

**DORMANT COMMERCE CLAUSE CONSTRAINTS ON  
SOCIAL MEDIA REGULATION**

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*Since 2021, thirty-four U.S state legislatures have introduced bills regarding technology companies' moderation of users' content. Of these, three have successfully become law, most notably in Texas and Florida, which, in a national first, have banned social media companies from censoring users' opinions or de-platforming political candidates. Critically, neither law depends on a federal regulator, instead advancing a vision of state-by-state internet speech regulation that, at times, allows the state to assert extraterritorial authority while proposing no clear mechanism for delineating in-state and out-of-state users or interactions.*

*Social media laws like the ones in Texas and Florida directly implicate Dormant Commerce Clause concerns, which U.S. internet law has long avoided. Though later blocked by federal courts on other grounds, these social media laws likely violated the Dormant Commerce Clause, which requires that no state or local law places an undue burden on interstate commerce. While no court has yet reached the question, such arguments were raised challenging the Florida and Texas laws and will no doubt arise again as similar laws coming down the legislative pipe are contested in future.*

*This Essay argues that no commitment to federalism in the face of changing technology justifies giving one state the authority to substantially interfere with how out-of-state residents talk to each other. While perhaps well-intentioned, these laws will, at best, further balkanize interstate online discourse by jeopardizing innumerable businesses and individuals communicating across state lines, and at worst, allow individual states to*

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*unconstitutionally step beyond the reach of federal law. Though some scholars have argued that Dormant Commerce Clause challenges may be overcome through use of geolocation tracking, such solutions raise a host of privacy and cybersecurity concerns that would, perversely, only contribute further to degradation of a democratic, digital public sphere.*

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## I. THE DORMANT COMMERCE CLAUSE

Since the first social media platform debuted in 1997,<sup>2</sup> social media companies<sup>3</sup> have fundamentally changed how and what information is consumed by both the American public and the world. Accordingly, in recent years, calls to regulate social media have gathered steam. Laws mandating that social media platforms cannot take down so-called “viewpoint-based” posts from their sites are among the newest and most contentious internet regulations.

Because social media platforms facilitate interstate commerce by allowing businesses of all sizes to reach customers across state lines, and are themselves global commercial enterprises, any state seeking to regulate these platforms must be mindful of the Constitution’s limits on doing so. Recently passed broad anti-censorship laws directly implicate the Dormant Commerce Clause, a lesser-known facet of the Commerce Clause<sup>4</sup> that presents a formidable regulatory constraint on state lawmaking. Indeed, after content moderation bans were passed in Florida and Texas, NetChoice, a trade group whose members include Meta and Twitter, as well as the Computer & Communications Industry Association filed suit to declare each law unconstitutional, partly on Dormant Commerce Clause grounds.<sup>5</sup> Though no court has reached the merits of those early arguments, the issues were reserved for remand and will surely recur, given other states’ interest in passing similar laws.

The idea that the Commerce Clause contains “dormant” or implied limits on individual states’ rights to regulate commerce first appeared in 1824 in arguments and dicta from *Gibbons v. Ogden*.<sup>6</sup> Since then, the Dormant Commerce Clause has become entrenched

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<sup>2</sup> SixDegrees, which launched in 1997 and was defunct by 2001, is considered the first recognizable social networking site because it allowed users to create personalized profiles and required them to “add” others’ before their profiles could message each other.

<sup>3</sup> This Essay takes “social media companies” to generally refer to those owning the most used and well-known platforms in the United States, such as Meta (formerly Facebook), YouTube, TikTok, Snapchat, and Twitter.

<sup>4</sup> U.S. CONST., art. I, § 8, cl. 3. (vesting Congress with the power “to regulate Commerce... among the several States” and “among foreign Nations”).

<sup>5</sup> See Complaint at 62, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. May 27, 2021) (No. 4:21cv220-RH-MAF; Complaint at 38, *NetChoice, LLC v. Paxton*, (W.D. Tex. Sept. 22, 2021) (No. 1:21-CV-840-RP).

<sup>6</sup> Unsurprisingly, some originalists believe the doctrine is illegitimate. See, e.g., Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 36 DUKE L. J. 569 (1987).

as a judicially created doctrine that disallows states from unduly burdening interstate commerce. Though its contours have evolved over its two-hundred-year existence, the doctrine’s *raison d’être* is to keep states from obstructing the channels of interstate commerce via actions like discriminating against out-of-state merchants, blocking commerce into or out of their state, or otherwise engaging in protectionist activities that disproportionately burden out-of-state actors relative to local benefits.<sup>7</sup> Underlying the doctrine is the assumption that Congress can and would pass laws to prohibit states from engaging in such conduct; thus, judges may presumptively strike down state laws in violation, though Congress may, at any time, pass a law permitting such state conduct and thereby rendering Dormant Commerce Clause problems moot.<sup>8</sup> In the case of state regulation of social media content, the Dormant Commerce Clause remains salient because Congress has passed no such law.

Courts traditionally evaluate a state law’s validity under the Dormant Commerce Clause in one of two ways. Namely, a law is unconstitutional if it: (1) discriminates against out-of-state economic actors, or (2) burdens interstate commerce incommensurate with putative local benefits.<sup>9</sup> Laws falling under the first category are nearly always invalidated because they must satisfy “the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”<sup>10</sup> However, because most state laws, including the Texas and Florida social media laws, do not facially discriminate against out-of-state actors, courts turn to undue burdens analysis, which hinges on application of a balancing test established by the Supreme Court in *Pike v. Bruce Church Inc.*

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<sup>7</sup> See, e.g., *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

<sup>8</sup> The classic example of Congress legislating to allow state protectionism is the McCarran-Ferguson Act of 1945, which allowed states to maintain individual insurance regulations. State laws regulating insurance markets were otherwise incompatible with the Dormant Commerce Clause. See McCarran–Ferguson Act, 15 U.S.C. §§ 1011-15.

