Free Speech and the Regulation of Social Media Content

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SUMMARY

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As the Supreme Court has recognized, social media sites like Facebook and Twitter have become important venues for users to exercise free speech rights protected under the First Amendment. Commentators and legislators, however, have questioned whether these social media platforms are living up to their reputation as digital public forums. Some have expressed concern that these sites are not doing enough to counter violent or false speech. At the same time, many argue that the platforms are unfairly banning and restricting access to potentially valuable speech.

Currently, federal law does not offer much recourse for social media users who seek to challenge a social media provider's decision about whether and how to present a user's content. Lawsuits predicated on these sites' decisions to host or remove content have been largely unsuccessful, facing at least two significant barriers under existing federal law. First, while individuals have sometimes alleged that these companies violated their free speech rights by discriminating against users' content, courts have held that the First Amendment, which provides protection against *state* action, is not implicated by the actions of these *private* companies. Second, courts have concluded that many non-constitutional claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides immunity to providers of interactive computer services, including social media providers, both for certain decisions to host content created by others and for actions taken "voluntarily" and "in good faith" to restrict access to "objectionable" material.

Some have argued that Congress should step in to regulate social media sites. Government action regulating internet content would constitute state action that may implicate the First Amendment. In particular, social media providers may argue that government regulations impermissibly infringe on the providers' own constitutional free speech rights. Legal commentators have argued that when social media platforms decide whether and how to post users' content, these publication decisions are themselves protected under the First Amendment. There are few court decisions evaluating whether a social media site, by virtue of publishing, organizing, or even editing protected speech, is itself exercising free speech rights. Consequently, commentators have largely analyzed the question of whether the First Amendment protects a social media site's publication decisions by analogy to other types of First Amendment cases. There are at least three possible frameworks for analyzing governmental restrictions on social media sites' ability to moderate user content.

First, using the analogue of the company town, social media sites could be treated as state actors who are themselves bound to follow the First Amendment when they regulate protected speech. If social media sites were treated as state actors under the First Amendment, then the Constitution itself would constrain their conduct, even absent legislative regulation. The second possible framework would view social media sites as analogous to special industries like common carriers or broadcast media. The Court has historically allowed greater regulation of these industries' speech, given the need to protect public access for users of their services. Under the second framework, if special aspects of social media sites threaten the use of the medium for communicative or expressive purposes, courts might approve of content-neutral regulations intended to solve those problems. The third analogy would treat social media sites like news editors, who generally receive the full protections of the First Amendment when making editorial decisions. If social media sites were considered to be equivalent to newspaper editors when they make decisions about whether and how to present users' content, then those editorial decisions would receive the broadest protections under the First Amendment. Any government regulations that alter the editorial choices of social media sites by forcing them to host content that they would not otherwise transmit, or requiring them to take down content they would like to host, could be subject to strict scrutiny. A number of federal trial courts have held that search engines exercise editorial judgment protected by the First Amendment when they make decisions about whether and how to present specific websites or advertisements in search results, seemingly adopting this last framework.

Which of these three frameworks applies will depend largely on the particular action being regulated. Under existing law, social media platforms may be more likely to receive First Amendment protection when they exercise more editorial discretion in presenting user-generated content, rather than if they neutrally transmit all such content. In addition, certain types of speech receive less protection under the First Amendment. Courts may be more likely to uphold regulations targeting certain disfavored categories of speech such as obscenity or speech inciting violence. Finally, if a law targets a social media site's *conduct* rather than speech, it may not trigger the protections of the First Amendment at all.

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One of the core purposes of the First Amendment's Free Speech Clause is to foster "an uninhibited marketplace of ideas,"[1] testing the "truth" of various ideas "in the competition of the market."[2] Social media sites[3] provide one avenue for the transmission of those ideas.[4] The Supreme Court has recognized that the internet in general, and social media sites in particular, are "important places" for people to "speak and listen," observing that "social media users employ these websites to engage in a wide array of protected First Amendment activity."[5] Users of social media sites such as Facebook, Twitter, YouTube, or Instagram can use these platforms to post art or news,[6] debate political issues,[7] and document their lives.[8] In a study conducted in early 2018, the Pew Research Center found that 68% of U.S. adults use Facebook, 35% use Instagram, and 24% report using Twitter.[9] These sites not only allow users to post content, they also connect users with each other, allowing users to seek out friends and content and often recommending new connections to the user.[10] On most social media platforms, users can then send content to specific people, or set permissions allowing only certain people to view that content. Through human curation and the use of algorithms, these platforms decide how content is displayed to other users.[11] In curating this content, social media sites may also edit user content, combine it, or draft their own additions to that content.[12] These platforms are generally free to users, and make revenue by selling targeted

[1] Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[2] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *Accord, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[3] The report does not precisely define the term "social media site," given that most of the cases defining First Amendment rights on the internet focus more on various companies' actions than their character. For one possible taxonomy of internet "intermediaries" proposed for future First Amendment analysis, see David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 386–87 (2010).

[4] *See, e.g.*, Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313, 333 (2014) ("Social media is the ideal 'marketplace' for the 21st century; it creates a dynamic place for every conceivable opinion to be expressed and shared.").

[5] Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

[6] *See, e.g.*, Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CTR. FACT TANK (Dec. 10, 2018), https://pewrsr.ch/2UvWPSe.

[7] *See, e.g.*, Kristen Bialik, *14% of Americans Have Changed their Mind about an Issue Because of Something They Saw on Social Media*, PEW RESEARCH CTR. FACT TANK (Aug. 15, 2018), https://pewrsr.ch/2Bc5TWF.

[8] *See, e.g.*, Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CTR. FACT TANK (Mar. 1, 2018), https://pewrsr.ch/2FDfiFd.

