The Constitutional Dimension of Free Speech Under the Biden Administration

by Enrico Andreoli

Abstract: *La perimetrazione costituzionale della libertà di parola durante l'amministrazione Biden* – The Biden administration has been confronted throughout its tenure with a major political-constitutional conflict over freedom of speech in the digital space as guaranteed by the First Amendment. The conflict is to be ascribed to the political-constitutional datum because, on the one hand, it seems to reflect a self-proclaimed ability of conservative political forces to set themselves up as supposed bastions of freedom of speech on the digital place as the 'marketplace of ideas'. On the other hand, the political forces represented in the Biden administration 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 which continued during the 2024 presidential election campaign. In the topic under discussion, as a result, the U.S. debate struggles to separate the legal datum from the political one, according to a dichotomous mainstream narrative. This consideration leads to question about the role played by the judiciary, and especially the Supreme Court, as an actor capable of standing or not in the role of synthesis (and if so, to what degree of neutrality) that it has often played in U.S. constitutionalism.

Keywords: Freedom of speech; First Amendment; Supreme Court of the United States; Judiciary; Social media platforms

1. Introduction

«The U.S. Constitution's First Amendment protects the freedom of speech from government abridgment. But the freedom of speech is a political value that concerns more than just the rights guaranteed by the First Amendment and enforced by courts».[1]

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».[2]

[1] J.M. Balkin, *Free Speech Versus the First Amendment*, 70 *UCLA L. Rev.* 1206 (2023), 1210.

[2] *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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The recognition and protection of this fundamental freedom have not escaped the many 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.

These innovations in 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».[3]

In recent years, this issue has found definite vigor in both U.S. politics and constitutionalism. It is a fact that the Biden administration has been confronted throughout its mandate with a major political-constitutional conflict over freedom of speech in the digital space as guaranteed by the First Amendment, which indicates how «Congress shall make no law … abridging the freedom of speech».

The conflict is to be ascribed to the political-constitutional datum because, on the one hand, it seems to reflect a self-proclaimed ability of conservative political forces to set themselves up as supposed bastions of freedom of speech on the digital place as the marketplace of ideas. On the other hand, the political forces represented in the Biden administration 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 which are allegedly continuing in the 2024 presidential election campaign.

A relevant, though not decisive, step occurred with the decision *Murthy v. Missouri* issued by the Supreme Court in June 2024,[4] which commentators have in almost all cases described as 'siding with Biden'.

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, 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. § 4 will consider the state-level regulation of digital platforms and the courts' interpretation of it. Finally, § 5 will deal with the most recent Supreme Court rulings.

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

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

[4] 603 U.S. _ (2024).

2. The constitutional perimeter of the First Amendment protection

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.[5] 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 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».[6]

Second, there are 'non-public fora', including, for example, a military base or an airport.[7] In these cases, the public power instead sees its ability to control private conduct amplified, legitimately restricting individual freedoms if in conflict with a different (public) interest that is equally constitutionally protected.

Finally, the 'limited and designated fora' are considered. 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 individuals, while denying it to others.[8] 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.[9]

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

[5] Allow me to refer to what has already been analyzed in E. Andreoli, Freedom of Speech *e comunicazione digitale. Spunti di riflessione dall'esperienza costituzionale statunitense*, G. Ferri (ed.), *Diritto costituzionale e nuove tecnologie* (2022), 29 ff., later integrated in Id., *Continuities and Discontinuities. First Amendment and Digital Free Speech in U.S. Constitutionalism*, in *DPCE Online*, 2023, Sp. Iss. 1, 261-284.

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

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

[8] *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).

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

freedom is illegitimate.[10] 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.[11] 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.[12]

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».[13]

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 private individuals irrespective of the «government's own speech».[14] 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».[15] There does not exist, in this sense, a «constitutional right as members of the public to a government audience for their policy views».[16]

The government speech doctrine was first enucleated, although not fully structured, in *Rust v. Sullivan*,[17] 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, 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».[18]

[10] «[T]his … 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»: 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).

[11] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983); *Minn. Voters All. v. Mansky*, 585 U.S. _ (2018).

[12] Even in this case, the guarantee of neutrality is necessary because of the possible different points of view. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

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

[14] *Pleasant Grove City, supra*, p. 467.

