Continuities and Discontinuities. First Amendment and Digital Free Speech in U.S. Constitutionalism

by Enrico Andreoli

Abstract: The Biden administration's first two years have recently been facing a major political-constitutional conflict over freedom of speech as guaranteed by the First Amendment. The conflict is to be ascribed to the political-constitutional datum because it seems to reflect a self-proclaimed ability of conservative political forces (until the 2022 midterm elections devoid of power at the federal level) to set themselves up as supposed bastions of freedom of speech on the digital space as the 'marketplace of ideas'. On the other hand, the political forces represented in the current Biden presidency have never hidden their willingness to take decisive action on the so-called 'misinformation' that conservative political forces have allegedly brought about during the Trump administration and in the handling of the pandemic. Beyond the political debate, the legal issue seems to be ascribed to the possible applicability or otherwise, to internet providers and social media platforms, of the regulatory provisions and jurisprudential principles enunciated for free speech with reference to different media. This paper, after providing an overview regarding the constitutional protection provided by the First Amendment to freedom of speech, aims first to offer an in-depth of the § 230 of the Communication Decency Act of 1996, which provides special protection to internet service providers from liability for content created by others. Secondly, the paper will dwell on the conflict in the matter that exists between the federal and state levels both at the regulatory and judicial levels: to this effect, that the contrast between the fate of two 'anti-censorship' state laws, namely the Texas H.B. 20, (whose constitutionality was recognized by the Fifth circuit), and the Florida S.B. 7072 (sanctioned instead by the Eleventh Circuit), is emblematic. Until a landmark pronouncement by the Supreme Court, the debate that the present contribution aims to analyze seems destined to proliferate.

Keywords: Freedom of Speech; First Amendment; Social Media Platforms; Communications Decency Act; State Action.

1. Introduction

Freedom of speech is an essential element for any system that intends to call itself democratic. This aspect is permanent in the United States of America, where the constitutional architecture is rooted in the assumption that «the people, not the government, possess the absolute sovereignty».[1]

[1] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). See G. Bognetti, *Libertà d'espressione nella giurisprudenza nordamericana. Contributo allo studio dei processi dell'interpretazione giuridica*, Milano, 1958. For a historical profile see J. Story, *Commentaries on the Constitution of the United States: with a Preliminary Review of the Constitutional History of*

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Like any societal change, however, the recognition and protection of this fundamental freedom have not escaped the many (and new) challenges brought to constitutionalism by the advent of the digital age. The Internet and social media platforms have indeed begun to play an increasingly important role, making the communication process an even faster and, above all, more widespread action. In particular, social media platforms have given the possibility to reach – contextually and immediately – an audience that is difficult (if not impossible) to reach by traditional communication means.

These innovations in (and of) the methods of communication have opened the door to multiple issues, such as the impact of digital communication on the freedom of speech as structured in the First Amendment of the U.S. Constitution. As the Supreme Court stated, «whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears».[2] One of those basic principles is that «the Free Speech Clause of the First Amendment constrains governmental actors and protects private actors».[3]

In recent years, this issue has found definite vigor in both U.S. politics and constitutionalism. The events related to possible cyber meddling in President Trump's election in 2016 are well known, as well as the controversy arising from President Trump's own expulsion from Twitter.[4] There is, in addition, the battle against misinformation and fake news, especially related to the Covid-19 pandemic.[5]

In the first two years following Joe Biden's 2020 election to the presidency, two aspects took on relevance about the relationship between freedom of speech and digital space. First, it will be highlighted that President Biden's view on § 230 of the Communication Decency Act of 1996[6] is one of continuity rather than discontinuity with former President Trump's views. Second, the paper will consider how conservatives, out of power for the last two years at the federal level,[7] have sought at the state level to regulate digital platforms.

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the Colonies and States Before the Adoption of the Constitution, Boston, 1833; J. Bagnell Bury, *A History of Freedom of Thought*, Oxford, 1913.

[2] *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

[3] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

[4] On November 19, 2022, Elon Musk, who recently acquired ownership of the social media Twitter, launched an online poll whose subject is voting on whether Donald Trump should be readmitted to the platform. On November 20, 2022, after a 24-hour online consultation on Musk's page in which some 15 million users expressed their opinions, Elon Musk tweeted «The people have spoken. Trump will be reinstated. Vox Populi, Vox Dei».

[5] L. Gielow Jacobs, *Freedom of Speech and Regulation of Fake News*, in 70 *The American J. of Comp. L.* i278 (2022).

[6] 47 U.S.C.

[7] The Republicans recently won a slim majority in the House of Representatives during the November 2022 midterms. On the date of December 4, 2022, Democrats retain control of the Senate; in the House of Representatives, where the majority stands at 218 seats, the Republican Party instead controls 221 and thus has obtained a slim majority in a victory that will fall short of their hopes of a 'red wave' but thwart

This paper intends to focus on these aspects. § 2 outlines an overview of the most important doctrines on the First Amendment, with specific regard to the distinction between 'public forum doctrines' and 'government speech'. In §§ 3 and 4, emphasis will be given to the state of the art regarding the place of digital space within forum analysis, also supplying a summary of the First Amendment cases rendered with reference to digital platforms. § 5 will analyze Biden's view on the quasi-constitutional statute represented by § 230 of the Communications Decency Act of 1996. Finally, § 6 will consider the state-level regulation of digital platforms, for the past two years the only level of government where Republicans have been able to act in opposition to the federal government.

2. First Amendment: From Physical to Virtual Space, Between Public Fora and Government Speech

To understand the actual scope of the freedom of speech guaranteed by the First Amendment, it is important to trace its perimeter of constitutional protection first. This operation is anything but metaphorical: to be constitutionally lawful, the test to be passed for a limitation on free speech requires analyzing (physically) the place where free speech is exercised.

To assess the constitutionality of a limitation on free speech by legislation, a court must first identify the place where that freedom would like to be enjoyed. The U.S. constitutional system identifies three main categories in this 'forum analysis'.

First, there may be traditional 'public fora' such as public streets, parks, or squares. In these places, public power has the lowest chance of restricting the freedom of speech referred to in the First Amendment: the extent of the constitutional guarantee finds its greatest breadth here. The contours of public fora as legal concepts emerged clearly in the 1970s, where the Supreme Court expressly ruled that any restriction on free speech in such contexts must be «carefully scrutinized».[8]

Second, there are 'non-public fora', including, for example, a military base or an airport.[9] In these cases, the public power instead sees its ability to (authoritatively) control private conduct amplified, legitimately restricting individual freedoms if in conflict with a different (public) interest that is equally constitutionally protected. There is room here for an extrinsic review operated on the exercise of freedom of speech, that is inherent in the spatial diffusion of the communicative message.