[9] *Id.*

[10] While many social media platforms are primarily centered around connections with friends or followers, this is not universally true. For example, commentators have discussed the app TikTok as an alternative to this friend-centric approach, noting that the platform opens to a page full of content that an algorithm has determined may interest the user based on past usage habits, rather than to a feed of friends' content. *See, e.g.*, Caroline Haskins, *TikTok Can't Save Us from Algorithmic Content Hell*, VICE MOTHERBOARD (Jan. 31, 2019), https://bit.ly/2Jlu1dF; John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), https://nyti.ms/2Hm0ygS.

[11] *See, e.g.*, Paul Hitlin & Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RESEARCH CTR. (Jan. 16, 2019), https://pewrsr.ch/2Hnqr1o; Will Oremus, *Twitter's New Order*, SLATE (Mar. 5, 2017), https://bit.ly/2lMs0pU.

[12] For example, Twitter sometimes creates "Moments," which it describes as "curated stories showcasing the very best of what's happening on Twitter." *About Moments*, TWITTER, https://bit.ly/2x0AxOt (last visited Mar. 27, 2019).

advertising space,[13] among other things.[14] Thus, social media sites engage in a wide variety of activities, at least some of which entail hosting—and creating—constitutionally protected speech.

Social media companies have recognized their role in providing platforms for speech.[15] To take one example, in a September 2018 hearing before the Senate Select Committee on Intelligence, the founder and Chief Executive Officer of Twitter, Jack Dorsey, repeatedly referred to Twitter as a "digital public square," emphasizing the importance of "free and open exchange" on the platform.[16] Critically, however, social media sites also have content-moderation policies under which they may remove certain content. Further, these sites determine how content is presented: who sees it, when, and where. As one scholar has said, social media sites "create rules and systems to curate speech out of a sense of corporate social responsibility, but also . . . because their economic viability depends on meeting users' speech and community norms."[17] Speech posted on the internet "exists in an architecture of privately owned websites, servers, routers, and backbones," and its existence online is subject to the rules of those private companies.[18] Consequently, one First Amendment scholar predicted ten years ago that "the most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislative and administrative regulations, the formation of new business models, and the collective activities of end-users."[19]

Social media companies have come under increased scrutiny regarding the type of user content that they allow to be posted on their sites, and the ways in which they may promote—or deemphasize—certain content. A wide variety of people have expressed concern that these sites do not do enough to counter harmful, offensive, or false content.[20] At the same time, others have

[13] *See, e.g.*, Kalev Leetaru, *What Does It Mean For Social Media Platforms To "Sell" Our Data?*, FORBES (Dec. 15, 2018), https://bit.ly/2W5MfRL; Louise Matsakis, *Facebook's Targeted Ads Are More Complex Than It Lets On*, WIRED (Apr. 25, 2018, 4:04 PM), https://bit.ly/2DZ1CG0.

[14] Some otherwise free sites include a subscription option, allowing certain users to pay fees to access premium content or unlock certain features. *See, e.g.*, *LinkedIn Free Accounts and Premium Subscriptions*, LINKEDIN, https://bit.ly/2sRWDhR (last visited Mar. 27, 2019).

[15] *See, e.g.*, *Foreign Influence Operations' Use of Social Media Platforms: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. (Sept. 5, 2018) [hereinafter *Hearing on Foreign Influence Operations*] (statement of Jack Dorsey, CEO of Twitter) ("[W]e believe that the people use Twitter as they would a public square and they often have the same expectations that they would have of any public space. For our part, we see our platform as hosting and serving conversations."); *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (Apr. 10, 2018) (statement of Mark Zuckerberg, CEO of Facebook) ("[W]e consider ourselves to be a platform for all ideas.").

[16] *Hearing on Foreign Influence Operations*, *supra* note 15.

[17] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625 (2018).

[18] Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 990 (2017).

[19] Jack M. Balkin, *Free Speech and Press in the Digital Age: The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009).

[20] *E.g.*, Anne Applebaum, *Regulate Social Media Now. The Future of Democracy is at Stake.*, WASH. POST (Feb. 1, 2019), https://wapo.st/2T4SmYS; John Carroll & David Karpf, *How Can Social Media Firms Tackle Hate Speech?*, KNOWLEDGE AT WHARTON U. PENN. (Sept. 22, 2018), https://whr.tn/2DuFeFH; David Dayen, *Ban Targeted Advertising*, THE NEW REPUBLIC (Apr. 10, 2018), https://bit.ly/2GRrT7z; Danielle Kurtzleben, *Did Fake News On Facebook Help Elect Trump? Here's What We Know*, NPR (Apr. 11, 218, 7:00 AM), https://n.pr/2GPdMDP; Caroline O'Donovan & Logan McDonald, *YouTube Continues To Promote Anti-Vax Videos As Facebook Prepares To Fight Medical Misinformation*, BUZZFEED NEWS (Feb. 20, 2019), https://bit.ly/2IWjIN5. *Cf., e.g.*, Mehreen Khan, *More 'Hate Speech' Being Removed from Social Media*, FINANCIAL TIMES (Feb. 2, 2019), https://on.ft.com/2EO6YCR.

argued that the platforms take down or deemphasize too much legitimate content.[21] In the September 2018 hearing referenced above, Sheryl Sandberg, the Chief Operating Officer of Facebook, expressed the difficulty of determining what types of speech would violate company standards barring hate speech.[22] Both Dorsey and Facebook founder and Chief Executive Officer Mark Zuckerberg have been asked to respond to allegations of political bias in their platforms' content moderation decisions at hearings before House and Senate committees.[23] Commentators and legislators alike have questioned whether social media sites' content policies are living up to the free speech ideals they have espoused.[24] As a result, some, including Members of Congress,[25] have called for regulation of social media platforms, focused on the way those companies police content.[26]

In light of this public policy debate, this report begins by outlining the current legal framework governing social media sites' treatment of users' content, focusing on the First Amendment and Section 230 of the Communications Decency Act of 1996 (CDA).[27] As explained below, under existing law, lawsuits predicated on these sites' decisions to remove or to host content have been largely unsuccessful because of (1) doctrines that prevent the First Amendment from being applied to private social media companies,[28] and (2) Section 230 of the CDA, which often protects social media companies from being held liable under federal or state laws for these

[21] *See, e.g.*, Mike Isaac & Sydney Ember, *Live Footage of Shootings Forces Facebook to Confront New Role*, N.Y. TIMES (July 8, 2016), https://nyti.ms/2CpLI37; Eli Rosenberg, *Facebook Censored a Post for 'Hate Speech.' It Was the Declaration of Independence.*, WASH. POST. (July 5, 2018), https://wapo.st/2SRj4zN; Liam Stack, *What Is a 'Shadow Ban,' and Is Twitter Doing It to Republican Accounts?*, N.Y. TIMES (July 26, 2018), https://nyti.ms/2NRWLYC; Jillian C. York & Karen Gullo, *Offline/Online Project Highlights How the Oppression Marginalized Communities Face in the Real World Follows Them Online*, ELEC. FRONTIER FOUND. (Mar. 6, 2018), https://bit.ly/2ulHdon.