<sup>9</sup> See *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (“[I]f a state law discriminates against . . . nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to ‘advance a legitimate local purpose.’”); see also *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”).

<sup>10</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *c.f.* *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding ban on bait fish importation in a rare instance of a challenged law surviving heightened scrutiny).

At its core, the *Pike* test provides an alternative way to identify purposeful discrimination against out-of-state economic interests and protect the instrumentalities of interstate transportation.<sup>11</sup> Under *Pike*, a facially neutral state statute will be upheld unless the burden imposed on out-of-state commerce is clearly excessive relative to putative local benefits.<sup>12</sup> If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated depends on the nature of the local interest involved and other available means. Though the Court revisited the *Pike* test in 2023, it could not agree on whether the balancing test should be narrowed, reinterpreted, or abandoned altogether. Nevertheless, a majority appears to believe that courts may engage in balancing under the Dormant Commerce Clause, even when the benefits and burdens alleged mix economic and non-economic issues.<sup>13</sup> Accordingly, this articulation of the *Pike* test remains binding, though the Court has clarified that the inquiry should focus on identifying economic protectionism. That said, extant case law leaves much to be desired by way of clear guidelines for future litigants. Even after *Ross*, precedent remains silent, for example, as to what level of scrutiny *Pike* requires – we cannot say whether the state’s local purpose must be real or merely possible, or whether the availability of less burdensome means automatically defeats a challenged law.<sup>14</sup>

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<sup>11</sup> Nat’l Pork Producers Council v. Ross, 215 L. Ed. 2d 336, n.4. (2023) (explaining that a majority of Justices agree on these “heartland” principles of *Pike*).

<sup>12</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>13</sup> See generally Nat’l Pork Producers Council v. Ross, 215 L. Ed. 2d 336 (2023). Across the many opinions in this case, Justices Thomas, Gorsuch, and Barrett seem to believe that courts cannot and should not attempt balancing under *Pike*. However, a majority – Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Jackson– think that courts can consider *Pike* claims and balance a law’s economic burdens against its noneconomic benefits, even if (as in *Ross*) challengers do not contend that the law has a discriminatory purpose. Confusingly, when applying *Pike*, those same six justices could not agree on how the challengers’ claims would fare. Four Justices (Thomas, Sotomayor, Kagan, and Gorsuch) felt plaintiffs failed to show how Proposition 12 substantially burdened interstate commerce, while Chief Justice Roberts and Justice Kavanaugh took the opposite view.

<sup>14</sup> Several Circuit split configurations exist depending on which doctrinal question is examined. For example, compare the First, Fifth, Seventh, and Ninth Circuit’s deferential approach towards stated local interests with the Second, Third, Eighth, and Tenth Circuits, which require more substantive evidence. See, e.g., *Allstate Ins. Co. v. Albott*, 495 F.3d 151, 164 (5th Cir. 2007); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 312–13 (1st Cir. 2005); *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005); *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir.1992); cf. *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d

A third strand of analysis—extraterritoriality—has also increasingly appeared in Dormant Commerce Clause cases but should, after *Ross*, be treated as a specialized application of *Pike* rather than a distinct test. Previously, extraterritoriality doctrine held that state laws are unconstitutional if they regulate “commerce that takes place wholly outside the state’s borders, whether or not the commerce has effects within the State.”<sup>15</sup> That rule, however, was quite broad: it theoretically applied to any state law that substantially impacted out-of-state commerce, thereby potentially jeopardizing myriad laws that had long been seen as important, uncontroversial exercises of states’ sovereign powers.<sup>16</sup>

*Ross* brought worries over the breadth of that rule to a head. In *Ross*, a group of pork producers brought suit against California Proposition 12, which banned the sale of pork in California if a pig was housed in cruel conditions, irrespective of whether the pork came from California breeders.<sup>17</sup> Though it was not their only argument, the challengers argued that the law violated extraterritoriality because the sheer size of the Californian market and its lack of in-state breeders meant that California was essentially imposing its regulatory regime wholly on out-of-state actors. But during oral argument, multiple Justices pushed back, worrying that acceptance of the challengers’ theory risked invalidating “many, many [similar] laws,”<sup>18</sup> and, because “the balkanization that the Framers were concerned about is surely present today,” allowing states to enact laws with extraterritorial impacts would encourage

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Cir. 2007); *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002); *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994).

<sup>15</sup> See *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); see also *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336

(1989) (holding a state law per se invalid if it “controls commerce occurring wholly outside the boundaries” of the enacting State). But, note that theories of extraterritoriality had been articulated prior. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (holding that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there”).

<sup>16</sup> See Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 MARQ. L. REV. 497, 502-17 (2016); KELSEY RINEHART EBERLY ET AL., POTENTIAL REVERBERATIONS OF PORK PRODUCERS’ COMMERCE CLAUSE CHALLENGE BEFORE THE SUPREME COURT 20 (Kristen Stilt & Chris Green eds., 2020).

<sup>17</sup> *Nat’l Pork Producers Council v. Ross*, 215 L. Ed. 2d 336, 345-346 (2023).

<sup>18</sup> Transcript of Oral Argument at 44, *Nat’l Pork Producers Council v. Ross*, 143 S.Ct. 1142 (2022) (No. 21-468).

states of different political bents to “constantly [be] at each others’ throats.”<sup>19</sup>

Importantly, the challengers’ arguments in *Ross* presented two fairness issues that are in tension with each other. Their framework suggested first that larger, more populous, or otherwise more powerful states will be effectively barred from regulating according to their own values; and second, that, if more powerful states *are* allowed to regulate with extraterritorial effects, less powerful states will be disenfranchised. Which of those fairness concerns takes priority over the other in a governance system where all fifty states are coequal sovereigns is a question without easy answers. We are, after all, still having heated debates as a nation about the fairness and legitimacy of the Electoral College, which is perhaps the most visible arena in which similar fairness issues arise. Furthermore, in the context of the Dormant Commerce Clause, there are no set criteria for what renders some states superior to others (i.e. size, population, economic measures, etc.). Perhaps in most cases the correct metric is market share; but, as arguments in cases like *Ross* tend to use population as a proxy or synonymous measure of power, we cannot be sure. Nevertheless, regardless of the measurement criteria selected, as states approach the middle of the spectrum between more and less powerful, how to differentiate between states that may or may not regulate based on the magnitude of their “out-of-state effects” becomes an arbitrary line-drawing exercise.