Finally, the 'limited and designated fora' are considered. In a middle position between the first two, they are a hybrid category consisting of the places created for targeted government actions and in which it would like to guarantee the maximum extent of freedom of speech to some

President Joe Biden's domestic agenda and will likely subject his White House to relentless investigations.

[8] *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[9] *Greer v. Spock*, 424 U.S. 828 (1976); *Int'l Soc'y for Krishna Consciousness, Inv. v. Lee*, 505 U.S. 672 (1992).

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individuals, while denying it to others.[10] A designated forum may arise if the government grants certain public property for a specific event, although such a space is not itself a public forum (such as a lecture hall at a public university). There is also a subcategory of the previous type, i.e., the limited forum, which exists when the space is reserved for discussion by specific groups of people, that is, for the discussion of specific predetermined topics.[11]

The three types of fora correspond to different scrutiny by the courts as to whether public authorities can restrict the freedom of speech of private citizens.

In a public forum, judicial scrutiny will have to be very strict when ascertaining whether any limitation on the exercise of constitutional freedom is illegitimate «this … means the regulation must be content neutral and only address the time, place, and manner of the expressive speech, leaving open ample alternative avenues for expression. If the regulation is not content neutral … the government will need to prove that the regulation is narrowly tailored to accomplish a compelling government interest».[12]

In a non-public forum, a court will have to consider whether any restrictions represent a reasonable limitation on expressive activity in the case, but without leading to overt discrimination based on possible different viewpoints.[13]

Finally, in a limited and designated forum the judiciary will be called upon to verify whether limits to freedom of expression are reasonable in view of the purposes for which the communicative space is intended. Even in this case, the guarantee of neutrality is necessary because of the possible different points of view.[14]

The forum designation test recalls all those spaces within which First Amendment protection operates: «[w]hen a speaker speaks in a space deemed a forum for First Amendment purposes, the government may not exercise viewpoint discrimination through censorship or exclusion».[15]

However, there is an important exception to the operation of the protection guaranteed by the First Amendment, i.e., the so-called government speech. The constitutional text guarantees protection from every possible restriction of public power on the exercise of free speech by

[10] *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788 (1985). See D. Rogers, *Constitutional Law – A Forum by Any Other Name … Would Be Just As Confusing: The Tenth Circuit Dismisses Intent from the Public Forums*, in 4 *Wyoming L. Rev.*, 753 (2004); W. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum–Characteristics of Forum*, in 70 *Alberta L. Rev.* 513 (2011).

[11] *Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

[12] P. Beety, J. Zepcevski, *Technological Transformation of the Public Square: Government Officials Use of Social Media and the First Amendment*, in 47 *Mitchell Hamline L. Rev.* 512 (2021).

[13] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

[14] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

[15] J. Wiener, *Social Media and the Message: Facebook, Forums, and First Amendment Follies*, in 55 *Wake Forest L. Rev.* 223-224 (2020).

private individuals irrespective of the «government's own speech».[16] In other words, «when the government "is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply».[17]

Theredoes not exist, in this sense, a «constitutional right as members of the public to a government audience for their policy views».[18] In what is identified as governmental space used by the public power itself – and where the latter will clearly express (political) viewpoints – the protection guaranteed by the First Amendment does not apply, without unduly restricting constitutional guarantees.

The government speech doctrine was first enucleated, although not fully structured, in *Rust v. Sullivan*,[19] where the Supreme Court ruled that the government could prohibit doctors who receive federal funds for family planning services from discussing abortion with their patients. Subsequently, however, the court ruled differently, stating that «viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker … or instances … in which the government used private speakers to transmit specific information pertaining to its own program».[20]

Therefore, the precise contours of the government speech doctrine were not clearly delineated and became subject to jurisprudential disputes. Justice Souter, in rendering the dissenting opinion in *Johanns v. Livestock* Marketing Association stated how «[t]he government-speech doctrine is relatively new, and correspondingly imprecise».[21]

A series of controversies reaching the Supreme Court well illustrates the existing tensions between forum analysis and government speech doctrine. In *Pleasant Grove v. Summum*,[22] the court ruled that a city authority can deny the placement of a religious monument in a public park, since such a monument might represent a form of government speech. In *Walker v. Texas Division, Sons of Confederate Veterans*,[23] by contrast, it ruled that the state of Texas could prevent the issuance of a special car license plate to a group of people whose intent was to place an image of the confederate flag on that plate.

This latter case is emblematic of the tension between 'forum doctrine' and 'government speech'. On one side, there are the plaintiffs, who assume that their freedom of speech may be violated by denying he issuance of a special license plate they themselves devised. In their opinion, the physical space of the license plate is understood as a designated forum. On the other side, there is public authority, according to which a license plate might be recognized as an expression of government speech; thus, a space immune from the full guarantees brought by the First Amendment. The Supreme

[16] *Pleasant Grove City, supra*, p. 467.
[17] J. Wiener, *Social Media, supra*, 221-222. See *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015).
[18] *Minn. State Bd. For Cmty. Colleges v. Knight*, 465 U.S. 271 (1984).
[19] 500 U.S. 173 (1991).
[20] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).
[21] 544 U.S. 550 (2005).
[22] 555 U.S. 460 (2009).
[23] 133 S. Ct. 2239 (2015).

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Court ruled in favor of the second thesis, using three arguments: (1) license plates have historically been used by States to communicate certain messages linked back to the states themselves; (2) they are identified by public opinion with the state; and (3) each state holds control over whether a message can be placed on special license plates, being fully entitled to deny permission.

It is evident how the tension between the doctrines at stake emerges where a certain medium represents the one through which government and private speech may confront each other. For all that has been said so far, this difference finds considerable repercussion with reference to the application or non-application of the protections guaranteed by the First Amendment to the exercise of free speech. This articulation is also of interest and has full repercussions for digital communication, having first to analyze what the intervening relationships between the Internet and the First Amendment may be.