[22] *Hearing on Foreign Influence Operations*, *supra* note 15. *See also, e.g.*, Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, VICE MOTHERBOARD (Aug. 23, 2018, 1:15 PM), https://bit.ly/2wtRboq.

[23] *Hearing on Foreign Influence Operations*, *supra* note 15; *Twitter: Transparency and Accountability: Hearing Before the H. Comm. on Energy & Commerce*, 115th Cong. (Sept. 5, 2018); *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (Apr. 10, 2018). *See also, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 627 (D. Del. 2007) ("Plaintiff alleges that [Google's] rejection or acceptance of ads is based upon . . . the political viewpoint of the ad . . . .").

[24] *See, e.g.*, William Cummings, *Republican Lawmakers Go after Facebook CEO Zuckerberg for Anti-Conservative Bias*, USA TODAY (Apr. 11, 2018), https://bit.ly/2BTQ5VH; Mattathias Schwartz, *Facebook and Twitter's Rehearsed Dance on Capitol Hill*, THE NEW YORKER (Sept. 6, 2018), https://bit.ly/2VqgDXG.

[25] To take one example, a bill was introduced in the 115th Congress, the Honest Ads Act, that would have ensured that disclosure requirements for political advertisements apply to advertising on social media. S. 1989, 115th Cong. (2017). Both Facebook and Twitter expressed support for this act. *E.g.*, Selina Wang, *Twitter Follows Facebook in Endorsing Senate's 'Honest Ads' Act*, BLOOMBERG (Apr. 10, 2018), https://bloom.bg/2Y8m7rm.

[26] *See, e.g.*, Mark Epstein, *Google's Effort To Undermine Free Speech Strengthens Case for Regulating Big Tech*, THE HILL (Aug. 31, 2017), https://bit.ly/2Rs0OjT; Makena Kelly, *Sen. Josh Hawley Is Making the Conservative Case Against Facebook*, THE VERGE (Mar. 19, 2019, 8:00 AM), https://bit.ly/2Tf9S8B; David McCabe, *Key Republican Warns Big Tech: Step Up or Be Regulated*, AXIOS (Feb. 28, 2018), https://bit.ly/2OlgqC5; Katy Steinmetz, *Lawmakers Hint at Regulating Social Media During Hearing with Facebook and Twitter Execs*, TIME (Sept. 5, 2018), https://bit.ly/2Rv4tgX; Craig Timberg, Tony Romm & Elizabeth Dwoskin, *Lawmakers Agree Social Media Needs Regulation, But Say Prompt Federal Action Is Unlikely*, WASH. POST (Apr. 11, 2018), https://wapo.st/2OekLqD. *Cf., e.g.*, Ben Brody, *Ted Cruz Echoes Elizabeth Warren's Criticism of Facebook's Power*, BLOOMBERG (Mar. 12, 2019, 3:25 PM), https://bloom.bg/2JAfqLF; Sen. Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://bit.ly/2SRNIt5.

[27] 47 U.S.C. § 230. While this provision is often referred to as Section 230 of the CDA, it was enacted as Section 509 of the Telecommunications Act of 1996, which amended Section 230 of the Telecommunications Act of 1934. Pub. L. No. 104-104, 110 Stat. 137 (1996).

[28] *See, e.g.*, Peters, *supra* note 18, at 992.

decisions.[29] The debate over whether the federal government should fill this legal vacuum has raised the question as to whether and to what extent the federal government can regulate the way social media sites present users' content, either to require these sites to take down, restrict access to, or qualify certain types of content, or, on the other hand, protect users' rights to post content on those sites.[30] Such government regulation would constitute state action that implicates the First Amendment.[31] While the issue largely remains an open question in the courts, the First Amendment may provide some protection for social media companies when they make content presentation decisions, limiting the federal government's ability to regulate those decisions.[32] The extent of any free speech protections will depend on how courts view social media companies and the specific action being regulated.[33]

Accordingly, the bulk of this report explores how the First Amendment applies to social media providers' content presentation decisions. Looking to three possible analogues drawn from existing First Amendment law, the report explores whether social media companies could be viewed in the same way as company towns, broadcasters, or newspaper editors.[34] The report also explains the possible regulatory implications of each First Amendment framework as Congress considers the novel legal issues raised by the regulation of social media.

Existing Legal Barriers to Private Lawsuits Against Social Media Providers

Under current federal law, social media users may face at least two significant barriers if they attempt to sue a social media provider for its decisions about hosting or limiting access to users' content. The first, which likely applies only to lawsuits predicated on a platform's decision to *remove* rather than *allow* content,[35] is the state action requirement of the First Amendment. The state action doctrine provides that constitutional free speech protections generally apply only

[29] *See, e.g.*, Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 662 (2012).

[30] *See supra* notes 20 and 21.

[31] *Cf., e.g.*, Reno v. ACLU, 521 U.S. 844, 879 (1997) (holding that provisions of the CDA prohibiting the transmission of certain "indecent" or "patently offensive" material to children are unconstitutional under the First Amendment).

[32] *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1612–13 (2018).