Perhaps spooked by the far-reaching implications of allowing extraterritoriality to continue developing as a separate doctrine, the Court in *Ross* sharply curtailed it. The Court dismissed the previously articulated rule and instead stated that extraterritoriality merely “typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.”<sup>20</sup> Thus, though the doctrine survives, it provides no “almost *per se*” rule under the Dormant Commerce Clause that wholly or substantially out-of-state economic effects render a law unconstitutional.<sup>21</sup> This makes intuitive sense, given that while state forays into interstate commercial warfare are neither novel nor unanticipated by the Constitution,<sup>22</sup> what counts as being

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<sup>19</sup> *Id.* at 95.

<sup>20</sup> Nat’l Pork Producers Council v. Ross, 215 L. Ed. 2d 336, 340-341 (2023).

<sup>21</sup> *Id.* at 341-342.

<sup>22</sup> See, e.g., Comptroller of Treas. of Md. v. Wynne, 575 U.S. 542, 570 (2015); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 448 (1941)(describing how states used trade laws “as weapons against each other” while competing for foreign commerce before the signing of the Constitution); THE



“interstate” has changed dramatically since the Founding. And, this is especially true for social media, where defining both the activity to be regulated and the location where the activity occurs are more nebulous endeavors than could be imagined in 1787.

## II. STATE REGULATION OF SOCIAL MEDIA SPEECH

Between 2021 and fall of 2022, thirty-four U.S. state legislatures have introduced dozens of bills on technology companies’ moderation of users’ content. Of these, three have become law. While New York’s law targeted specific kinds of hate speech, more notable were the laws in Texas and Florida, which in a national first banned social media companies from censoring users’ opinions or de-platforming political candidates.<sup>23</sup> Critically, neither law nor similar bills depend on a federal regulator; instead, they advance a vision of state-by-state internet speech regulation that, at times, allows the state to assert extraterritorial authority while proposing no clear mechanism for distinguishing in-state and out-of-state users or interactions.

To begin, it is worth examining the laws passed in Texas and Florida as they are written because of the light they shed on potential constitutional challenges. While some future version of these laws may be drafted with enough nuance to pass muster, these poorly drafted laws are still worth analyzing because they are the nation’s first to broadly regulate social media platforms in this way, and the slew of pending and future state bills that are modelled on them share their flaws.<sup>24</sup>

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FEDERALIST NO. 22 (Alexander Hamilton) (“The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint”); THE FEDERALIST NO. 7 (Alexander Hamilton) (describing how Americans’ entrepreneurial spirit lends itself to commercial competition and “reprisals and wars” between States).

<sup>23</sup> See *generally*, FLA. STAT. tit. 19, § 287.137 (2022); FLA. STAT. tit. 33, § 501.2041 (2022); FLA. STAT. tit. 9, § 106.072, and H.B. 20, 2021 Leg. (Tex. 2021).

<sup>24</sup> Some notable copycat bills include: Oklahoma (S.B. 383), Arkansas (H.B. 1647), Kansas (S.B. 187), North Dakota (H.B. 1144), West Virginia (H.B. 3307), Wyoming (S. F. 100), Montana (H.B. 482), Louisiana (S.B. 196), and Kentucky (S.B. 111). See Okla. S.B. 383, 58th Legis. (2021); Ark. H.B. 1647, 94th Gen. Assembly (2023); Kan. S.B. 187, Session of 2021 (2021); N.D. H.B. 1144, 77th Legis. Assembly (2021); W. Va. H.B. 3307, 86th Legis. (2023), Wyo. S. F. 100, 77th Legis. (2023); Mont. H.B. 482, 68th Legis. (2023); La. S.B. 196, 2021 Legis. Session (2021).

To that end, it is apparent that the laws' definitions of the actors and activities to be regulated are vague and arbitrary to a degree that excessively burden interstate commerce in violation of the Dormant Commerce Clause. In this context, where anticompetitive actions are a paramount concern, overbreadth issues are important for two reasons. First, and most importantly, it can indicate legislative intent to discriminate against out-of-state actors, which is impermissible. Second, it may tip judicial balancing towards unconstitutionality, by revealing that the law's burdens are more likely to outweigh its benefits because the burdens reach an unnecessarily broad pool of actors. At minimum, future state and federal legislators must therefore address the problems posed by overbroad, non-technical language when writing future iterations of similar laws.

The language problems in these laws illustrate how difficult it may be for a state to ever draft a comprehensive social media law in a way that does not run afoul of the Dormant Commerce Clause absent federal legislation clarifying the legal landscape. The Texas and Florida laws contain overbroad and sometimes internally inconsistent definitions of "social media website" or "company," meaning that any restrictions imposed impact speech<sup>25</sup> well beyond that posted on traditional social media sites. Texas's law, for example, applies to *any* public website that lets users post reviews, thereby netting sites like Amazon, Wikipedia, or Yelp that not generally categorized as social media.<sup>26</sup> Similarly, the definitions' varying numerical thresholds cover far more companies than the social media power players that were intended, thereby exacerbating overbreadth concerns while simultaneously creating confusion around compliance. Texas defines a platform as any website that "functionally has more than 50 million active users in the United States in a calendar month," while Florida requires "at least 100

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<sup>25</sup> There is also fair chance that the speech activities at issue are also defined too broadly to be constitutional, both per due process and the Dormant Commerce Clause. Texas's law, for instance, allows platforms to be sued for "censoring" content based upon a user's "viewpoint," though "censoring" includes virtually *any* action that impacts a user's post, regardless of degree of impact or level of automation, and "viewpoint" is left undefined. While First Amendment law regularly discusses the latter in the context of government discrimination without explicitly defining what constitutes a "viewpoint," whether and how to apply that jurisprudence to wholly private social media platforms and/or the Commerce Clause context is an open question.