3. A 'Modern Public Square': The Supreme Court's Openness to the Protection of Constitutionally Guaranteed Freedom of Speech in the Online Era

As mentioned above (§ 2), the Supreme Court has traditionally had to consider the concept of public forum understood as a physical space. In this sense, some scholars have argued that the public forum doctrine cannot be applied to the digital world, since the places it refers to have «immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions».[24]

The interpretive lines developed by more recent case law, however, take a different view. A public forum, it is argued, exists whenever a space has as its primary purpose the free exchange of ideas.[25] It might be understood in a sense that is not necessarily geographical, but also metaphysical.[26] And this, moreover, is true regardless of which party owns the space, whether public or private.[27]

It is important to note that, prior to 2010, no constitutional standard was given to define the possibility of regulating the exercise of free speech in the digital medium.[28] The earliest cases on the subject referred to instances of government websites, where the possible digital public-private interaction was almost nil. From the outset, a contrast arose between the identification of a non-public forum, on the one hand, and the idea that we

[24] D.S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, in *Brigham Young University L. Rev.* 1981 (2010). See the dating approach of the Supreme Court in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).
[25] *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788 (1985).
[26] *Rosenberg v. Rector*, *supra*.
[27] *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cornelius v. NAACP*, *supra*; *Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).
[28] A. Ardito, *Social Media, Administrative Agencies, and the First Amendment*, in 65 *Administration L. Rev.* 301 (2013); D.S. Ardia, *Government Speech*, *supra*, 2019.

were instead in the presence of government speech, on the other.[29] In *Page v. Lexington County School District One*,[30] for example, the theoretical distinction between interactive websites (recognized as non-public fora) and static websites (where government speech finds prominence instead) comes to the fore.

The Supreme Court's arrest in *Packingham v. North Carolina* was crucial to the evolution of the subject.[31] The court determined how an act issued by a person holding public power and aimed at restricting access to social media constituted a violation of the exercise of free speech protected by the First Amendment. The decision originated from scrutiny of a North Carolina state legislative act restricting access to social media for individuals convicted of sexual abuse where these platforms were freely accessible to individuals under the age of 18. In reversing the decision rendered by the state Supreme Court,[32] the federal Supreme Court came to regard the regulatory act under consideration as one conflicting with the constitutional mandate.

Social media have been described as modern public fora: «[b]y prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge».[33] In writing the opinion of the court, Justice Kennedy explicitly described cyberspace as the most relevant place for the interchange of ideas, also emphasizing the inherent democratic nature of the digital forum, and social media in particular.[34] Consequently, he warned that the Supreme Court had to be particularly careful before saying that the constitutional text does not provide protection in the digital place.

It should not be overlooked that, within the Supreme Court itself, the formulation of these concepts has been far from peaceful.[35] In dissenting opinion, Justice Alito cautioned that «[c]yberspace is different from the physical world»,[36] thus warning that one should be extremely cautious in creating First Amendment precedents applicable to the digital world.

The decision rendered in *Packingham* has attracted much attention among legal practitioners, especially for its reference to the concept of the 'modern public square'. It is interesting, therefore, to analyze how the lower courts have followed up on this precedent to better understand whether *Packingham* represents a constitutional leading case.

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[29] See *Putnam Pit., Inc. v. City of Cookeville*, 76 F. App'x 607 (6th Cir., 2003), where a local government website has been identified as a non-public forum; similarly, *Cahill v. Texas Workforce Commission*, 198 F. Supp. 2d 832 (E.D. Tex., 2002).
[30] 531 F.3d 275 (4th Cir., 2008).
[31] 137 S. Ct. 1730 (2017).
[32] *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App., 2013).
[33] *Id.*, 1737.
[34] See also *Reno v. ACLU*, 521 U.S. 844 (1997).
[35] It is still a 5-4 decision.
[36] *State v. Packingham*, *supra*, 1744.

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4. Free Speech in Digital Places: The Constitutional Interpretation of the Lower Courts

Considering the guidance expressed in *Walker v. Texas Division*, on the one hand, and the dictum expressed in *Packingham*, on the other, U.S. courts initially manifested a wandering tendency in their interpretive guidelines on the exercise of free speech to be protected in the digital place. The most controversial case is quite specific: it refers to the case in which a person, in his capacity as a government agent, implements acts of deletion and blocking on a digital platform.

The first example in this regard is brought by the «Davison saga».[37] Specifically, these are two disputes in which a private individual, Brian Davison, sued in Virginia against several county officials whose responsibility, according to the plaintiff, was to block him on Facebook, thereby restricting the exercise of his constitutionally protected freedom of speech.

In the first dispute,[38] the plaintiff challenged the act of blocking and deleting that he had allegedly suffered on the official Facebook page of the Attorney for the Commonwealth for Loudon County. The operation was carried out after the plaintiff had made a long series of comments in objection to the public authority's actions. The court that heard the case determined that the Facebook page in question constituted a limited public forum; consequently, it held that the restrictions were compatible with the purposes of the digital place.

The fate of the second (later) dispute was different,[39] in which the plaintiff challenged the banning activity he had suffered on the Facebook page 'Chair Phyllis J. Randall', i.e., the page of the chairperson of the county's local governing body. Given that the Facebook page in question was being used as a tool of governance, the court first determined that the owner of the page had voluntarily intended to devote this space to one in which dialogue between government authority and citizens is a constant activity. In other words, it acted «as a governmental designation of a place for public communication».[40]

The virtual space of a social media site has been compared to a public forum with reference to the interactive part of the page: «Randall's posts, comments, and the curated content on her page amounted to government speech. However, the … interactive aspects of the account resembled forums and proceeded with forum analysis».[41]

A second example is *Morgan v. Bevin*,[42] where the blocking activity suffered by two users on the Kentucky governor's Facebook and Twitter pages was challenged under the principles inferable from the public forum doctrine. The reasoning followed by the Court, here, is divergent from that

[37] J. Wiener, *Social Media*, *supra*, 229.
[38] *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va., 2017).
[39] *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va., 2017), then appealed and decided in *Davison v. Randall*, 912 F.3d 666 (4th Cir., 2019).
[40] *Id.*, 716.
[41] *Id.*, 687.
[42] 298 F. Supp. 3d 1003 (E.D. Ky., 2018).

followed in the second Davison saga case, identifying as government speech the activity put in place on the governor's Facebook and Twitter pages: consequently, the full constitutional protection of free speech as guaranteed by the First Amendment would not operate.

First, the court ruled that Facebook and Twitter were privately owned websites, just as personal accounts created there by a user are «privately owned channels of communication and are not converted to public property by the use of a public official».[43] Second, the governor's personal accounts were created with the intention of communicating his political vision and activities, but they cannot be traced back to the «open forum for general discussion of all issues by the public».[44]

The best-known example about free speech in the digital space, however, is the *Knight First Amendment Institute at Columbia University v. Trump*, in which former President Donald Trump was held accountable for the act of blocking several dissenting users from content posted on his Twitter account.

The District Court of New York, in the first instance,[45] held that the former president's Twitter account can be considered a public forum, given that a space is provided in which any user can constantly interact with a public official. Accordingly, for the purposes of the constitutional standard for the protection of free speech, «[t]he viewpoint-based exclusion of the individual plaintiffs from that designated public forum [was] proscribed by the First Amendment and [could not] be justified by the President's personal First Amendment interests».[46] The Supreme Court claimed that the account @realDonaldTrump has been used more than once to appoint government officials and express presidential policies, in addition to being subject to the dictates of the Presidential Records Act.[47] For all these reasons, the District Court came to assess the account as governmental rather than private.

