tolerates advertising for scams, fraud, and illegal goods on its platforms because such advertising totals ten percent of its annual revenue—about \$16 billion per year).
 2. See, e.g., Panle Jia Barwick, Siyu Chen, Chao Fu, and Teng Li, *Digital Distractions with Peer Influence: The Impact of Mobile App Usage on Academic and Labor Market Outcomes*, 141 QUARTERLY J. ECON. 1, 5–6 (Feb. 2026), academic.oup.com/qje/article/141/1/1/8292650 (finding that mobile app usage is contagious between collegiate roommates, reduces GPAs, lowers physical education scores, and decreases post-graduation wages); Daniel Buck, *The Evidence for Phone Bans Mounts*, FORDHAM INST. (May 9, 2025), fordhaminstitute.org/national/commentary/evidence-phone-bans-mounts.
 3. See, e.g., Casey Newton, *OpenAI maps out the chatbot mental health crisis*, PLATFORMER (Oct. 27, 2025), platformer.news/openai-mental-health-research-chatgpt-suicide-delusions (“OpenAI released new research on the prevalence of users with potentially serious mental health issues on ChatGPT. . . . 560,000 people showing signs of psychosis or mania, 1.2 million people developing a potentially unhealthy bond to a chatbot, and 1.2 million people having conversations that indicate plans to harm themselves.”); Kashmir Hill & Jennifer Valentino-DeVries, *What OpenAI Did When ChatGPT Users Lost Touch With Reality*, N.Y. TIMES (Nov. 23, 2025), nytimes.com/2025/11/23/technology/openai-chatgpt-users-risks.html (“[ChatGPT] . . . discouraged [Adam Raine] from sharing his [suicidal] intentions with his family. In its final messages before Adam took his life in April, the chatbot offered instructions for how to tie a noose.”); Myra Cheng, Cinoo Lee, Pranav Khadpe, Sunny Yu, Dyllan Han, and Dan Jurafsky, *Sycophantic AI Decreases*

of ultra-high-definition graphic adult content is distorting teens' sexual preferences and expectations.⁴ And malign actors are using these digital platforms to polarize, radicalize, and terrorize the polity.⁵

A policymaker interested in doing something about these pressing issues of the day will no doubt encounter the suggestion that the First Amendment stands as an insurmountable hurdle to regulation that touches and concerns software. This prevailing consensus among many scholars, commentators, and jurists says that three distinct aspects of First Amendment doctrine are potent deregulatory forces—together producing a speech-based digital simulacrum of

Prosocial Intentions and Promotes Dependence (Oct. 1, 2025), doi.org/10.48550/arXiv.2510.01395 (“[T]hese findings show that social sycophancy is prevalent across leading AI models, and even brief interactions with sycophantic AI models can shape users’ behavior: reducing their willingness to repair interpersonal conflict while increasing their conviction of being in the right.”).

4. See, e.g., Jane Hone, *‘I think it’s natural’: why has sexual choking become so prevalent among young people?*, THE GUARDIAN (Sept. 1, 2024), theguardian.com/lifeandstyle/article/2024/sep/02/i-think-its-natural-why-has-sexual-choking-become-so-prevalent-among-young-people; UnHerd, *Porn and Social Media Are Killing Childhood* (Apr. 19, 2024), unherd.com/watch-listen/porn-and-social-media-are-killing-childhood/; E.J. Dickson, *We’re All Spitting in One Another’s Mouths These Days*, THE CUT (June 25, 2025), thecut.com/article/spitting-in-mouth-sex-trend.html (“Like many sexual trends, spitting originated in hardcore porn before trickling down into the mainstream. . . . In this respect, some people I spoke with compared it to choking, which has become something of a scourge in hetero sexual encounters thanks to men imitating it from porn.”); Gustavo Turner, *My Stepdad’s Huge Data Set*, LOGIC MAGAZINE (Jan. 1, 2019), logicmag.io/play/my-stepdad-s-huge-data-set/ (“Porn companies, when trying to figure out what people want, focus on the customers who convert [from free to paid]. It’s their tastes that set the tone for professionally produced content and the industry as a whole. . . . [B]acked by online data of paid customers seemingly obsessed with [particular fetishes like incest], the twenty-first-century porn industry . . . has seen a spike in titles devoted to these . . . fantasies.”).
5. See, e.g., Danit Finkelstein, Sonia Yanovsky, Jacob Zucker, Anisha Jagdeep, Collin Vasko, Ankita Jagdeep, Lee Jussim, and Joel Finkelstein, *Information manipulation on TikTok and its relation to American users’ beliefs about China*, 2 FRONT. SOC. PSYCHOL. (Jan. 27, 2025), doi.org/10.3389/frsps.2024.1497434 (“As hypothesized, our Study I simulated TikTok users encountered [pro-China] content, a result that could not easily be explained by user engagement metrics (Study II). The more time real people reported spending on TikTok (Study III), the more their perceptions and attitudes favored [Chinese Communist Party] interests. Furthermore, evidence from the present three studies and other reports . . . converges on the conclusion that the CCP is advancing its propaganda by manipulating social media.”); Nathan Witkin, *The Case Against Social Media Is Stronger Than You Think*, ARACHNE (Aug. 27, 2025), arachnemag.substack.com/p/the-case-against-social-media-is (“[S]ocial media has empowered a (relatively) small group of political influencers who, in response to the perverse incentives created by attentional negativity bias, have disseminated ideas that make people more angry, fearful, and extremist.”); Henry Farrell, *We’re getting the social media crisis wrong*, PROGRAMMABLE MUTTER (Jan. 7, 2025), programmablemutter.com/p/were-getting-the-social-media-crisis (“The collective perspectives that emerge from social media—our understanding of what the public is and wants—are similarly shaped by algorithms that select on some aspects of the public, while sidelining others.”); Mike Levine, Pierre Thomas, and Lucien Bruggeman, *FBI has opened 250 investigations tied to violent online network ‘764’ that preys on teens, top official says*, ABC NEWS (May 6, 2025), abcnews.go.com/US/fbi-opened-250-investigations-tied-violent-online-network/story?id=121480884 (“FBI officials say they are growing

Lochner v. New York.⁶

The first concerns creeping First Amendment coverage.⁷ Critics focus on the constitutional protection afforded to corporations' speech and commercial advertising starting in the 1970s, arguing that the Court has since been on an inexorable march to sweep ever more activities within the First Amendment. The second centers on the Court's recent tendency to apply ever more withering scrutiny to laws that draw content-based distinctions and that compel, rather than restrict, expression.⁸ The third focuses on the extreme solicitude the Court has afforded to editors.⁹ Some have argued that prioritizing editors' curatorial interests repeats *Lochner's* error by ignoring the sociopolitical realities of our media environment—one dominated by a small number of wealthy owners of communicative infrastructure.

To a would-be data-governance reformer, then, free-speech doctrine resembles the multi-headed Hydra—a terrifying mythological beast that stands ready to snatch up any attempt at information-age reform.¹⁰ For one, laws that govern information flows invariably draw content-based distinctions and elicit information, putting them at risk of the Court's content-based and compelled-speech cases.¹¹ For another, commercial-speech doctrine poses difficulty to governing free-to-use platforms that monetize by collecting and processing data to target advertisements.¹² And despite the vast scale of user-generated-content platforms—wherein a minuscule number of moderators rely on automated processes to govern the expression of billions of users worldwide—they are nevertheless entitled to claim the constitutional mantle of the newspaper editor of yore.¹³ Ultimately, the conventional wisdom holds, the First Amendment means that little can be done about software-perpetuated wrongs.

This Article challenges this data-governance pessimism. It shows how the current Supreme Court has proven unexpectedly receptive to laws burdening profit-motivated information processing, and it guides policymakers on how to seize a generational opportunity to enact the future of data governance.

increasingly concerned about a loose network of violent predators who befriend teenagers through popular online platforms and then coerce them into escalating sexual and violent behavior—pushing victims to create graphic pornography, harm family pets, cut themselves with sharp objects, or even die by suicide.”).

6. 198 U.S. 45 (1905).

7. See Part 1.1, *infra*.

8. See Part 1.2, *infra*.

9. See Part 1.3, *infra*.

10. See generally Rebecca Aviel, Margot E. Kaminski, Toni M. Massaro, and Andrew Keane Woods, *From Gods to Google*, 134 YALE L.J. 1269 (2024); Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100 (2024) [hereinafter Douek & Lakier, *Lochner.com*].

11. See Aviel et al., *supra* note 10, at 1304–10.

12. See, e.g., Marco Crocetti, *Targeted Advertising and the First Amendment: Student Privacy vs. Protected Speech*, 25 CATH. U.J. L. & TECH. 23 (2017).

13. Douek & Lakier, *supra* note 10, at 115–23.

In three recent First Amendment cases—*Moody v. NetChoice, LLC*,¹⁴ *TikTok Inc. v. Garland*,¹⁵ and *Free Speech Coalition, Inc. v. Paxton*¹⁶—technology companies asked the Court to use its commercial-speech, compelled-speech, content-based, and editorial-discretion doctrines to nullify vast swaths of recent digital regulation. Almost without exception, the conservative justices declined industry’s invitation by narrowly characterizing the laws’ burden on the companies’ expression.¹⁷ That critical and unexpected move surfaced at every level of the First Amendment analysis: it led the Court to limit the scope of the First Amendment’s coverage, to lower scrutiny, to help the laws survive that scrutiny, and to deprive industry of a well-worn procedural tool for invalidating disfavored laws root and branch.¹⁸

The Court’s approach, considered together, marks a sharp methodological break.¹⁹ Whereas the early Roberts Court decided First Amendment cases using categorical rules and bombastic rhetoric, the conservative justices are now embracing a discretionary approach with a carefully calibrated tone. The narrowed burden is this new discretion at work, since the characterization of a law’s expressive burden is precisely the kind of judgment that categorical rules once limited. Even as the Court sustains new forms of data governance, though, the deregulatory First Amendment continues apace in contexts like corporate-speech cases and those involving the specter of coercive ideological conformity.²⁰ Understanding how rival paradigms govern free-speech cases reveals that technology companies are ill-equipped to take advantage of a *Lochner*ian one.

The Court’s new method is already surfacing in the lower courts. Federal circuit courts are now regularly rejecting industry’s broadest challenges and sustaining novel youth-safety regulations from red and blue states alike.²¹ But because a discretionary approach offers latitude rather than guarantees, policymakers who wish to seize the chance to legislate amid loosened First Amendment constraints require concrete guidance about the continued constitutional risks of different reform strategies.²² This Article synthesizes how the lower courts are operationalizing the Supreme Court’s new approach and exposes the regulatory possibilities that lie beyond *Lochner*’s long shadow.

Despite these promising signs, many scholars and commentators have heavily criticized the Court’s recent decisions and expressed little interest in seizing this new chance at reform.²³ They denounce the wisdom of the laws upheld,

14. 603 U.S. 707 (2024).

15. 604 U.S. 56 (2025).

16. 606 U.S. 461 (2025).

17. See Part 2.1, *infra*.

18. See Parts 2.1–2.2, *infra*.

19. See Part 2.3.1, *infra*.

20. See Part 2.3.2, *infra*.

21. See Part 3.1.1, *infra*.

22. See Part 3.1.2, *infra*.

23. See Part 3.2, *infra*.

contend that the decisions are politically motivated and unprincipled, and doubt that the Court will uphold other forms of data-based regulation. Though not groundless, their skepticism is ultimately misplaced. As litigators increasingly reveal the depths of tech companies' engagement- and profit-maximizing depravity²⁴ and as bipartisan political support swells for reining in the digital technologies that permeate modern life,²⁵ policymakers would be profoundly mistaken to squander data governance's First Amendment opportunity.

This Article has three parts. Part 1 surveys the prevailing scholarly accounts of the Court's First Amendment Lochnerism. Part 2 analyzes the Court's recent First Amendment technology cases to develop a competing paradigm wherein the Court narrowly casts a law's burden on protected expression. Doing so reveals how the conservatives have embraced a discretionary method that departs sharply from the categorical approach of the preceding era. Part 3 shows how the lower courts are operationalizing narrowed burdens, distills a risk-graded strategy for policymakers, and answers the critics resisting the deregulatory paradigm's retreat.

1. THE PREVAILING DEREGULATORY ACCOUNTS

Since the New Deal, jurists and scholars have leveled the accusation that courts are wielding the First Amendment as a potent deregulatory tool.²⁶ These arguments invoke a variety of different labels and metaphors—First Amendment Lochnerism and the laissez-faire First Amendment, for instance—but the basic contours are the same: holding laws unconstitutional on free-speech grounds siphons authority away from the democratically accountable policymakers who enacted the laws, thereby placing ever more policy choices beyond popular deliberation.

Scholars differ, however, on what exactly makes First Amendment doctrine excessively deregulatory. Each account focuses on a distinct aspect of the Court's jurisprudence: first, the Court's parallel movement to afford greater and greater protection to corporate and commercial speech, especially beginning in the 1990s; second, the Court's more recent jurisprudence on content-based laws and compelled speech; and third, the Court's unwavering commitment to strong protections for editorial discretion. This Part surveys these doctrines and outlines the prevailing scholarly accounts of how they constitute a deregulatory First Amendment.

24. See, e.g., Plaintiffs' Opposition, *supra* note 1.

25. See notes 477–490 and accompanying text, *infra*.

26. See, e.g., Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1349 (1941) ("A few years ago a bench headed by the present Chief Justice read 'liberty of contract' out of the due process clause and promptly read freedom of speech into its place."); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 647 (1943) (FRANKFURTER, J., dissenting).

1.1 CORPORATE & COMMERCIAL SPEECH

Courts and scholars have long observed that only a subset of activities that implicate speech are subject to First Amendment scrutiny. Over two decades ago, Frederick Schauer called it First Amendment salience,²⁷ while Amanda Shanor has more recently referred to it as coverage.²⁸ In recent decades, the Court has rendered more and more state action subject to First Amendment scrutiny. Two strands of doctrine illustrate this creeping First Amendment coverage: corporate speech and commercial speech.

The Court first held that for-profit non-media corporations were entitled to First Amendment protection in 1978 when it invalidated a state law that prohibited corporations from spending to influence ballot initiatives that did not “materially affect” their property, business, or assets.²⁹ Two years later, the Court struck down a state agency order that prohibited a public utility from mailing customers’ billing statements with accompanying inserts that expressed the corporation’s “opinions or viewpoints on controversial issues of public policy.”³⁰

The Court did not immediately press the corporate speech doctrine to its logical endpoint—that artificial and natural persons enjoyed identical expressive freedoms.³¹ The Rehnquist Court repeatedly upheld campaign-finance restrictions.³² But by 2010, after the arrival of a new chief justice and with Samuel Alito having replaced Sandra Day O’Connor, the Court overturned those decisions and held in *Citizens United v. Federal Election Commission* that regulating corporate political spending violated the First Amendment.³³

The Court’s commercial speech cases have followed a similar arc. The Court first afforded constitutional protection to commercial speech in 1976’s *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, overturning over thirty years of precedent along the way.³⁴ Originally, “constitutional protection for commercial speech was supported by progressive jurists who were anxious to break informational monopolies, particularly in the medical and legal professions,” whereas the Court’s conservatives “vigorously objected to this ex-

27. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

28. See Amanda Shanor, *First Amendment Coverage*, 93 NYU L. REV. 318 (2018) [hereinafter Shanor, *Coverage*].

29. See *First Bank of Boston v. Bellotti*, 435 U.S. 765, 767–68, 776 (1978).

30. *Consolidated Edison Co. of New York v. Public Service Comm. of New York*, 447 U.S. 530, 533 (1980).

31. See Lakier, *Real Lochner*, *supra* note 40, at 1265, 1267.

32. See *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

33. *Citizens United v. Federal Election Comm.*, 558 U.S. 310 (2010).

34. 425 U.S. 748 (1976) (overturning *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

pansion of First Amendment rights.”³⁵ In *Central Hudson Gas & Electric Corp. v. Public Services Commission* four years later, the Court clarified that laws burdening commercial speech were subject to intermediate scrutiny.³⁶

The Court remained cagey about exactly what constituted the “commercial speech” subject to this form of review: *Virginia Pharmacy* was couched in terms of “speech [that] does no more than propose a commercial transaction,”³⁷ whereas *Central Hudson* referred to “expression related solely to the economic interests of the speaker and its audience.”³⁸ Three years later, Justice Marshall held that “informational pamphlets” that referred to contraceptives were commercial speech because they were advertisements that referred to specific products and the mailer had an economic incentive to send them; it was the “combination of *all* these characteristics” that “provide[d] strong support for the . . . conclusion that the informational pamphlets [were] properly characterized as commercial speech.”³⁹

Backlash to *Virginia Pharmacy* and its progeny was both strong and immediate, and the Court initially appeared “to back away from rigorously protecting commercially oriented speech.”⁴⁰ In 1986, Chief Justice Rehnquist wrote an opinion concluding that “because the Puerto Rican legislature possessed the ‘greater power’ to ban all gambling in the territory, it also possessed the ‘lesser power’ to ban all ads about gambling in the territory, even when it did not choose to ban the gambling itself.”⁴¹ Since legislatures have tremendous power to ban the sale of certain goods, “the Court’s less-power argument granted legislatures virtually unlimited power to ban whatever advertising they desired.”⁴² Three years later, Justice Scalia penned an opinion upholding a university’s restriction on Tupperware parties, clarifying that *Central Hudson* scrutiny requires only a “reasonable fit” between the government’s ends and means—not the least-restrictive-means requirement from strict scrutiny.⁴³

But in the 1990s, “the political valence of commercial speech doctrine shifted radically” when the Court’s conservatives “began to appreciate its potential as a deregulatory tool.”⁴⁴ Not only did renewed criticism fail to quell the deregulatory march this second time, “[i]f anything, the Court ratcheted up the level of

35. Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 168 (2015).

36. See *Central Hudson Gas & Electric Corp. v. Public Services Comm.*, 447 U.S. 557 (1980).

37. *Virginia Pharmacy*, 425 U.S. 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm.*, 413 U.S. 376, 385 (1973)) (internal quotation marks omitted).

38. *Central Hudson*, 447 U.S. at 561.

39. *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60, 66–67 (1983).

40. Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1261, 1267 (2020) [hereinafter Lakier, *Real Lochner*].

41. *Id.* (quoting *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345–46 (1986)).

42. *Id.*

43. See *Board of Trustees of the State University of N.Y. v. Fox*, 492 U.S. 469, 475–81 (1989).

44. Post & Shanor, *supra* note 35, at 168.

protection it applied.”⁴⁵ In 1995, Justice Thomas struck down a beer-labeling requirement after concluding that the law failed both *Central Hudson*’s under- and over-inclusiveness requirements, thereby ratcheting up the fit requirements that Justice Scalia had loosened six years earlier.⁴⁶ The next year, the Court explicitly repudiated the “greater-includes-the-lessor” argument on its way to holding unconstitutional a restriction on alcohol advertising.⁴⁷ Decisions in the following years also invalidated restrictions on gambling, tobacco, and pharmaceutical advertisements.⁴⁸ Together, these decisions fueled a scholarly supposition that *Central Hudson*’s intermediate scrutiny was increasingly resembling strict scrutiny.⁴⁹

The Court’s skepticism of burdens on profit-motivated speech reached its apotheosis in 2011’s *Sorrell v. IMS Health*.⁵⁰ There, the Vermont legislature enacted a law that restricted the sale and use of “prescriber-identifying information.”⁵¹ Data brokers purchase information from pharmacies and insurance companies about which doctors prescribe which drugs, and after collating and analyzing that data, they sell the insights to pharmaceutical companies to aid their marketing efforts.⁵² This practice—where pharmaceutical sales representatives attempt to convince doctors to prescribe their expensive patent-protected products—is known as “detailing,” and Vermont (along with other New England states) enacted the law in an effort to drive down drug prices that the states ultimately helped finance.⁵³ Absent a doctor’s consent, the statute specifically prohibited pharmacies and insurers from selling doctors’ prescription information and prohibited drug companies from using the data for marketing.⁵⁴

Unlike past commercial speech cases, the law did not itself regulate advertisements; rather, it restricted only advertising precursors—the data that fuels and facilitates companies’ marketing efforts. And unlike past commercial speech cases, a six-justice majority declined to apply *Central Hudson*; Justice Kennedy’s opinion for the Court ultimately deferred the level-of-scrutiny question, concluding only that “Vermont’s law enacts content- and speaker-based restrictions,” “burdens disfavored speech by disfavored speakers,” and was therefore

45. Lakier, *Real Lochner*, *supra* note 40, 1268.

46. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–91 (1995).

47. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510–11 (1996).

48. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

49. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and Bartnicki, 40 *HOUSTON L. REV.* 697, 732 (2003).

50. 131 S. Ct. 2653 (2011).

51. *Id.* at 2659–60.

52. See Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 *WM. & MARY L. REV.* 1501, 1516–17 (2015).

53. *Id.* at 1518.