<sup>26</sup> H.B. 20, 87th Tex. Leg. (2021) (codified in scattered sections of 5 TEX. BUS. & Com. Code, 10 TEX. BUS. & Com. Code, and 6 TEX. CIV. PRAC. & REM. CODE).

million monthly individual platform participants globally.”<sup>27</sup> Neither law, nor similar bills elsewhere, addresses the lack of generally accepted understandings of what constitutes a social media “user,” “participant,” or “activity” – in fact, there isn’t even consensus on whether a “user” or “profile” must be human. Moreover, the laws count users and participants retroactively and make no accommodation for spikes in traffic to sites that may otherwise not meet the user threshold (say, due to a particularly viral post or trend). Altogether, plenty of companies that might not otherwise consider themselves “social media platforms” are exposed to liability unless they preemptively come into compliance with these complex laws. In this way, these laws are open to related overbreadth challenges to do with due process as well.<sup>28</sup>

Troublingly, these laws are also worded in ways that explicitly apply beyond state borders and implicitly acknowledge the national and/or international character of social media platforms. Tellingly, no law defines user counts strictly in terms of users within its state.<sup>29</sup> This means that a platform might have no “active users” in Texas or Florida, yet still be required to comply with their social media laws. Indeed, regarding regulated activities, Texas’s law governs anyone who “does business in” or “shares or receives expression in” Texas.<sup>30</sup> Unless businesses enact a novel mechanism to ensure their posts never reach Texas residents, any non-Texas business is at risk of “doing business in Texas” and must, presumably, have a plan for compliance despite being entirely out-of-state. This has obvious impact on social media companies’ ability

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<sup>27</sup> H.B. 20, 87th Tex. Leg. (2021) (codified in scattered sections of 5 TEX. BUS. & Com. Code, 10 TEX. BUS. & Com. Code, and 6 TEX. CIV. PRAC. & REM. CODE); S.B. 7072, 2021 Regular Session (2021) (codified in scattered sections of 9 FLA. STAT., 19 FLA. STAT., and 33 FLA. STAT. tit. 5, §§ 120.001-.151. Other states’ proposed bills vary yet more greatly, with many broader in scope than Texas and Florida simply because they specify no numerical threshold whatsoever.

<sup>28</sup> *See, e.g.*, *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (requiring that a defendant’s contacts with the state be of such quality and quantity that it would be fundamentally fair and reasonable to subject the defendant to jurisdiction there); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (allowing general jurisdiction only when a corporation is “essentially at home in the forum state”).

<sup>29</sup> Just one proposed bill, Utah’s S.B. 228, defines “user” using clear reference to its own state, though neither Utah residents nor businesses that do business in Utah constitute the entire universe of possible “users.” *See* S.B. 228, 64th Utah Legis. §13-58-102 (13)-(14) (2021).

<sup>30</sup> H.B. 20, 87th Tex. Leg. (2021) (codified in scattered sections of 5 TEX. BUS. & Com. Code, 10 TEX. BUS. & Com. Code, and 6 TEX. CIV. PRAC. & REM. CODE).

to engage in commerce globally, and runs afoul of both the Dormant Commerce Clause and potentially the First Amendment.

In addition to their unconstitutional vagaries and wide reach, complying with the Texas and Florida laws could kneecap social media platforms' ability to engage in interstate commerce by imposing significant burdens on their infrastructure and organization. For a platform to comply with even just the statutory ambiguities abovementioned, it must likely radically rework or scrap its existing feed algorithms, advertising models, and user engagement methods – something which, given the informal nature of much software development and the black box of machine learning, may not even be possible without destroying much of platforms' current strengths and proprietary information. Meanwhile, penalties for being noncompliant may push companies away from attempts at content moderation: beyond potential damage to a platform's brand and reputation, these laws generally allow a private right of action in addition to state enforcement, both with substantial costs and fines attached.<sup>31</sup> Whether smaller or emerging platforms would risk entering such a precarious landscape is unclear, as is the continued operation of extant platforms in states with particularly broad anti-censorship laws, or anti-censorship laws that may, now or in future, conflict with other state laws requiring content moderation.

### III. UNCONSTITUTIONAL CONTENT MODERATION BANS

Under at least one strand of Dormant Commerce Clause jurisprudence, the content moderation bans enacted in Texas and Florida and copied by others are unconstitutional. This has significant implications for how future social media laws should be drafted, as well as ways Dormant Commerce Clause doctrine might evolve to oversee online technologies and activities more effectively.

Beginning with facial discrimination analysis, these content moderation bans initially survive scrutiny but do seem to exhibit discriminatory effect. On their face, no passed or proposed ban discriminates against out-of-state commerce because the laws fail to delineate in-state versus out-of-state.<sup>32</sup> However, whether these

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<sup>31</sup> See H.B. 20, 87th Tex. Leg. (2021) (providing successful plaintiffs with injunctive relief, costs, possible fines, and attorney's fees and authorization for a court to impose further fines).