The decision was later upheld (with similar reasoning) by the Second Circuit:[48] «the First Amendment does not allow public officials using a social media account for official purposes to exclude people form an otherwise-open online dialogue based on the expression of disagreeable views».[49]

The *ratio decidendi* of the *Knight* decision was immediately followed by the subsequent ruling rendered in *Price v. City of New York*.[50] This is, again, an action brought by an individual who was the recipient of a blocking act on several Twitter accounts traceable to government agents

[43] *Id.*, 1011.
[44] *Id.*, 1006.
[45] 302 F. Supp. 3d 541 (S.D. N.Y., 2018).
[46] *Id.*, 580.
[47] Presidential Records Act (PRA) of 1978, 44 U.S.C. ß2201-2209: regulatory act that, among other things, establishes the public ownership of all presidential documents, to which digital content created on the digital space of a social network is therefore also traced.
[48] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Circ., 2019).
[49] *Id.*, 230.
[50] No. 15 Civ. 5871 (KPF), 2018 WL 3117507 (D.D. N.Y., June 25, 2018).

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(in this case, the page of a section of the NYPD, a page run by the New York City Mayor's Office aimed at combating domestic violence, as well as a page of the Commissioner of the Mayor's Office). Again, the court rejected the argument that there was government speech on these pages, instead reiterating the analysis proposed in the Knight case: given that the account is not publicly owned, the interactive space on it that exists has been evaluated as a public forum where the constitutional guarantees of the First Amendment operate and where, consequently, viewpoint discrimination is not legitimate.

Beginning with the *Packingham* case and the subsequent jurisprudential interpretations that qualified the virtual space as a public forum, the last few years have witnessed a veritable wave of entrenched litigation in the lower courts related to the possible (illegitimate) constraint on the exercise of free speech because of a blocking act on a social media platform. The prevailing interpretation was to sanction the (constitutional) illegality of preventing access to an account traceable to a government agent, an act that would constitute undue viewpoint discrimination. In this vein, I can mention the reasoning enucleated in the cases *One Wisconsin Now v. Kremer*,[51] *McKercher v. Morrison*,[52] *Robinson v. Hunt County*,[53] *Windom v. Harshbarger*,[54] *Garnier v. Poway Unified School District*,[55] *Wagschal v. Skoufis*.[56]

As we have seen so far, the act of translating the constitutional guarantees traditionally provided to freedom of speech to virtual space is a delicate and controversial issue, and it is certainly topical in the U.S. legal system. Multiple factors assume relevance in terms of judicial constitutional interpretation: first, whether the virtual world is brought back to forum analysis or government speech; second, whether digital interaction platforms are used for private purposes or related to the exercise of public office.

As for the latter, it is important to remember that the Supreme Court, in April 2021, erased the *Knight* case.[57] The decision was remanded to the lower court with an order to divest the dispute because it was deemed moot, given that Donald Trump has, in the meantime, returned to being a private citizen. A comment was briefly provided by Justice Thomas, who stressed the «legal difficulty that surrounds digital platforms–namely, that applying old doctrines to new digital platforms is rarely straightforward. Respondents have a point, for example, that some aspects of Mr. Trump's account resemble a constitutionally protected public forum. But it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it». Beyond the value of the decision itself, his comment seems to confirm the trend in the jurisprudence referred to above, namely,

[51] 354 F. Supp. 3d 940 (W.D. Wis., 2019).
[52] No. 18CV1054JM(BLM), 2019 WL 1098935 (D.D. Cal., Mar. 8, 2019).
[53] 921 F.3d 440 (5th Cir., 2019).
[54] 396 F. Supp. 3d 675 (N.D. W. Va., 2019).
[55] No. 17-CV-2215-W JLB, 2019 WL 4736208 (S.D. Cal., Sept. 26, 2019).
[56] 442 F. Supp. 3d 612 (D.D. N.Y., 2020).
[57] 593 U.S. ____ 2021.

the tendency to find a certain kind of public forum in social media used for public purposes.

There seems to be, then, a consensus to the idea that an account used by a government agent may be subject to the rules proper to forum analysis, if only for that portion specifically devoted to interaction with other parties. The users will thus not be able to see the exercise of their freedom of speech restricted (usually, in a dissenting sense from the content offered on the social media in question) through acts depriving them of the ability to express themselves digitally. According to the constitutional interpretation becoming more and more deep-rooted, there would be a direct violation of the constitutional letter set forth in the First Amendment.

5. The Role Played by 47 U.S.C. § 230 in Shaping Free Speech

It is now necessary to draw attention to the role played in digital free speech by the discipline contained in the § 230 of the Communication Decency Act of 1996.

The First Amendment, as noted, prohibits the government from restricting most forms of speech. Consequently, an act that required companies to moderate contents based on the expressed political viewpoint would likely be struck down as unconstitutional. At the same time, private companies can create specific (private) rules to restrict online speech (for example, with bans for hate speech), and as private entities they will not have to juggle the bottlenecks of protection guaranteed by the First Amendment.

This aspect is distinct from, albeit connected to, the following issue, i.e. whether social media platforms should be liable for what their users post in the exercise of their freedom of speech. § 230 of the Communication Decency Act precisely provides special protection to internet service providers from liability for content created by others. The core purpose of § 230 is «to promote the continued development of the internet and other interactive computer services»,[58] and «to preserve the vibrant and competitive free market the presently exist for the internet and other interactive computer services, unfettered by Federal or State regulation».[59]

The shield offered to internet intermediaries from liability for hosting or otherwise facilitating the transmission of false statements responds specifically to a court ruling that had held an online service provider liable for defamatory content posted by a user.[60]

Section (c)(1) of the § 230 expressly states that «No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider». Section (c)(2), instead, provides that internet providers are not liable for «any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

[58] 47 U.S.C. § 230 (b)(1).
[59] 47 U.S.C. § 230 (b)(2).
[60] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

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lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to [the above mentioned] material».

Section (c)(1) of § 230 hence protects both internet service providers and social media companies, as well as other online services that publish third-party content. It thus recognizes that digital platform exposure to civil liability for third-party posts can act as a tool to censor or chill speech that might enjoy protections at the margins.

Congress enacted § 230 to encourage «the free flow of information over the internet».[61] This approach was later reinforced by the interpretation in *Packingham*, where it has been recognized that internet and social media have become more important places for public communication than physical ones where citizens gathered.

In those digital places, the First Amendment puts the government in the role of public trustee, granting access to all speakers, and preventing viewpoint discrimination.[62] At the same time, with the enactment of § 230 the Congress ascribes a similar onus to internet platforms but guaranteeing them the opportunity to engage in viewpoint discrimination among the speakers they host.