54. *Sorrell*, 131 S. Ct. at 2660.

subject to “heightened judicial scrutiny” and “presumptively invalid.”⁵⁵

The opinion also contains a number of passages of startling breadth. At one point, Justice Kennedy remarks that “the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”⁵⁶ Similarly, he suggests there is a “rule that information is speech,” and because Vermont imposed content- and speaker-based restrictions on protected expression, it was not entitled to an exception to the information-is-speech rule.⁵⁷

Sorrell has overshadowed many other laws that regulate information flows. Commentators have pointed to it not just as an important waypoint on commercial speech’s deregulatory lurch but also as spelling doom for most privacy laws.⁵⁸ The opinion seemed to corroborate earlier work—auditioned in law reviews and libertarian think-tank sessions—that contended that most, if not all, informational restrictions were unconstitutional.⁵⁹ In its wake, several prominent academics have seized on its sweeping language to argue that data is speech and thus data-privacy laws violate the First Amendment.⁶⁰ Technology companies in recent years have employed these arguments when trying to invalidate regulations of their data-processing business activities.⁶¹

Scholars’ *Lochner* critique of First Amendment doctrine has often centered on the parallel development of corporate and commercial speech, though there is comparatively greater criticism of the latter. Morgan Weiland describes a scholarly consensus of “a neo-*Lochner* moment” constituted by “two moments of significant doctrinal upheaval: the development of the commercial speech

55. *Id.* at 2663, 2664, 2667 (quoting *R.A.V. v. St. Paul*, 505 U.S. at 382 (1992)).

56. *Id.* at 2667.

57. *Id.*

58. See, e.g., Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1131–32 (2015) [hereinafter Cohen, *Zombie*]; G.S. Hans, *No Exit: Ten Years of “Privacy vs. Speech” Post-Sorrell*, 65 WASH. U. J. L. & POLICY 19 (2021).

59. See Cohen, *Zombie*, *supra* note 58, at 1131 (citing SOLVEIG SINGLETON, *PRIVACY AS CENSORSHIP: A SKEPTICAL VIEW OF PROPOSALS TO REGULATE PRIVACY IN THE PRIVATE SECTOR* (Cato Inst. Policy Analysis No. 295, 1998), available at perma.cc/KE3A-XWKU; Adam Thierer & Berin Szoka, *What Unites Advocates of Speech Controls & Privacy Regulation?*, PROGRESS ON POINT (Nov. 2009), available at perma.cc/P2WA-3PQW; Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000)).

60. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014); Memorandum from Andrew J. Pincus et al., Mayer Brown, to Christopher Mohr, Gen. Counsel of Software & Info. Indus. Ass’n (Jan. 24, 2019).

61. See, e.g., *ACA Connects v. Frey*, 471 F. Supp. 3d 318 (D. Me. 2020); *NetChoice, LLC v. Bonta*, No. 25-146 (9th Cir., Sept. 9, 2025); Kashmir Hill, *Facial Recognition Start-Up Mounts a First Amendment Defense*, N.Y. TIMES (Aug. 11, 2020), nytimes.com/2020/08/11/technology/clearview-floyd-abrams.html; Ryan Mac & Kashmir Hill, *Clearview AI Settles Suit and Agrees to Limit Sales of Facial Recognition Database*, N.Y. TIMES (May 9, 2022), nytimes.com/2022/05/09/technology/clearview-ai-suit.html.

doctrine beginning with [*Virginia Pharmacy*] and the dramatic turn in campaign finance law in *Citizens United*.⁶² Julie Cohen has argued that it's "no coincidence that the Court's commercial speech jurisprudence has developed alongside its cases about the free speech rights of corporations generally" because both doctrines "reflect an economic reality in which information has increasingly become untethered from industrial production to become a source of value in its own right, and in which powerful interests that profit from information-related activities have systematically resisted regulatory oversight."⁶³ Robert Post and Amanda Shanor argued a decade ago that plaintiffs across the country "are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy."⁶⁴ "It is no exaggeration," they explain, "to observe that the First Amendment has become a powerful engine of constitutional deregulation" in which the "echoes of *Lochner* are palpable."⁶⁵ Shanor writing alone has focused specifically on the commercial speech doctrine, explaining that a growing "number of scholars, commentators, and [justices] have suggested that courts' growing protection for commercial speech threatens to revive a new form of *Lochnerian* constitutional economic deregulation."⁶⁶ And more generally, John Coates has documented how corporations' rate of success in bringing First Amendment challenges at the Supreme Court has surged—outpacing the vindication of individuals' speech claims.⁶⁷

1.2 CONTENT-BASED LAWS & COMPELLED SPEECH

It's been over two decades since the Court last applied *Central Hudson*. During this ongoing commercial-speech winter, however, other facets of free speech doctrine have come to the deregulatory fore. Scholars have focused more recently on how the Court's content-based and compelled-speech cases threaten a wide array of regulation that touches or concerns information flows.

The 2015 decision in *Reed v. Town of Gilbert* constituted an abrupt expansion of judicial scrutiny. There, the town of Gilbert, Arizona, enacted an ordinance that generally prohibited the posting of signs but made a series of exceptions for certain subject matters—ideological signs, political signs, and temporary directional signs.⁶⁸ The Court held that the sign ordinance was subject to strict scrutiny because it was content-based. Justice Thomas's majority opinion flatly concluded that a "law that is content based on its face is subject to strict scrutiny re-

62. Morgan Weiland, *Expanding the Periphery & Threatening the Core*, 69 STAN. L. REV. 1389, 1393, 1401 (2017) (citations omitted).

63. Cohen, *Zombie*, *supra* note 58, at 1132.

64. Post & Shanor, *supra* note 35, at 166–67.

65. *Id.* at 167.

66. Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 134, 183 (2016).

67. John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONSTITUTIONAL COMMENTARY 223 (2015).

68. *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

ardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech."⁶⁹ Because the ordinance's treatment of a particular sign "depend[s] entirely on the communicative content of the sign," it was therefore subject to strict scrutiny.⁷⁰

Though *Reed* was not the first time the Court had made the sweeping suggestion that all content-based laws are unconstitutional,⁷¹ Justice Kagan's dissent noted some of the many ways that's never been true: "We apply strict scrutiny to facially content-based regulations of speech . . . when there is any realistic possibility that official suppression of ideas is afoot."⁷² But when there is no realistic possibility that a facially content-based regulation is intended to favor certain speakers or viewpoints, the Court has traditionally "relax[ed its] guard so that entirely reasonable laws imperiled by strict scrutiny can survive."⁷³

Moreover, the Court has traditionally permitted policymakers to draw content-based distinctions around partially or wholly unprotected categories of speech—including commercial speech.⁷⁴ So *Reed* left many commentators puzzling the constitutional status of laws that, for example, restricted misleading advertisements, as well as continued anxiety about most privacy laws.⁷⁵

The Court attempted to limit *Reed*'s sweep in 2022 *City of Austin v. Reagan National Advertising of Austin*.⁷⁶ There, the Court considered whether the differential treatment of on-premises and off-premises signs made the law content-based.⁷⁷ The Fifth Circuit had interpreted *Reed* to mean that "the fact that a government official has to read a sign's message to determine the sign's purpose is

69. *Id.* at 165 (internal quotation marks omitted).

70. *Id.* at 164.

71. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

72. *Reed*, 576 U.S. at 182 (KAGAN, J., concurring) (internal quotation marks omitted).

73. *Id.* at 183 (KAGAN, J., concurring) (internal quotation marks omitted).

74. See, e.g., Eugene Volokh & Jane Bambauer, *The Supreme Court Rules on Protecting Kids from Sexually Themed Speech Online*, FREE SPEECH UNMUTED 14:50–20:55 (July 1, 2025); *City of Austin v. Reagan National Advertising of Austin*, 596 U.S. 61, 87 n.1 (2022) (THOMAS, J., dissenting) ("For several categories of historically unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, the government ordinarily may enact content-based restrictions without satisfying strict scrutiny. This Court's precedents have also declined to apply strict scrutiny to several other types of content-based restrictions, including laws targeting 'commercial speech'" (citations omitted).).

75. See, e.g., *id.*; Margot E. Kaminski, *The First Amendment and Data Privacy: Between Reed and a Hard Place*, CONCURRING OPINIONS (Sept. 20, 2018), concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-margot-e-kaminski-the-first-amendment-and-data-privacy-between-reed-and-a-hard-place.html; Brief of the Knight First Amendment Institute and Professor Genevieve Lakier as Amici Curiae, *City of Austin v. Reagan National Advertising of Austin, Inc.*, No. 20–1029, at 3 (Aug. 20, 2021).

76. 596 U.S. 61 (2022).

77. *Id.* at 65–66.

enough to render a regulation content based and subject it to strict scrutiny.”⁷⁸ The majority disagreed with that broad interpretation of *Reed*, holding that a law is content-based when it discriminates on “the topic discussed or the idea or message expressed.”⁷⁹ The *Reed* ordinance flunked that test because it subjected different categories of signs to more or less favorable treatment depending on their subject matter; the law in *City of Austin*, by contrast, was a content-neutral regulation of a sign’s location, even though an enforcer must read the sign to understand whether it complies.⁸⁰ Notably, Justice Thomas—the author of the *Reed* majority opinion—dissented, explaining that “*Reed*’s rule is that any law that draws distinctions based on communicative content is content-based.”⁸¹

Despite the Court’s attempt to walk back *Reed*’s anachronistic approach to content-based regulation, *City of Austin* has done little to allay fears that the Court’s approach to content discrimination threatens all kinds of workaday regulation. As Justice Breyer wrote in his *City of Austin* concurrence, many laws treat different subject matters differently, including consumer-protection labeling, confidential medical records, workplace safety warnings, robocalls, and more.⁸² “If *Reed* is taken as setting forth a formal rule that courts must strictly scrutinize regulations simply because they refer to particular content,” he explained, “we have good reason to fear . . . that courts will strike down entirely reasonable regulations that reflect the will of the people.”⁸³

In other words, *City of Austin* may well provide a reprieve for the many sign ordinances imperiled by *Reed*, but it doesn’t ameliorate the Lochernization risk posed by expanding the definition of content-based treatment. As Rebecca Aviel, Margot Kaminski, Toni Massaro, and Andrew Keane Woods have explained, “*Reed* thus represents a significant deregulatory turn” by “imperil[ing] lawmakers’ legitimate attempts to identify the objects and subjects of regulation by category.”⁸⁴

It’s not only been the Court’s approach to content-based discrimination that has spurred recent accusations of a deregulatory First Amendment; the Court’s compelled-speech doctrine has engendered similar allegations. For many years, compelled speech was governed by two dueling approaches: As a general matter, compelling someone to express an idea with which they disagreed has been presumptively unconstitutional, as evidenced by the government’s inability to punish Jehovah’s Witnesses for refusing to recite the Pledge of Allegiance

78. *Id.* at 68 (quoting 972 F.3d 696, 699 (5th Cir. 2020)) (alterations and internal quotation marks omitted).

79. *Id.* at 69.

80. *Id.* at 69–72.

81. *Id.* at 97 (THOMAS, J., dissenting).

82. *Id.* at 79 (BREYER, J., concurring).

83. *Id.* at 79–80 (BREYER, J., concurring) (internal quotation marks omitted).

84. Aviel et al., *supra* note 10, at 1307.

and for obscuring New Hampshire license plates' "Live Free or Die" motto.⁸⁵ On the other hand, compelled *commercial* disclosures were governed by the far laxer—though deeply ambiguous⁸⁶—standard from *Zauderer v. Office of Disciplinary Counsel*,⁸⁷ if they implicated the First Amendment at all.⁸⁸ *Zauderer* held that regulators may require a commercial actor to disclose "purely factual and uncontroversial information about the terms under which . . . services will be available," so long as the disclosure is not "unjustified or unduly burdensome" and "reasonably related to the State's interest in preventing deception of consumers."⁸⁹

Even after *Sorrell* and *Reed*, some posited that courts were increasingly willing to uphold disclosure obligations on commercial actors—complicating a didactic portrayal of the Supreme Court engaged in an unrelenting deregulatory push.⁹⁰ But two recent cases have cast doubt on that counter-narrative. In 2018's *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, the Court held unconstitutional a California law that required pro-life "crisis pregnancy centers" to provide certain notices to putative patients.⁹¹ Licensed facilities were required to supply information about the state's free or low-cost pregnancy-related healthcare, including abortions, and unlicensed facilities were required to disclose their unlicensed status.⁹²

The Court held both notices were unconstitutional.⁹³ Justice Thomas's majority opinion determined that the licensed notice was an impermissible content- and speaker-based burdens on protected expression and that the unli-

85. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

86. See, e.g., *American Meat Institute v. Dept. of Agriculture*, 760 F.3d 18, 20 (D.C. Cir. 2014) (*en banc*) ("We now hold that *Zauderer* in fact does reach beyond problems of deception."); *id.* at 28 (ROGERS, J., concurring) ("I write separately to dissociate myself from the suggested reformulation of the separate standards for First Amendment protection of commercial speech in *Zauderer* . . . and *Central Hudson*. . . . Although the *en banc* court . . . stat[es] only that 'one could think of *Zauderer* largely as an application of *Central Hudson*,' blurring the lines between the standards portends unnecessary confusion . . ." (citations omitted).); *id.* at 30 (KAVANAUGH, J., concurring) ("This case involves commercial speech. The First Amendment protects commercial speech and regulations of commercial speech are analyzed under the Supreme Court's *Central Hudson* framework.").

87. 471 U.S. 626 (1985).

88. See, e.g., Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 894 (2022).

89. *Id.* at 651.

90. See, e.g., Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 973 (2017) ("While a number of commentators have suggested that the First Amendment has become progressively more solicitous of commercial interests, this claim is not entirely correct. Courts have been generous to legislatures in applying the standard set out in *Zauderer* to uphold disclosure obligations imposed on commercial actors" (citing Coates, *supra* note 67; Shanor, *New, supra* note 66)).

91. 585 U.S. 755, 138 S. Ct. 2361 (2018).

92. *Id.* at 2367.

93. *Id.* at 2370.

censed notice was unconstitutional under *Zauderer*.⁹⁴ It declined to apply *Zauderer* to the licensed notice, concluding that it was not limited to “purely factual and uncontroversial information about the terms under which services will be available.”⁹⁵ Though the government and the lower court had failed to advance a persuasive reason to apply a lower standard of scrutiny, the Court nevertheless held that the licensed notice failed even intermediate scrutiny.⁹⁶ By a similar token, the unlicensed notice was “unjustified or unduly burdensome” under *Zauderer* because the state had failed to demonstrate that the disclosure was remedying a “potentially real and not purely hypothetical harm.”⁹⁷

Commentators have argued that the Court’s increasingly skeptical treatment of disclosures bodes poorly for privacy law. Margot Kaminski, for instance, has explained that the transparency requirements that inhere in contemporary data-protection laws mean that they “rely in large part on increasing, not decreasing, speech,” but *NIFLA* shows how “the Court’s recent First Amendment cases now shut down disclosure as a regulatory tool.”⁹⁸ Under the Court’s *NIFLA* approach, she argues, the new privacy laws’ transparency and disclosure requirements constitute “[c]ontent-based compelled speech” and impermissibly mandate that companies speak “a particular message.”⁹⁹

Fear that *NIFLA* marked the beginning of an expansion of compelled-speech scrutiny has been borne out in the intervening years. In 303 *Creative LLC v. Elenis*, decided in 2023, the Court considered whether requiring a website designer to provide a custom website for a same-sex couple under the Colorado Anti-Discrimination Act constituted a form of unconstitutional compelled speech.¹⁰⁰ The Court held that it did.¹⁰¹ Justice Gorsuch’s majority opinion concluded that a custom website constituted “pure speech” and that the state’s public accommodation law was attempting to compel it.¹⁰² The Court eschewed strict scrutiny, holding simply that the law was unconstitutional as to the website designer.¹⁰³ Along the way, the Court pointedly rejected the government’s characterization of the expressive burden on the website designer as merely incidental.¹⁰⁴ Far from requiring a commercial actor to serve all comers, the state

94. See *id.* at 2371 (“The licensed notice is a content-based regulation of speech.”); *id.* at 2377 (“The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement . . .”).

95. *Id.* at 2372 (ellipses omitted).

96. *Id.* at 773–75.

97. *Id.* at 2377.

98. Kaminski, *supra* note 75.

99. *Id.*

100. 600 U.S. 570 (2023).

101. *Id.* at 602–03.

102. *Id.* at 587.

103. *Id.*; see also Aviel et al., *supra* note 10, at 1275 (“The Court did not consider whether the state could demonstrate compelling reasons for its nondiscrimination law. It simply announced a categorical prohibition against government compulsion of ‘pure speech.’”).

104. 303 *Creative*, 600 U.S. at 593.

was instead “seek[ing] to force an individual to utter what is not in her mind about a question of political and religious significance.”¹⁰⁵

The decision in *303 Creative* has loomed large for some scholars evaluating the First Amendment prospects of extant and prospective data governance. Aviel, Kaminski, Massaro, and Woods have argued that *303 Creative* poses a serious quandary for the Roberts court: through its commitment to vindicating the claims “of a persecuted religious minority standing fast in the face of a domineering and majoritarian regulator,” the Court has erected a “set of constitutional entitlements that logically extend [from religious dissidents] to technology firms.”¹⁰⁶ Specifically, they argue that *303 Creative* “made five troubling moves that have direct and profound implications for technology regulation.”¹⁰⁷ First, the Court’s employment of free-speech—rather than free-exercise—principles to side with the website designer will “allow[] speakers to challenge regulations regardless of whether they are motivated by religious conscience.”¹⁰⁸ Second, the Court obviated the line between conduct and expression by characterizing the website as “pure speech,” an argument that technology companies can repurpose for regulations of their software.¹⁰⁹ Third, the Court conflated the expressive interests of the designer with that of its customer, allowing platforms to prioritize their speech claims over those of their users.¹¹⁰ Fourth was the Court’s blithe assumption that compliance with the public-accommodation law imposed an unduly coercive burden on the designer, which will make it “difficult to assess whether a given technology regulation is tailored appropriately to a legitimate government interest.”¹¹¹ Finally, the Court’s categorical invalidation—and its refusal to apply strict scrutiny—means that governments in the future will have no opportunity to persuade courts that its technology regulation carefully advances a compelling justification.¹¹²

1.3 EDITORIAL DISCRETION

Commentators’ concerns with the Court’s recent First Amendment jurisprudence are not only limited to the expansion of laws subject to First Amendment scrutiny and the increasing skepticism of those laws. Some have in fact *encouraged* those developments, leveling instead a very different charge of First Amendment Lochnerism. These scholars have instead focused on the Court’s extremely robust protection of editorial discretion.

105. *Id.* at 596 (internal quotation marks and bracket omitted).

106. Aviel et al., *supra* note 10, at 1269.

107. *Id.* at 1314.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

Miami Herald Publishing Co. v. Tornillo, decided in 1974, considered the constitutionality of a Florida must-carry statute.¹¹³ The law entitled political candidates who had been criticized by the newspaper to a “right of reply”—the ability to have their response printed by the newspaper that had published the original critique.¹¹⁴ Despite the Court having previously upheld remarkably similar must-carry provisions that applied to broadcasters,¹¹⁵ a unanimous court struck down the Florida law. The Court embraced a startlingly broad justification for doing so: “The choice of material to go into a paper . . . and the treatment of issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”¹¹⁶ The government, the Court further held, had failed to demonstrate how “regulation of this crucial process can be exercised consistent with the First Amendment.”¹¹⁷ In *Buckley v. Valeo* two years later, the Court expounded upon that rationale, remarking that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹¹⁸

Ever since, the Court has assigned an expansive understanding to “editorial discretion” and consequently viewed must-carry obligations that intrude upon that discretion with considerable skepticism. This has not only meant that the government “could not prevent private corporations from speaking in their own voice . . . but also that it could not interfere with their editorial or curatorial choices in any way.”¹¹⁹ Employing this line of reasoning led the Court to invalidate a requirement imposed on a state-sanctioned electricity monopolist to include in its customer mailings a public-interest group’s contrary opinions¹²⁰ and to vindicate the “expressive autonomy” of an organizer who excluded a group of queer Irish-Americans from marching in the St. Patrick’s Day parade.¹²¹ The Court embraced the organizers’ First Amendment claim even though they “had in the past almost never excluded anyone from the parade and . . . no one appeared capable [of] . . . explain[ing] what the organizers were expressing by denying the queer paraders access to the parade.”¹²²

That’s not to suggest that editorial discretion had no limits. For one, the Court has tended to unpersuasively grandfather in its treatment of broadcasters by opaquely invoking supply constraints—a consideration at odds with *Buck-*

113. 418 U.S. 241 (1974).

114. *Id.* at 243.

115. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

116. *Tornillo*, 418 U.S. at 258.

117. *Id.*

118. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

119. Douek & Lakier, *Lochner.com*, *supra* note 10, at 119.

120. See *Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1 (1986).

121. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

122. Douek & Lakier, *Lochner.com*, *supra* note 10, at 119–20.

ley's exhortation against viewpoint diversity.¹²³ Beyond broadcasting though, the Court has twice upheld must-carry provisions over *Tornillo*-style objections. In *PruneYard Shopping Center v. Robins*, the Court upheld a state constitutional provision that granted protestors a right of access to a privately owned shopping mall over the First Amendment objections of the mall owner.¹²⁴ And in *Rumsfeld v. FAIR*, the Court upheld a federal law that mandated law schools provide military recruiters with access to their campuses, even when the schools' exclusion was an attempt to communicate disagreement with the military's Don't Ask, Don't Tell policy.¹²⁵ In both instances, the Court cast doubt on the extent to which enforcing the must-carry provision infringed upon the expressive autonomy of the would-be excluder. As the Court has itself explained, "the compelled access [in *PruneYard* and *FAIR*] did not affect the complaining party's own expression."¹²⁶

Some scholars in recent years have argued that *this* facet of the Court's free speech jurisprudence resurrects *Lochner*.¹²⁷ Unlike the conventional accounts surveyed above, these scholars do not necessarily object to expansive First Amendment coverage, but instead contest *Buckley*'s rejection of expressive redistribution as a permissible governmental objective.¹²⁸ In a media environment such as ours, a muscular interpretation of editorial discretion—and the attendant invalidity of expressive redistribution—means that the wealthy property owners in control of the means of communication enjoy extremely strong constitutional protections, whereas the government is largely disabled from attempting to amplify the voices of individuals whose expressive needs rely on those property owners' communicative infrastructure. This repeats the error of *Lochner* not in that it removes economic policymaking from democratic deliberation, but rather in its wholly negative conception of fundamental rights—that "[f]reedom of the press is guaranteed only to those who own one."¹²⁹

Genevieve Lakier has led this charge against the Court's free speech doctrine. She has argued that *Lochner*'s error was "not its failure to defer but instead its failure to recognize that, under conditions of pronounced economic inequality, the freedom of workers could be enhanced, not undermined, by legislative

123. See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997); Douek & Lakier, *Lochner.com*, *supra* note 10, at 121 ("[T]here was very good reason to believe that when it enacted the cable law, Congress was motivated by the exact same concern that motivated the passage of the right of reply law in Florida—namely, a desire to promote the diversity of viewpoints in the public sphere.").