[33] *See, e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 741–42 (D.C. Cir. 2016) (holding that net neutrality rules do not violate the First Amendment, as applied to "the provision of internet access as common carriage," but noting that "insofar as a broadband provider might offer its own content—such as a news or weather site—separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of internet content"). In particular, legal commentators have disagreed regarding whether content originally created by users should be treated in some circumstances as the *platforms'* speech, given that these platforms often make editorial decisions about whether and how to present that user-generated content. *See, e.g.*, Stuart Minor Benjamin, *Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1680 (2011).

[34] *See, e.g.*, Klonick, *supra* note 32, at 1658.

[35] As discussed *infra*, "First Amendment: State Action Requirement," the First Amendment protects against government actions "abridging the freedom of speech." U.S. CONST. amend. I. Logically, while parties may abridge speech when they take down or restrict access to user content, they likely do not abridge speech by disseminating that speech. The Supreme Court has held that the government can violate the First Amendment when, for example, it requires speakers to accompany their speech with disclaimers or other notices. *E.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018). Nonetheless, in this context, the Court was not concerned by the state's decision to allow the original content, but by the fact that it required *additional* content, and was particularly concerned that this additional content may "drown[] out" the original speech. *See id.* at 2378.

when a person is harmed by an action of the government, rather than a private party.[36] The second legal barrier is the CDA's Section 230, which offers broad immunity to "interactive computer service" providers.[37] Section 230(c)(1) provides immunity from any lawsuit that seeks to hold a service provider liable for publishing information that was created by an "information content provider," effectively protecting social media sites from liability for hosting content.[38] By contrast, Section 230(c)(2) provides immunity for sites that take good faith action to restrict access to content that the provider or users deem "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[39] Thus, federal law does not currently provide a recourse for many users who would like to challenge a social media site's decision to ban or restrict content, or to host content—and may affirmatively bar liability in certain circumstances.

First Amendment: State Action Requirement

The Free Speech Clause of the First Amendment provides that "*Congress* shall make no law . . . abridging the freedom of speech"[40] and applies to the "*State[s]*" through the Fourteenth Amendment.[41] Thus, the First Amendment, like other constitutional guarantees, generally applies only against *government* action.[42] As the Supreme Court has said, "while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."[43] However, the Supreme Court has, in limited circumstances, allowed First Amendment claims to proceed against seemingly private parties that abridge protected speech.[44]

The clearest example of the Court extending the First Amendment to apply to the actions of a private party comes from *Marsh v. Alabama*, where the Court held that the First Amendment prohibited the punishment of a resident of a company-owned town for distributing religious literature.[45] While the town in question was owned by a private corporation, "it ha[d] all the characteristics of any other American town," including residences, businesses, streets, utilities, public safety officers, and a post office.[46] Under these circumstances, the Court held that "the

[36] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972).

[37] 47 U.S.C. § 230(c). *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1358–59 (D.C. Cir. 2014) (discussing scope of immunity provided by Section 230).

[38] 47 U.S.C. § 230(c)(1).

[39] *Id.* § 230(c)(2).

[40] U.S. CONST. amend. I (emphasis added). Although the text of the First Amendment refers to "Congress," it has long been understood to restrict action by the executive branch as well. *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 160 (1973) (Douglas, J., concurring) (describing First Amendment as restricting Congress, whether "acting directly or through any of its agencies such as the FCC"); *see generally, e.g.*, Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013).

[41] 44 Liquormart v. Rhode Island, 517 U.S. 484, 489 n.1 (1996); U.S. CONST. amend. XIV ("[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

[42] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972).

[43] Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

[44] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Marsh v. Alabama, 326 U.S. 501, 508–09 (1946).

[45] *Marsh*, 326 U.S. at 509. A state statute "ma[de] it a crime to enter or remain on the premises of another after having been warned not to do so"; the resident had been warned that, pursuant to a company policy, she could not distribute religious literature without a permit, and she subsequently disregarded that warning and refused to leave a sidewalk. *Id.* at 503–04. Accordingly, although the case involved a criminal prosecution brought by the State of Alabama, liability turned on the *town's* ability to prevent residents from distributing literature without a permit. *See id.*

[46] *Id.* at 502–03.

corporation's property interests" did not "settle the question"[47]: "[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[48] Consequently, the corporation could not be permitted "to govern a community of citizens" in a way that "restrict[ed] their fundamental liberties."[49] The Supreme Court has described *Marsh* as embodying a "public function" test, under which the First Amendment will apply if a private entity exercises "powers traditionally *exclusively* reserved to the State."[50]

Since *Marsh* was issued in 1946, however, it has largely been limited to the facts presented in that case. The Supreme Court extended the *Marsh* decision in 1968: in *Amalgamated Food Employees Union v. Logan Valley Plaza*, the Court held that a private shopping mall could not prevent individuals from peacefully picketing on the premises, noting similarities between "the business block in *Marsh* and the shopping center" at issue in that case.[51] However, the Court subsequently disclaimed *Logan Valley* in *Hudgens v. NLRB*, rejecting the idea that "large self-contained shopping center[s]" are "the functional equivalent of a municipality."[52] Instead, the Court held that in *Hudgens*, where a shopping center manager had threatened to arrest picketers for trespassing, "the constitutional guarantee of free expression ha[d] no part to play."[53] As a result, the picketers "did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike."[54] In another decision in which the Supreme Court held that the First Amendment did not prevent a shopping center from banning the distribution of handbills, the Court distinguished *Marsh* by noting that "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."[55] By contrast, the disputed shopping center had not assumed "municipal functions or power."[56] The fact that the shopping center was generally open to the public did not qualify as a "dedication of [the] privately owned and operated shopping center to public use" sufficient "to entitle respondents to exercise therein the asserted First Amendment rights."[57]

Apart from the factual circumstances presented by the company town that exercises powers "traditionally" and "exclusively" held by the government,[58] the Court has sometimes applied the First Amendment against private parties if they have a "sufficiently close relationship" to the government.[59] Such circumstances may exist where a private company "is subject to extensive

[47] *Id.* at 505.