[15] J. Wiener, *Social Media, supra*, 221-222. See *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

[16] *Minn. State Bd. For Cmty. Colleges v. Knight*, 465 U.S. 271 (1984).

[17] 500 U.S. 173 (1991).

[18] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

Therefore, the precise contours of the government speech doctrine were not clearly delineated and became subject to jurisprudential disputes.[19]

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*,[20] 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*,[21] 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.

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. The courts' interpretive path for the virtual space as a public forum

The Supreme Court has traditionally had to consider the concept of public forum understood as a physical space. 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».[22]

[19] Justice Souter, in rendering the dissenting opinion in *Johanns v. Livestock Marketing Association* (544 U.S. 550 (2005)) stated how «[t]he government-speech doctrine is relatively new, and correspondingly imprecise».

[20] 555 U.S. 460 (2009).

[21] Cit. This 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 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.

[22] D.S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, in *Brigham Young University L.*

The interpretive lines developed by recent case law take a different view. A public forum, it is argued, exists whenever a space has as its primary purpose the free exchange of ideas.[23] It might be understood in a sense that is not necessarily geographical, but also metaphysical.[24] And this, moreover, is true regardless of which party owns the space, whether public or private.[25]

The earliest cases on the matter referred to instances of government websites, where the possible digital public-private interaction was almost nil. A contrast arose between the identification of a non-public forum, on the one hand, and the idea that we were instead in the presence of government speech, on the other hand.[26] In *Page v. Lexington County School District One*,[27] for example, the 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.[28] 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.[29] In reversing the decision rendered by the state Supreme Court,[30] the federal Supreme Court came to regard the regulatory act under consideration as one conflicting with the constitutional datum. 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».[31]

It should not be overlooked that, within the Supreme Court itself, the formulation of these concepts has been far from peaceful. In his dissenting opinion Justice Alito cautioned that «[c]yberspace is different from the

Rev. 1981 (2010). See the dating approach of the Supreme Court in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

[23] *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788 (1985).

[24] *Rosenberg v. Rector*, *supra.*

[25] *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cornelius v. NAACP*, *supra*; *Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).

[26] 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).

[27] 531 F.3d 275 (4th Cir., 2008).

[28] 582 U.S. 98 (2017).

[29] 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.

[30] *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App., 2013).

[31] *Id.*, 1737. 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. See also *Reno v. ACLU*, 521 U.S. 844 (1997).

physical world»,[32] thus warning that one should be extremely cautious in creating First Amendment precedents applicable to the digital world.

It is interesting to analyze how the lower courts have followed up on this Supreme Court ruling to understand whether *Packingham* represents a constitutional leading case.

Considering the guidance expressed in *Walker v. Texas Division*, on the one hand, and the dictum expressed in *Packingham*, on the other, U.S. lower courts initially manifested a 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'.[33]

In the first dispute,[34] 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 operations of blocking and deleting were carried out after the plaintiff had made a long series of comments in objection to the public authority's actions. The court 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 dispute was different,[35] 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: it acted «as a governmental designation of a place for public communication».[36] 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».[37]

Another example where acts of deletion and blocking on a digital platform comes into consideration is *Morgan v. Bevin*,[38] 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 is divergent

[32] *State v. Packingham*, *supra*, 1744.
[33] 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.
[34] *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va., 2017).
[35] *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).
[36] *Id.*, 716.
[37] *Id.*, 687.
[38] 298 F. Supp. 3d 1003 (E.D. Ky., 2018).

from that 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.[39]

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 (and at the time of writing, newly re-elected) 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,[40] held that the Trump'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, «[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».[41] The Supreme Court claimed that the account 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.[42] 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:[43] «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».[44]

The *ratio decidendi* of the *Knight* decision was immediately followed by the subsequent ruling in *Price v. City of New York*.[45] Again, the same District Court reiterated the analysis proposed in the *Knight* case: given that the account is not publicly owned, the interactive space on it that

[39] 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»: *id.*, 1011; 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»: *id.*, 1006.

[40] 302 F. Supp. 3d 541 (S.D. N.Y., 2018).

[41] *Id.*, 580.

[42] Presidential Records Act (PRA) of 1978, 44 U.S.C. §2201-2209: 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.

[43] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Circ., 2019).

[44] *Id.*, 230.

[45] No. 15 Civ. 5871 (KPF), 2018 WL 3117507 (D.D. N.Y., June 25, 2018). 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 (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).