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

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

126. *Moody v. NetChoice*, 144 S. Ct. 2383, 2401 (2024).

127. See generally Lakier, *Real Lochner*, *supra* note 40.

128. See *id.* at 1271–1300 (embracing coverage); *id.* at 1318–1330 (contesting *Buckley*).

129. A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, *NEW YORKER* (May 14, 1960).

restrictions on what terms and conditions they could contract for.”¹³⁰ The same thing, she contends, can be said about today’s First Amendment: free speech doctrine today “largely fails (and in some contexts, adamantly refuses) to consider the economic and social forces that as a practical matter shape the exercise of First Amendment rights,” which results in “a body of law that . . . insists that most legislative efforts to protect the expressive freedom of the less powerful by limiting the expressive freedom of the more powerful are constitutionally impermissible.”¹³¹

Writing with Evelyn Douek, Lakier has explicitly condemned the Court’s editorial discretion cases on this ground: “Beginning in the 1970s, . . . the Court began to conceive of the First Amendment as much more exclusively a shield against intentional governmental intrusions on private autonomy (as exercised under existing property arrangements), rather than as a mechanism for promoting and protecting a robust and healthy democratic public sphere.”¹³² While the Court was busy “strengthen[ing] the First Amendment protections offered to . . . private property owners,” it was also “limiting the protection the First Amendment provided to speaker and listeners who spoke and listened on other people’s property.”¹³³

Lakier and Douek are not alone. Others have also suggested that the First Amendment ought to be interpreted with an eye toward power inequities. Nelson Tebbe, for instance, has argued “that considerations of distributive justice do properly affect interpretation of free speech” because “people who are suffering from certain forms of deprivation and disadvantage will find it impossible to exercise their basic rights to participate in the project of cooperative government.”¹³⁴

And many commentators have echoed Lakier’s observations about the zero-sum nature of a speech environment dominated by a small number of extremely powerful companies: the wins they notch against governmental intrusion on their businesses serve as a further diminishment of the expressive autonomy of the speakers and listeners who rely on their platforms. Jack Balkin has analogized the digital public sphere to a triangle comprising governments, individuals, and the platforms that facilitate expression.¹³⁵ Alan Rozenshtein has seized on the analogy to argue that the “way to resist digital *Lochner* is to clearly differentiate when companies are arguing on behalf of their users’ First Amendment rights from when they are arguing on behalf of their own rights.”¹³⁶ Writing

130. Lakier, *Real Lochner*, *supra* note 40, at 1244–45.

131. *Id.* at 1245.

132. Douek & Lakier, *Lochner.com*, *supra* note 10, at 115.

133. *Id.*

134. Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 961 (2020).

135. Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUMBIA L. REV. 2011, 2014–15 (2018).

136. Alan Z. Rozenshtein, *Silicon Valley’s Speech: Technology Giants and the Deregulatory First*

together with Kyle Langvardt, they have proposed a broader, totality-of-the-circumstances approach to evaluating the constitutionality of must-carry laws: “Rather than asking categorically whether platforms are ‘editors,’ courts should assess how specific regulatory requirements affect the speech interests of all stakeholders—platforms, users, and society—and whether government interests justify those burdens.”¹³⁷

* * *

The prevailing scholarly accounts of the First Amendment seemingly all agree that something about the Court’s jurisprudence in recent generations is Lochnerian. All also worry that the Court stands on the precipice of extending the First Amendment’s deregulatory power into a digital age where individuals’ expressive abilities largely turn on private governance and profit-motivated software affordances. But scholars disagree over what precisely makes free speech today Lochnerian. Many have objected to creeping coverage and heightened scrutiny: more and more laws have been subjected to withering skepticism despite an increasing attenuation between the laws’ challengers and their claims to underlying First Amendment values. But more recently, some have accepted broad First Amendment coverage, instead contesting the Court’s emaciated conception of what governmental objectives justify regulation. But there is an ultimate consensus that speech law today provides corporations with a rich panoply of constitutional arguments they can deploy to insulate their business activities from regulatory oversight.

Yet in the past few years, the Court has repeatedly declined companies’ invitation to invalidate laws that seriously interfered with their profit-motivated information processing. The next Part outlines these incongruous results and explains how they complicate the conventional deregulatory accounts.

2. NARROWED EXPRESSIVE BURDENS

Private commercial interests have recently suffered three high-profile defeats in First Amendment cases at the Supreme Court. This Part outlines those losses and offers a theory to explain them: in all three instances, the Court employed a narrow conception of the laws’ burden on the challengers’ expression. This narrowing of expressive burdens appears throughout the First Amendment analysis: whether the First Amendment applies at all, the applicable level of scrutiny, and the rigor with which that scrutiny is applied. These narrowed burdens are affecting those substantive facets of free speech law and they’re also having reverberations in the procedures that govern how future First Amendment chal-

Amendment, 1 J. FREE SPEECH L. 337, 357 (2021).

137. Kyle Langvardt & Alan Z. Rozenshtein, *Beyond the Editorial Analogy: First Amendment Protections for Platform Content Moderation After Moody v. NetChoice*, 6 J. FREE SPEECH L. 1, 33 (2025).

lenges will be litigated.

These decisions have not just produced results that are in significant tension with earlier cases that elicited commentators' deregulatory objections. The way the conservatives have resolved the cases shows a clear methodological change—rejecting categorical rules and embracing discretion—and the Court's narrow characterization of a law's expressive burden is that new discretion at work. The trend, of course, has its limits: the deregulatory First Amendment is likely to continue unabated in future cases involving corporate speech and those where challengers persuasively cast themselves as minorities resisting coercive ideological conformity.

Part 2.1 describes the three recent cases and how they're shaping the substance of First Amendment law, while Part 2.2 turns to their effects on procedure. Part 2.3 harmonizes the narrowing of expressive burdens with prior precedents by describing the outer bounds of the Court's new sympathies.

2.1 IN SUBSTANCE

Three recent First Amendment cases illustrate how the recent trend of narrowing expressive burdens is affecting the substance of First Amendment doctrine.

2.1.1 MOODY V. NETCHOICE

In the days following January 6, 2021, many social media companies banned Donald Trump's accounts: Facebook and Instagram suspended them on January 7;¹³⁸ then Twitter announced a “permanent”—since-revoked—ban on January 8;¹³⁹ YouTube suspended his channel on January 12;¹⁴⁰ among others.¹⁴¹ This surge of coordinated action was not limited to Trump's official accounts: Reddit banned the r/DonaldTrump subreddit¹⁴² and Discord closed “The Donald” server on January 8;¹⁴³ an estimated 70,000 accounts associated with QAnon

138. See *Former President Trump's Suspension*, FACEBOOK OVERSIGHT BOARD (May 5, 2021), oversightboard.com/decision/fb-691qamhj/.

139. Twitter, *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), blog.x.com/en_us/topics/company/2020/suspension.

140. Zen Soo, *YouTube suspends Trump's channel for at least a week*, ASSOCIATED PRESS (Jan. 13, 2021), wpde.com/news/nation-world/youtube-suspends-trumps-channel-for-at-least-a-week-01-13-2021.

141. See, e.g., Khristopher J. Brooks, *Snapchat permanently bans Trump from its platform*, CBS NEWS (Jan. 14, 2021), cbsnews.com/news/snapchat-trump-ban/; Sara Fischer, *Twitch disables Trump's channel following chaos in D.C.*, AXIOS (Jan. 7, 2021), axios.com/2021/01/07/twitch-disable-trumps-channel-capitol-dc.

142. Brian Heater & Taylor Hatmaker, *Reddit bans r/donaldtrump following violence at the US Capitol*, TECHCRUNCH (Jan. 8, 2021), techcrunch.com/2021/01/08/reddit-donaldtrump-ban-capitol/.

143. Jay Peters, *Discord bans pro-Trump server 'The Donald'*, THE VERGE (Jan. 8, 2021), theverge.com/2021/1/8/22221579/discord-bans-the-donald-server-reddit-subreddit.

were purged from Twitter around January 11 and 12;¹⁴⁴ Facebook announced a platform-wide removal of “Stop the Steal” related content on January 11;¹⁴⁵ and Parler, a social media platform favored by Trump supporters, was removed from the Apple App Store and Google Play Store, and their Amazon Web Services account was suspended, around January 9.¹⁴⁶

In response, Republican lawmakers in at least 33 states introduced or enacted laws that sought to regulate the content-moderation processes that produced this so-called “Great Deplatforming.”¹⁴⁷ Florida enacted its law in May 2021,¹⁴⁸ and it applies to “social media platforms,” defined as a service or system “enabl[ing] computer access by multiple users” that does business in the state of Florida and that has either annual gross revenues exceeding \$100 million or “100 million monthly individual platform participants globally.”¹⁴⁹ The Florida law restricts these social media platforms from “‘censor[ing] or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source.’”¹⁵⁰ Content-moderation practices must further be applied “in a consistent manner.”¹⁵¹ The law also includes a host of transparency and reporting requirements. Any time a post is altered or removed, the platform has seven days to provide an explanation that includes a “thorough rationale” for the platform’s action.¹⁵²

Texas enacted a similar law in September 2021.¹⁵³ The Texas law applies to any social-media platform that allows its users “to communicate with other users for the primary purpose of posting information, comments, messages, or images” and that has more than 50 million monthly active users.¹⁵⁴ The law pro-

144. *Twitter blocks 70,000 QAnon accounts after US Capitol riot*, ASSOCIATED PRESS (Jan. 12, 2021), apnews.com/article/twitter-blocks-70k-qanon-accounts-171a5c9062be1c293169d764d3d0d9c8.

145. See Guy Rosen & Monika Bickert, *Our Preparations Ahead of Inauguration Day*, META (Jan. 11, 2021), about.fb.com/news/2021/01/preparing-for-inauguration-day/.

146. Mark Gurman & Matt Day, *Apple, Amazon Remove Parler After Use in U.S. Capitol Riots*, BLOOMBERG NEWS (Jan. 9, 2021), bloomberg.com/news/articles/2021-01-10/apple-removes-parler-from-app-store-after-use-in-capital-riot.

147. See *Since Jan. 6 Attack, Anti-Content Moderation Bills Proliferate in State Legislatures*, CHAMBER OF PROGRESS (Jan. 5, 2022), progresschamber.org/since-jan-6-attack-anti-content-moderation-bills-proliferate-in-state-legislatures/; Evelyn Douek, Quinta Jurecic, Jonathan Zittrain, and Jen Patja, *Jonathan Zittrain on the Great Deplatforming*, LAWFARE PODCAST (Jan. 14, 2021).

148. Press Release, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, EXECUTIVE OFFICE OF THE FLORIDA GOVERNOR (May 24, 2021), flgov.com/eog/news/press/2021/governor-ron-desantis-signs-bill-stop-censorship-floridians-big-tech.

149. Fla. Stat. § 501.2041(1)(g).

150. *Moody v. NetChoice*, 603 U.S. 707, 720 (2024) (quoting Fla. Stat. § 501.2041(b)(b)).

151. Fla. Stat. § 501.2041(2)(b).

152. See *id.* § 501.2041(2)(d)(1), (3).

153. See Press Release, *Governor Abbott Signs Law Protecting Texas From Wrongful Social Media Censorship*, OFFICE OF THE TEXAS GOVERNOR (Sept. 9, 2021), gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship.

154. Tex. Bus. & Com. Code §§ 120.001(1), 120.002(b).

hibits platforms from “censor[ing]” based on viewpoint, including blocking, banning, removing, deplatforming, demonetizing, de-boosting, restricting, denying equal access or visibility to, or otherwise discriminating against any expression.¹⁵⁵ Like the Florida law, the Texas statute requires that platforms notify users when their posts are removed and must “explain the reason the content was removed.”¹⁵⁶ Such users are entitled to an appeal that the platform must adjudicate within two weeks.¹⁵⁷

NetChoice—a trade association representing Meta, Google, X, Etsy, Reddit, and other technology companies that operate user-generated-content networks—brought facial First Amendment challenges against both laws.¹⁵⁸ District courts in both Florida and Texas sided with the challengers and preliminarily enjoined the statutes, reasoning that they interfered with the platforms’ “editorial judgment.”¹⁵⁹

On appeal, the Eleventh Circuit largely affirmed.¹⁶⁰ It held that platforms’ content-moderation decisions were a form of protected expression and that the law burdened that expression in both content-specific and content-neutral ways.¹⁶¹ Because the content-moderation provisions could not survive even intermediate scrutiny, the Eleventh Circuit invalidated all of them.¹⁶² The court applied *Zauderer* to the transparency and disclosure requirements.¹⁶³ It held that the requirement that platforms provide a thorough rationale for every content-moderation action because it was “unduly burdensome and likely to chill platforms’ protected speech.”¹⁶⁴ The other transparency and disclosure requirements, however, satisfied *Zauderer*.¹⁶⁵

The Fifth Circuit, on the other hand, reversed the district court and upheld the Texas law in its entirety.¹⁶⁶ It concluded that the platforms’ content-moderation decisions were “not speech” and thus did not implicate the First Amendment at all: the law “chills no speech whatsoever. To the extent it chills anything, it chills censorship,”¹⁶⁷ and the platforms’ “censorship is not speech.”¹⁶⁸ But even if the law did burden expression, it was a constitutional exercise of the state’s in-

155. Tex. Civ. Prac. & Rem. Code § 143A.001(1).

156. *Id.* § 120.103(a)(1).

157. *Id.* §§ 120.103(a)(2), 120.104.

158. *Moody*, 603 U.S. at 721; NetChoice, *About Us* (last visited Nov. 14, 2025), netchoice.org/about/#association-members (listing members).

159. See 546 F. Supp. 3d 1082, 1096 (ND Fla. 2021); 573 F. Supp. 3d 1092, 1117 (WD Tex. 2021).

160. See *NetChoice v. Attorney General*, 34 F.4th 1196 (11th Cir. 2022).

161. *Id.* at 1226–27.

162. *Id.* at 1228.

163. *Id.* at 1230.

164. *Id.*

165. *Id.*

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

167. *Id.* at 452 (emphasis omitted).

168. *Id.* at 494.

terest in “protecting a diversity of ideas and viewpoints.”¹⁶⁹ By a similar token, the statute’s transparency and disclosure obligations were not unduly burdensome under *Zauderer*.¹⁷⁰

The Supreme Court granted certiorari in both cases to resolve whether the laws’ content-moderation and individualized-explanation provisions violated the First Amendment.¹⁷¹ The Court decided them together at the end of the October Term 2023.¹⁷² Justice Kagan authored the majority opinion, which reversed and remanded both decisions below.¹⁷³ Justice Kagan’s opinion was joined in whole by Chief Justice Roberts, Justice Sotomayor, Justice Kavanaugh, and Justice Barrett, and in part by Justice Jackson.¹⁷⁴ Justices Barrett and Jackson each wrote a concurring opinion.¹⁷⁵ Justice Alito authored an opinion concurring only in the judgment, which was joined by both Justice Thomas and Justice Gorsuch.¹⁷⁶ Justice Thomas also wrote a separate opinion concurring in the judgment.¹⁷⁷

It became abundantly clear from the very first question posed at oral argument that the justices were principally concerned with the challenges’ facial posture,¹⁷⁸ an issue that had received scant attention in any of the lower courts.¹⁷⁹ The majority opinion bore out that concern, reversing the lower courts and instructing them to re-evaluate the laws’ constitutionality in light of the Court’s doctrine governing facial First Amendment challenges.¹⁸⁰ Facial challenges as a general matter, Justice Kagan explained, may only succeed if the plaintiff “establishes that no set of circumstances exists under which the law would be valid, or he shows that the law lacks a plainly legitimate sweep.”¹⁸¹ Court applies a “less demanding though still rigorous standard” in First Amendment cases: “The question is whether a substantial number of the law’s applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁸² In other

169. *Id.* at 482 (emphasis omitted).

170. *Id.* at 485–88.

171. See Order, 600 U.S. ___ (Sept. 29, 2023) (granting cert. in the first two of the Solicitor General’s four questions presented); Brief for the United States as Amicus Curiae, *Moody v. NetChoice* and *NetChoice v. Paxton*, Nos. 22-277, 22-393, and 22-555, at I (Aug. 14, 2023) (listing the four questions presented).

172. See *Moody*, 603 U.S. at 707; Opinions of the Court - 2023, SUPREME COURT (last visited Nov. 14, 2025), supremecourt.gov/opinions/slipopinion/23.

173. *Moody*, 603 at 745.

174. *Id.* at 711–12.

175. *Id.*

176. *Id.*

177. *Id.*

178. See Transcript of Oral Argument, *Moody v. NetChoice*, No. 22-277, 6:5–15 (Feb. 26, 2024).

179. *Moody*, 603 U.S. at 724 (“So far in these cases, no one has paid much attention to that issue.”).

180. *Id.* at 723–26.

181. *Id.* at 723 (internal brackets and quotation marks omitted).

182. *Id.* (internal quotation marks omitted).

words, “even a law with a plainly legitimate sweep may be struck down in its entirety . . . only if the law’s unconstitutional applications substantially outweigh its constitutional ones.”¹⁸³

The lower courts, the majority explained, had failed to address that question. Doing so first requires an evaluation of a law’s scope—“[w]hat activities, by what actors, do the laws prohibit or otherwise regulate?”¹⁸⁴ It was anything but clear what these “laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends’ financial exchanges, or how a ride-sharing service like Uber runs[.]”¹⁸⁵ Only after ascertaining the laws’ applications can a court proceed to evaluate “which of the laws’ applications violate the First Amendment, and to measure them against the rest.”¹⁸⁶ The problem for the Supreme Court was not only that the lower courts had focused only on the constitutionality of “certain heartland applications” like the Facebook News Feed and the YouTube homepage, but also that the parties’ briefs and the record had also failed to identify the laws’ scope and weigh their constitutional applications against their unconstitutional ones.¹⁸⁷

That would’ve been enough to resolve the cases before them. “But,” Justice Kagan explained, “it is necessary to say more about how the First Amendment relates to the laws’ content-moderation provisions.”¹⁸⁸ The opinion then went on to explain the Court’s editorial discretion cases and how they ought to be applied by the lower courts to the Facebook News Feed and YouTube homepage, since the Fifth Circuit in particular proceeded based on a “serious misunderstanding of First Amendment precedent and principle.”¹⁸⁹ After marching through explanations of the editorial discretion cases, the Court offered three general principles: “First, the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others’ speech, is directed to accommodate messages it would prefer to exclude.”¹⁹⁰ That principle remained unwavering even though “a compiler includes most items and excludes just a few.”¹⁹¹ And finally, the government was effectively disabled from justifying must-carry regulations on expressive diversity or redistribution grounds.¹⁹² Though the government may pursue that objective through “enforcing competition laws,” it is not permitted to “forc[e] a private speaker to present

183. *Id.* at 723–24 (internal quotation marks omitted).

184. *Id.* at 724.

185. *Id.* at 725.

186. *Id.*

187. *Id.* at 726.

188. *Id.*

189. *Id.* at 727.

190. *Id.* at 731–32.

191. *Id.* at 732.

192. *Id.* at 732–33.

views it wished to spurn in order to rejigger the expressive realm.”¹⁹³

It was at this point that Justice Jackson parted way with the majority, explaining in her solo concurrence that she “would not go on to treat either [case] like an as-applied challenge and preview our potential ruling on the merits.”¹⁹⁴ The remainder of the majority opinion—speaking on behalf of a bare majority of justices—then applied those editorial-judgment principles to the Facebook News Feed and YouTube homepage.¹⁹⁵ The Fifth Circuit’s errors were manifold. As applied to social media platforms’ feeds, the Texas law implicated the First Amendment because the platforms “are making expressive choices” when they “use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized.”¹⁹⁶ In short, because feed curation was expressive, the Texas law’s content-moderation provisions burdened the platforms’ protected editorial judgment.¹⁹⁷ And irrespective of whether strict or intermediate scrutiny applied, those provisions were unconstitutional as applied to the Facebook News Feed and YouTube homepage because Texas’s expressive redistribution justification was not legitimate.¹⁹⁸

Justice Barrett penned a brief concurrence. Though she ostensibly joined the entirety of the majority’s reasoning, her concurrence suggested her views were more circumspect than the majority’s editorial-discretion application suggested. While she agreed that an editor’s “function qualifies for First Amendment protection only if it is inherently expressive,” it was by no means self-evident what that meant even in the context of a social-media feed.¹⁹⁹ Justice Barrett then proceeded to draw a distinction between the automated implementation of a human’s expressive decision-making and more abstract possibilities: “if a platform’s algorithm just presents automatically to each user whatever the algorithm thinks the user will like,” such as “content similar to posts with which the user previously engaged,” then the “First Amendment implications of the Florida and Texas laws might be different.”²⁰⁰ “What if,” she posed, “a platform’s owners hand the reins to an AI tool and ask it simply to remove ‘hateful’ conduct?”²⁰¹ It was not clear, in such a scenario, that a “human being with First Amendment rights [has] made an inherently expressive choice.”²⁰² Ultimately, she concluded, “technology may attenuate the connection between content-moderation *actions* (e.g., removing posts) and human beings’ constitutionally protected right to *decide for themselves* the ideas and beliefs deserving of expression, consideration, and

193. *Id.* at 732–33.