[48] *Id.* at 507. *See also id.* at 508 (noting that residents of company towns, like residents of other towns, "must make decisions which affect the welfare of community and nation," and that to do this, they must have access to "uncensored" information).

[49] *Id.* at 509.

[50] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (emphasis added). *Accord* Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158–59 (1978).

[51] 391 U.S. 308, 317 (1968). In dissent, Justice Black would have ruled that the picketers could not, "under the guise of exercising First Amendment rights, trespass on . . . private property for the purpose of picketing." *Id.* at 329 (Black, J., dissenting).

[52] Hudgens v. NLRB, 424 U.S. 507, 520 (1976).

[53] *Id.* at 521.

[54] *Id.*

[55] Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

[56] *Id.*

[57] *Id.* at 569–70.

[58] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[59] *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (holding that such a relationship existed where the private company operated a public utility that represented a "substantial monopoly" under congressional authority and,

state regulation"—although government regulation alone is not sufficient to establish the state action requirement.[60] Instead, the inquiry in such a case is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[61] In a 2001 case, the Supreme Court held that a state athletic association, while "nominally private," should be subject to First Amendment standards because of "the pervasive entwinement of public institutions and public officials in its composition and workings."[62]

Some plaintiffs have argued that various internet companies, including some social media sites, should be treated as state actors subject to the First Amendment when those companies take down or restrict access to their speech. Courts have rejected these claims.[63] Many of these decisions have involved relatively terse applications of existing Supreme Court precedent.[64] In a few cases, however, federal district courts have explored the application of these state action cases in more detail.

First, lower courts have repeatedly held that social media sites do not meet the "exclusive public function test"[65] and are not akin to a company town.[66] In so holding, courts have recognized that, under prevailing Supreme Court case law, private actors are not "state actors subject to First Amendment scrutiny merely because they hold out and operate their private property as a forum for expression of diverse points of view."[67] Accordingly, they have held that the mere fact that social media providers hold their networks open for use by the public is insufficient to make them

more importantly, the company operated "under the regulatory supervision" of a governmental agency, and the particular action being challenged involved action by that agency).

[60] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

[61] *Jackson*, 419 U.S. at 351. In *Burton v. Wilmington Parking Authority*, the Supreme Court held that a private parking authority had to comply with the Equal Protection Clause of the Fourteenth Amendment where a garage that it operated was "erected and maintained with public funds by an agency of the State to serve a public purpose." 365 U.S. 715, 724 (1961). In that case, the Court believed that the state had "so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725. Courts have sometimes described *Burton* as creating a "symbiotic relationship" test for state action, separate from the "nexus" standard outlined in *Jackson*. *See, e.g.*, *Jackson*, 419 U.S. at 357; Perkins v. Londonderry Basketball Club, 196 F.3d 13, 20 (1st Cir. 1999); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995); Fitzgerald v. Mountain Laurel Racing Inc., 607 F.2d 589, 595 (3d Cir. 1979). *Cf., e.g.*, Marie v. Am. Red Cross, 771 F.3d 344, 362 (6th Cir. 2014) (describing "the symbiotic relationship or nexus test" as one of *four* possible state action inquiries).

[62] *Brentwood Acad.*, 531 U.S. at 298.

[63] *E.g.*, Jayne v. Google Internet Search Engine Founders, 63 Fed. Appx. 268, 268 (3d Cir. 2008) (per curiam); Green v. Am. Online (AOL), 318 F.3d 465, 472 (3rd Cir. 2003); Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *25–26 (N.D. Cal. Mar. 26, 2018); Nyabwa v. FaceBook, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at *2 (S.D. Tex. Jan. 26, 2018); Quigley v. Yelp, Inc., No. 17-cv-03771-RS, 2017 U.S. Dist. LEXIS 103771, at *4 (N.D. Cal. July 5, 2017); Buza v. Yahoo!, Inc., No. C 11-4422 RS, 2011 U.S. Dist. LEXIS 122806, at *2 (N.D. Cal. Oct. 24, 2011); Young v. Facebook, Inc., No. 5:10-cv-03579-JF/PVT, 2010 U.S. Dist. LEXIS 116530, at *9 (N.D. Cal. Oct. 25, 2010); Estavillo v. Sony Comput. Entm't Am. Inc., No. C-09-03007 RMW, 2009 U.S. Dist. LEXIS 86821, at *3–4 (N.D. Cal. Sept. 22, 2009); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631–32 (D. Del. 2007); Nat'l A-1 Advert. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 169 (D.N.H. 2000); Cyber Promotions v. Am. Online, 948 F. Supp. 436, 445 (E.D. Penn. 1996).

[64] *See, e.g.*, *Green*, 318 F.3d at 472; *Nyabwa*, 2018 U.S. Dist. LEXIS 13981, at *2; Forbes v. Facebook, Inc., No. 16-CV-404 (AMD), 2016 U.S. Dist. LEXIS 19857, at *4–5 (E.D.N.Y. Feb. 18, 2016); *Buza*, 2011 U.S. Dist. LEXIS 122806, at *2; *Langdon*, 474 F. Supp. at 631–32.

[65] *Cyber Promotions*, 948 F. Supp. at 441; *accord Quigley*, 2017 U.S. Dist. LEXIS 103771, at *4.

[66] *See Prager Univ.*, 2018 U.S. Dist. LEXIS 51000, at *18; *Estavillo*, 2009 U.S. Dist. LEXIS 86821, at *4.

[67] *Prager Univ.*, 2018 U.S. Dist. LEXIS 51000, at *24; *accord Estavillo*, 2009 U.S. Dist. LEXIS 86821, at *5.

subject to the First Amendment.[68] Courts have rejected plaintiffs' efforts to characterize the provision of a public forum[69] or "the dissemination of news and fostering of debate"[70] as public functions that were traditionally and exclusively performed by the government.