<sup>32</sup> See *Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (holding that the first step of analysis is assessing whether “a

laws’ practical “effect is to favor in-state economic interests over out-of-state interests” is an open question given where most major social media companies are based and a lack of public data on where commerce facilitated by them is located.<sup>33</sup> Laws like Texas’s were intended to prevent “a handful of billionaires in San Francisco that run these tech companies” from “silenc[ing] conservative ideas [and] religious beliefs.”<sup>34</sup> This suggests that these laws disproportionately (or entirely) burden out-of-state actors,<sup>35</sup> though current doctrine does not specify if a business’s location is based upon its headquarters alone (or whether the calculus includes place of incorporation, regional offices, etc.). If location is defined broadly, it may be enough, for example, to defeat a constitutional challenge by mentioning that a company like Meta has four offices in Texas. At any rate, the second component of discriminatory effect analysis requires that differential treatment of economic actors “be as between entities that are similarly situated.”<sup>36</sup> However, there aren’t many platforms offering comparable services or that have even a fraction of the same name recognition. Truth Social, for instance, is headquartered in Florida but fall far short of the laws’ user threshold. Absent data on where companies that operate wholly or in part *on* major platforms are, there is no provable discriminatory effect.

As a result of ambiguous local benefits and overbroad burdens, *Pike* balancing resolves the opposite way. Recall that under *Pike*, “a law’s practical effects may also disclose the presence of a discriminatory purpose.”<sup>37</sup> And, because a majority in *Ross* could not agree on whether economic harms and benefits should not be weighed against noneconomic ones, this paper examines both. Here, it is not actually clear what or how strong the putative local benefit in these laws is. Though these state laws’ preambles are replete with unproven claims about censorship by platforms, the core benefit proffered is unmitigated access to others’ social media posts. But,

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state statute directly regulates or discriminates against interstate commerce or [whether] its effect is to favor in-state economic interests over out-of-state interests”).

<sup>33</sup> *See id.*

<sup>34</sup> *See* Shawn Mulcahy, *Gov. Greg Abbott Backs Bill to Stop Social Media Companies From Banning Texans for Political Views*, Texas Tribune (Mar. 5, 2021) (quoting a Texas state legislator).

<sup>35</sup> *See* Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 648 (6th Cir. 2010).

<sup>36</sup> *See id.*; *see also* Int’l Franchise Ass’n, Inc. v. City of Seattle, 97 F. Supp. 3d 1256, 1272 (W.D. Wash.); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298–99 (1997).

<sup>37</sup> *Nat’l Pork Producers Council v. Ross*, 215 L. Ed. 2d 336, 342 (2023) (explaining how *Pike* and its progeny are inseparable from the Court’s Dormant Commerce Clause antidiscrimination cases).

unlike the clearly defined, obviously protected class of disabled Californians the court found for in *Agency on Deafness*,<sup>38</sup> here, the group to be protected is presumably *all* citizens (though legislators' remarks suggest the laws are intended primarily to protect political conservatives). And, even assuming some form of targeted censorship occurs, a court weighing that interest may find it to be diluted if ceasing one form of alleged "discriminatory impact" against some citizens is likely to result in an increase in discrimination against others. Plenty of evidence suggests that the elimination of content moderation incentivizes extreme, radicalizing, and hateful content,<sup>39</sup> which, in turn, is disproportionately aimed at traditionally marginalized people who may then face real-world violence as a result.<sup>40</sup> While allowing that kind of speech to flourish online may be a state's prerogative, it does call the sincerity of the state's proffered benefit into question, and highlights possible tensions between abiding by the Dormant Commerce Clause's protections and other substantive rights.

In fact, a plaintiffs' success in challenging social media regulations may depend on the novel question of how much (if at all) a court should import concepts from First Amendment law into Dormant Commerce Clause analysis. Observe a few features of the cases applying *Pike*. Since *Pike* was decided in 1970, it has been cited by 644 published federal cases, with a rough split of twenty to thirty cases per circuit, irrespective of depth of discussion.<sup>41</sup> Of those, less than a fifth feature substantive First Amendment claims. Where opinions include both claims, judges treat them separately: judges have not used First Amendment law to inform their Dormant

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<sup>38</sup> See *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014).

<sup>39</sup> For an example of how popular anime and manga discussion board 4chan devolved into a cesspit of racism, bigotry, and violent speech, see, e.g., Rob Arthur, *The Man Who Helped Turn 4chan Into the Internet's Racist Engine*, VICE (Nov. 2, 2020). For more examples, see, e.g., James Clayton, *Facebook Bans Holocaust Denial Content*, BBC NEWS (Oct. 12, 2020) (recounting how Mark Zuckerberg was moved by data showing an increase in anti-Semitic violence to reverse Facebook's policy of leaving Holocaust denial content up); Craig Timberg & Elizabeth Dwoskin, *Reddit Closes Long-Running Forum Supporting President Trump After Years of Policy Violations*, WASH. POST (Jan. 29, 2020) (describing how Reddit's lax enforcement of content moderation policies encouraged posts calling for violence against peaceful protestors).

<sup>40</sup> See, e.g., DANIELLE K. CITRON, *HATE CRIMES IN CYBERSPACE* (2016); Rachel Hatzipanagos, *How Online Hate Turns into Real-Life Violence*, WASH. POST (Nov. 30, 2018).

<sup>41</sup> However, the Ninth Circuit has heard greater that number of cases (37), but the Federal Circuit (1) and the D.C. Circuit (2) virtually none.

Commerce Clause analysis or vice versa.<sup>42</sup> Moreover, aside from ongoing litigation over the Texas and Florida laws, there are no directly analogous extant cases. Few Dormant Commerce Clause cases mention the internet, virtually none mention social media platforms, and if there are speech regulations also at issue, they have tended to involve corporate advertising, voting laws, and tax issues rather than the free speech issues implicated here. Because the fact-intensive nature of *Pike* balancing has produced wide ranging outcomes, it is hard to say with certainty what burdens or benefits are valid, let alone whether their respective weights can be informed by other areas of law. Thus, to what extent First Amendment law can or should act as a constraint on Dormant Commerce Clause analysis is unbroken ground.