194. *See id.* at 749 (JACKSON, J., concurring).

195. *See id.* at 733–43.

196. *Id.* at 740.

197. *See id.*

198. *See id.* at 740–43.

199. *Id.* at 745 (BARRETT, J., concurring).

200. *Id.* at 746.

201. *Id.*

202. *Id.* (internal quotation mark omitted).

adherence.”²⁰³

Justice Alito’s opinion, joined by Justice Gorsuch and Justice Thomas, concurred only in the judgment and offered a fundamentally different framework for evaluating when content-moderation decisions implicate the First Amendment.²⁰⁴ To receive constitutional protection, he explained, a platform would need to satisfy three criteria: exercise meaningful editorial discretion, express a collective point, and show how must-carry provisions affect its own message.²⁰⁵ Justice Alito then went on to describe why those principles afforded limited protection to many apps and websites: WhatsApp and Gmail do not engage in curation, Parler engages in little content moderation at all, Reddit’s moderation is decentralized, and commercial reviews on Yelp are different from political speech on X.²⁰⁶ Elsewhere, he echoed Justice Barrett’s concerns about the attenuation between humans’ expressive choices and the automated, at-scale nature of digital content moderation, asking, “Are [algorithmic] decisions equally expressive as the decisions made by humans? Should we at least think about this?”²⁰⁷ The opinion also expressed sympathy for Texas’s expressive redistribution justification and is notable for its overt hostility to the platforms.²⁰⁸ At one point, Justice Alito questioned the influence these private companies have over public discourse: “Maybe we should think about the enormous power exercised by plat-forms like Facebook and YouTube as a result of ‘network effects.’ And maybe we should think about the unique ways in which social-media plat-forms influence public thought.”²⁰⁹

The Court’s nuanced treatment of the laws came as a surprise to many commentators, particularly on the left, who appeared to largely assume that both laws were obviously doomed.²¹⁰ That consensus is hardly surprising in light of the prevailing accounts of the Court’s deregulatory bent surveyed in Part 1 and the laws’ proponents’ avowed viewpoint-discriminatory objectives.²¹¹ And while there is much language in the majority’s application of the editorial-discretion cases to the Facebook News Feed and YouTube homepage that is favorable to technology companies, the decision should be seen as a significant loss for the industry—the byproduct of a badly miscalculated overreach.²¹² Industry’s

203. *Id.* (internal brackets and quotation marks omitted).

204. *See id.* at 767 (ALITO, J., concurring).

205. *Id.* at 782–85.

206. *Id.* at 787–88.

207. *Id.* at 795.

208. *Id.* at 794–95.

209. *Id.* at 795 (internal citation omitted).

210. *See* Langvardt & Rozenshtein, *supra* note 137, at 31–32.

211. *See, e.g., NetChoice*, 34 F.4th at 1201 (“The State of Florida . . . has enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by ‘the “big tech” oligarchs in Silicon Valley’ to ‘silenc[e]’ ‘conservative’ speech in favor of a ‘radical leftist’ agenda.”); *Moody*, 603 U.S. at 740–41.

212. *See, e.g., Tom McBrien*, *In NetChoice Cases, Supreme Court Labels a Surprisingly Narrow Class of Online Platform Company Activities as Protected Expression*, EPIC (July 10, 2024),

lawyers throughout the litigation had effectively adopted the *Sorrell*-originated principle that data is speech and thus their clients, whose businesses amount to simply information processing, were effectively beyond regulation altogether; laws that explicitly sought to regulate their curation decisions were an obvious slam dunk in the companies' favor.²¹³ And yet the majority—which spoke for only for a tenuous, bare majority of justices in the passages most favorable to industry—necessarily rejected this sweeping understanding on the First Amendment, emphasizing that it was the application of human-authored content-moderation guidelines, and perhaps only decisions made under those guidelines, that were “inherently expressive” under *Tornillo* and thus subject to First Amendment protection.²¹⁴ In other words, the fact that the justices unanimously rejected the notion that software-mediated services that touch and concern expression—direct-messaging services, e-commerce reviews, ride-sharing feedback, financial-exchange commentary, and so forth—are constitutionally unsailable ought to be understood as a massive setback for Silicon Valley.²¹⁵ Not only would a contrary understanding have led to the facial invalidation of the laws—given the tilt of the facial challenges' constitutional-versus-unconstitutional balancing—but both Justice Kagan's and Justice Alito's opinions make those points explicitly.²¹⁶

Other commentators have noted the jarring disconnect between the pre-*Moody* consensus and the decision's aftermath. As Kyle Langvardt and Alan Rozenshtein have explained, “[i]t appears that at least five Justices—Barrett, Jackson, and the Alito bloc—are unmoved by Silicon Valley's long efforts to present computer technology as an inherently expressive phenomenon.”²¹⁷ These justices, and perhaps some of the others, “seem to view platform content moderation as a mixture of human speech and technologically mediated con-

epic.org/in-netchoice-cases-supreme-court-labels-a-surprisingly-narrow-class-of-online-platform-company-activities-as-protected-expression/ (“Th[e decision] was a blow to NetChoice—the tech industry trade association that brought the lawsuit—which had asked for an incredibly broad rule from the Court.”).

213. See Brief for Respondents, Attorney General v. NetChoice, LLC, No. 22-277, at 19 (Nov. 30, 2023) (“First, ‘dissemination of information’ is plainly ‘speech within the meaning of the First Amendment’” (quoting *Sorrell*, 564 U.S. at 570).); *id.* at 40 (“This Court has repeatedly held that the ‘dissemination of information’ is itself ‘speech within the meaning of the First Amendment’” (quoting *Sorrell*, 564 U.S. at 570).).

214. See *Moody*, 603 U.S. at 745–46 (BARRETT, J., concurring); Langvardt & Rozenshtein, *supra* note 137, at 27 (“[T]he majority’s embrace of platform editorial rights proves surprisingly narrow. . . . [T]he majority only explicitly protected platforms’ curation of their main feeds through content removal, demotion, or labeling. Many questions remain open: whether account suspensions or monetization decisions trigger First Amendment scrutiny, whether platform design choices like autoplay or infinite scroll implicate speech rights, and if so, at what level of protection. Even this limited protection appears uncertain, particularly in light of Justice Barrett’s concurrence.”).

215. See *Moody*, 603 U.S. at 724–25; *id.* at 786–90 (ALITO, J., concurring).

216. See *id.*

217. Langvardt & Rozenshtein, *supra* note 137, at 28.

duct that does not automatically call for strong First Amendment protection.”²¹⁸

That conclusion is further bolstered by peeking behind the Court’s velvet curtain. Public reporting—as well as the Court’s distribution of opinion assignments²¹⁹—has suggested that the majority opinion was initially assigned to Justice Alito, and that Justices Jackson and Barrett had expressed support at conference for an opinion that was “more sympathetic to the Fifth Circuit’s rejection of platform editorial rights.”²²⁰ It was only after Alito’s draft “questioned whether any of the platforms’ content-moderation could be considered ‘expressive’ activity” that Justice Barrett defected to Justice Kagan’s alternative approach.²²¹ Langvardt and Rozenshtein underscore the fact that such “a basic question about platform speech rights remained in play—even in a case involving explicit viewpoint regulation—suggests how far we are from the categorical protection many scholars once predicted.”²²² In short, five justices “ultimately signed opinions either rejecting or expressing serious reservations about extending categorical First Amendment protections to social-media content moderation.”²²³

What’s most remarkable for our purposes here is how the justices arrived at this unexpected outcome. Despite the suggestions that Justice Kagan’s opinion “reli[es] on the greatest hits of the laissez-faire canon”²²⁴ and the “doctrinal hegemony” of the laissez-faire approach,²²⁵ the tenuous majority leaves considerable space for future information governance by casting the platforms’ expressive functions in unmistakably narrow terms. The majority notes that even “some amount of editorial choice might nevertheless not be enough to transform a digital speech platform into a protected ‘expressive product.’”²²⁶ It was only their marquee feeds—undeniably shaped by each platform’s unique expressive decisions²²⁷—that received *Tornillo*’s protection. Despite confronting “a

218. *Id.*

219. See, e.g., Josh Blackman, *Did Justice Alito Lose The Majority Opinions In Trevino and NetChoice?*, VOLOKH CONSPIRACY (July 2, 2025), reason.com/volokh/2024/07/02/did-justice-alito-lose-the-majority-opinions-in-trevino-and-netchoice/.

220. Langvardt & Rozenshtein, *supra* note 137, at 31 (citing Joan Biskupic, *Exclusive: How Samuel Alito Got Canceled from the Supreme Court Social Media Majority*, CNN (July 31, 2024), cnn.com/2024/07/31/politics/samuel-alito-supreme-court-netchoice-social-media-biskupic).

221. Biskup, *supra* note 220. Justice Jackson similarly declined to join Justice Alito’s opinion but stopped short of Justice Kagan’s application of editorial-discretion principles to the Facebook News Feed and YouTube homepage. See *Moody*, 603 U.S. at 748–49 (Jackson, J., concurring). Justice Alito’s sympathy for viewpoint diversity echoed concerns Justice Jackson expressed in her brief concurrence. Compare *id.* at 785 (Alito, J., concurring) with *id.* at 749 (Jackson, J., concurring).

222. Langvardt & Rozenshtein, *supra* note 137, at 31–32.

223. *Id.* at 32.

224. Douek & Lakier, *Lochner.com*, *supra* note 10, at 137.

225. *Id.* at 137.

226. *Id.* at 138.

227. See *Moody*, 603 U.S. at 738–39 (discussing Facebook’s Community Standards and YouTube’s Community Guidelines).

direct challenge to editorial autonomy, the [majority] offered only limited protection, confined to platform functions most analogous to traditional newspaper editing.²²⁸ As Langvardt and Rozenshtein put it, “*Moody* is proof of life, but not proof of scope, for *Tornillo*.”²²⁹

The Court’s other opinions make that point even more explicitly. Justice Jackson’s *Moody* opinion obliquely suggests a willingness to apply distinct constitutional rules to digital platforms,²³⁰ and Justice Barrett’s specifically set an outer boundary of editorial discretion—a move that seemingly required recognition, if not outright adoption, in a footnote of the majority opinion.²³¹ Most remarkable is the Alito bloc’s unwillingness to extend First Amendment protection to anything the platforms do.²³²

Justice Gorsuch and Justice Thomas also signed onto a Justice Alito opinion in *Murthy v. Missouri* five days earlier.²³³ *Murthy* involved a First Amendment challenge by social-media users against members of the Biden administration that the plaintiffs contended had pressured and conspired with technology executives to censor and suppress conservative viewpoints about the COVID–19 pandemic on social media.²³⁴ A six-justice majority held that the plaintiffs lacked standing, and Justice Alito’s dissent inveighed against the platforms as pliant actors willing and able to carry out the government’s censorious directives.²³⁵ The same three justices within the span of a week twice refused to view the platforms as independent editors exercising protected discretion; they instead considered the platforms conduits for others’ expression whose own information processing carried little expressive significance of its own.

The Court’s treatment of editorial discretion was not, however, the only abrupt departure from the prevailing deregulatory accounts. Contrary to much catastrophizing in the aftermath of *NIFLA* and 303 *Creative*, eight justices agreed that the laws’ transparency and disclosure requirements were properly governed by *Zauderer*.

2.1.2 TIKTOK V. GARLAND

After *Moody*, the Court again confronted the First Amendment implications of a law that overtly interfered with a technology company’s business activities and again cast the law’s expressive burden in undeniably narrow terms.

228. Langvardt & Rozenshtein, *supra* note 137, at 31.

229. *Id.*

230. See *Moody* at 749 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 386 (1969) (positing that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them”)).

231. See *id.* at 736 n.5.

232. *Moody*, 603 U.S. at 793–96 (ALITO, J., concurring).

233. See *Murthy v. Missouri*, 603 U.S. 43 (2024).

234. See *id.* at 48–56.

235. See *id.* at 93–95 (Alito, J., dissenting).

TikTok is a user-generated-content network that operates a mobile app and website.²³⁶ The platform enables users to create, share, and view short-form videos.²³⁷ It is operated by TikTok, Inc., a California company that hosts and distributes the app and website in the United States, but the California company “is wholly owned through a chain of corporate entities by . . . ByteDance Ltd., which is the ultimate parent of TikTok.”²³⁸ ByteDance is incorporated in the Cayman Islands, but its headquarters are in Beijing, and it’s principally operated from offices located in the People’s Republic of China (PRC).²³⁹

The default view in the TikTok app is known as the “For You” page, which displays algorithmically curated videos to TikTok users.²⁴⁰ It’s inaccurate to characterize TikTok as a social network because the content that TikTok displays to viewers is not confined to a user’s self-defined network.²⁴¹ Rather, TikTok pioneered the now-dominant approach to user-generated-content networks: an algorithmic recommendation engine with an open graph—one that incorporates content from anywhere on the network.²⁴² TikTok is estimated to have over 170 million monthly active users in the United States, and its success is largely attributable to the effectiveness of its recommendation algorithm, which has an uncanny ability to discern users’ interests and display additional content aligned with those so-called revealed preferences.²⁴³ The recommendation algorithm is owned and engineered by ByteDance, stored inside the PRC, and its exact intricacies are a closely guarded secret.²⁴⁴

The relationship between ByteDance and the Chinese government is opaque. According to several national-security officials, “the PRC maintains a powerful Chinese Communist Party committee ‘embedded in ByteDance’ through which it can exert its will on the company.”²⁴⁵ The committee reportedly includes at least 138 employees, including ByteDance’s “chief editor.”²⁴⁶ More generally, ByteDance “is subject to Chinese laws that require it to ‘assist or cooperate’ with the Chinese Government’s ‘intelligence work’ and to ensure that

236. *TikTok Inc. v. Garland*, 145 S. Ct. 57, 63 (2025).

237. *Id.*

238. Brief for Respondent at 3, *TikTok Inc. v. Garland*, *Firebaugh v. Garland*, 604 U.S. 56 (2025) (Nos. 24-656 & 24-657).

239. *Id.*

240. *TikTok*, 604 U.S. at 63.

241. See, e.g., Brendan Benedict, *TikTok Is “Not A Social Network”*, BIG TECH ON TRIAL (Apr. 18, 2025), bigtechontrial.com/p/tiktok-is-not-a-social-network.

242. See, e.g., *id.*; Cal Newport, *TikTok and the Fall of the Social-Media Giants*, NEW YORKER (July 28, 2022), newyorker.com/culture/cultural-comment/tiktok-and-the-fall-of-the-social-media-giants.

243. *TikTok*, 604 U.S. at 63; Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), nytimes.com/2021/12/05/business/media/tiktok-algorithm.html.

244. Brief for Respondent, *supra* note 238, at 3; Brett M. Frischmann & Peter Ormerod, *Regulating Manipulative Design Is Not Preempted by CDA 230 or the First Amendment*, 75 EMORY L.J. ___, n.126 (forthcoming 2026).

245. Brief for Respondent, *supra* note 238, at 4.

246. *Id.*

the Chinese Government has ‘the power to access and control private data’ the company holds.”²⁴⁷ This close connection between the Chinese government and an information-dissemination platform used by more than every other American has engendered significant national-security concerns.²⁴⁸ These concerns generally come under two headings: data collection and foreign influence.²⁴⁹

TikTok, by dint of its operation, collects a dizzying array of information about its users.²⁵⁰ Such data collection is of course common among other free-to-use user-generated-content networks like Instagram and YouTube.²⁵¹ But because Chinese law compels ByteDance to make its data available to the Chinese government, the United States “has long been concerned that TikTok’s data collection threatens to allow the Chinese Communist Party access to Americans’ personal and proprietary information, which could allow the Chinese government to . . . track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.”²⁵² Journalists in the United States have published numerous troubling accounts of data access within TikTok, as well as inconsistencies between the company’s representations and actions.²⁵³

Second is the concern that the Chinese government may exercise direct or indirect control over TikTok’s recommendation algorithm.²⁵⁴ Due to the algorithm’s opacity and its personalized nature, understanding exactly what is happening on TikTok at an aggregated level is nigh impossible.²⁵⁵ But researchers have documented that TikTok is on balance populated with content that is considerably more favorable to the PRC than TikTok’s competitors, and anecdotal evidence supports these accounts.²⁵⁶ The federal government also maintains that ByteDance operating abroad “has a demonstrated history of manipulating the content on TikTok, including at the direction of the PRC.”²⁵⁷ The federal govern-

247. *TikTok*, 145 S. Ct. at 63 (quoting H.R. Rep. No. 118-417, p. 4 (2024)).

248. Brief for Respondent, *supra* note 238, at 4.

249. *See id.*

250. *See Frischmann & Ormerod*, *supra* note 244, at n.126.

251. *See id.*

252. Brief for Respondent, *supra* note 238, at 5 (internal quotes omitted).

253. *See, e.g., Emily Baker-White, Leaked Audio From 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed From China*, BUZZFEED NEWS (June 17, 2022), buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access; EMILY BAKER-WHITE, EVERY SCREEN ON THE PLANET: THE WAR OVER TIKTOK (2025); Glenn Thrush & Sapna Maheshwari, *Justice Dept. Investigating TikTok’s Owner Over Possible Spying on Journalists*, N.Y. TIMES (Mar. 17, 2023), nytimes.com/2023/03/17/us/politics/tik-tok-spying-justice-dept.html.

254. Brief for Respondent, *supra* note 238, at 5–6.

255. *See Frischmann & Ormerod*, *supra* note 244, at n.126.

256. *See Danit Finkelstein, Sonia Yanovsky, Jacob Zucker, Anisha Jagdeep, Collin Vasko, Ankita Jagdeep, Lee Jussim, and Joel Finkelstein, Information manipulation on TikTok and its relation to American users’ beliefs about China*, 2 FRONT. SOC. PSYCHOL. (Jan. 27, 2025), doi.org/10.3389/frsps.2024.1497434.

257. Brief for Respondent, *supra* note 238, at 5.

ment thus expressed concern that the PRC could use “covert content manipulation on TikTok to . . . sow doubts about the U.S. leadership, undermine democracy, . . . and magnify U.S. societal divisions in ways favorable to the PRC.”²⁵⁸

Over the course of four years, the federal government under both President Trump and President Biden negotiated with ByteDance in an effort to ameliorate these concerns.²⁵⁹ Those negotiations ultimately proved futile, and Congress in April 2024 enacted the Protecting Americans from Foreign Adversary Controlled Applications Act.²⁶⁰ The law imposes ruinous civil penalties on third-party service providers that facilitate the distribution of a “foreign adversary controlled application,” such as by offering the application in a mobile app store or providing internet hosting services.²⁶¹ The law explicitly designates TikTok as a “foreign adversary controlled application” and supplies the President with authority for designating additional applications.²⁶² Covered applications can avoid the act’s prohibitions and penalties through a “qualified divestiture,” a transaction that the President determines will result in the application’s “no longer being controlled by a foreign adversary” and will “preclude[] the establishment or maintenance of any operational relationship between the [domestic] operations of the application and any formerly affiliated entities that are controlled by a foreign adversary.”²⁶³ The law’s effective date was January 19, 2025.²⁶⁴

The law provided for exclusive judicial review in the D.C. Circuit.²⁶⁵ Before its effective date, TikTok and its users filed petitions for review. In December 2024, the D.C. Circuit denied those petitions.²⁶⁶ The court of appeals first concluded that the law implicated the First Amendment because it “impose[d] a disproportionate burden upon those engaged in protected First Amendment activities.”²⁶⁷ It then went on to “assume without deciding” that strict scrutiny applied because “the Government arguably based its content-manipulation justification for the Act upon the content on the platform.”²⁶⁸ The court nevertheless concluded, however, that the law satisfied strict scrutiny because the government’s national-security justifications were compelling and that the law was narrowly tailored to serving those interests.²⁶⁹

258. *Id.* at 6.

259. *Id.* at 6–8.

260. Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, Div. H, 138 Stat. 955 [hereinafter PAFACA].

261. *Id.* §§ 2(a)(1), 2(d)(1).

262. *Id.* § 2(g)(3).

263. *Id.* § 2(g)(6).

264. See *TikTok Inc. v. Garland*, 122 F.4th, 930, 939–40 (D.C. Cir. 2024).

265. See PAFACA, *supra* note 260, § 3.

266. *TikTok*, 122 F.4th at 940.

267. *Id.* at 948–50.

268. *Id.* at 948, 950–52.

269. *Id.* at 952–65.

The Supreme Court reviewed the law on an extremely expedited timeline: the Court granted cert. and set argument five weeks after the D.C. Circuit opinion published, and the Court's own opinion issued one week after argument—two days before the law's effective date.