For example, in *Cyber Promotions v. American Online (AOL)*, a district court rejected the argument that "by providing Internet e-mail and acting as the sole conduit to its members' Internet e-mail boxes, AOL has opened up that part of its network [to the public] and as such, has sufficiently devoted this domain for public use."[71] The court said that "[a]lthough AOL has technically opened its e-mail system to the public by connecting with the Internet, AOL has not opened its property to the public *by performing any municipal power or essential public service* and, therefore, does not stand in the shoes of the State."[72] The challengers in that case, a company that had been blocked from sending unsolicited advertisements via email, also argued that AOL performed an exclusive public function because the company had "no alternative avenues of communication . . . to send its e-mail to AOL members."[73] The judge rejected this claim as well, concluding that the company *did* have alternative avenues to send its advertising to AOL members, including other places on the internet as well as "non-Internet avenues."[74] Similarly, in *Prager University v. Google LLC*, a district court held that by operating YouTube, "a 'video-sharing website,'" and then restricting access to some videos, Google had not "somehow engaged in one of the 'very few' functions that were traditionally 'exclusively reserved to the State.'"[75]

Trial courts have also held that social networks have failed to meet the joint participation, nexus, and entwinement tests for state action.[76] In *Cyber Promotions*, the court held that there was no joint participation because the government was not involved in AOL's challenged decision.[77] Another trial court, in *Quigley v. Yelp, Inc.*, similarly concluded joint participation did not exist

[68] *See Prager Univ.*, 2018 U.S. Dist. LEXIS 51000, at *23–24; *Quigley*, 2017 U.S. Dist. LEXIS 103771, at *4; *Estavillo*, 2009 U.S. Dist. LEXIS 86821, at *4; *Cyber Promotions*, 948 F. Supp. at 442.

[69] *E.g.*, *Prager Univ.*, 2018 U.S. Dist. LEXIS 51000, at *26 ("Defendants do not appear to be at all like, for example, a private corporation . . . that has been given control over a previously public sidewalk or park . . . .").

[70] *Quigley*, 2017 U.S. Dist. LEXIS 103771, at *4 ("The dissemination of news and fostering of debate cannot be said to have been traditionally the exclusive prerogative of the government.").

[71] 948 F. Supp. at 442 (internal quotation mark omitted).

[72] *Id.* (emphasis added).

[73] *Id.* at 442–43.

[74] *Id.* at 443.

[75] Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *16 (N.D. Cal. Mar. 26, 2018) (citation omitted) (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978)).

[76] *Quigley*, 2017 U.S. Dist. LEXIS 103771, at *5–7; Estavillo v. Sony Comput. Entm't Am. Inc., No. C-09-03007 RMW, 2009 U.S. Dist. LEXIS 86821, at *5 (N.D. Cal. Sept. 22, 2009); *Cyber Promotions*, 948 F. Supp. at 444–45. *See also* Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 U.S. Dist. LEXIS 132992, at *7–8 (E.D.N.Y. Aug. 6, 2018) ("[N]o reasonable person could infer from the pleading that the state 'encouraged' or 'coerced' the Facebook defendants to enable users to delete posts or to 'look away' if and when they do."). *Cf.* Daphne Keller, *Who Do You Sue?*, HOOVER INST., Aegis Series Paper No. 1902, at 3 (2019) ("Governments influence platforms' content removal decisions in a number of ways."). However, lower courts have sometimes concluded that the social media profiles of government agencies or government officials *may* be public fora in which the First Amendment applies, if they have been opened to the public. *See, e .g.*, Davison v. Randall, 912 F.3d 666, 682–84 (4th Cir. 2019); Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, (S.D.N.Y. 2018), *appeal filed*, No. 18-1691 (2d Cir. June 5, 2018); *but see, e.g.*, Hargis v. Bevin, No. 3:17-cv-00060-GFVT, 2018 U.S. Dist. LEXIS 54428, at *15 (E.D. Ky. Mar. 30, 2018) (holding that the First Amendment's forum doctrine does not apply because state governor's "use of privately owned Facebook Page and Twitter pages is personal speech," and he was "speaking on his own behalf").

[77] 948 F. Supp. at 444. The court said that the court's involvement alone did not implicate the First Amendment. *Id.* at 444–45.

between various social media sites and the government where the plaintiff failed to show that the state participated in the specific actions challenged in the lawsuit.[78] That court also rejected an argument that there was "a pervasive entwinement between defendants and the government because the government maintains accounts on the defendants' websites, and uses their websites to communicate with citizens."[79] Even assuming that this allegation was true, the court held that this was not "the sort of entwinement that . . . converts a private party's actions to state action,"[80] observing that the government did not participate "in the operation or management of defendants' websites," but only used these sites "in the same manner as other users."[81]

Accordingly, lower courts have uniformly concluded that the First Amendment does not prevent social media providers from restricting users' ability to post content on their networks. However, the Supreme Court has not yet weighed in on this subject, and as will be discussed in more detail below,[82] a number of legal commentators have argued that, notwithstanding these trial court decisions, courts *should* view social media platforms as equivalent to state actors, at least when they perform certain functions.

Section 230 of the CDA

A constitutional injury is not the only type of harm that a social media user might suffer as a result of a social network's decisions about user content, and litigants have brought a wide variety of claims challenging these sorts of decisions. For example, plaintiffs have argued that sites' decisions to remove or restrict access to their content constituted unfair competition under the Lanham Act,[83] discrimination under the Civil Rights Act of 1964,[84] tortious interference with contractual relationships,[85] fraud,[86] and breach of contract.[87] Other plaintiffs have attempted to hold online platforms liable for harm stemming from the sites' decisions *not* to remove content,

[78] *Quigley*, 2017 U.S. Dist. LEXIS 103771, at *5–6.

[79] *Id.* at *6.

[80] *Id.*

[81] *Id.* at *7. *See also Estavillo*, 2009 U.S. Dist. LEXIS 86821, at *5 (noting that Sony's Playstation 3 network "was not created to further government objectives," that the government had no authority in the governing of the network, and that the government did not "encourag[e] Sony to create the Network").

[82] *See infra* "Social Media Sites as Company Towns."