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 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 constraint on the exercise of free speech because of a blocking act on a social media platform. The prevailing interpretation was to sanction the action of preventing access to an account traceable to a government agent, an act that would constitute undue viewpoint discrimination. I can mention the reasoning enucleated in the cases *One Wisconsin Now v. Kremer*,[46] *McKercher v. Morrison*,[47] *Robinson v. Hunt County*,[48] *Windom v. Harshbarger*,[49] *Garnier v. Poway Unified School District*,[50] *Wagschal v. Skoufis*.[51]

Multiple factors assume relevance in terms of the topic under examination: 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.[52] The decision was remanded to the lower court with an order to divest the dispute because it was deemed moot, given that Donald Trump later returned to being a private citizen. 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 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.

4. Social media platforms, anti-censorship (state) law, and the judiciary

The considerations made in the preceding paragraph leads to why the opening reference to the *Murthy* Supreme Court case, which commentators have in almost all cases described as 'siding with Biden'.

The *Murthy* decision deals with issues like those emerged within the proceedings in lower courts relative to two 'anti-censorship' state law, namely the Texas House Bill 20, and the Florida Senate Bill 7072.

[46] 354 F. Supp. 3d 940 (W.D. Wis., 2019).
[47] No. 18CV1054JM(BLM), 2019 WL 1098935 (D.D. Cal., Mar. 8, 2019).
[48] 921 F.3d 440 (5th Cir., 2019).
[49] 396 F. Supp. 3d 675 (N.D. W. Va., 2019).
[50] No. 17-CV-2215-W JLB, 2019 WL 4736208 (S.D. Cal., Sept. 26, 2019).
[51] 442 F. Supp. 3d 612 (D.D. N.Y., 2020).
[52] 593 U.S. __ (2021): *Biden, et al. v. Knight First Amendment Institute at Columbia University, et al.*, On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, No. 20–197 (decided April 5, 2021).

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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.[53] 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.

Section 7 of the bill 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».

The Texas District Court for the Western District of Texas issued a preliminary injunction on December 1, 2021,[54] 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*.[55]

On May 11, 2022, the Fifth Circuit reviewed the District Court's preliminary injunction for abuse of discretion.[56] The Court of Appeals posed its reasoning on the following assumptions: (a) section 7 of H.B. 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 7 of H.B. 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.

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.[57] 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

[53] See N.I. Brown, J. Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 *Syracuse L. Rev.* 521 (2018)
[54] *NetChoice, LLC v. Paxton, Attorney General of Texas*, No. 1:21-CV-840-RP, 2021.
[55] 418 U.S. 241 (1974).
[56] *NetChoice, LLC v. Paxton, Attorney General of Texas*, No. 21-51178 (5th Cir. 2022).
[57] *NetChoice, LLC etc. v. Ken Paxton*, Attorney General of Texas, No. 21A720, 596 U.S. 61 (2022). On appeal, the decision was subsequently vacated due to lower court failing to perform a full First Amendment assessment of the laws and remanded for further consideration: see 603 U.S. 707 (2024).

vacating the stay imposed by the Fifth Circuit because the applicable law was 'novel' in nature.

On May 24, 2021, Florida enacted Senate Bill 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. 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.[58]

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. (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. (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.

In June 2021, the U.S. District Court for the Northern District of Florida granted a motion and preliminarily enjoined enforcement of the Bill.[59] 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 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.

On May 23, 2022, The Eleventh Circuit ruled that much of S.B. 7072 likely violate the First Amendment.[60] The Court of Appeals held that the Bill 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 Court first pointed to the Supreme Court's ruling in *Miami Herald*, which established that the editorial judgements made by private entities about whether and how to disseminate speech are protected

[58] S.B. 7072, § 1(5), (6).
[59] *Netchoice, LLC v. Moody*, No. 21-cv-00220-RH-MAF 546, F. Supp.3d 1082 (N.D. Fla. June 30, 2021).
[60] *NetChoice, LLC v. State of Florida Attorney General*, No. 21-12355 (11th Cir. 2022).

under the constitution.[61] 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».[62]

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[63] and law school,[64] social media platforms have expression as their core function, which is violated by the act:[65] «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».[66]

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.[67] Further, Congress excluded computer services like social media companies from the definition of common carrier in the Telecommunication Act of 1996.[68] 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».[69]

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

[61] In the 1974 case, the court rejected a Florida law requiring newspapers to print candidates' replies to editorials criticizing them. Subsequent Supreme Court rulings, protecting cable operators (*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)) and decisions by parade organizers (*Hurley v. Iris-American Gay, Lesbian & Bisexual Group of Boston*, *supra*) about what third party-created content they disseminate, further underpinned this free speech principle.