The per curiam opinion affirmed and thereby upheld the law.²⁷⁰ Remarkably, the Court dithered on whether the law implicated the First Amendment at all. It explained that several categories of laws “can, but do not necessarily, trigger” First Amendment scrutiny: laws that directly regulate expressive conduct and laws that involve “governmental regulation of conduct that has an expressive element,” as well as laws that, “although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities.”²⁷¹ The Court then expressed uncertainty about which type of law this was, since it “does not regulate the creator petitioners at all” and it directly regulates ByteDance and TikTok “only through the divestiture requirement.”²⁷² Acknowledging that the Court had never previously “treated a regulation of corporate control as a *direct* regulation of expressive activity or semi-expressive conduct,” the Court declined to “break that new ground in this unique case.”²⁷³

The more natural fit was that the law imposed a disproportionate burden on TikTok's expressive activities, which include “content moderation, content generation, access to a distinct medium for expression, association with another speaker or preferred editor, and receipt of information and ideas.”²⁷⁴ While “an effective ban on a social media platform with 170 million U.S. users certainly burdens those users' expressive activity in a non-trivial way,” this law was “in many ways different in kind from the regulations of non-expressive activity” that the Court had previously subjected to First Amendment scrutiny.²⁷⁵ Ultimately, because the Court had not previously “articulated a clear framework for determining whether a regulation of non-expressive activity that disproportionately burdens those engage in expressive activity triggers heightened review,” the Court “assume[d] without deciding that the challenged provisions . . . are subject to First Amendment scrutiny.”²⁷⁶

The Court then went on to conclude the law was subject to intermediate scrutiny because it was a content-neutral speech regulation.²⁷⁷ It explained two categories of cases that are content-based. First are facially content-based laws,

270. See *TikTok*, 604 U.S. at 60.

271. *Id.* at 67.

272. *Id.* at 67–68 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703–04 (1986)) (internal quotation marks omitted).

273. *Id.* at 68.

274. *Id.* at 68–69.

275. *Id.* at 69.

276. *Id.*

277. *Id.* at 70–71.

which are those that apply to “particular speech because of the topic discussed or the idea or message expressed.”²⁷⁸ Second are facially content-neutral laws that are nevertheless content-based because the law “cannot be justified without reference to the content of the regulated speech or was adopted by the government because of disagreement with the message the speech conveys.”²⁷⁹ This law, according to the Court, was facially neutral and justified by a content-neutral rationale.

The Court rejected TikTok’s argument that the law was content-based on its face because it excludes from its coverage any company that operates an application “whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews.”²⁸⁰ Despite that provision seeming to discriminate based on content, the petitioners could not invoke that content-based exclusion because it did not apply to them.²⁸¹

The Court also dismissed the law’s TikTok-specific provisions.²⁸² Past cases have established that targeting specific speakers is inherently suspect and thus laws that burden speech based on a speaker’s identity are ordinarily subject to strict scrutiny.²⁸³ Here, however, the Court invoked a rarely employed exception for when “some special characteristic” justifies “differential treatment”—here, a “foreign adversary’s ability to leverage its control over the platform to collect vast amounts of personal data from 170 million U.S. users.”²⁸⁴

The Court further disagreed that the law was motivated by a content-based purpose.²⁸⁵ For one, the government did offer a content-neutral justification in the form of preventing a geopolitical adversary from collecting Americans’ sensitive information.²⁸⁶ But the government also offered a rather obviously content-based justification: “preventing a foreign adversary from having control over the recommendation algorithm that runs a widely used U.S. communications platform, and from being able to wield that control to alter the content on the platform in an undetectable manner.”²⁸⁷ The Court characterized the case as a novel one involving a mixed motive—a law justified on both content-neutral

278. *Id.* at 70.

279. *Id.* at 70–71 (quoting *Reed*, 576 U.S. at 164) (internal quotation marks omitted).

280. *See id.* at 71–72; PAFACA, *supra* note 260, § 2(g)(2)(B).

281. *TikTok*, 604 U.S. at 71–72; *see also First Amendment — Freedom of Speech — Social Media — TikTok Inc v. Garland*, 139 HARV. L. REV. 280, 283 (2025) [hereinafter *TikTok Note*] (“[B]ecause the exclusions pertained to the Act’s general provisions—in other words, because TikTok would still be targeted if the Court struck those provisions—they were beyond the scope of TikTok’s as-applied challenge.”).

282. *TikTok*, 604 U.S. at 72–73.

283. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

284. *TikTok*, 604 U.S. at 72–73 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 660–61 (1994)).

285. *Id.* at 78–80.

286. *See id.* at 72.

287. *Id.* at 78.

and content-based grounds.²⁸⁸ The Court demurred on both the question of “whether the Government’s foreign adversary control justification is content neutral” and what was the “proper standard for mixed-justification cases.”²⁸⁹ Instead, it proceeded to ignore the foreign-influence justification on the grounds that “Congress would have passed the challenged provisions based on the data collection justification alone.”²⁹⁰

The Court then went on to uphold the law after applying intermediate scrutiny because the data-security justification was an important interest unrelated to the suppression of expression and the law was sufficiently tailored to serve that justification.²⁹¹ Despite the law’s exclusions for review sites undermining the data-security justification—since review sites could (and do) collect just as much data as TikTok—the Court explained “the First Amendment imposes no freestanding underinclusiveness limitation” and the government “need not address all aspects of a problem in one fell swoop.”²⁹² The law was also not substantially broader than necessary to achieve the data-security interest because the government had shown that interest “would be achieved less effectively absent the regulation” and the government did not “ignore less restrictive approaches” that had “already proven effective.”²⁹³

Justice Sotomayor penned a brief concurrence, explaining that she saw “no reason to assume without deciding that the Act implicates the First Amendment because . . . precedent leaves no doubt that it does.”²⁹⁴ Justice Gorsuch concurred only in the judgment, offering “a few, and admittedly tentative, observations.”²⁹⁵ As relevant here, Justice Gorsuch agreed with the per curiam opinion’s refusal to “endors[e] the government’s asserted interest in preventing the covert manipulation of content as a justification for the law.”²⁹⁶ He also expressed serious doubt that the law was content neutral, suggesting that the law ought to be subjected to strict scrutiny.²⁹⁷ Nevertheless, he explained, the law satisfied that high bar because the government’s justification was compelling and no less restrictive alternative was available.²⁹⁸

The decision effects a number of striking doctrinal inventions that should be understood in the aggregate as casting the law’s burden on expression in remarkably narrow terms. These moves surprised the vast majority of academic commentators, which had largely lined up in opposition to the law, believing

288. *Id.*

289. *Id.* at 78.

290. *Id.* at 79.

291. *Id.* at 73–78.

292. *Id.* at 76 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015)).

293. *Id.* at 76, 78.

294. *Id.* at 80 (SOTOMAYOR, J., concurring)

295. *Id.* at 81 (GORSUCH, J., concurring)

296. *Id.*

297. *See id.* at 82–83.

298. *Id.* at 83–84.

that it was a rather overt form of impermissible content-, speaker-, and view-point-based discrimination.²⁹⁹ The suggestion that a law effectively banning a communications platform might not implicate the First Amendment at all—a conclusion that seven justices were apparently open to—was scarcely entertained before oral argument.³⁰⁰ The D.C. Circuit, for instance, had wryly characterized it as “the Government’s ambitious argument that this case . . . does not implicate the First Amendment at all,” and dismissed it in two paragraphs.³⁰¹

Beyond the coverage question, the opinion employs three creative techniques to avoid strict scrutiny: discounting of the law’s content-based exclusions, exempting the law from the principle that strict scrutiny applies when the government singles out a speaker for differential treatment, and refusing to allow an impermissible motive to taint the law’s permissible justification. It’s not difficult to imagine an alternative outcome where the Court accepted any one, some combination, or all of these arguments, concluding that the law must satisfy strict scrutiny. Upholding the law after applying strict scrutiny hardly would have been unprecedented, given that the D.C. Circuit did so in *TikTok* itself, following the Court’s lead in 2010’s *Holder v. Humanitarian Law Project*.³⁰² In *Holder*, a six-justice majority—containing all five Republican-appointed justices—upheld the criminal prohibition on providing material support to designated terrorist organizations after concluding that the law survived strict scrutiny.³⁰³ The *TikTok* Court’s various moves to duck and weave around its strict scrutiny precedents were unpredictable and suggest that a majority of justices were simply unwilling to be handcuffed by precedents’ broad application of strict scrutiny.

Finally, the Court’s application of intermediate scrutiny can hardly be called rigorous.³⁰⁴ Many commentators had argued the law was grossly underinclusive

299. See, e.g., Brief of First Amendment and Internet Law Professors as Amici Curiae in Support of Petitioners, *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (No. 24-656); Ganesh Sitaraman, Sanjay Jolly, Zephyr Teachout, Nikolas Guggenberger, Anupam Chander, Elettra Bietti, *Six Reactions to the Proposed TikTok Ban*, LPE PROJECT BLOG (Mar. 26, 2024), lpeproject.org/blog/six-reactions-to-the-proposed-tiktok-ban/; Jameel Jaffer & Genevieve Lakier, *The Supreme Court Must Intervene in the TikTok Case*, KNIGHT FIRST AMENDMENT INSTITUTE BLOG (Dec. 10, 2024), knightcolumbia.org/blog/the-supreme-court-must-intervene-in-the-tiktok-case; “Speech & the Border” Transcript—Episode Five: *The Free Speech Costs of Banning TikTok*, KNIGHT FIRST AMENDMENT INSTITUTE PODCAST (Dec. 18, 2024), knightcolumbia.org/content/speech-the-border-transcriptepisode-five-the-free-speech-costs-of-banning-tiktok.

300. See, e.g., the preceding note; cf. Genevieve Lakier, *The TikTok Ban and the Limits of the First Amendment*, LPE PROJECT BLOG (Jan. 22, 2025), lpeproject.org/blog/the-tiktok-ban-and-the-limits-of-the-first-amendment/ [hereinafter Lakier, *Limits*].

301. *TikTok*, 122 F.4th at 949.

302. See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

303. See *id.*

304. See, e.g., Lakier, *Limits*, *supra* note 300 (“The Court upheld the law after applying a remarkably deferential version of the intermediate scrutiny standard that courts apply in First Amendment cases to content-neutral regulations of speech.”).

because the PRC could collect Americans' data using alternative means.³⁰⁵ But the Court insisted that an alternative be proven as just as effective at serving the government's interest, an unusual—and likely insurmountable—burden of proof on the challenger.

There are, of course, reasons to doubt that *TikTok* stands for a wide array of broadly applicable principles. For one, the law itself is extraordinary. In a time of extreme political polarization amid a notoriously sclerotic Congress, it's striking that an overwhelming bipartisan majority of legislators voted to enact a law that could ban a communications platform used by every other American.³⁰⁶ For another, the case's unusual posture—a tightly compressed schedule for briefing and decision, as well as exclusive judicial review in a single appellate court—explicitly led the Court to deferring several hard questions.³⁰⁷ And finally, the Court's opinion was quite explicit about the narrowness of its holding, at least as to the differential-treatment holding. Although “[d]ata collection and analysis is a common practice in this digital age,” the Court explained, “TikTok’s scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data [it] collects, justify differential treatment to address the Government’s national security concerns.”³⁰⁸ Laws targeting other speakers “would by necessity entail a distinct inquiry and separate considerations.”³⁰⁹

And yet it would be a mistake to suggest the opinion is a good-for-one-ride-only ticket. For one, the Court knows how to express that sentiment when it suits it.³¹⁰ And the five moves to minimize the law's burden on expression might not be remarkable in isolation, but in the aggregate they suggest a real willingness among a supermajority of justices to contort precedent's Lochnerian tendencies—at least in the right circumstances. This methodological departure was both stark and unnecessary: the Court had available an alternative way to uphold the law that would have followed a Roberts Court precedent and signaled ongoing continuity with the categorical rule-based approach of earlier. Instead, it decided the case using a calibrated approach that retained considerable discre-

305. See, e.g., Lauren Leffer, *Banning TikTok Would Do Basically Nothing to Protect Your Data*, SCIENTIFIC AMERICAN (Mar. 22, 2024), scientificamerican.com/article/tiktok-ban-data-privacy-security/.

306. See, e.g., Haleluya Hadero, *Senate passes bill forcing TikTok's parent company to sell or face ban, sends to Biden for signature*, ASSOCIATED PRESS (Apr. 23, 2024), apnews.com/article/tiktok-ban-congress-bill-1c48466df82f3684bd6eb21e61ebcb8d.

307. See *TikTok*, 604 U.S. at 68, 69, 71, 79.

308. *Id.* at 73.

309. *Id.*

310. See, e.g., *Dames & Moore v. Reagan*, 453 U.S. 654, 661 (1981) (“We attempt to lay down no general ‘guidelines’ covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.”); Transcript of Oral Argument, *Learning Resources v. Trump*, No. 24-1287, 10:16–19 (“[T]he Court in *Dames & Moore* went out of its way to say that it was issuing a very narrow decision that it pretty much expected to apply only in this case.”); *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances . . .”).

tion over what constitutes an impermissible burden on protected expression. And of course *TikTok* doesn't stand alone: as discussed both above and below, it's one piece of a larger trend wherein justices with sterling deregulatory credentials have had an abrupt about-face.

2.1.3 FREE SPEECH COALITION V. PAXTON

The conservative justices' willingness to narrowly cast the expressive burden of a law interfering with tech companies has been illustrated most acutely in a post-*TikTok* decision involving age verification for adult websites.

The federal government has long attempted to make adult material unavailable to minors. Those efforts have largely been met with failure. Even before the internet, the Court applied strict scrutiny and struck down laws that prohibited explicit telephone messages and "indecent but not obscene" cable television channels between 6 A.M. and 10 P.M.³¹¹ Congress redoubled those efforts with the rise of the internet and its attendant ubiquity of explicit material. In 1996, Congress enacted the Communications Decency Act (CDA), which made it a crime for any person to post content in "the entire universe of cyberspace" that was "indecent" or "patently offensive" when the poster knew a child would be among the recipients.³¹² The CDA provided an affirmative defense in the form of age verification.³¹³ In *Reno v. American Civil Liberties Union*, the Court applied strict scrutiny and held the law unconstitutional.³¹⁴ Congress thereafter tried again, enacted the Child Online Protection Act (COPA), which criminalized posting "content that is harmful to minors online for commercial purposes."³¹⁵ It too provided an affirmative defense to those who employed certain means—such as using a credit card or digital age certificate—to prevent minors from gaining access to the prohibited material.³¹⁶ In *Ashcroft v. American Civil Liberties Union II*, the Court again applied strict scrutiny and struck down the law.³¹⁷

These cases stood uneasily against the well-accepted proposition that the government may require age verification in the physical world for material that is obscene as to minors. In *Ginsberg v. New York*, the Court applied rational basis and upheld a state law that required sellers to verify age before raising an "honest mistake" of age as a defense.³¹⁸ Ever since, "the constitutionality of laws . . . that impose in-person age-verification requirements has been taken as a

311. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000).

312. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 876 (1997).

313. See 47 U.S.C. § 223(e)(5).

314. 521 U.S. 844, 874–76 (1997).

315. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 661 (2004) (quoting 47 U.S.C. § 231(a)(1)).

316. *Id.* at 662 (citing 47 U.S.C. § 231(c)(1)).

317. See *id.* at 666–70.

318. *Ginsberg v. New York*, 390 U.S. 629, 644 (1968).

given.”³¹⁹

There has been a renewed effort in recent years among state lawmakers to restrict minors’ access to explicit materials online. Louisiana enacted Act 440 in 2022, and it creates civil liability for “commercial entities who distribute material harmful to minors” unless they use “reasonable age verification methods.”³²⁰ Utah, Virginia, Mississippi, Texas, Arkansas, and Montana all quickly followed suit, passing laws that require age verification for pornography websites that meet a “substantial portion” threshold—usually one-third harmful-to-minors content.³²¹ At least 15 additional states have since enacted laws with similar age-verification requirements.³²²

A trade association for the pornography industry challenged the constitutionality of the Texas law.³²³ The district court granted the challengers a preliminary injunction after concluding that strict scrutiny applied and that the government was unlikely to satisfy it.³²⁴ The Fifth Circuit disagreed. It held instead that under *Ginsberg*, the law was only subject to rational basis scrutiny.³²⁵

The Supreme Court affirmed.³²⁶ In an ideologically divided 6–3 decision, the Court held that the Texas law was subject to intermediate scrutiny and upheld it.³²⁷ Justice Thomas’s majority opinion initially characterizes the Court’s past decisions in exceedingly narrow terms: the federal laws in *Sable*, *Playboy*, *Reno*, and *Ashcroft II* all involved a “blanket prohibition” or an “outright ban”;³²⁸ the CDA’s age-verification requirement in *Reno* was a functionally unavailable affirmative defense;³²⁹ and *Ashcroft II* was a “self-consciously narrow and fact-bound decision” where the Court merely affirmed the circuit court’s application of strict scrutiny under the abuse-of-discretion standard after the government conceded that strict scrutiny applied.³³⁰

Having dispensed with past decisions that seemed to compel strict scrutiny, the opinion then concluded that the Texas law was subject to intermediate

319. *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461, 486 (2025).

320. See La. Stat. Ann. § 9:2800.29 (2023); see also Daniel S. Anduze, Note, *Obscenity Revisited: Defending Recent Age-Verification Laws Against First Amendment Challenges*, 58 COLUM. J. L. & SOCIAL PROBLEMS 147 (2024).

321. See Eric N. Holmes, *Online Age Verification (Part I): Current Context*, CONGRESSIONAL RESEARCH SERVICE: LEGAL SIDEBAR (Aug. 17, 2023), congress.gov/crs-product/LSB11020; Marc Novicoff, *A Simple Law Is Doing the Impossible. It’s Making the Online Porn Industry Retreat.*, POLITICO (Aug. 8, 2023), politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148.

322. See *Free Speech Coalition*, 606 U.S. at 468.

323. *Id.*

324. *Free Speech Coalition, Inc. v. Colmenero*, 689 F. Supp. 3d 373, 391–93 (WD Tex. 2023).

325. *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 269–71 (5th Cir. 2025).

326. *Free Speech Coalition*, 606 U.S. at 463.

327. See *id.* at 470–99.

328. See *id.* at 486–89.

329. See *id.* at 487–88.

330. *Id.* at 488–90.

scrutiny because “it has only an incidental effect on protected speech.”³³¹ The law did not directly regulate the protected speech of adults because it “simply requires proof of age to access content that is obscene as to minors.”³³² And since minors “have no First Amendment right to access speech that is obscene to them,” the law’s burden on adults’ ability to access protected speech was “only incidental to the statute’s regulation of activity that is not protected by the First Amendment.”³³³ In light of this ostensibly incidental burden, intermediate scrutiny was the appropriate standard.³³⁴ The Court’s conclusion ultimately seems to hinge on its flat assertion that “accessing material obscene to minors without verifying one’s age is not constitutionally protected.”³³⁵

The majority then applied intermediate scrutiny and upheld the law.³³⁶ Shielding children from sexual content was not just an important interest—it was a compelling one.³³⁷ And the law was sufficiently tailored to that interest.³³⁸ The Court quoted from *TikTok*’s recitation of intermediate scrutiny’s fit requirements to explain that “a regulation is adequately tailored so long as the government’s interest would be achieved less effectively absent the regulation and the regulation does not burden substantially more speech than is necessary to further that interest.”³³⁹ As in *TikTok*, insisting that any less-restrictive alternative be equally effective is a powerful instrument for stacking the deck in the government’s favor, since there is a long list of ways that a proposed alternative could be considered less effective than the law under review.³⁴⁰

So defined, the age-verification requirements were “plainly a legitimate legislative choice,” since states have long required age verification for in-person transactions.³⁴¹ The specific verification methods contemplated by the Texas law were similarly permissible, since other age-restricted services (such as gambling and alcohol and tobacco sales) rely on the same methods, as do some pornographic websites.³⁴² The challengers’ fit arguments were unavailing. Content filtering and ISP blocking were not suitable alternatives because they would

331. *Id.* at 478 (quoting *Boy Scouts of America v. Dale*, 530 U. S. 640, 659 (2000)) (internal quotation marks omitted).

332. *Id.* at 482.

333. *See id.* 482–83

334. *Id.* at 483

335. *Id.* at 483 (emphasis omitted).

336. *See id.* at 495–97.

337. *Id.* at 496.

338. *Id.* at 496–97.

339. *Id.* at 496 (quoting *TikTok*, 604 U.S. at 76) (internal quotation marks omitted).

340. *See* Transcript of Oral Argument, *Free Speech Coalition, Inc. v. Paxton*, No. 23–1122, 99:8–17 (Jan. 15, 2025) (“One thing that concerns me is oftentimes someone will say, well, there’s a less restrictive alternative. I think it’s really important to make clear that any less restrictive alternative has to serve the compelling interest[,] or important interest if it’s intermediate [scrutiny], . . . to the same degree.”).

341. *Free Speech Coalition*, 606 U.S. at 497.

342. *Id.*

achieve “Texas’s interest in shielding children from sexual content . . . less effectively” than the age-verification law.³⁴³ And the law’s carveouts for search engines was permissible because “the First Amendment imposes no freestanding underinclusiveness limitation” and “search engines do not exercise the same degree of control over the websites to which they link, so the State could reasonably conclude that it makes less sense to regulate them.”³⁴⁴

Justice Kagan authored a dissenting opinion. She hotly disputed the majority’s level-of-scrutiny analysis, explaining that “the majority’s analysis reduces to this: Requiring age verification does not directly burden adults’ speech rights because adults have no right to be free from the burden of age verification. Gerrymander the right to incorporate the burden, and the critical conclusion follows.”³⁴⁵ The opinion contests the majority’s strained efforts to duck and weave around past cases, concluding that the Court was “not shy about why it has adopted these special-for-the-occasion, difficult-to-decipher rules. It thinks they are needed to get to what it considers the right result: giving Texas permission to enforce its statute.”³⁴⁶ While Justice Kagan suggested—both in the dissent and at oral argument³⁴⁷—that she was inclined to think some form of age-verification should satisfy strict scrutiny, her opinion excoriates the majority’s result-oriented reasoning, casting the majority analysis “as unnecessary as it is unfaithful to the law.”³⁴⁸

The dissent draws in stark relief the extent to which the conservative justices have retreated from the deregulatory impulses reflected in *Reno* and *Ashcroft*. Most pointed is the majority’s level-of-scrutiny analysis, which characterizes the burden on adults’ ability to access protected expression in such narrow terms as to elicit the charge it was engaged in an indefensible, results-driven gerrymander. Justice Kagan contends that the Court’s conclusion that the law imposed only an incidental burden on protected expression is “nothing like what we have ever understood as an incidental restraint for First Amendment purposes” because the law “defines speech by content and tells people entitled to view that speech that they must incur a cost to do so.”³⁴⁹

343. *Id.* at 497–98 (internal quotation marks omitted).