Courts have interpreted the § 230 to afford a generous protection to entities that qualify as internet providers and that do not qualify as content providers or creators. The *Zeran v. Am. Online* case,[63] which has come to be described as «probably the most important court ruling in Internet law»,[64] helped to shield computer service providers from a broad range of claims based on speech content. Other courts have stated that § 230 protects not only internet providers but also computer service users (such as persons who forward or repost content so long as they did not exercise control over the content) and social media platforms (for the user content they host).[65]

The language used in § 230 is somewhat problematic in that it seems to consent to what is impermissible under the First Amendment: «Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them».[66] This is one of the reasons why President Biden agrees in many ways with former President Trump that the statute ought to be reformed, even if starting from completely different assumptions.

Both Republicans and Democrats agree on the reform of § 230; yet classic liberals are concerned that the elimination of the immunity could erode the exchange in the marketplace of ideas. The bipartisan critique is

[61] L. Gielow Jacobs, *Freedom of Speech and Regulation of Fake News*, *supra*, i301.
[62] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).
[63] 129 F.3d 327 (4th Cir. 1997).
[64] E. Goldman, *The Ten Most Important Section 230 Rulings*, in 20 *Tulane J. Tech. & Intell. Prop.* 3 (2017).
[65] See *Doe v. MySpace, Inc.*, 528 F.3d 413 (2008).
[66] P. Hamburger, *The Constitution Can Crack Section 230*, in *Wall Street J.* (January 29, 2021), available at https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851 (last accessed November 19, 2022).

that Big Tech companies have effectively enjoyed a statutory immunity that has permitted them to behave irresponsibility by allowing third-party posts without any monitoring.

In April 2018, Donald Trump signed into law the Allow State and Victims to Fight Online Sex Trafficking Act (FOSTA),[67] i.e., a bill that purports to fight sex trafficking by reducing legal protection for online platforms. The Act carves out an exception to § 230, stating that the latter does not apply to civil and criminal charges of sex trafficking or to conduct that promotes or facilitates prostitution. In May 2020, Trump released an executive order targeting § 230 and social media,[68] obliging regulators to redefine § 230 more narrowly. In bypassing the authority of Congress and the courts, it pushed agencies to collect complaints of political bias that could justify revoking sites' legal protection.

President Joe Biden has not advanced a specific § 230 agenda since his election, but in January 2020 he proposed to revoke it completely.

In the first two years of Biden's presidential term, Democrats have largely been concerned with getting platforms to remove more content because of the harms associated with the hate speech, terrorism, harassment, and Covid-19 disinformation. Into this perspective fits the creation, announced on April 27, 2022, of a fiercely contested 'Disinformation Governance Board within the Department of Homeland Security, whose function is to protect national security by disseminating guidance to DHS agencies on combating misinformation, even online.

Many proposals are pending in Congress to modify the scope of § 230 immunity for internet service providers, but none has yet been enacted into law.[69]

The bipartisan push to reform § 230 appears, though, to be at odds with the qualified constitutional immunity extended to defamation defendants in cases brought by public officials and public figures under the *New York Co. v. Sullivan*[70] line of cases. Those cases, which require a heightened showing of 'actual malice',[71] also confer an immunity to liability on the recognition that free speech requires 'breathing space' and that false and erroneous statements are always likely to be made during any discussion.[72] As observed, «[t]he question is whether the threat of removing immunity protections or other benefits under laws like Section

[67] Public Law No: 115-164 (04/11/2018).
[68] Exec. Order No. 13,925 §2, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020). That order mandated that «immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech but use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints».
[69] Among the main bills presented in past years there deserves to be mentioned the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT), which would make sites demonstrate that they are fighting child sex abuse.
[70] 376 U.S. 254, 270-71 (1964); *Curtis Publ'g Co. v. Butts*, 389 U.S. 889 (1967); *Associated Press v. Walker*, 398 U.S. 28 (1967); *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974).
[71] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).
[72] *Brown v. Hartlage*, 456 U.S. 45 (1982).

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230 is coercive to the point of "abridging the freedom of speech, or of the press" as applied to these companies».[73]

The challenge is then to find a suitable role for the government that does not itself threaten free speech, since «protecting free speech can be viewed as compelled speech».[74] The focus for a possible normative intervention should be the return to the original vision of social media companies and internet providers as being content-neutral. In fact, internet as a space for individual exploration and invention should not be thwarted by the opposing values of others.[75]

Internet providers and social media companies clearly play a significant role in the exercise of free speech in the digital medium, but they are private actors, and their private status hits the 'blind spot' in the First Amendment protection. However, a government intervention in the regulation of what it is or is not permissible to 'publish' on digital platforms risks falling into the trap of the 'compelled speech' just indicated, as well as exposing itself to the risk of being a solution dictated by political-content preferences.

A recent bill seems to fit perfectly into this perspective of recurrent political-based proposal for modifications: House Committee on Oversight and Reform Member James Corner, House Committee on Energy and Commerce Ranking Member Cathy McMorris Rodgers, and House Committee on the Judiciary Ranking Member Jim Jordan introduced the Protecting Speech from Government Interference Act on September 1, 2022.[76] The bill aims to prohibit Biden administration officials and federal bureaucrats from using their authority, influence, or resources (contracting, grantmaking, rulemaking, licensing, permitting, investigatory or enforcement actions) to promote censorship of lawful speech or advocate that a third party or private entity (such as social media companies) censor speech. As much as it may seem on the merits to be a bill capable of bringing proper attention to the protection of free speech, it is worth noting that the main justifications brought by the proponents for its presentation refer to an assumed narrative referring to the will of the Biden's administration to 'silence ordinary Americans'.

An important evolution of the topic could be represented by the *Gonzalez v. Google LLC* and *Twitter v. Taamneh* pending cases before the Supreme Court, concerning which, on October 3, 2022, the court granted certiorari.

In particular, the *Gonzalez* case centers on a young American law student, Nohemi Gonzalez, who was killed in a 2015 ISIS attack in Paris. Her family sued Google, claiming that YouTube, which is owned by Google, violated the Anti-Terrorism Act[77] when its algorithm recommended ISIS videos to other users.

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[73] J. Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, in 45 *Harvard J. of Law & Public Policy* 622 (2022).
[74] *Id.*, 631. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006).
[75] See J. Stuart Mill, *On Liberty (1859)*, Kitchener, 2001.
[76] H.R. 8752.
[77] 18 U.S.C. § 2333.