Though in the First Amendment context courts will not distinguish between the merits of different kinds of protected speech,<sup>43</sup> no case law says that courts cannot scrutinize the substantive effects of speech as part of the balancing test in the Dormant Commerce Clause context. After all, while the Dormant Commerce Clause and First Amendment issues may overlap, each doctrine is animated by different values, and their analyses ask different questions. So, given that the kinds of laws most regularly upheld in the face of Dormant Commerce Clause challenges are those that impact “cardinal civic responsibilities... [of] safety, and welfare,”<sup>44</sup> laws that enable the proliferation of social media speech that includes incitement, hate speech, calls to violence, and the like could be seen as burdens that cut against putative local benefits. But, although one Circuit recently found that the state has a legitimate interest in “protecting its citizens from disparate discriminatory impact,”<sup>45</sup> it isn’t clear that interest is implicated here due to current difficulties in proving removal of content on the basis of users’ political opinions by platforms.<sup>46</sup>

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<sup>42</sup> See, e.g., *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1284 (W.D. Wash. 2012) (featuring robust discussion of both First Amendment and Dormant Commerce Claims but maintaining their independence).

<sup>43</sup> See *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (stating that once a forum is opened to assembly or speaking, the government cannot distinguish between views presented because of “equality of status in the field of ideas”).

<sup>44</sup> See *Dep’t of Revenue v. Davis*, 553 U.S. 328, 342 (2008).

<sup>45</sup> See *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014).

<sup>46</sup> See James Clayton, *Social Media: Is It Really Biased Against US Republicans?*, BBC NEWS (Oct. 27, 2020) (summarizing results of Pew Research Study on social media censorship sentiments).

Whether or not the state’s interest is deemed significant, however, three burdens on interstate commerce outweigh it. First, as novel must-carry mandates,<sup>47</sup> the Texas and Florida laws require platforms to host and accord the same weight to content from corporate rivals, which may be fatal to smaller or newly-launched competitors and harm businesses’ financial interests in ways analogous to instances courts have found substantial. Though there is no right for private commercial actors to engage in commerce under the Dormant Commerce Clause, the Supreme Court has prioritized laws that ensure “orderly market conditions” and lower courts have spoken about both primary and secondary effects of economic “health and safety.”<sup>48</sup> Second, harsh cumulative penalties in these laws incentivize platforms to avoid any form of content moderation, and in doing so, exposes platforms to liabilities that courts have found significant when a law does not also contain a good faith defense, safe harbor, or perhaps even a phase-in period for compliance. After all, for some sites that fall within the laws’ broad definitions of “social media website,” like Wikipedia and Reddit, their entire operations would be decimated if, say, each user attempt to edit a Wikipedia page or moderate a private chat room is deemed an illegal act.<sup>49</sup> Content moderation bans may also present a Catch-22 because companies must simultaneously comply with laws that *do* require censorship of certain content, and ultimately, there may be no feasible way to definitively comply with both legal regimes.<sup>50</sup> Here, though no state has yet imposed criminal liability

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<sup>47</sup> Traditional must-carry rules for cable television are distinguishable from the social media laws at issue for two reasons. First, if a state passed its own must-carry rule for cable, that would prompt preemption issues due to federal law and Federal Communication Commission regulations. But here, there are no analogous federal laws (though Congress may pass one at any time). Second – and perhaps more importantly – it is highly unlikely that extant must-carry cable laws would ever violate the Dormant Commerce Clause due to their hyperlocal nature. Those laws’ geographic range do not interfere with states’ ability to compete in interstate commercial activities. For the same to be even slightly true in a social media setting, however, companies would have to enable detailed geolocation tracking. While possible, such a requirement would create burdens from privacy law compliance and the like that go well beyond a single state, thus burdening companies’ ability to do business across state borders. Further discussion of specific issues with geolocation tracking follows at the end of this section.

<sup>48</sup> See *North Dakota v. United States*, 495 U.S. 423, 432, (1990); *Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen.*, 50 F.4th 1126, 1144 (11th Cir. 2022); *Turizo v. Subway Franchisee Advert. Fund Tr. Ltd.*, No. 21-CIV-61493-RAR, 2022 WL 2919260, at \*9 (S.D. Fla. May 18, 2022).

<sup>49</sup> See Charlie Warzel, *Is This the Beginning of the End of the Internet?*, THE ATLANTIC (Sept. 28, 2022).

<sup>50</sup> FOSTA-SESTA, a law designed to curb sex trafficking, presents an example of this because companies appear to read its sweeping language



for noncompliance, the monetary risk of civil litigation, particularly through the private right of action, is huge, and harmful content like that in *American Booksellers* is certainly at issue.<sup>51</sup>

Responding to content moderation bans may further require platforms to fragment their sites into different versions for different states, an endeavor that may be prohibitively expensive, technically unfeasible, legally risky, and likely anticompetitive. Here, it is relevant that no state has yet explained whether its free speech interests “could be promoted as well with a lesser impact on interstate activities,” which may ultimately doom these laws’ survival in court.<sup>52</sup> A platform that must run a different version of itself in each state is one necessarily slower to create and roll out changes, whether to react to bad actors or develop new user features, and that slowness is compounded by requirements like Texas’s that a site cannot update its rules more than once every thirty days. And, in terms of engineering, it may not even be possible for a platform to build and run two simultaneous versions of itself, let alone fifty or more.<sup>53</sup> The technical knowledge and resources required to accomplish such a thing are quantitatively different from the mere addition of something like an existing closed captioning feature to a limited number of videos, as the Ninth Circuit required CNN to do for its California-based users.<sup>54</sup> Even trending topics pages on social media, which are tailored to a viewer’s geographic location, do not fully add or remove posts from users’ access – they merely

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broadly, taking their obligations to include sometimes taking down legal speech. *See, e.g.,* Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as we Know it*, VOX (July 2, 2018). More examples, however, are likely to emerge as an increasing number of states with wide-ranging political views venture further into the content moderation space. *See* Khara Boender & Jordan Rodell, *The State of State Content Moderation Laws*, DISRUPTIVE COMPETITION PROJECT (Dec. 7, 2023) (noting that California and New York have pursued laws that would require new forms of content moderation).