344. *Id.* at 498–99.

345. *Id.* at 514 (KAGAN, J., dissenting).

346. *Id.* at 502.

347. *See id.* (“Texas should not receive that permission if it can achieve its goal as to minors while interfering less with the speech choices of adults. And if it cannot, then Texas’s statute would survive strict scrutiny, given the obvious importance of its goal.”); Transcript, *supra* note 340, at 89:7–90:20.

348. *Free Speech Coalition*, 606 U.S. at 502 (KAGAN, J., dissenting).

349. *Id.*

2.2 IN PROCEDURE

While *Moody*, *TikTok*, and *Free Speech Coalition* all shift some aspects of substantive First Amendment doctrine, these decisions—as well as other recent cases and larger dynamics at the Court—also suggest that the procedural aspects of litigating free-speech claims are becoming more difficult for challengers.

Moody's core holding—that all four of the lower courts had failed to conduct the proper facial-challenge analysis—is the most explicit illustration of this dynamic. After *Moody*, it's almost inconceivable that a technology company or trade association will be able to quickly secure the wholesale invalidation of a new data-based regulation. Recall that courts are required to precisely identify the activities and the actors that are regulated by the law.³⁵⁰ After that, they must determine which of the laws' applications violate the First Amendment and then measure those against constitutional applications.³⁵¹ The results of that balancing must only result in invalidation of an entire law if its unconstitutional applications substantially outweigh its constitutional ones.³⁵²

This renewed vigor in the facial-challenge analysis is already having reverberations in the lower courts. In *NetChoice*'s First Amendment challenge to California's Protecting Our Kids from Social Media Addiction Act, for instance, the Ninth Circuit recently upheld the vast majority of the law, noting that *NetChoice* had again failed to develop the factual record that *Moody* calls for.³⁵³

Moody's facial-challenge analysis is part of a broader trend of making First Amendment challenges difficult to win—an effort that has been spearheaded by the Court's conservative wing. In 2023's *United States v. Hansen*, for example, the Court declined to invalidate a criminal statute that prohibits “encourag[ing] or induc[ing]” illegal immigration.³⁵⁴ The challenger argued that the law criminalized immigration advocacy and other protected expression, and the Ninth Circuit agreed.³⁵⁵ Justice Barrett's 7–2 opinion reversed.³⁵⁶ Everyone agreed that the challenger's violations of the statute had gone much further than mere advocacy, but he nevertheless sought to invalidate the law by pointing to other potential applications of the law that might infringe on others' protected expression.³⁵⁷ The majority was not impressed: while his broad reading of the statute was itself dubious, even if the law “reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful application is not lopsided enough to justify the ‘strong medicine’ of

350. *Moody*, 603 U.S. at 724.

351. *Id.* at 725.

352. *Id.* at 723–24.

353. See *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1019–23 (9th Cir. 2025).

354. *United States v. Hansen*, 599 U.S. 762, 766 (2023) (citing 8 U.S.C. § 1324(a)(1)(A)(iv)).

355. *Id.* at 767–79.

356. *Id.* at 765.

357. *Id.* at 768.

facial invalidation for overbreadth.”³⁵⁸ Justice Thomas’s concurrence reiterated his call for the Court to reconsider the entirety of its overbreadth doctrine: the Ninth Circuit’s “reasoning starkly demonstrates that this Court’s facial overbreadth doctrine offers a license for federal courts to act as ‘roving commissions assigned to pass judgment on the validity of the Nation’s law.’”³⁵⁹ These roving commissions, he explained, were inconsistent with practice at the Founding and this case had “demonstrate[d] just how far courts have drifted from their original station of adjudicating the rights of the parties before them in accordance with law.”³⁶⁰ In *Moody* itself, Justice Thomas’s concurrence went further, positing that federal courts lack jurisdiction to “deem a statute ‘facially’ unconstitutional.”³⁶¹ In arguing against courts’ modern practice of invalidating facially unconstitutional laws, Justice Thomas also cast doubt on vagueness doctrine.³⁶²

In a related vein is *TikTok*’s conclusion that the company could not invoke the law’s exceptions for review sites in claiming that it drew impermissible content-based distinctions. Much like *Moody*’s curbing of facial challenges and *Hansen*’s overbreadth analysis, this aspect of the Court’s reasoning seeks to limit the arguments that litigants may make—ones that will specifically benefit them and not merely other speakers.

The same pattern surfaces in *Murthy*. The Court’s holding that the plaintiffs could not establish a sufficient causal link between the Executive Branch officials’ communications to the social-media platforms and the platforms’ content-moderation decisions of the plaintiffs’ posts is of a related kind: a procedural obstacle to adjudicating a free speech claim on the merits that has a high, difficult-to-satisfy evidentiary bar.³⁶³

Together, these cases show that *Moody* was no one-off aberration. The Court’s conservatives have long been hostile to courts’ attempts to adjudicate the First Amendment claims of non-parties, which will continue to dampen companies’ attempts to have new data-governance statutes invalidated root and branch on thin factual records. *Murthy* shows a schism within the conservatives about just how consistently those procedural rigors should apply, signaling that the justices have multiple ways to avoid adjudicating excessively abstract and far-reaching speech claims. These procedural aspects of the current Court’s First Amendment doctrine thus send an unmistakable signal to policymakers consid-

358. *Id.* at 784 (quoting *Broaderick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

359. *Id.* at 786 (THOMAS, J., concurring) (quoting *Broaderick*, 413 U.S. at 610–11).

360. *Id.* at 791–92.

361. *Moody*, 603 U.S. at 750, 752–61 (THOMAS, J., concurring).

362. *See id.* at 763–66.

363. *See* Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. CHI. L. REV. 781, 859–60 (2026) (“[T]he decision in *Murthy* will almost certainly make it harder for plaintiffs who want to challenge coercive jawboning schemes to establish that they have standing to sue. . . . [F]or [indirect] plaintiffs—the most likely actual plaintiffs—establishing this kind of causation, on the basis of imperfect knowledge and prior to discovery, may often be extremely difficult to do.”).

ering new forms of regulation: the broader and more sweeping the law applies, the more cumbersome it will be for industry to invalidate it.³⁶⁴

2.3 COMPETING PARADIGMS

In three recent First Amendment challenges, the Supreme Court's conservative supermajority has voted to uphold laws that seriously interfere with profit-motivated information-processing activities. These cases are remarkable not only for their results, but also for a methodological shift among the conservatives—whereas they previously embraced an approach pervaded by categorical rules and sweeping rhetoric, they now evince a far more measured, discretionary approach to free speech cases. These results and methodology are inconsistent with the prevailing scholarly consensus surveyed in Part 1, which maintains that the conservative justices wield free-speech doctrine as a potent deregulatory tool—resurrecting a digital *Lochner*. At the same time, it's important to avoid over-reading *Moody*, *TikTok*, and *Free Speech Coalition*, since some forms of First Amendment deregulation are sure to continue. This section first synthesizes the doctrinal moves the justices have made recently and contrasts them against prior related decisions. Then it seeks to identify the outer limits of the Court's new tolerance for digital regulation. It, in short, situates these recent cases within the existing free speech backdrop.

2.3.1 FROM CONSTRAINT TO DISCRETION

A narrow interpretation of a law's burden on expression is the preeminent maneuver that Court has used on its way to upholding laws over recent free speech challenges. Part 2.1 and 2.2 showed how that move surfaces throughout the First Amendment analysis. Holding these cases up side-to-side with similar cases from the recent past helps illustrate how both results and reasoning are incongruous.

In *Moody*, the majority's narrow conception of editorial discretion led it to hold that only the most editor-like behaviors of speech platforms receive First Amendment protection. The only things we can say definitely qualify are platforms' crafting of content-moderation rules in advance and their application of those rules to user-generated content in their premier informational feeds. And even that holding seems on tenuous ground, given the reserved questions and uncertainty about the connection between humans' expressive curation and software platforms' reliance on automated algorithmic sorting and ranking. The

364. See Douek & Lakier, *Lochner.com*, *supra* note 10, at 167–68 (“The message [*Moody*] sends to lawmakers is that if they draft sufficiently ambiguous laws, those laws may survive facial challenges even if the purposes that motivate them are considered constitutionally impermissible.”).

Florida and Texas laws' broad applicability made adjudication in a facial posture all but impossible, signaling to lower courts that challengers bear a heavy evidentiary burden before possibly succeeding on invalidating laws in one fell swoop.

Separate and apart from the majority's narrow vindication of the platforms' most editor-like behavior was the Alito bloc's questioning whether the must-carry laws burdened any protected expression paired with their overt hostility towards extending *Tornillo* into the digital public sphere. Justice Alito's opinion repeatedly sought to distinguish social-media platforms from newspaper editors. For instance, he castigated the majority for reflexively accepting that "social-media platforms—which use secret algorithms to review and moderate an almost unimaginable quantity of data today—are just as expressive as the newspaper editors who marked up typescripts in blue pencil 50 years ago."³⁶⁵ Elsewhere, he asserts that Facebook and YouTube produce 1.3 billion times as much data daily as the *New York Times*.³⁶⁶ These passages, among others, are difficult to square with the prevailing portrayal of the conservative justices as in the thrall of private ordering and market-driven outcomes.³⁶⁷

The *TikTok* per curiam opinion's serious engagement with the argument that the law didn't implicate the First Amendment at all is related: it suggests that laws with an undeniable effect on expression might nevertheless be outside the First Amendment's purview and thus subject to only rational-basis scrutiny. Similar too is the opinion's bending over backwards to avoid strict scrutiny—ignoring the law's content-based exclusions, its speaker-based differential treatment, and the government's content-based justification. And the application of that intermediate scrutiny was ultimately quite deferential: the challengers' fit arguments were doomed absent proof that an alternative means was equally effective at furthering the government's data-security justification, and the Court's narrow characterization of the burden on TikTok's expression reinforced its conclusion there was no equally effective, less-restrictive alternative.

The Court's methodology is in stark contrast to several decisions from the Roberts Court's deregulatory heyday. For one, the Court's refusal to allow the foreign-influence justification to taint the law is particularly noteworthy. In *Sorrell*, after all, the Court struck down the Vermont law under an ambiguous form of "heightened scrutiny"; the Court was clear that the state's distaste for pharmaceutical marketing had doomed the law, and the state's data-privacy justifications could not hope to save it.³⁶⁸ *TikTok* is the exact inverse: the Court ignored the government's content-based, foreign-influence justification and upheld the statute based on only the permissible, data privacy justification.³⁶⁹ Another is the

365. *Moody*, 603 U.S. at 767 (Alito, J., concurring).

366. *Id.* at 794.

367. See Douek & Lakier, *Lochner.com*, *supra* note 10, at 108–09.

368. See *Sorrell*, 564 U.S. at 565, 572–76, 578.

369. See *TikTok Note*, *supra* note 281, at 286–88 ("In fact, the Court has often struck down

TikTok Court's disagreement with the D.C. Circuit's reasoning, which had upheld the law after applying strict scrutiny. The Court could have signaled continuity with the early Roberts Court *Holder* decision, which upheld the material-support statute after applying strict scrutiny.³⁷⁰ But only Justice Gorsuch advocated for that position; the majority instead eschewed a categorical-rule-based approach in favor of one that allowed the Court to exercise considerable discretion over what it considered a burden on protected expression.

Free Speech Coalition follows a similar set of contortions. The majority opinion strains to avoid unfavorable precedent and to minimize the law's burden on protected expression. Building the speech burden into the right itself allows the Court to arrive at *TikTok*'s level-of-scrutiny analysis: a law that seemed to rather overtly burden protected expression in fact only did so in an indirect way, leading to intermediate scrutiny. And again, that intermediate scrutiny bears little resemblance to the ever-tightening noose from the 1990s' commercial speech cases.

The Court's reasoning is indeed hard to square with its earlier online age-verification cases. But it also marks a departure from another early Roberts Court case involving harms to minors, *Brown v. Entertainment Merchants Association*.³⁷¹ There, an ideologically mixed five-justice majority applied strict scrutiny and struck down a California law that banned minors from purchasing violent video games.³⁷² Justice Scalia's majority opinion is notable for its vintage categorical approach: video games' graphic visual content and interactivity were constitutionally indistinguishable from fables like *Snow White* and *Hansel and Gretel*.³⁷³ Justice Alito's *Brown* concurrence—for himself and Chief Justice Roberts—expressed serious misgivings about the majority's technological-neutrality approach, but nonetheless invalidated the law on vagueness grounds.³⁷⁴ Justice Thomas's dissenting opinion contended that “the freedom of speech, as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.”³⁷⁵ Fifteen years later, those three remaining Republican-appointed justices—now joined by their three new Republican-appointed colleagues—could all agree to eschew Justice Scalia's categorical treatment of video games,

statutes as being impermissibly content based even though their primary purpose was indubitably content neutral” (in-ternal quotation marks and brackets omitted).).

370. See *Holder*, 561 U.S. 1. The majority opinion in *Holder* is admittedly cagey about the applicable standard of scrutiny, but the Court has since called it strict scrutiny. See *Free Speech Coalition*, 606 at 484 (2025) (“In the First Amendment context, we have held only once that a law triggered but satisfied strict scrutiny—to uphold a federal statute that prohibited knowingly providing material support to a foreign terrorist organization.”).

371. 564 U.S. 786 (2011).

372. *Id.* at 799–804.

373. *Id.* at 795–99.

374. *Id.* at 805 (Alito, J., concurring).

375. *Id.* at 821 (Thomas, J., dissenting).

instead concluding that the state should have considerable discretion to protect minors from harmful speech even when doing so burdened adults' fully protected expressive activities.

2.3.2 LIMITS

These recent decisions show how the Court's conservatives—albeit to varying degrees—have adopted a methodologically distinct approach to free speech online. But it would be a mistake to interpret that shift as itself categorical. A deregulatory First Amendment, in other words, continues apace in circumstances other than the ones canvassed above.³⁷⁶ But that means that any given speech case may be governed by one of multiple competing paradigms. So what leads the Court's conservatives to cast a law's expressive burdens in narrow terms, and in what circumstances will they decline to do so?

Gregory Elinson and I writing together have recently traced the evolution of competing speech paradigms at the Roberts Court.³⁷⁷ That study suggests that certain conservative speech projects are continuing unencumbered by the conservatives' shifting approach to regulation of the digital public sphere.³⁷⁸ Most straightforward is the paradigm that governs corporate speech and campaign-finance cases. In June 2026, all six conservatives voted together to invalidate a campaign-finance restriction on coordinated expenditures between candidates and outside groups.³⁷⁹ That decision extends a continuous through-line of conservative skepticism of restrictions on electoral spending throughout the entirety of the Roberts Court's jurisprudence, and that paradigm shows no signs of waning.³⁸⁰

More complex, however, is how to interpret much of the Roberts Court's free-speech jurisprudence over the past decade. As Part 1 outlined, scholars have tended to read decisions like *Reed*, *NIFLA*, and *303 Creative* as straightforward applications of the deregulatory project. Commentators, for example, have characterized *Reed* as governed by a commercial-deregulation paradigm;³⁸¹ *Sorrell*, *Reed*, and *NIFLA* as operating together to threaten reasonable economic regulations;³⁸² and *303 Creative* as illustrating how the First Amendment is a “weapon

376. But see Robert Knowles, *How Lochnerism Ends*, 56 SETON HALL L. REV. 65 (2025) (predicting that Lochnerism “has likely peaked and will begin a rapid decline”).

377. See Gregory Elinson & Peter Ormerod, *The End of First Amendment Lochnerism* (draft on file).

378. See *id.*

379. See *National Republican Senatorial Committee v. Federal Election Commission*, 609 U.S. ____ (June 30, 2026).

380. See Elinson & Ormerod, *supra* note 377.

381. See Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1981 (2016).

382. See William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 876–79 (2020).

of deregulation” in the conservatives’ *Lochnerian* campaign.³⁸³

But that is not the best way to read those cases. Rebecca Aviel and her coauthors have shown that something other than commercial deregulation has been driving successful First Amendment challenges at the Roberts Court for some time.³⁸⁴ Both free-speech and free-exercise doctrine, they argue, are governed by what they call the oppressed-speaker paradigm: “The Roberts Court is motivated by the trope of a persecuted religious minority standing fast in the face of a domineering and ideologically majoritarian regulator.”³⁸⁵ Identifying this similarity in recent First Amendment cases allows them to find a persuasive through-line in *Reed*, *NIFLA*, *303 Creative*, and more.³⁸⁶ And this interpretation also sheds light on the Court’s First Amendment docket after they published, including a win for a church denied a tax benefit,³⁸⁷ vindication for parents who sought an exemption from their public school’s pro-LGBTQ+ curriculum,³⁸⁸ and a successful challenge to a state-law ban on conversion therapy.³⁸⁹

Despite their incisive identification of this paradigm, Aviel and her coauthors add their voices to the scholarly consensus that the oppressed-speaker cases spell trouble for all sorts of workaday economic regulations, specifically contending that the oppressed-speaker paradigm will require the Court to afford heightened protection to both persecuted religious minorities and powerful technology companies.³⁹⁰ As they put it, the *Moody* court “blinked,” “side-stepped,” and “flatly ignored the technology companies’ arguments that *303 Creative*’s firm assertion that website design is ‘pure speech.’”³⁹¹ This oversight, they maintain, is “baffling,”³⁹² and *303 Creative* will continue to prove difficult to reconcile in coming challenges to tech regulation because “distinguishing between religious speakers and platforms . . . would impermissibly enshrine viewpoint and speaker discrimination into free-speech law.”³⁹³ Ultimately, they conclude, the Court has put itself in a difficult conundrum: “either (1) apply the principles developed for religious speakers to new technologies and expose a wide range of technology policy tools to constitutional attack, or (2) create special rules for religious speakers, which would violate the Court’s own notions about viewpoint and speaker neutrality.”³⁹⁴

383. See Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 273 (2023); Lucien Ferguson, *The Limits of Lochnerism*, 32 WM. & MARY BILL RTS. J. 929 (2024).

384. See generally Aviel et al., *supra* note 10.

385. *Id.* at 1280.

386. See *id.* at 1301–14.

387. See *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025).

388. See *Mahmoud v. Taylor*, 606 U.S. 522 (2025).

389. See *Chiles v. Salazar*, 607 U.S. 627 (2026).

390. See Aviel et al., *supra* note 10, at 1274.

391. *Id.* at 1277–78.

392. *Id.* at 1342.

393. *Id.* at 1269.

394. *Id.*

The narrowed expressive burdens surveyed in this Part have shown that the Court is electing a third possibility. It's not that the Court has been forced to adopt an explicit rule that singles out religious minorities for preferential treatment; it's that narrowly characterizing expressive burdens allows the Court to quarantine the oppressed-speaker cases from the digital-public-sphere cases without any explicit speaker-based line. Building on their approach, Elinson and I have argued that the oppressed-speaker paradigm may have actually contributed to the conservatives' new receptiveness to regulation of information processors.³⁹⁵ Justice Alito's opinions in *Murthy* and *Moody* mark an important inflection point: read together, the opinions suggest that once technology companies became instrumental in oppressing conservative viewpoints, they increasingly resembled the overreaching regulators that the oppressed-speaker paradigm protects against.³⁹⁶ And once those companies gained a reputation as oppressors, they have since struggled to generate support for the deregulatory playbook of the early Roberts Court.

To be sure, Justice Alito's opinions in *Murthy* and *Moody* spoke only for three justices. Chief Justice Roberts and Justice Kavanaugh have evinced greater fidelity to deregulating markets, and Justice Barrett has occupied an inchoate intermediate position. But three justices' reflexive skepticism of the social-media companies has seemingly opened a lane for other conservative shibboleths to win out over deregulation, like national security in *TikTok* and public mores in *Free Speech Coalition*.

This interpretation suggests that the conservatives are likely to continue favoring sweeping rhetoric and categorical rules to vindicate the interests of conservative speakers voicing unpopular viewpoints who are suffering from oppression by both public and private power. But the market actors who have played a role in that oppression—as well as those with similar and related interests—are considerably less likely to find a receptive audience of justices eager to halt a meddlesome regulator's interference with their profit-motivated information processing.

That naturally then raises the follow-on question of which paradigm will apply in any particular case. Does a given software regulation constitute an attempt at coercive ideological conformity necessitating withering scrutiny, or merely impose a permissible indirect burden on expression? With a theory to explain Silicon Valley's recent losses in hand, the next Part considers these implications—specifically the question of how putative data-governance reformers can avail themselves of the narrowed-expressive-burden paradigm.