[62] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 26.

[63] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[64] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (FAIR), *supra.*

[65] *Ark Educ. TV Comm'n*, 523 U.S. 666 (1998); *Bartnicki v. Vopper*, 523 U.S. 514 (2001).

[66] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 35, 36.

[67] *Reno v. ACLU*, *supra*, 870.

[68] 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».

[69] *NetChoice, LLC v. State of Florida Attorney General*, *supra*, 43.

same standards that apply to other laws burdening First-Amendment-protected activity.[70]

On July 1, 2024, the Supreme Court sent back to the lower courts for another look both the challenges to laws in Texas and Florida that would regulate how large social media companies control content posted on their sites.[71] In a decision by Justice Kagan, the Court explained that both lower courts had focused too narrowly on how the laws applied to the challengers themselves, even though the cases challenged the constitutionality of the laws more broadly.

These conflicting lower court rulings about removing controversial material from social media platforms have opened the field to Supreme Court interpretations on whether the First Amendment protects Big Tech's editorial discretion or forbids its censorship of 'disliked' views. This is where the *Murthy* decision fits in, even if the Supreme Court did not delve into all the issues that arose on the matter, having primarily stated because of a procedural assumption.

5. Does the Supreme Court really 'side with Biden' on protecting free speech in the digital space?

The Supreme Court decided *Murthy v. Missouri* holding that neither the state nor individual plaintiffs had established standing to seek an injunction against the government defendants.

Some initial food for thought can be drown from this decision. At its core, the First Amendment protects against government infringements on speech. With reference to the freedom of speech on the digital space, the First Amendment is the basis used to argue conflicting quarrels: on the one hand, the constitutional provision could be violated if it is not protected the right of private companies, including social media platforms, to control the speech they publish and disseminate, and this include the right of 'social-media-platforms-as-editors' not to publish something they don't want to publish; on the other hand, the First Amendment could be violated 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.

The *Murthy* ruling, while not fully entering the merits of the current debate (in particular, what appears to be the decisive distinction between social media platforms as editors or common carriers), is interesting because it seems to partially de-emphasize the political momentum in favor of the legal datum. When the violation of free speech on social media platforms is traced back to the ascertainment of the procedural prerequisite of standing in the form of actual or future injury to the very same freedom, this seems to shift the focus away from viewpoint-based infringement, that is one of the main narratives in this debate.

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[70] 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*, 855 F.3d 434 (2017).

[71] *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024): see *supra*, 57.

Murthy is not the unique case during the current Supreme Court term involving the relationship between government, social media, and free speech: variously, can be mentioned the rulings in *Moody v. NetChoice, LLC*,[72] *Vidal v. Elster*,[73] *Speech First, Inc. v. Sands*,[74] *Lindke v. Freed*,[75] *O'Connor-Ratcliff v. Garnier*,[76] *Gonzalez v. Trevino*,[77] *National Rifle Association of America v. Vullo*.[78]

Among them, in March 2024, in *Lindke v. Freed*, the justices weighed in on a slightly different matter, i.e. when public officials can be held liable for blocking their critics on their personal social media accounts. The Court posed that a public official who prevents someone from commenting on the official's social-media page engages in state action only if the official both possessed actual authority to speak on the state's behalf on a particular matter and purported to exercise that authority when speaking in the relevant social-media posts.

Instead, in May 2024, the Supreme Court unanimously ruled in favor of the National Rifle Association in a case that raised similar issues, but not exactly regarding free speech on social media platforms. In the *N.R.A. v. Vullo* case Justice Sotomayor, writing for a unanimous Court, said that the group could pursue a First Amendment claim against a New York State official who had encouraged companies to stop doing business with it after the 2018 school shooting in Parkland (Florida). Although a government official is allowed to share his views freely and criticize beliefs, Justice Sotomayor wrote, that official may not use the power of the state to punish or suppress disfavored expression.