[83] e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *4 (M.D. Fla. Feb. 8, 2017); Spy Phone Labs LLC v. Google Inc., No. 15-cv-03756-KAW, 2016 U.S. Dist. LEXIS 143530, at *8 (N.D. Cal. Oct. 14, 2016).

[84] Sikhs for Justice "SJF", Inc., v. Facebook, Inc., 144 F. Supp. 3d 1088, 1090 (N.D. Cal. 2015), *aff'd*, 697 Fed. Appx. 526, 526 (9th Cir. 2017).

[85] Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1172 (9th Cir. 2009); *e-ventures Worldwide, LLC*, 2017 U.S. Dist. LEXIS 88650, at *4; *Spy Phone Labs LLC*, 2016 U.S. Dist. LEXIS 143530, at *8; Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *4 (W.D. Okla. May 27, 2003); *cf.* e360Insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008) (tortious interference with prospective economic advantage).

[86] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 626 (D. Del. 2007). Plaintiffs suing social media companies have also alleged state law causes of action for deceptive business and trade practices, *e-ventures Worldwide, LLC*, 2017 U.S. Dist. LEXIS 88650, at *4; *e360Insight, LLC*, 546 F. Supp. 2d at 607; *Langdon*, 474 F. Supp. 2d at 626, and breaches of covenants of good faith and fair dealing, *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *8 (N.D. Cal. Nov. 2, 2016); *Spy Phone Labs LLC*, 2016 U.S. Dist. LEXIS 143530, at *8; *Sikhs for Justice*, 144 F. Supp. 3d at 1091.

[87] *Sikhs for Justice*, 144 F. Supp. 3d at 1091; Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. 09-4567, 2011 U.S. Dist. LEXIS 26757, at *6 (D.N.J. Mar. 15 2011); *Langdon*, 474 F. Supp. 2d at 626.

claiming, for example, that by publishing certain content, the sites committed defamation[88] or negligence,[89] or violated state securities law.[90] However, many of these suits are barred by the broad grant of immunity created by the CDA's Section 230.[91]

47 U.S.C. § 230(c)

(1) TREATMENT OF PUBLISHER OR SPEAKER.—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.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) 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; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[92]

Section 230, as seen in the text box above, distinguishes between "interactive computer services" and "information content providers."[93] An interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[94] Courts have considered online platforms such as Facebook,[95] Twitter,[96] and Craigslist[97] to be "interactive computer service" providers.[98] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or

[88] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009) ("The cause of action most frequently associated with . . . section 230 is defamation."); *see, e.g.*, Ricci v. Teamsters Union Local 456, 781 F.3d 25, 27 (2d Cir. 2015).

[89] *E.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (negligence and assault); *Barnes*, 570 F.3d at 1102-03 (negligent undertaking).

[90] Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007).

[91] 47 U.S.C. § 230. *See also Universal Commc'n Sys., Inc.*, 478 F.3d at 418 ("The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly . . ."); *id.* at 419 ("[W]e too find that Section 230 immunity should be broadly construed."). For example, relying on Section 230, courts have dismissed claims alleging that various social media platforms have supported terrorist organizations by allowing terrorists to use their sites. *See* Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 145 (E.D.N.Y. 2017); Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1118 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739, 750 (9th Cir. 2018).

[92] Courts have read 47 U.S.C. § 230(c)(2)(B)'s reference to "paragraph (1)" to mean § 230(c)(2)(A). *E.g.* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1173 n.5 (9th Cir. 2009) ("We take it that the reference to the 'material described in paragraph (1)' is a typographical error, and that instead the reference should be to paragraph (A), i.e., § 230(c)(2)(A). Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with 'material,' whereas subparagraph (A) pertains to and describes material.") (citation omitted).

[93] 47 U.S.C. § 230(f).

[94] *Id.* § 230(f)(2).

[95] *E.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

[96] *E.g.*, Fields v. Twitter, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016).

[97] *E.g.*, Chicago Lawyers' Comm. for Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

[98] *See also* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007) ("Providing access to the Internet is . . . not the only way to be an interactive computer service provider.").

development of information provided through the Internet or any other interactive computer service."[99]

Section 230 contains two primary provisions creating immunity from liability. First, Section 230(c)(1) specifies that interactive service providers and users may not "be treated as the publisher or speaker of any information provided by another information content provider."[100] Second, Section 230(c)(2) states that interactive service providers and users may not be held liable for voluntarily acting in good faith to restrict access to objectionable material.[101] Section 230 preempts state civil lawsuits and state criminal prosecutions to the extent that they are "inconsistent" with Section 230.[102] It also bars certain federal civil lawsuits,[103] but, significantly, not federal criminal prosecutions.[104] Section 230(e) outlines a few exemptions: for example, Section 230 immunity will not apply in a suit "pertaining to intellectual property"[105] or in claims alleging violations of certain sex trafficking laws.[106]

Section 230(c)(1)

Section 230, and particularly Section 230(c)(1), distinguishes those who create content from those who provide access to that content, providing immunity to the latter group.[107] An entity may be both an "interactive computer service" provider and an "information content provider," but the critical inquiry for applying Section 230(c)(1) is whether, with respect to the particular actions alleged to create liability, the service provider developed the underlying content.[108]

Courts have held that an interactive computer *service* provider may be subject to suit if it is also acting as a *content* provider.[109] Frequently, the application of Section 230(c)(1) immunity turns

[99] 47 U.S.C. § 230(f)(3).

[100] *Id.* § 230(c)(1).

[101] *Id.* § 230(c)(2).

[102] 47 U.S.C. § 230(e)(3) preempts contrary state law, providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *See also, e.g.*, Doe v. GTE Corp., 347 F.3d 655, 658 (7th Cir. 2003) ("These provisions preempt contrary state law."); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013) (concluding that a state law imposing criminal liability "is likely expressly preempted by" the CDA).

[103] *See, e.g.*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174–75 (9th Cir. 2008).

[104] 47 U.S.C. § 230(e)(1) provides that Section 230 shall not "be construed to impair the enforcement of . . . any . . . Federal criminal statute."