The issue was whether § 230 immunizes interactive computer services when their algorithms make targeted recommendations of information provided by another. Petitioners' allegations included that Google was liable because YouTube (owned by Google) allowed ISIS to post videos and other content to communicate the terrorist group's message, to radicalize new recruits, and to generally further its mission. They allege that, despite Google's knowledge of ISIS videos on YouTube and its ability to block and suspend ISIS-related accounts, Google did not make substantial or sustained efforts to remove ISIS-related content.

The District Court granted Google's motion to dismiss based on § 230 immunity. The Ninth Circuit concluded that § 230 immunity applies to content recommendations so long as the method for making recommendations treated harmful third-party content equally to other third-party content. The essence of plaintiffs' claim was that Google did not do enough to block or remove content, which it determined were core functions of publishing; thus, the claims necessarily sought to treat Google as a publisher.

The District Court rejected claims that the algorithms recommending content meant that the content was 'created' or 'developed' by Google, applying a test that looks to whether a website 'materially contributes' to the unlawfulness of the conduct. The Ninth Circuit hence concluded that so long as the algorithms do not treat ISIS-created content differently than other third-party content, they were merely 'neutral tools' to facilitate communication and content of others.

In 2020, the Supreme Court dismissed the petitioners who asked for clarification on the parameters of § 230 in the case *Malwarebytes Inc. v. Enigma Software Group USA, LLC*.[78] In a statement accompanying the denial of the petition for certiorari, Justice Thomas wrote that «in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by internet platforms. … [I]n the 24 years since its adoption, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world».

The pending cases, therefore, could pose a golden opportunity for the Supreme Court to clarify some of the issues that appear to be of most current relevance to online free speech, with special reference to what the § 230 of the Communication Decency Act of 1996 shield covers and what it does not.

6. First Amendment, Social Media Platforms, Free Speech, and the States

The topics highlighted in the previous paragraph are reflected in the relationship between federation and state. The issue, again, takes on a highly politicized connotation. Out of power at the federal level for the first

[78] 592 U. S. ____ 2020.

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two years of the Biden administration, conservatives have sought at the state level to regulate digital platforms.

Many U.S. states are considering enacting laws that regulate social media platforms. To date, two of them (Texas and Florida) have passed such laws, that immediately found strong opposition, with conflicting judicial outcomes, on the alleged violation of the First Amendment.

6.1 Texas H.B. 20 'constitutionality'

Texas H.B. 20 is an anti-deplatforming law enacted on September 9, 2021. It prohibits Twitter, Facebook, and other big social media platforms from censoring a user, a users' expression, or a users' ability to receive the expression of another person based on the speaker's viewpoint, whether expressed on or off the site, which covers nearly all common content moderation practices. The bill also allows Texas residents or the state Attorney General to sue platforms for any kind of negative treatment to a user or a post, including taking down and down-ranking posts, suspending, shadowing, or cancelling accounts.

Two sections of H.B. 20 are particularly relevant. First, section 7 addresses viewpoint-based censorship of users' posts: «A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state». Second, section 2 imposes certain disclosure and operational requirements on the social media platforms: to disclose how they moderate and promote content and publish in an acceptable use policy, to publish a biannual transparency report, and to maintain a complaint-and-appeal system for their users.

The Texas District Court for the Western District of Texas issued a preliminary injunction on December 1, 2021,[79] and held that section 7 is «facially unconstitutional». Starting from the premise that social media platforms are not common carriers, it then concluded that platforms engage in some level of editorial discretion by managing and arranging content, and viewpoint-based censorship is part of that protected editorial discretion clearly stated in *Miami Herald Publishing Co. v. Tornillo*.[80] The court then also held that section 2 is unconstitutional since it will chill the social media platforms' speech by disincentivizing viewpoint-based censorship. Finally, the court found that H.B. 20 discriminates based on content and speaker, because it permits censorship of some content and only applies to large social media platforms.

On May 11, 2022, the Fifth Circuit reviewed the District Court's preliminary injunction for abuse of discretion.[81] The Court of Appeals posed its reasoning on the following assumptions: (a) section 7 of HB 20 does not chill speech, it chills censorship; (b) the First Amendment's text and history offers no support for the platforms' right to censor; (c) section

[79] *NetChoice, LLC v. Paxton, Attorney General of Texas*, No. 1:21-CV-840-RP, 2021.
[80] 418 U.S. 241 (1974).
[81] *NetChoice, LLC d v. Paxton, Attorney General of Texas*, No. 21-51178 (5th Cir. 2022).

7 of HB 20 does not regulate the platforms' speech, it protects other people's speech and regulate the platforms' conduct; (d) 47 U.S.C. § 230 reflects Congress's judgement that the platforms are not speaking when they host other people's speech; (e) the common carrier doctrine vests Texas legislature with the power to prevent the platforms from discriminating against Texas users.

Among these, it is pivotal to consider the reference to the Communication Decency Act of 1996. The Fifth Circuit stated that § 230 reflects Congress's judgement that the platforms do not operate like traditional publishers and are not 'speaking' when they host user-submitted content, consequently undercutting the arguments for holding that platforms' censorship of users is protected speech.

A specific passage of the reasoning of the court deserves to be highlighted: «Section 230 … instructs courts not to treat the Platforms as "the publisher or speaker" of the user-submitted content they host … And those are the exact two categories the Platforms invoke to support their First Amendment argument. So if § 230 (c)(1) is constitutional, how can a court recognize the Platforms as First-Amendment-protected speakers or publishers of the content they host?».[82]

Here, the court suggests that the platform's position seems to be a shift from their traditional claims that they are simple conduits for user speech and that whatever might look like editorial control is in fact the blind operation of neutral tools: here, they claim to be publishers.

To this effect, the majority of the court states that § 230 (c)(2) only considers the removal of limited categories of content[83] but it says nothing about viewpoint-based censorship: it clarifies that censoring limited categories of content does not remove the immunity conferred by § 230 (c)(1).

This does not seem to be a fair point. Contrary to the contention about inconsistency, Congress in adopting § 230 never factually determined that the platforms are not 'publishers'.

There seems to exist a false dichotomy forced on the platforms, classified for all purposes as either a publisher or a mere conduit. They could be both at the same time, but the protection afforded to them is differentiated according to the normative source that establishes the protection discipline. One aspect is that of liability under § 230, another is that of supposed 'misinformation', which protection does not fall within the scope of applicability of the former. To solve this 'false problem', it would first be necessary to define what internet providers and, in particular, social media platforms are: whether entities with editorial capacity – to which the principles of discretion consequential to Miami Herald will apply,[84] which is the most accepted approach at the moment among the courts, and with which I personally agree –, whether common carriers – thus not entitled to discriminate against the users – or whether other.