Both the *Murthy* and the *Vullo* cases presented similar allegations of censorship 'by stealth', which occurs when a private entity limits its customers' or members' speech because the government asked to do so.

In *Vullo*, for example, the New York state financial regulator pressured financial services companies to cut ties with clients, such as the NRA, that advocate for positions disfavored by the state. But the Supreme Court held that a government official cannot directly or indirectly coerce a private party to punish or suppress disfavored speech on her behalf, and that «[t]o state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that … could be reasonably understood to convey a threat of adverse government action in order to punish or suppress speech».[79]

Murthy focused solely on standing and held that it had not been established. The case arose from a barrage of communications from administration officials urging social media platforms to take down posts on topics like the coronavirus vaccine and claims of election fraud: during the outbreak of Covid-19 in 2020, Surgeon General Vivek Murthy issued a health advisory that encouraged the social media platforms to take steps to

[72] *Id.*
[73] 602 U.S. 286 (2023).
[74] 601 U.S. _ (2024).
[75] 601 U.S. 187 (2024).
[76] 601 U.S. 205 (2024).
[77] 602 U.S. 653 (2024).
[78] 602 U.S. 175 (2024).
[79] *Id.*, 12.

prevent Covid–19 misinformation from taking hold; the Centers for Disease Control and Prevention then alerted the platforms to Covid–19 misinformation trends and flagged example posts. Two States (Missouri and Louisiana), sided by five individual social-media users, sued dozens of executive branch officials and agencies, alleging that the Government pressured the social media platforms to censor their speech in violation of the First Amendment.

In the previous stages of trial, the District Court of Louisiana issued a preliminary injunction in favor of the plaintiffs.[80] U.S. District Judge Terry Doughty agreed that federal officials had violated the First Amendment by 'coercing' or 'significantly encouraging' social media platforms' content moderation decisions.

The U.S. Court of Appeals for the Fifth Circuit largely upheld that ruling, saying that administration officials had become excessively entangled with the platforms or used threats to spur them to act.[81] The panel entered an injunction forbidding many officials to coerce or significantly encourage social media companies to remove content protected by the First Amendment.

The Supreme Court reversed the decision by the Court of Appeals and sent the case back for further proceedings. Justice Barrett wrote for the 6-3 majority: because the plaintiffs were seeking an order limiting future communications between government officials and social media platforms, the plaintiffs' lawsuit could only go forward it they could show «a substantial risk that … at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant».[82] To this effect, the Court wrote that the plaintiffs had failed to overcome two daunting hurdles in their attempt to establish what was required to show standing: that the government had caused their injuries and that they faced a prospect of future injury.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented: «[f]or months, high-ranking government officials placed unrelenting pressure on Facebook to suppress Americans' free speech». He contended that the «most important role [for freedom of speech] is protection of speech that is essential to democratic self-government and speech that advances humanity's store of knowledge, thought, and expression». The speech at the center of this case, Justice Alito insisted, «falls squarely within those categories».

Nevertheless, the Court held that no plaintiff had standing because standing to seek an injunction requires plaintiffs to demonstrate a substantial risk of future harm traceable to a government defendant. This, the Court held, plaintiffs did not do. Moreover, the Court held that plaintiffs had not demonstrated that past successful efforts by government officials to suppress their speech was sufficient to show future threat of injury.

It is interesting to note that under *Vullo* government coercion or inducement creates the First Amendment violation because the

[80] *Missouri v. Biden*, No. 22-cv-1213 (W.D. La., July 4, 2023).
[81] No. 23-30445 (5th Cir., October 3, 2023).
[82] 603 U.S. _ (2024), 2.

government action was easily traced through the intermediary to the speaker. *Murthy*, by contrast, requires more, mandating an identified future communication subject to an identified censorship attempt by a known government actor leading to coercion upon a specific platform to suppress that communication. Without such detail, according to the Court, alleged future harm is mere conjecture.

It was correctly noted how *Murthy* has two relevant takeaways.[83] First, the legal standard enunciated in *Vullo* is not as clear as it seemed, and thus government may do indirectly what it cannot do directly if the plaintiff is unable to establish traceability and redressability at an individual message level. Second, as the administrative state continues to expand its reach over private entities, it accumulates additional levers it can pull to control public discourse while obscuring its own responsibility.