395. See Elinson & Ormerod, *supra* note 377.

396. See *id.*

3. OPERATIONALIZING THE OPPORTUNITY

The Court's recent willingness to uphold new forms of data governance presents a unique opportunity for policymakers concerned with the role that technology companies play in modern life. Because the Court's new approach is discretionary rather than rule-based, seizing the policymaking opportunity requires careful drafting, attention to detail, and recognition of how lower courts are interpreting the Supreme Court's signals. This Part first shows what forms those new regulatory possibilities should take, and it then explains why the prevailing resistance to the Court's narrowed-burden approach is misguided.

3.1 REGULATORY GREENFIELDS

Ever since the Court decided *Sorrell*, there has been considerable anxiety among information-privacy and data-governance scholars that the Court was ready to declare unconstitutional most regulations that touch and concern data flows. Ashutosh Bhagwat argued shortly after *Sorell* that it might signal the death of privacy regulation altogether.³⁹⁷ Jane Bambauer relied on the *Sorrell* opinion to build her thesis that data is speech.³⁹⁸ Eugene Volokh similarly pointed to *Sorrell* when making the case that the California Consumer Privacy Act was unconstitutional.³⁹⁹ As G.S. Hans observed around *Sorrell*'s ten-year anniversary, scholarly debates about the constitutionality of data-based regulation have been mired in a "Sartrean trap" where "privacy and speech are hopelessly, endlessly pitted as oppositional."⁴⁰⁰ The intervening years have done little to assuage those concerns. Rebecca Aviel and her coauthors contend in their recent Yale Law Journal feature that "the myriad tripwires laid for technology laws by current First Amendment doctrine" mean that "regulators now have an almost-impossible task."⁴⁰¹

The paradigm identified in Part 2 should put those categorical concerns to rest. After all, if data and data processing are inherently expressive, then there would be no need for a remand in *Moody* since the Texas and Florida laws' burden on social-media platforms' information-processing activities would be interfering with protected expression from top to bottom. Similarly, *TikTok*'s flirtation with rational basis, its decision to apply intermediate scrutiny, and its upholding of the law exclusively based on a data-privacy justification would be

397. See Bhagwat, *supra* note 58, at 868–74.

398. See Bambauer, *supra* note 60, 71–72.

399. See Pincus et al., *supra* note 60, at 1, 5, 11–12.

400. Hans, *supra* note 58, at 21.

401. Aviel et al., *supra* note 10, at 1300. See also Douek & Lakier, *supra* note 10, at 104 ("On their face, the decisions in the [social-media] platform trilogy seemed to pour cold water on the idea that the arrival of the internet would provide any respite from the laissez-faire, or what some have described as Lochnerian, First Amendment.").

inconceivable in a world where data is protected expression and attempts to regulate it are subject to strict scrutiny.

The obviation of this 15-year pall over data governance thus creates a world of new possibilities—a regulatory greenfield. How can and should policymakers seize the opportunity? This section begins by reviewing how the narrowed-burden paradigm has been operating in the lower federal courts and then uses those decisions to detail concrete guidance for policymakers seeking to seize data governance's First Amendment opportunity.

3.1.1 NARROWED BURDENS IN THE LOWER COURTS

Policymakers in statehouses have recently been enacting new forms of data governance. Industry has undertaken an ongoing campaign to invalidate much of that legislation using the deregulatory playbook, but those efforts have met limited success. This subsection reviews five federal circuit court decisions adjudicating industry's First Amendment challenges to youth-and-design-focused data governance.⁴⁰² They are organized chronologically by decision date, and though most of their postures remain preliminary, the survey culminates in a final merits judgment.

In 2024, California enacted SB 976, the Protecting Our Kids from Social Media Addiction Act.⁴⁰³ The law restricts minors' access to personalized social-media feeds and regulates some of the platforms' design features and functions.⁴⁰⁴ It requires the platforms to obscure from minor users how many likes and shares a post has received, and the platforms must make minors' accounts private by default.⁴⁰⁵ All of the law's restrictions may be bypassed with parental consent, though the platforms must file annual reports documenting how many minors use their services and how many parents have opted out of the law's protections.⁴⁰⁶ NetChoice brought both facial and as-applied challenges to the law, and the district court preliminarily enjoined several portions of it.⁴⁰⁷ In September 2025, a unanimous panel of the Ninth Circuit affirmed in part and reversed in part, concluding that NetChoice was entitled to a preliminary injunction only as to one provision.⁴⁰⁸ Relying in part on *Moody*, the panel rejected all of NetChoice's facial challenges, concluding that several were unripe, NetChoice lacked standing to bring some, and it had failed to carry its burden on both steps of the facial-challenge analysis on others.⁴⁰⁹ As to the as-applied challenges, the

402. To be fair, industry has fared far better in federal district court than in the circuit courts.

403. See 2024 Cal. Stats. ch. 321, SB 976, 2023-24 Reg. Sess. (Cal. 2024) (codified at Cal. Health & Safety Code §§ 27000–07).

404. See *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1010 (9th Cir. 2025).

405. Cal. Health & Safety Code § 27002(b)(3).

406. *NetChoice*, 152 F.4th at 1010–11 (citing Cal. Health & Safety Code § 27005).

407. *NetChoice v. Bonta*, 761 F. Supp. 3d 1202 (N.D. Cal. 2024).

408. *NetChoice*, 152 F.4th 1002.

409. See *id.* at 1019–22.

court concluded that hiding like counts was a content-based restriction subject to strict scrutiny and therefore NetChoice's First Amendment challenge to that provision was likely to succeed on the merits.⁴¹⁰ But the others—the private-mode default setting and age-verification requirements—were content neutral and likely to survive intermediate scrutiny.⁴¹¹ The court also rejected NetChoice's void-for-vagueness argument.⁴¹²

In 2024, Florida enacted a law that restricts children and young teens from accessing social-media platforms with certain features the legislature deemed addictive.⁴¹³ The law articulates a four-part coverage test: a covered social-media platform is one that (1) allows users to upload or view others' content; (2) meets a specified minor-user threshold; (3) employs algorithms to select content for users; and (4) employs "addictive features" like infinite scroll, push notifications, auto-play video, and the like.⁴¹⁴ The law prohibits users of such platforms under the age of 14 and requires parental consent for users aged 14 and 15.⁴¹⁵ NetChoice, along with another industry trade association, sought to invalidate the law on First Amendment grounds.⁴¹⁶ The district court granted them a broad preliminary injunction, but a divided panel of the Eleventh Circuit stayed that injunction in November 2025.⁴¹⁷ The panel majority concluded that the law was content neutral and therefore subject to intermediate scrutiny, and the law was likely to survive intermediate scrutiny.⁴¹⁸ The dissenting judge argued that the law was "plainly unconstitutional on its face."⁴¹⁹

In 2022, California enacted the California Age-Appropriate Design Code Act (CAADA).⁴²⁰ As relevant here, the law applies to only certain online services likely to be accessed by minors, and it imposes a host of affirmative obligations and prohibitions on those businesses, including a requirement that covered services estimate their users' age, restrictions on how the platforms use certain data, and a prohibition on certain deceptive design practices termed "dark patterns."⁴²¹ In 2023, NetChoice initially secured a preliminary injunction from the district court that prevented the entire law from going into effect, but a panel of the Ninth Circuit vacated that injunction after *Moody* was decided be-

410. *Id.* at 1015–17.

411. *See id.* at 1017–19.

412. *Id.* at 1022–23.

413. *See* Fla. Stat. § 501.1736 (2025).

414. *Id.* § 501.1736(1)(e).

415. *Id.* §§ 501.1736(2)(a) & (3)(a).

416. *See* Comp. & Comm'n's Industry Ass'n v. Uthmeier, 826 F. Supp. 3d 1358 (N.D. Fla. 2025).

417. *See* Comp. & Comm'n's Industry Ass'n v. Uthmeier, No. 25-11881, 2025 WL 3458571 (11th Cir. Nov. 25, 2025).

418. *See id.* at *6–*23.

419. *Id.* at *27 (Rosenbaum, J., dissenting).

420. Cal. Civ. Code §§ 1798.99.28–1798.99.40.

421. *Id.* § 1798.99.30(b)(4)(A)–(F) (coverage definition); *id.* § 1798.99.31(a)(5) (age estimation requirement); *id.* §§ 1798.99.31(b)(1)–(4), (7) (data use and dark patterns restrictions).

cause the district court had failed to perform *Moody*'s facial-challenge analysis correctly.⁴²² On remand, NetChoice renewed its motion for preliminary injunction and again the district court enjoined the law in its entirety.⁴²³ On appeal a second time, a unanimous panel of the Ninth Circuit vacated some of that second preliminary injunction in March 2026.⁴²⁴ It held that NetChoice had again failed to carry its facial-challenge burden under *Moody* on its challenges to the law's coverage definition and age-estimation requirements.⁴²⁵ On the other hand, the panel concluded that NetChoice's vagueness challenges were likely to succeed as to the law's restrictions on data use and dark patterns.⁴²⁶

In 2025, the Texas legislature enacted SB 2420, the App Store Accountability Act.⁴²⁷ The law regulates mobile app store marketplaces by requiring age verification, parental consent, age ratings, and other content displays.⁴²⁸ An industry trade association challenged the law on First Amendment grounds, and the district court preliminarily enjoined the entire law after concluding it was subject to strict scrutiny.⁴²⁹ In June 2026, a Fifth Circuit panel stayed the preliminary injunction.⁴³⁰ Two judges concluded that the law was at most subject to intermediate scrutiny because it regulated only commercial speech; they specifically reserved the question of whether the law implicated the First Amendment altogether.⁴³¹ The state was entitled to a stay because the law, in their view, satisfied *Central Hudson* scrutiny.⁴³² They also disagreed that the law's coverage definition made it content-based and rejected the challengers' vagueness challenge.⁴³³ The third member of the panel concurred only in the result and did not write separately.⁴³⁴

In 2023, Ohio enacted the Parental Notification by Social Media Operators Act.⁴³⁵ The law, like others just canvassed, includes a coverage definition and imposes various obligations on covered social-media platforms, such as obtaining parental consent for any contract between a child and the platform, transparency and disclosure obligations to parents for the services' content-moderation policies and features, verifying that consent by mail or phone, and denying ac-

422. See *NetChoice, LLC v. Bonta*, 692 F. Supp. 3d 924 (N.D. Cal. 2023); *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024).

423. See *NetChoice, LLC v. Bonta*, 770 F. Supp. 3d 1164 (N.D. Cal. 2025).

424. *NetChoice, LLC v. Bonta*, 170 F. 4th 744 (9th Cir. 2026).

425. *Id.* at 754–63.

426. *Id.* at 763–67.

427. See 89th Leg., R.S., ch. 200, Tex. Gen. Laws 385–90 (codified at Tex. Bus. & Com. Code ch. 121).

428. See *Students Engaged in Advancing Tex. v. Paxton*, 177 F.4th 665 (5th Cir. 2026).

429. *Students Engaged in Advancing Tex. v. Paxton*, 814 F. Supp. 3d 769 (N.D. Tex. 2025).

430. *Students Engaged*, 177 F.4th at 674.

431. See *id.* at 669–70, n.7.

432. *Id.* at 670–71.

433. *Id.* at 671–73.

434. See *id.* at 669 n.*.

435. H.B. 33, 135th Gen. Assemb., Reg. Sess. (2023) (codified at Ohio Rev. Code § 1349.09).

cess to children in the absence of such verified consent.⁴³⁶ NetChoice challenged the law on First Amendment grounds and secured a permanent injunction against the entire law from the district court.⁴³⁷ On appeal, a divided panel of the Sixth Circuit reversed the permanent injunction and directed judgment in favor of the state in June 2026.⁴³⁸ The two judges in the majority disagreed over the rationale: one concluded that the law survived strict scrutiny, whereas the other concluded that NetChoice had failed to carry its facial-challenge burden under *Moody*.⁴³⁹ The dissenting judge argued that the law could not survive strict scrutiny.⁴⁴⁰

3.1.2 STRATEGIC CALCULUS FOR POLICYMAKERS

The Supreme Court's recent embrace of judicial discretion about what constitutes a burden on expression opens a path for policymakers who understand the opportunity correctly and act on it by drafting legislation likely to withstand industry's constitutional onslaught. Informed by the circuit-court decisions just canvassed, this subsection provides guidance to legislators about how best to seize the policymaking opportunity.

It's clear that not every state-level attempt at data governance is equally likely to survive a First Amendment challenge. The first, low-risk lane is the regulation of data processing that more closely resembles commercial activity than expression. In past work, I've explained how data processors engage in a closely related family of behaviors to wring profit from data: they collect and analyze massive amounts of data about human behavior to apprehend, predict, and modify those behaviors.⁴⁴¹ That enables them to serve products, services, and prices that differentiate on an individualized basis.⁴⁴² This core strategy manifests in a number of distinct contexts: algorithmically personalized services like newsfeeds and playlists, targeted advertising, insurance pricing, access to credit, and algorithmically modulated wages, rent, and prices.⁴⁴³

The Supreme Court's narrowed-burden approach shows that policymakers have wide discretion to target the vast majority of these profit-motivated information-processing activities and should put to rest concerns that data process-

436. Ohio Rev. Code § 1349.09.

437. *NetChoice, LLC v. Yost*, 778 F. Supp. 3d 923 (S.D. Ohio 2025).

438. *NetChoice, LLC v. Yost*, 180 F.4th 268 (6th Cir. 2026).

439. *Id.* at 285–93 (Clay, J.); *id.* at 309–12 (Batchelder, J., concurring). Both opinions also rejected NetChoice's vagueness challenge. *See id.* 293–97 (Clay, J.); *id.* at 312–15 (Batchelder, J., concurring).

440. *See id.* at 320–23 (Ritz, J., dissenting).

441. *See* Peter Ormerod, *Regulating Data Monetization*, 13 TEXAS A&M L. REV. ___, 16–23 (forthcoming 2026) [hereinafter Ormerod, *Monetization*].

442. *See id.* at 24.

443. *See id.* at 27–46.

ing is automatically expressive.⁴⁴⁴ Individualized credit and pricing techniques are unlikely to implicate the First Amendment at all, since they are regulations of non-expressive activities that do not have a disproportionate burden on expressive activity.⁴⁴⁵

Regulations of targeted advertising, under the narrowed-burden framework, may similarly be outside the First Amendment's coverage altogether, or they may be subject to intermediate scrutiny as long as the government offers a content-neutral justification or persuasively frames the regulation as implicating only commercial speech.⁴⁴⁶ But *TikTok* and *Free Speech Coalition* suggest that intermediate scrutiny is eminently satisfiable, especially since the government can rely on *TikTok* for the proposition that data privacy and data security are important government interests.

The Fifth Circuit's SB 2420 decision discussed in Part 3.1.1 similarly suggests that regulations of app marketplaces are on strong footing because they're either regulations of conduct that don't implicate the First Amendment at all or they're subject to a newly lenient application of intermediate scrutiny.

Also in the low-risk lane are policy interventions targeted at increasing competition. I've explained elsewhere that some deleterious data practices are likely to prove difficult to govern using rule-based regulation.⁴⁴⁷ In these circumstances, antitrust and competition policy can be an effective alternative for indirectly disciplining companies' data-driven behaviors.⁴⁴⁸ The narrowed-burden framework confirms that competition-increasing policies raise minimal First Amendment concerns. After all, the Court in *Moody* explained that competition policy is a permissible way that the government may promote the otherwise-impermissible justifications of viewpoint diversity and expressive redistribution.⁴⁴⁹ In instances where the government is using competition policy to aim at objectives that are wholly unrelated to cultivating a diverse speech environment—like concerns that data processors are engaging in harmful and discriminatory individualized pricing or that app store operators are colluding over commissions—the First Amendment is unlikely to have any role.

Finally, disclosure requirements also belong in the low-risk lane. Eight justices in *Moody* signaled that *Zauderer* governed the social-media laws' transparency provisions, signaling that *NIFLA* does not portend doom for any such provisions. While district courts have occasionally invalidated factual dis-

444. *But cf.* Bambauer, *supra* note 60.

445. *See TikTok*, 604 U.S. at 69.

446. *See Ormerod, Monetization, supra* note 441, at 38–41.

447. *See* Peter Ormerod, *Disciplining Mechanisms*, 27 YALE J. L. & TECH. ___, 17–22 (forthcoming 2026) [hereinafter Ormerod, *Disciplining*].

448. *See id.*

449. *See Moody*, 603 U.S. at 732–33 (“[I]t is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. . . . [T]he government can take varied measures, like enforcing competition laws, to protect that access” (citing *Turner I*, 512 U.S. at 647)).

closures imposed on generative AI companies,⁴⁵⁰ the Court's approach in *Moody* suggests their skepticism is misplaced and that the circuit courts here too are poised to reject industry's attempts to invalidate transparency and oversight obligations.

In a second, medium-risk lane are regulations of digital design and architecture. This approach holds great promise, but it's highly sensitive to careful drafting.

In past work, I've argued that policymakers concerned with the perils of personalization should specifically train their initiatives on technology companies' design and engineering decisions that manipulate their users, including overt efforts to addict people—especially teens and youths—to their platforms and services.⁴⁵¹ In recent years, there has been a growing recognition that the digital devices and services that pervade modern life are effecting forms of harm and injustice that are diffused, subtle, and unevenly distributed—but nonetheless, in the aggregate, constitute a grave threat to our body politic's acuity and emotional and psychological health.⁴⁵² These concerns have been particularly pronounced in minors,⁴⁵³ and researchers have increasingly shown that the same profit- and engagement-maximizing imperatives are also driving ideological and political polarization.⁴⁵⁴

The narrowed-burden paradigm detailed above suggests that these efforts have a viable, execution-dependent path to surviving First Amendment review: *Moody* indicates that profit- and engagement-maximizing design and engineering decisions may not be inherently expressive, and the concurrences signal

450. *Compare x.AI LLC v. Bonta*, No. 25-12295, 2026 WL 626926 (C.D. Cal., Mar. 4, 2026) (denying motion for preliminary injunction) with *NetChoice v. Weiser*, 808 F. Supp. 3d 1223 (D. Colo. Dec. 2025) (granting preliminary injunction).

451. See generally Frischmann & Ormerod, *supra* note 244 (reviewing recent cases and state laws).

452. See, e.g., Nathan Witkin, *The Case Against Social Media Is Stronger Than You Think*, ARACHNE (Aug. 27, 2025), arachnemag.substack.com/p/the-case-against-social-media-is (refuting Dan Williams, *The Case Against Social Media Is Weaker Than You Think*, CONSPICUOUS COGNITION (July 26, 2025), conspicuouscognition.com/p/the-case-against-social-media-is); Henry Farrell, *We're getting the social media crisis wrong*, PROGRAMMABLE MUTTER (Jan. 7, 2025), programmablemutter.com/p/were-getting-the-social-media-crisis; Panle Jia Barwick, Siyu Chen, Chao Fu, and Teng Li, *Digital Distractions with Peer Influence: The Impact of Mobile App Usage on Academic and Labor Market Outcomes*, QUARTERLY J. ECON. (Oct. 17, 2025), doi.org/10.1093/qje/qjaf048; Myra Cheng, Cino Lee, Pranav Khadpe, Sunny Yu, Dyllan Han, and Dan Jurafsky, *Sycophantic AI Decreases Prosocial Intentions and Promotes Dependence* (Oct. 1, 2025), doi.org/10.48550/arXiv.2510.01395.

453. See, e.g., JONATHAN HAIDT, *THE ANXIOUS GENERATION* (2024); Vivek H. Murthy, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, N.Y. TIMES (June 17, 2024), nytimes.com/2024/06/17/opinion/social-media-health-warning.html.

454. See, e.g., Tiziano Piccardi, Martin Saveski, Chenyan Jia, Jeffrey Hancock, Jeanne L. Tsai, and Michael S. Bernstein, *Reranking partisan animosity in algorithmic social media feeds alters affective polarization*, SCIENCE (Nov. 27, 2025), science.org/doi/epdf/10.1126/science.adu5584; see also Witkin, *supra* note 452 (citing studies).

there is little interest among a majority of justices to extend *Tornillo's* newspaper-editor analogy to addictive and opaque digital platforms that pervasively surveil their users to extract their attention and promote dependency. *TikTok* similarly tells us that First Amendment coverage is no foregone conclusion and that policymakers will get the benefit of intermediate scrutiny as long as they persuasively offer a content-neutral justification for their policies, such as combatting an ongoing mental-health catastrophe. And *Free Speech Coalition* suggests that policymakers have particular latitude—and a sympathetic audience of justices—when their justifications sound in protecting minors.

The two Ninth Circuit cases and the Eleventh Circuit case canvassed in Part 3.1.1 illustrate the promises and perils of this second lane. California's SB 976 shows how content-neutral regulations of default settings can survive intermediate scrutiny but that not all such regulations—such as hiding like counts—will necessarily be considered content neutral. CAADCA suggests that legislatures must be careful to define the targets of their regulation with specificity, since multiple provisions were invalidated on vagueness grounds. The Eleventh Circuit's approach to the Florida law corroborates much activity in trial courts concerning social-media platforms' tort liability for addictive and manipulative design: regulating infinite scroll, autoplay, and notification architecture are not necessarily expressive, and regulating such features has a viable path for surviving intermediate scrutiny.

A third, high-risk lane includes access restrictions. These face considerable constitutional exposure, though invalidation is not assured.