<sup>51</sup> *See* Am. Booksellers Found. For Free Expression v. Dean, 202 F. Supp. 2d 300, 321 (D. Vt. 2002), *aff’d in part, modified in part sub nom.* Am. Booksellers Found. v. Dean, 342 F.3d 96 (2d Cir. 2003).

<sup>52</sup> *Id.* (citing *Pike*, 397 U.S. at 142). More broadly, there is robust discussion regarding the extent to which platforms themselves have free speech rights and/or fiduciary duties that may also be relevant, but such discussions go beyond the scope of this paper. *See, e.g.,* Jane Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017); Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

<sup>53</sup> *See* Mike Masnick, *No One Has Any Clue How Texas’ Social Media Law Can Actually Work (Because It Can’t Work)*, TECH DIRT (Sept. 30, 2022).

<sup>54</sup> *See id.*, *see also* Greater L.A. Agency on Deafness, Inc. v. CNN, Inc., 742 F.3d 414, 433 (9th Cir. 2014).

reorganize what receives viewing prominence. By contrast, complying with content moderation bans would require a more wholesale reworking of existing feed algorithms, policies and practices around blocking or removing users, advertising models, and, potentially, supporting physical infrastructure. These burdens on interstate commerce, given the broad swathe of internet companies the laws apply to, are likely unconstitutional (though, notably, nothing would stop a state from offering platforms incentives to act in these ways within their borders). While many of these technical and business problems also exist when different countries regulate social media differently (e.g. member states within the European Union), the Dormant Commerce Clause is only concerned with how those problems’ anticompetitive potential and interference with platforms’ *interstate* commerce conflict with the federal government’s right to govern national markets and communications infrastructure.<sup>55</sup>

Encouraging hyper-local geolocation tracking<sup>56</sup> or entrenchment of “borders” between social media as viewed in different states also does not necessarily solve Dormant Commerce Clause problems. By potentially forcing companies to unconstitutionally collect government-issued identification from users,<sup>57</sup> excluding residents from accessing goods and services facilitated by social media across state lines<sup>58</sup> and severely eroding individuals’ privacy in ways that may violate state law,<sup>59</sup> geolocation as a solution creates additional burdens on interstate commerce that make it less likely to outweigh putative local benefits. A default system of hyper-local location tracking on something as ubiquitous as social media would strip users of

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<sup>55</sup> See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (holding that an Illinois safety law regarding mudflap design on large trucks was unconstitutional because it was so unlike other states’ mudflap requirements that it placed too great a burden on and obstructed interstate trucking operations).

<sup>56</sup> See Jack L. Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083 (2023) (arguing that online platforms can implement geolocation to determine where users are, then apply software differently to users depending on their state as a means of addressing Dormant Commerce Clause challenges).

<sup>57</sup> See *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1286 (W.D. Wash. 2012).

<sup>58</sup> See *Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dep’t of Health*, 50 F.4th 1126, 1144 (11th Cir. 2022).

<sup>59</sup> See *id.* at 1143. An increasing number of privacy laws are also being passed at the state level. In addition to specific laws targeting issues like biometric data and children’s privacy, five states—California, Colorado, Connecticut, Utah and Virginia—have enacted comprehensive consumer data privacy laws.

privacy: among other concerns, it could make thousands of people more susceptible to criminal punishment, domestic violence and stalking, and other ill-effects of online echo-chambers. Because of the ensuing chilling effects and reduced product quality, default data collection practices, particularly when paired with surreptitious sensitive inferences, have been decried by privacy advocates for years and indeed may be illegal in states that have passed omnibus privacy protection regimes. This has been demonstrated post-*Dobbs*,<sup>60</sup> as sharp shifts in state abortion laws alerted users that their speech activities in seemingly borderless virtual worlds were actually acutely sensitive to the laws of the physical state they inhabited. Because law enforcement can request or buy location data from private companies (and has routinely done so, in a variety of cases), many researchers, digital rights advocates, and women's health advocates express concern about what, if any, guardrails protect the location privacy of abortion-seekers in states that might criminally prosecute them for doing so.<sup>61</sup> Thus, setting aside the poor public policy of encouraging infrastructure that fences-off portions of the internet based on user location,<sup>62</sup> using hyperlocal, constant geolocation tracking to solve Dormant Commerce Clause concerns could be a cure worse than the disease.<sup>63</sup>

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<sup>60</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

<sup>61</sup> See e.g., Louise Matsakis, *Privacy Groups Warn About Data-Tracking if Roe is Overturned*, NBC NEWS (May 11, 2022); Geoffrey A. Fowler & Tatum Hunter, *For People Seeking Abortions, Digital Privacy is Suddenly Critical*, WASH. POST (June 24, 2022); Juliana Kim, *Data Privacy Concerns Make the Post-Roe Era Uncharted Territory*, NPR (July 2, 2022); see also CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10786, ABORTION, DATA PRIVACY, AND LAW ENFORCEMENT ACCESS: A LEGAL OVERVIEW 5 (2022).

<sup>62</sup> The "Great Firewall" of China is a well-known and, in the West, much condemned combination of technologies and laws that blocks access in China to websites and information the Chinese government disapproves of. As a result, Chinese citizens receive a radically different and often one-sided information narrative that has, over the course of two decades, resulted in increased nationalist and isolationist sentiment, and diminished activism and free press activities. See Yaqiu Wang, *In China, the 'Great Firewall' is Changing a Generation*, POLITICO (Sept. 1, 2020). Russia has also recently enacted a "sovereign internet law," which some believe will result in a China-like domestic version of the internet walled off from the world by a "digital Iron Curtain." See Rishi Iyengar, *The Digital Iron Curtain: How Russia's Internet Could Soon Start to Look a Lot Like China's*, CNN (Mar. 8, 2022).