[82] *Id.*, 40.
[83] «Obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material».
[84] *Miami Herald Publishing Co. v. Tornillo*, *supra.*

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There is a second issue that is worth noting in this decision rendered by the Fifth Circuit, which points to the constitutional-compatibility problem of section 7 of H.B. 20. The section clearly goes beyond the simple promotion of the widespread dissemination of information from a multiplicity of sources, as stated in *Turner Broad. Sys., Inc. v. FCC*[85] with reference to the rationale test for the operable level of scrutiny.[86]

The Texas statute prohibits platform censorship based on the viewpoint, so it does not seem like a content- and viewpoint-neutral law.[87] Hence, it directly interferes with the editorial choices the platforms make, which is a First Amendment expression as both a mean and an end.[88]

The Supreme Court has recognized that a state may not burden the speech of others to tilt public debate in a preferred direction,[89] and that there is no interest in restricting the speech of some elements of the society to enhance the relative voice of others as the First Amendment «was designed to secure the widest possible dissemination of information from diverse and antagonistic sources».[90]

The scope of the conduct prohibited by section 7 is very broad, but if the goal is only to make more speech available, there is no reason that the platforms should have to publish 'everything'. When the platforms elevate certain third-party content above other, it does mean that they are engaging in activity to which First Amendment protection attaches.

Following the constitutionality of the Texas law, almost any decision the social platforms make is going to be perceived as a response to someone's viewpoint, and this will lead to a flood of lawsuits. At the same time, some platforms may stop moderating and allow abusive speech back on their sites, and others may take down even more speech to try to defeat the impression that they are being biased.

The second useful point touched by the court is the application to platforms of the 'common carrier doctrine', used to regulate monopoly infrastructure such as post offices, telephone companies, trains, and roads, which prevents discrimination against the users.[91]

This is not a completely unexplored argument; suffice it to refer to the reasoning of Justice Thomas: «there is clear historical precedent for regulating transportation and communications networks in a similar

[85] 520 U.S. 180 (1997).
[86] Referencing to cable television, the Supreme Court referred to three substantial governmental interests for the judicial scrutiny: 1) preserving the benefits of free, over-the-air local broadcasting television; 2) promoting the widespread dissemination of information from a multiplicity of sources, and 3) promoting fair competition in the market for television programming. See also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).
[87] *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); accord *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022).
[88] *Miami Herald Publishing Co. v. Tornillo*, *supra*.
[89] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).
[90] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).
[91] *Fitchburg R.R. Co. v. Gage*, 78 Mass. (12 Gray) 393 (1859); *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188 (1869); *Munn v. Illinois*, 94 U.S. 113 (1876); *State ex rel. Webster v. Nebraska Telephone Co.*, 22 N.W. 237 (1885); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Walls v. Strickland*, 93 S.E. 857 (N.C. 1917).

manner as traditional common carriers».[92] Justice Thomas noted that these companies had supplanted telephone and mail companies and the support given to social media companies was used as a basis for regulation: «Though digital instead of physical, they are at bottom communication networks, and they 'carry' information from one user to another».[93]

Regulating social media companies as if they were telephone companies seem feasible; yet it would lead to some further considerations. It would allow the government to impose public forum protection from censorship. It would also be a broader application of § 230, which is modeled on the treatments of telephone companies or postal carriers, that do not exercise control over communications. In so doing, internet providers could continue to delete threats of actual harm (such as criminal conduct or fraudulent practices), but also «the censorship of the amorphous categories of "misinformation" or "disinformation" would be impermissible».[94]

The main issue for the resolution of this topic is not in starting by comprehending internet providers and social media platforms as common carriers and then applying to them a preferred constitutional doctrine. The main issue seems to lie in the fact that § 230 allows for moderation of the content with a standard which is related (only) to the concepts of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, but not on viewpoint. Therefore, it probably urges a § 230 actualization to social media platforms, that appears to be welcome bipartisan.[95]

Following the Fifth Circuit ruling, in a 5-4 decision issued on May 31, 2022, the Supreme Court vacated the stay imposed by the Court of Appeals, thereby reimposing the preliminary injunction against H.B. 20 pending the full merits appeal.[96] The majority did not issue a formal decision, but Justice Alito authored a dissenting opinion, joined by Justices Thomas and Gorsuch. Justice Alito cautioned that he had «not formed a definitive view on the novel legal questions that arise from» H.B. 20 but argued that the plaintiff had not shown a substantial likelihood of success on the merits that warranted vacating the stay imposed by the Fifth Circuit because the applicable law was 'novel' in nature.

These developments have several takeaways. The Supreme Court's decision relieves social media platforms of the obligation to comply with

[92] *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220, 1221 (2021).
[93] *Id.*, 1223-1224.
[94] J. Turley, *Harm and Hegemony*, *supra*, 644. See *Turner Broad. Sys., Inc. v. FCC* (1994), *supra*, 636.
[95] Some of the proposals focus on unlawful content and leave the rest of 'objectionable' content to people using free speech: see the Stop the Censorship Act, H.R. 4027, 116th Cong. (2020). Other proposals state that the moderation would be limited to situation where «(I) the action is taken in a viewpoint-neutral manner; (II) the restriction limits only the time, place, or manner in which the material is available; and (III) there is a compelling reason for restricting that access or availability»: see the Online Freedom and Viewpoint Diversity Act (OFVDA), S. 4534, 116th Cong. (2020), proposed to change «otherwise objectionable» material with «promoting self-harm, promoting terrorism, or unlawful» material.
[96] *NetChoice, LLC etc. v. Ken Paxton, Attorney General of Texas*, No. 21A720, 596 U.S. ____ (2022).

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H.B. 20 in Texas pending the full appeal on the merits by the Fifth Circuit. But, because the Fifth Circuit's decision only addressed whether the injunction should be stayed pending a full appeal, the Fifth Circuit has yet to decide the legality of the injunction against H.B. 20 on the merits. Although the Supreme Court decision strongly signals the court's stance, decisions on the constitutionality of H.B. 20 may be taken to the Supreme Court following a full trial on the merits.

6.2 Florida S.B. 7072 'unconstitutionality'

On May 24, 2021, Florida enacted S.B. 7072 to combat, in the words of Governor Ron DeSantis, the 'biased silencing' of the conservative's freedom of speech by the Big Tech oligarchs in Silicon Valley.

S.B. 7072's enacted findings are more measured. The act expressly states that private social-media platforms are important in preserving First Amendment protections for all Floridians and argues that they should be treated similarly to common carriers.[97]

The relevant provisions of S.B. 7072 can be divided into three categories. (1) Content-moderation restrictions: a social media platform may not willfully deplatform a candidate for office; may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a candidate; may not censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast (Fla. Stat. § 106.072(2), § 501.2041(2)(h), and § 501.2041(2)(j)).

(2) Disclosure obligations: a social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban (Fla. Stat. § 501.2041(2)(a)).