Policymakers across the political spectrum have begun responding to concerns about the effect of personalized digital services on youths through legislation that restricts their access to social-media platforms. Other countries have more explicitly identified these threats and sought to mitigate them. Australia, for instance, recently implemented a first-of-its-kind social-media ban for children under the age of 16.⁴⁵⁵ It represents the “most aggressive move any democracy has made to address the harms of social media on children,” and more than three-quarters of Australians supported the law when it was passed.⁴⁵⁶ Commentators note that the Australian ban appears to be the beginning of a trend among Western democracies—one that is only expected to accelerate if researchers can demonstrate the law's beneficial effects.⁴⁵⁷

The Eleventh Circuit and Sixth Circuit decisions reviewed in Part 3.1.1 show multiple viable paths for upholding such restrictions. The Eleventh Circuit applied intermediate scrutiny and sided with the government, whereas one judge

455. See Casey Newton, *Australia Kicks the Kids Off Social Media*, PLATFORMER (Dec. 9, 2025), platformer.news/australia-social-media-ban-analysis/.

456. *Id.* (citing Byron Kaye, *Australian social media ban started with call to act by politician's wife*, REUTERS (Nov. 29, 2024), [reuters.com/world/asia-pacific/australian-social-media-ban-started-with-call-act-by-politicians-wife-2024-11-29/](https://www.reuters.com/world/asia-pacific/australian-social-media-ban-started-with-call-act-by-politicians-wife-2024-11-29/)).

457. See *id.*

in the Sixth Circuit upheld Ohio's after applying strict scrutiny. The Sixth Circuit decision is particularly instructive: a detailed, factual record enabled the conclusion that policymakers are furthering a government interest of the highest order in the most effective and least restrictive way possible.

At the same time, access restrictions face an uncertain future at the Supreme Court. After the Fifth Circuit declined to preliminarily enjoin Mississippi's youth social-media access restriction, NetChoice sought applied for emergency relief from the Supreme Court.⁴⁵⁸ The Court unanimously denied NetChoice's stay request, but Justice Kavanaugh wrote separately.⁴⁵⁹ While he concurred in the denial, he nevertheless explained that "NetChoice has, in my view, demonstrated that it is likely to succeed on the merits . . . [because] enforcement of the Mississippi law would likely violate its members' First Amendment rights under this Court's precedents."⁴⁶⁰ Justice Kavanaugh's statement underscores that some justices may see *Free Speech Coalition*—which restricts speech that is totally unprotected as to minors—as distinct from social-media access restrictions, which burden minors' ability to receive fully protected expression. To be clear, it's not certain that a majority of the Court is has the appetite to extend *Brown* to social media, and the swelling political movement that is demanding such restrictions—and their success in the circuit courts—suggest that foreclosing that path could prove costly and unpopular. Uncertainty pervades this question, however, given Justice Thomas's stated views about speaking to minors, Justice Alito's and Justice Gorsuch's overt skepticism of social-media platforms, Justice Kagan's reservations about joining the majority in *Brown*,⁴⁶¹ and the liberals' more general Lochnerian concerns about invalidating a health and safety regulation geared toward protecting children. Still, it's possible that the Court will view a restriction on who may receive lawful speech as categorically different from the other regulations just discussed, which instead focus on how business process data.

To summarize, then: policymakers have a new opportunity to enact data governance that faces reduced constitutional exposure. The most favorable ground for that opportunity includes drafting coverage definitions by feature, function, and design, not by content; avoiding content-based exclusions; using objective, measurable standards; articulating content-neutral justifications; including robust severability provisions; including fact-based transparency and oversight provisions; seeking to bolster competition; and building a robust evidentiary record in both legislation and litigation. Access restrictions, content-

458. *NetChoice L.L.C. v. Fitch*, 134 F.4th 799 (5th Cir. 2025); *NetChoice, LLC v. Fitch*, 145 S. Ct. 2658 (2025).

459. See *NetChoice*, 145 S. Ct. at 2658.

460. *Id.*

461. See Kyle Orland, *Supreme Court justice second-guesses decisive vote in gaming free speech case*, ARS TECHNICA (Jan. 5, 2015), arstechnica.com/gaming/2015/01/supreme-court-justice-second-guesses-decisive-vote-in-gaming-free-speech-case.

based and vague definitions, and avowed viewpoint discrimination stand on much more tenuous footing. In short, the Court's recent moves to narrowly cast technology companies' expressive burdens pave the way for canny lawmakers to craft new policies insulated from industry's First Amendment attack.

3.2 MISPLACED RESISTANCE

One would be forgiven for thinking that the opportunity here is rather obvious. The Court's conservatives have surprisingly sided with the government in three recent First Amendment cases—surely those who have long been concerned about a deregulatory First Amendment will recognize the opening and seek to fill it. Alas, scholars and commentators for the most part *encouraged* the Court to rule for the challengers in *Moody*, *TikTok*, and *Free Speech Coalition*, and they've heavily criticized the decisions that upheld those laws. Resisting the Court's narrowed-burden paradigm, however, promises to squander a generational opportunity to legislate amid loosened First Amendment constraints.

Law professors and civil society overwhelmingly lined up in opposition to the Florida and Texas social-media laws. Twenty law and technology scholars argued that the laws unconstitutionally forced unwanted speech on hapless listeners.⁴⁶² Eric Goldman argued that the laws' disclosure provisions were not subject to *Zauderer* and consequently unconstitutional.⁴⁶³ Richard Hasen contended that upholding the laws would both increase political violence and election subversion while also violating the First Amendment.⁴⁶⁴ Christopher Yoo disparaged the suggestion that the laws were a permissible form of common-carriage regulation.⁴⁶⁵ The Knight Institute, the Center for Democracy and Technology (CDT), and the Electronic Frontier Foundation (EFF) all similarly urged the Court to strike down the laws.⁴⁶⁶ Only a handful of progressive scholars encouraged the Court to uphold them.⁴⁶⁷ Conversely, it was conservatives who mostly supported the laws and who provided the scholarly scaffolding in

462. See Brief of First Amendment and Internet Law Scholars as Amici Curiae in Support of NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277).

463. See Brief of Professor Eric Goldman as Amicus Curiae in Support of NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277).

464. See Brief of Professors Richard L. Hasen, Brendan Nyhan, and Amy Wilentz as Amici Curiae Supporting NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277).

465. See Brief of Professor Christopher S. Yoo as Amicus Curiae Supporting NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277).

466. See Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae in Support of Neither Party, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277); Brief of the Center for Democracy & Technology as Amicus Curiae in Support of NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277); Brief of the Electronic Frontier Foundation et al. as Amici Curiae in Support of NetChoice, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22–277).

467. See Brief of Law and History Scholars as Amici Curiae in Support of Respondents, *NetChoice v. Paxton*, 603 U.S. 707 (2024) (No. 22–555).

their favor.⁴⁶⁸

TikTok and *Free Speech Coalition* involved similar dynamics. In *TikTok*, over thirty internet law professors urged the Court to apply strict scrutiny and hold the law unconstitutional, as did the Knight Institute;⁴⁶⁹ only a few filed a brief on the government's behalf.⁴⁷⁰ Outside the litigation itself, legal scholars overwhelmingly assumed the law was patently unconstitutional,⁴⁷¹ and few defended it.⁴⁷² Evelyn Douek has since sought to condemn *TikTok* to the First Amendment anticanon.⁴⁷³ In *Free Speech Coalition*, eight First Amendment scholars urged the Court to invalidate the law, as did CDT and EFF.⁴⁷⁴ It was again predominantly conservatives who urged the Court to rule in the government's favor.⁴⁷⁵

This avalanche of criticism naturally leads one to wonder: what explains the dissonance between progressives' Lochnerian anxieties and their resistance to new forms of regulation? These critics may contend that *Moody*, *TikTok*, and *Free Speech Coalition* have little to say about the types of regulations surveyed in Part 3.1. They might argue that the Court's willingness to uphold these laws actually does not say much about how future regulations will fare, and perhaps the only real lesson we should take from them is that the Court's conservatives are sympathetic to policies championed by Republican lawmakers. Look at the laws reviewed in these cases, the objection goes, and you'll find partisans in Florida and Texas outraged over the silencing of conservatives on social media, foreign-policy hawks in Congress concerned about the national-security threat of a geopolitical rival, and social conservatives' long history of hostility to pornography. The ideological and partisan valence of the Court's other recent decisions corroborate this line of thinking, as does the Court's less-than-fully-persuasive attempts at reconciling past First Amendment decisions in the trio of decisions

468. See, e.g., Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391 (2020); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021); Brief of Legal Scholars Adam Candeub & Adam MacLeod as Amici Curiae in Support of Florida and Texas, *Moody v. NetChoice*, 603 U.S. 707 (2024) (No. 22-277).

469. See Brief of First Amendment and Internet Law Professors as Amici Curiae in Support of Petitioners, *TikTok, Inc. v. Garland*, 604 U.S. 56 (2025) (No. 24-656).

470. See, e.g., Brief of Amici Curiae Zephyr Teachout and Joel Thayer in Support of Respondent, *TikTok, Inc. v. Garland*, 604 U.S. 56 (2025) (No. 24-656).

471. See, e.g., note 299 and accompanying text.

472. See, e.g., Podcast, *Jane Bambauer, Ramya Krishnan, and Alan Rozenshtein on the Constitutionality of the TikTok Bill*, Lawfare (Sept. 18, 2024), lawfaremedia.org/article/lawfare-daily-jane-bambauer-ramya-krishnan-and-alan-rozenshtein-on-the-constitutionality-of-the-tiktok-bill; LPE PROJECT BLOG, *supra* note 299.

473. See Evelyn Douek, *TikTok and the First Amendment Anticanon*, SUP. CT. REV. (forthcoming 2026).

474. See Brief of Amici Curiae First Amendment Scholars in Support of Petitions, *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025) (No. 23-1122).

475. See, e.g., Amicus Curiae Brief of Scholars in Support of Respondent, *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025) (No. 23-1122).

discussed in Part 2.1. Evidence from the lower courts, surveyed in Part 3.1.1, tends to corroborate a partisan lens, since many of those decisions involved conservative circuits upholding legislation enacted in Republican-dominated states. Taken together, the Court's recent moves suggest that the conservative justices can just as easily turn on a dime again when confronting data-based regulations that don't implicate shibboleths like silenced conservatives, national security, or puritanical mores. Ultimately, if partisan sympathies are driving the results in *Moody*, *TikTok*, and *Free Speech Coalition*, then new forms of data governance—especially those emanating from Democratic-controlled statehouses and championed by progressives—are in fact unlikely to claim the benefit of narrowed expressive burdens.

It's plainly true that the laws at issue in *Moody*, *TikTok*, and *Free Speech Coalition* had a strongly conservative political valence and that politicization of the judiciary is a real and undeniably grave problem. But even the most cynical among us does not hold the strongest version of this objection—that identical laws rise and fall based on the political party of their enactors. After all, that would mean that age-verification laws enacted by Democrats in blue states would be imperiled, but there is no evidence to suggest that partisanship alone is driving constitutional outcomes or that the conservative justices will hold unconstitutional materially similar or near-identical regulations simply because they were sponsored by Democrats.

Putting aside the strongest form of the objection, though, the trio of cases surveyed in Part 2.1 have produced a set of facially party-blind rules that have no inherent partisan switch. The objection, in other words, may be right about the doctrines' origins but wrong about their operation, and the cases surveyed in Part 3.1.1 prove it: lower-court judges are reading the Supreme Court's signals and doing so has led them to characterize laws as content neutral, apply deferential forms of commercial-speech and intermediate scrutiny, express skepticism about broad First Amendment coverage, vacate and remand district court decisions for detailed showings that the challenge meets *Moody*'s stringent facial-challenge framework, and surgically sever unconstitutional provisions.

And those decisions from the lower courts do not have a strong partisan or ideological valence. The Ninth Circuit's decision sustaining much of SB 976, a California law enacted by Democrats, was authored by a Trump appointee and joined by two Clinton appointees. The panel that reviewed CAADCA—another California law spearheaded by Democrats—and allowed most of it to take effect was a panel composed of judges appointed by George W. Bush, Trump, and Biden, and that decision was unanimous. The Eleventh Circuit majority opinion allowing Florida's law to go into effect was joined by two Trump appointees and it was an Obama appointee who called it plainly unconstitutional—a striking inversion of the right-wing deregulatory charge that has been so common in the past decade. The Sixth Circuit decision upholding Ohio's Re-

publican-championed law in a final merits opinion had a majority composed of a Clinton appointee who concluded the law survived strict scrutiny and a Republican appointee relying on *Moody*; the Biden appointee dissented. The Fifth Circuit panel that rejected NetChoice's invitation to hold the Mississippi law unconstitutional on its face had the same nominating-president composition as the Eleventh Circuit's (two Trump, one Biden) and its decision was unanimous—with one of the conservatives expressing agreement with Justice Thomas's dissent in *Brown* and thus a desire to uphold the law in its entirety rather than remand for a *Moody* analysis.⁴⁷⁶ And the narrowed-burden approach has also attracted the votes of Democratic appointees at the Supreme Court: all three joined *TikTok* in whole or in part, Justice Jackson's concurrence in *Moody* echoed Justice Alito's skepticism of the platforms' editorial claims, and the denial of NetChoice's stay application in the Mississippi case elicited zero noted dissents.

That is not to suggest that policymakers are totally unconstrained by the First Amendment. Part 3.1.2 already graded the risks of different approaches, and Justice Kavanaugh's concurrence in the Mississippi stay application illustrates how the coming battles will be fought. Justice Kavanaugh and Chief Justice Roberts—as evidenced by their votes in *Moody*—are presumably still sympathetic to technology companies' deregulatory arguments, and the liberals' stare decisis commitments may make them unwilling to radically depart from settled precedent. But few new forms of data governance are squarely controlled by existing precedent, so there are undoubtedly multiple votes on both sides of the ideological spectrum in play. It's therefore descriptively wrong—and normatively counterproductive—to assume that all new forms of data-based regulation will reduce to votes along party lines. In short, there is little reason to believe that the narrowed expressive burdens the conservative justices adopted in *Moody*, *TikTok*, and *Free Speech Coalition* will only be employed to uphold policies enacted by their fellow travelers. If anything, recent appellate decisions show that votes to sustain state regulation of technology companies have come disproportionately from conservative jurists—irrespective of whether those legislative efforts were partisan or not, spearheaded by Democrats or Republicans.

Something similar is also true about policymakers more generally. Let's grant for a moment that the conservative jurists are considerably more likely to vote to uphold regulations championed in whole or in part by their ideological counterparts. The problem for our objector is that the data-based regulations canvassed above need not—and increasingly do not—have a clear partisan valence. While conservatives' commitment to deregulatory and laissez-faire principles runs deep, there is a growing movement on both sides of the aisle to question Silicon Valley's outsized influence over modern life. That Republicans en-

476. See *NetChoice v. Fitch*, 134 F.4th 799 (5th Cir. 2025); see also *id.* at 809 (HO, J., concurring).

acted the laws reviewed in *Moody*, *TikTok*, and *Free Speech Coalition* is itself some evidence of this phenomenon. But it goes considerably further than that. The social-media regulations recently reviewed by the Fifth, Ninth, and Eleventh Circuits similarly enjoyed bipartisan support, and the Florida and Mississippi laws were signed and championed by deeply conservative governors. Consider a few additional examples:

- Utah enacted two laws in 2024 to regulate social-media platforms. One “holds social media companies responsible for the mental health problems they cause through the design of their platforms,”⁴⁷⁷ and the other “blocks harmful and addictive product features on social media, protects minors’ privacy, and gives parents the tools and resources they need to keep their children safe.”⁴⁷⁸ Both laws were sponsored by Republican lawmakers, enacted on a bipartisan basis, and signed by a Republican governor.⁴⁷⁹
- Florida barred elementary and middle school students from using cell phones throughout the school day and imposed new restrictions on high school students’ ability to use phones during instructional time.⁴⁸⁰ The measure was part of a larger education bill, largely championed by Republicans and signed by a Republican governor.⁴⁸¹
- A bipartisan group of 42 state attorneys general have sued social-media platforms for addictive and harmful design practices.⁴⁸² Meta’s effort to obtain absolute immunity from suit under Section 230 of the Communications Decency Act met a chilly reception from an ideologically diverse panel of Ninth Circuit judges.⁴⁸³
- The Trump administrations both initiated and maintained several of the biggest antitrust lawsuits against large technology companies like Meta and Google.⁴⁸⁴ Those suits were also joined by a bipartisan group of state attorneys general.
- A bipartisan group of senators have called for regulating AI chatbots,

477. Utah Protecting Minors Online (last visited Dec. 8, 2025), socialmedia.utah.gov.

478. *Id.*

479. See Utah House Bill 464, legiscan.com/UT/bill/HB0464/2024; Utah Senate Bill 194, legiscan.com/UT/bill/SB0194/2024.

480. See Florida House Bill 1105 (2025), legiscan.com/FL/bill/H1105/2025.

481. See *id.*

482. See, e.g., Press Release, Attorney General Brian Schwalb Sues Meta for Endangering Youth Through Addictive Social Media Platforms, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA (Oct. 24, 2023), oag.dc.gov/release/attorney-general-brian-schwalb-sues-meta; see also *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 702 F. Supp. 3d 809 (N.D. Cal. 2023).

483. See Oral Argument in *People of the State of California v. Meta*, No. 24–7032 (9th Circuit, Jan. 6, 2026), youtube.com/live/A2xmhyAKYgI?si=TgWfhEKVCQK7yHII&t=2473.

484. See *United States v. Google LLC*, 2025 WL 2523010 (Sept. 2, 2025); *United States v. Google LLC*, 778 F. Supp. 3d 797 (E.D. Va. 2025); *Federal Trade Comm. v. Meta Platforms*, No. 20–3590, 2025 WL 3458822 (D.D.C. Dec. 2, 2025).

expressing particular concern over the risks they pose to children.⁴⁸⁵ In a related vein, the Trump FTC has launched an inquiry by sending requests for information to seven companies that operate consumer-facing AI chatbots.⁴⁸⁶ The Republican Florida Attorney General initiated the first state-led lawsuit against OpenAI for deceptive and unfair trade practices.⁴⁸⁷

- The Republican Party has been bitterly divided over the Trump administration's attempt to preempt state laws that regulate artificial-intelligence services.⁴⁸⁸

This is a small sampling that illustrates the existence of a broader movement to interrogate the role that digital technologies are playing in our lives and the largely unaccountable corporate executives who oversee them. This “new wave of the now-decade old ‘techlash’” roots its criticism of “Big Tech in ideas of health (public, social, intellectual, and spiritual) and morality,” rather than simply their power and size—“positioning the rise of social media and the platform giants as something between a public-health scare and a spiritual threat, rather than (solely) a problem of political economy or market design.”⁴⁸⁹ Commentators have marveled at the open political lane, predicting that there is an opportunity “to run not against Facebook or Meta as a big company that needs to be broken up,” but instead “to run against all of it—that society and modernity and politics shouldn’t feel like this.”⁴⁹⁰

So even if we accept our objector’s dubious premise that the Supreme Court’s recent First Amendment cases are little more than naked partisanship, it’s becoming increasingly clear that the regulation of technology companies is

485. See Press Release, *Hawley Introduces Bipartisan Bill Protecting Children from AI Chatbots with Parents, Colleagues*, U.S. SENATOR JOSH HAWLEY (Oct. 28, 2025), hawley.senate.gov/hawley-introduces-bipartisan-bill-protecting-children-from-ai-chatbots-with-parents-colleagues/.

486. See Press Release, *FTC Launches Inquiry into AI Chatbots Acting as Companions*, FED. TRADE COMM. (Sept. 11, 2025), ftc.gov/news-events/news/press-releases/2025/09/ftc-launches-inquiry-ai-chatbots-acting-companions.

487. <https://www.myfloridalegal.com/newsrelease/attorney-general-james-uthmeier-files-first-nation-state-led-lawsuit-against-openai-ceo>

488. See Clare Duffy, *Trump says he’ll sign executive order blocking state AI regulations, despite safety fears*, CNN (Dec. 8, 2025), cnn.com/2025/12/08/tech/trump-eo-blocking-ai-state-laws; Alex Miller, *State-level AI rules survive — for now — as Senate sinks moratorium despite White House pressure*, FOX NEWS (Dec. 6, 2025), foxnews.com/politics/state-level-ai-rules-survive-now-senate-sinks-moratorium-despite-white-house-pressure; Cecilia Kang, *Defeat of a 10-Year Ban on State A.I. Laws Is a Blow to Tech Industry*, N.Y. TIMES (July 1, 2025), nytimes.com/2025/07/01/us/politics/state-ai-laws.html; Gerrit De Vynck, *The Surprising Issue Driving a Wedge Between Trump and his MAGA Base*, WASH. POST (Nov. 23, 2025), washingtonpost.com/technology/2025/11/23/trump-maga-division-tech-ai/.

489. Max Read, *Platform Temperance*, READ MAX (Oct. 31, 2025), maxread.substack.com/p/platform-temperance (quoting Ezra Klein, *The Democrats Are Losing the War for Attention. Badly.*, N.Y. TIMES (Jan. 17, 2025), nytimes.com/2025/01/17/opinion/ezra-klein-podcast-chris-hayes.html).

490. *Id.*

an issue that is uniting—rather than dividing—policymakers. And perhaps that also counsels against pursuing partisan policies. To the extent that lawmakers on the left and right can forge consensus over accountability for these digital behemoths, it's all the more likely those policies will be held perfectly consistent with the First Amendment because doing so undercuts any sense that legislators are waging a viewpoint-discriminatory campaign.

CONCLUSION

The conventional scholarly consensus says that the First Amendment promises to interfere with any attempt at information-age reform. Three recent Supreme Court cases, however, suggest that account is—at best—incomplete. This Article has shown that recent laws governing technology companies have not been controlled by a deregulatory paradigm. The Court has instead narrowly cast the burden these laws imposed on protected expression. Policymakers interested in addressing twenty-first-century problems and harms should recognize and seize the opportunity posed by this narrowed-burden paradigm.