<sup>63</sup> See, e.g., Mark A. Lemley, *The Splinternet*, 70 DUKE L. J. 1397 (2021) (arguing that the balkanization of the internet as a result of nationalizing software, hardware, and internet infrastructure has numerous drawbacks, including increased domestic surveillance, government repression of popular reform movements, and cybersecurity risks).

Moreover, there is nothing preventing a court from taking the noneconomic ill-effects of technological changes into account when assessing constitutional doctrine, and indeed, past jurisprudence includes enough latitude for them to do so. Precedent suggests that a court could include privacy harms, as well as their secondary ill-effects on health and well-being, into its Dormant Commerce Clause analysis without falling afoul of classic privacy law hurdles like standing<sup>64</sup> as courts need not require “precise figures or statistics to determine... a burden on interstate commerce.”<sup>65</sup> Moreover, case after case has stressed that Dormant Commerce Clause analyses must focus on the “practical effect” of a statute.<sup>66</sup>

Even using extraterritoriality analysis to inspect for in-state protectionism suggests that these laws could violate the Dormant Commerce Clause because of the burdens they place on interstate commerce. Because these laws offer no means to differentiate between users based on location or workable definitions of the activities to be regulated, and major platforms are by design intended as semi-borderless spaces for dialogue, there is no question that the laws’ effects will be felt – perhaps disproportionately and unduly - by citizens of other states, thereby kneecapping platforms’ commercial endeavors. Certainly, any effects will be felt widely: Pew estimates that 70% of Americans have at least one social media account, a figure that is spread almost equally across income levels and ruralness of living place,<sup>67</sup> and a majority of users access their account at least once daily.<sup>68</sup>

Though what few internet-focused Dormant Commerce Clause cases have been heard show that specificity of location and limitation of the activity to be regulated are crucial for a state law’s survival, in line with the Court’s holding in *Ross*, we can see that extraterritoriality can be tied to issues at the heart of *Pike* and classic nondiscrimination cases. Take *Pataki* and *Henkel*. In the former, the court invalidated a New York statute regarding internet transmissions of pornography to minors both because of its extraterritorial effects and because the state’s legitimate objective of

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<sup>64</sup> See Danielle K. Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793 (2022).

<sup>65</sup> *Rocky Mountain Ass'n of Recruiters v. Moss*, 541 F. Supp. 3d 1247, 1257–58 (D. Colo. 2021).

<sup>66</sup> See *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014).

<sup>67</sup> Pew Rsch. Ctr., *Social Media Fact Sheet*, PEW RSCH. CTR. (April 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/?menuItem=81867c91-92ad-45b8-a964-a2a894f873ef>.

<sup>68</sup> *Id.*

protecting children from pedophilia was outweighed by extreme burdens to interstate commerce, incentivization of inconsistent internet regulations, and out-of-state chilling effects on commerce.<sup>69</sup> Chiefly, the law at issue was too broad – it covered all online communications transmitted over “any computer communication system.”<sup>70</sup> On the other hand, in *State v. Henkel*, the court only upheld a Washington regulation that prohibited internet transmission of spam emails because the statute specifically required emails be read by a Washington resident or initiated from a Washington computer.<sup>71</sup> The statute at issue there explicitly did not extend to emails merely routed through Washington computers, or non-email communications, thus cabining the law and minimizing burdens on out-of-state actors. Social media content moderation bans are more like the statute at issue in *Pataki* than *Henkel*. For instance, Texas’s social media law is so broad that it likely applies to out-of-state non-Texans interacting exclusively with other non-Texans online. In fact, chronology is as much an issue as geography – the Texas law makes it unclear whether the law applies if a user was *ever* in a particular state, thus representing an even greater danger of overreach of individual state power.

Future courts hoping to clarify this area of law should thus account for two things. First, though the Court in *Ross* indicated that it would not broadly expand the reach of the Dormant Commerce Clause, courts must still decide whether and how commerce depending substantially on the internet is different from classic Dormant Commerce Clause cases involving the interstate movement of tangible goods. From there, courts should be clear and deliberate in outlining a hierarchy of interests (whether economic, non-economic, or both) for (i) states enacting regulations, and (ii) those that may be impacted by out-of-state regulations, such that balancing is guided by predictable, shared priorities and weighting.

Ultimately, we need broad review and fresh debate over the principles of the Commerce Clause and federalism in the online age. That states are “laboratories of democracy” does not give them blanket authority to use their police powers to try and control non-state residents or corporations, let alone supremacy over the federal government in areas historically reserved for it, such as national commerce. Principles like the Dormant Commerce Clause serve as a necessary bulwark against internecine commercial (and political,

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<sup>69</sup> The most-followed example is likely *American Libraries Ass'n v. Pataki* and its progeny. See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

<sup>70</sup> See *id.*

<sup>71</sup> See *State v. Heckel*, 24 P.3d 404 (Wash. 2001).

and moral) warfare between ideologically opposed states, but greater clarification on the application and limits of the doctrine are needed for the online age.

#### **IV. CONCLUSION**

Extant proposals to ban content moderation underappreciate the complexity of social media platforms, oversimplify content moderation issues, and disregard the multitude of roles that these unique sites play. As passed, these laws promote policies that would alter the digital public sphere beyond recognition – hampering the development of healthy, democratic speech online in the process. Regulators must acknowledge that today’s platforms act as far more than a digitized (and often idealized) public square, and any state law that enacts overbroad leave-up or take-down content mandates must contend with ensuing negative consequences on interstate commerce and amplification of known forces on social media that contribute to the polarization of American politics and culture. Our choices in regulating social media are more nuanced than the false dichotomy between state-by-state anarchy and arbitrary censorship presented by the litigation over the Texas and Florida laws. There can and must be room for reasonable regulation of the digital public sphere.