(3) A user-data requirement: a social media platform must allow a deplatformed user to access or retrieve all the user's information, content, material, and data for at least 60 days (Fla. Stat. § 501.2041(2)(i)).

In June 2021, the U.S. District Court for the Northern District of Florida granted a motion and preliminarily enjoined enforcement of §§ 106.072 and 501.2041 in their entirety.[98] The court held that the provision that impose liability for platforms' decisions to remove or deprioritize content are likely preempted by 47 U.S.C. § 230 (c)(2), which states that «no provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected».

The District Court held that the act's provisions implicated the First Amendment because they restrict platforms' constitutionally protected exercise of 'editorial judgement'. The court then applied a strict First Amendment scrutiny because it concluded that some of the act's provisions

[97] S.B. 7072, § 1(5), (6).
[98] *Netchoice, LLC v. Moody*, No. 21-cv-00220-RH-MAF 546, F. Supp.3d 1082 (N.D. Fla. June 30, 2021).

were content-based and, more broadly, because it found that the entire bill was motivated by the state's viewpoint-based purpose to defend conservatives' speech from perceived liberal Big Tech bias. The court concluded that the provisions seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms.

On May 23, 2022, The Eleventh Circuit ruled that much of S.B. 7072 likely violate the First Amendment.[99] The Court of Appeals held that S.B. 7072 triggers First Amendment scrutiny because it restricts social-media platforms exercise of editorial judgement and requires them to make certain disclosures.

In ruling that the act possibly violates the First Amendment, the Eleventh Circuit first pointed to the Supreme Court's ruling in *Miami Herald Publishing Co. v. Tornillo*, which established that the editorial judgements made by private entities about whether and how to disseminate speech are protected under the constitution.[100] Subsequent Supreme Court rulings, protecting cable operators[101] and decisions by parade organizers[102] about what third party-created content they disseminate, further underpinned this free speech principle.

When platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results, or sanction breaches or their community standards, the court stated that they engage in First Amendment-protected activity: «just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices not to propound a particular point of view».[103]

Second, the panel rejected Florida's argument that S.B. 7072 does not implicate free speech right because it only requires platforms to host speech and not necessarily agree with it. The court said that, unlike the private entities such as shopping centers[104] and law school,[105] social media platforms have expression as their core function, which is violated by the act:[106] «social-media platforms' content-moderation decisions communicate messages when they remove or "shadow-ban" users or content. … Such conduct-the targeted removal of users' speech from websites whose primary function is to serve as speech platforms-conveys a message to the reasonable observer … at a minimum, a message of disapproval. Thus, social-media platforms engage in content moderation that is inherently expressive».[107]

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[99] *NetChoice, LLC v. State of Florida Attorney General*, No. 21-12355 (11th Cir. 2022).
[100] In the 1974 case, the court rejected a Florida law requiring newspapers to print candidates' replies to editorials criticizing them.
[101] *Turner Broad. Sys., Inc. v. FCC* (1994), *supra*. See also *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 4 (1986).
[102] *Hurley v. Iris-American Gay, Lesbian & Bisexual Group of Boston*, *supra*.
[103] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 26.
[104] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).
[105] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, *supra*.
[106] *Ark Educ. TV Comm'n v. Forbes*, 523 U.S. 666 (1998); *Bartnicki v. Vopper*, 523 U.S. 514 (2001).
[107] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 35, 36.

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Third, the court rejected Florida's argument that large social media services are common carriers. The Eleventh Circuit also cited Supreme Court precedent in *Reno v. ACLU*, where it was said internet forums have never been subject to the same regulation and supervision as the broadcast industry. Further, Congress excluded computer services like social media companies from the definition of common carrier in the Telecommunication Act of 1996.[108]

If social media platforms are not common carriers, Florida state can't just decide to make social media platforms into that: «neither law nor logic recognizes government authority to strip an entity of its First Amendment right merely by labeling it a common carrier».[109]

Given these three major assumptions, the court held that social media platforms possess the First Amendment right to exercise editorial judgement, then any law infringing that right should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity.[110]

To conclude, it is worth nothing that while the Eleventh Circuit did not decide whether § 230 preempted the S.B. 7072 provisions, the court's findings dovetail with the reasoning found in many § 230 cases. For example, the court held that «when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users – a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site».[111]

This refers to the inquiry previously examined in § 230 litigation, which looks to whether a claimant seeks to hold a social media platform liable for its exercise of a publisher's traditional editorial functions (such as deciding whether to publish, withdraw, postpone, or alter content).

7. Conclusions

Conflicting lower court rulings about removing controversial material from social media platforms point toward a landmark Supreme Court decision on whether the First Amendment protects Big Tech's editorial discretion or forbids its censorship of 'disliked' views.

Both Florida and Texas have signaled they want the Supreme Court to review their laws aimed at stopping social media censorship as a violation of the First Amendment to the Constitution, which has resulted in the circuit split above mentioned (§ 6).

The political-constitutional issues regarding social media platforms and free speech are made even more conflictual by the action recently taken by Attorneys General of two Republican-led U.S. states, Missouri, and

[108] 47 U.S.C. § 223(e)(6): «Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunication carriers».
[109] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 43.
[110] See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *U.S. Telecom Ass'n v. FCC*, 855 F.3d 434 (2017).
[111] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 19.

Louisiana, who filed a lawsuit against the Biden administration accusing high-ranking officials (including the President) of having pressured and colluded with social media companies to censor and suppress information over the last two years.

The lawsuit described the administration's supposed efforts to hush up certain information as one of the greater assaults of the federal government in the Nation's history on Americans' constitutional right to free speech.[112] Louisiana's Attorney General characterized Big Tech as an extension of Biden's government, which he defined as busy in suppressing truth and demonizing those who think differently.

At its core, the First Amendment protects against government infringements on speech. At the same time, the First Amendment is the same basis used to make conflicting arguments. On the one hand, the constitutional provision could be violated if the right of private companies, including social media platforms, to control the speech they publish and disseminate were not protected, and this includes the right of 'social-media-platforms-as-editors' not to publish something they don't want to publish. On the other hand, if it is not protected, the right to speech on 'social-media-platforms-as-common-carriers' without content limitation and without discrimination against service users could be violated.

Lawmakers in Georgia, Ohio, Tennessee, and Michigan are now considering bills like Texas H.B. 20 and Florida S.B. 7072. Consequently, it is likely that more courts will be called on to decide whether platforms have a First Amendment right to moderate content on their sites. It is possible that an effective guidance will come soon from the Supreme Court. Without its clarification, states will usher in an era of overweening regulation, where information available to online users will become regionally divided based on which content local politicians prefer.

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[112] The lawsuit was filed on June 2022 before the U.S. District Court for the Western District of Louisiana.

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