Issues, these, leading to question about the actual scope of the Supreme Court's rulings on the controversial relationship between digital medium, freedom of speech, and constitutional datum. Or rather, to wander the current scope of the basic First Amendment doctrines.

6. Conclusions

It is thus appropriate to conclude by moving on two aspects related to the possible regulation of the freedom of speech on the digital space during the Biden administration: the policy level, on the one hand, and the possible gap between the very same freedom of speech and the First Amendment, on the other hand.[84]

As for the policy level, during the Biden administration two main opposing initiatives can be mentioned.

First, the creation, announced on April 27, 2022, of a '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.

Second, the Protecting Speech from Government Interference Act,[85] sponsored by the Republican MP James Comer and introduced in House on January 9, 2023. The bill prohibits federal employees from censoring the speech of others while acting in an official capacity. Specifically: it prohibits employees of executive agencies from using their official authority to censor a private entity or engaging in censorship of a private entity while on duty, wearing a uniform, or using official government property; it defines censor or censorship to mean influencing or coercing, or directing another to influence or coerce, for the removal of lawful speech, the

[83] See C. Fleming Crawford, *Will the Supreme Court's Decision in Murthy v. Missouri Lead to More Government Censorship?*, *The Federalist Society* (https://fedsoc.org/commentary/fedsoc-blog/will-the-supreme-court-s-decision-in-murthy-v-missouri-lead-to-more-government-censorship). See also K. Duffy, *The Supreme Court Was Right on Murthy v. Missouri*, *Council on Foreign Relations* (https://www.cfr.org/article/supreme-court-was-right-murthy-v-missouri).

[84] In this sense the reference is to the thought that emerged in J.M. Balkin, *Free Speech Versus the First Amendment*, cit.

[85] H.R. 8752.

addition of disclaimers, or the restriction of access with respect to any interactive computer service (like social media platforms).

The bill passed House on March 9, 2023, was received in the Senate on March 14, 2023, and is now pending.

These policy initiatives seem to do nothing but almost mirror the different interpretations made by lower courts and referred to above, a political conflict that leaves the Supreme Court to insert itself as the body capable of synthesis in U.S. constitutionalism.[86]

As for the possible gap between freedom of speech and First Amendment, it seems interesting to consider that courts may come to change basic First Amendment doctrines, mainly because the 'traditional rules' of the doctrines could be found to be increasingly irrelevant to many aspects of online speech governance.

In a «pluralist model of speech governance»[87] Professor Balkin writes of digital speech regulation as a triangle of relationships:[88] between governments and private individuals or group; between governments and the owners and operators of the digital infrastructures; and between the owners and operators of private of privately-owned digital infrastructure and the people and organizations who speak online. This model has important consequences for the First Amendment: «[t]he free speech triangle … generates free speech conflicts between speakers and owners of digital infrastructures. … Both sides … will claim that the political values and rights of free speech are on their side. But because of features of U.S. constitutional doctrine, when the free speech claims of end users and digital companies' conflict, courts are likely to assign First Amendment rights to digital companies and not to end users».[89]

Even if the courts deny end users First Amendment rights against digital companies, the latters will repeatedly resort to the First Amendment to defend themselves against regulation. In response, social media reformers will try to neutralize the First Amendment claims of digital companies, seeking to «de-constitutionalize»[90] online speech rights disputes, making them something different from First Amendment rights enforced by the judiciary.

Murthy seems to be a case in point, leading the evolution of the debate toward wondering not so much whether digital space can be brought back into the First Amendment, but, conversely, whether free speech as understood in the First Amendment is what one wants to protect when it comes to free speech in the digital medium.

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[86] It is of all significance to report that the Supreme Court will hear an important First Amendment case on January 15, 2025: in *Free Speech Coalition v. Paxton* the Court will consider a challenge to a Texas law that requires websites to verify the age of their users if at least one-third of their content is harmful to minors; the U.S. Court of Appeals for the 5th Circuit upheld the law, rejecting an argument that it violated the First Amendment by imposing a burden on adults' access to that content.

[87] J.M. Balkin, *Free Speech Versus the First Amendment*, cit., 1215.

[88] J.M. Balkin, *Free Speech is a Triangle*, 118 *Colum. L. Rev.* 2011 (2018).

[89] J.M. Balkin, *Free Speech Versus the First Amendment*, cit., 1221-1222.

[90] *Id.*

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