[105] *Id.* § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."); *see, e.g.*, Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (holding that providing immunity from a suit alleging a violation of intellectual property laws "would 'limit' the laws pertaining to intellectual property in contravention of § 230(e)(2)").

[106] *See* 47 U.S.C. § 230(e)(5).

[107] *See id.* § 230(f). *See also, e.g.*, Ricci v. Teamsters Union Local 456, 781 F.3d 25, 28 (2d Cir. 2015) ("In short, a plaintiff defamed on the internet can sue the original speaker, but typically 'cannot sue the messenger.'" (quoting Chicago Lawyers' Comm. for Civil Rights under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008))). Some have noted, however, that 47 U.S.C. § 230(c)(1) does not itself use the word "immunity," or any comparable legal terms. *See Chicago Lawyers' Comm. for Civil Rights under Law, Inc.*, 519 F.3d at 669; Doe v. GTE Corp., 347 F.3d 655, 660–61 (7th Cir. 2003). *Compare* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009) (explaining that 47 U.S.C. § 230(c)(1) alone does not create immunity from suit, but creates protection from liability when viewed in conjunction with 47 U.S.C. § 230(e)(3)), *with* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, [47 U.S.C. § 230(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

[108] *See, e.g.*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008).

[109] *Id.* at 1162-63. Some circuits have described a three-part test to determine whether an entity posting information is

not on the type of suit that is being brought—that is, for example, whether it is a suit for libel or for breach of contract[110]—but on whether the facts establish that the interactive computer service provider was merely a publisher of another's content,[111] or whether the service provider itself created or developed content.[112] Courts have generally held that a site's ability to control the content posted on its website does not, in and of itself, transform an interactive computer service into an internet content provider.[113] As one court said, "a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online."[114] A service provider may still be immune from suit under Section 230(c)(1) even if it makes small editorial changes to that content.[115]

Conversely, a "website operator" can be liable for "content that it creates itself, or is 'responsible, in whole or in part' for creating or developing."[116] Even if the service provider does not itself solely create the content, Section 230 immunity might be unavailable if the service provider "augment[s] the content."[117] For example, one state court held that, even assuming that Snapchat was a provider of interactive computer services, a plaintiff's claim against the company could proceed where the alleged harm was caused by a "filter," or a graphic overlay on a user's photo, that was created by Snapchat itself.[118] Because the plaintiff sought "to hold Snapchat liable for its own conduct," the court held that "CDA immunity does not apply."[119]

Some courts have applied a "material contribution test,"[120] asking whether a service provider "materially contribute[d] to the illegality" of the disputed content,[121] or "in some way specifically encourage[d] development of what is offensive about the content."[122] Thus, for example, a federal

entitled to immunity: Section 230 "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." *Barnes*, 570 F.3d at 1100–01. *Accord* Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398, 409 (6th Cir. 2014); Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014); Fed. Trade Comm'n v. Accusearch, Inc., 570 F.3d 1187, 1196 (10th Cir. 2009).

[110] *See, e.g.*, *Barnes*, 570 F.3d at 1102–03 ("[W]hat matters is not the name of the cause of action . . . [but] whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."). *Cf., e.g.*, Doe v. Internet Brands, Inc., 824 F.3d 846, 851, 853 (9th Cir. 2016) (concluding Section 230 did not bar plaintiff's claim because the type of tort duty allegedly breached was not within the scope of the statute).

[111] *See* 47 U.S.C. § 230(f)(2).

[112] *See* Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 174, 176 (2d Cir. 2016). *See also* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) ("[A]n interactive computer service provider remains liable for its own speech.").

[113] *See, e.g.*, *Klayman*, 753 F.3d at 1358.

[114] *Id.*

[115] *See* Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 985 (10th Cir. 2000). *See also* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 299 (D.N.H. 2008) ("[A] service provider's privilege as a 'publisher' under the Act protects more than the mere repetition of data obtained from another source, but extends to the provider's 'inherent decisions about how to treat postings generally.'") (quoting *Universal Commc'n Sys., Inc.*, 478 F.3d at 422).

[116] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1170, 1162 (9th Cir. 2008) (quoting 47 U.S.C. § 230(f)(3)).

[117] *Id.* at 1167–68.

[118] Maynard v. Snapchat, Inc., 816 S.E.2d 77, 79–81 (Ga. Ct. App. 2018).

[119] *Id.* at 81.

[120] Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398, 413 (6th Cir. 2014).

[121] *Id.* at 415. *Accord, e.g.*, *Fair Hous. Council*, 521 F.3d at 1168.

[122] Fed. Trade Comm'n v. Accusearch, Inc., 570 F.3d 1187, 1199 (10th Cir. 2009). *Cf. Jones*, 755 F.3d at 414–15 (rejecting "an encouragement theory of 'development'" that would impose liability for intentionally encouraging

appellate court concluded that Roommates.com, a site that "match[ed] people renting out spare rooms with people looking for a place to live," was not wholly immune from claims that it had violated laws prohibiting housing discrimination.[123] The court concluded that Roommates.com could be subject to suit for discrimination because the site required all users to respond to questions about their sex, family status, and sexual orientation by selecting among preset answers to those questions, and to state their "preferences in roommates with respect to the same three criteria."[124] Accordingly, in the court's view, as to these questions and answers, Roommates.com was "more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."[125] Each user's personal page was "a collaborative effort between [Roommates.com] and the subscriber."[126] This rendered it the "'information content provider' as to the questions"[127] and the answers.[128]

Section 230(c)(2)

Although courts frequently consider the immunity in Section 230(c)(1) and Section 230(c)(2) together, as one "Section 230" shield,[129] the text of these provisions suggests they cover distinct circumstances. Section 230(c)(1) applies more broadly, to any suit in which the plaintiff seeks to hold the provider liable as the publisher of another's information.[130] By contrast, Section 230(c)(2) applies only to good-faith, voluntary actions by a provider—or a third party assisting providers—to restrict access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content.[131]

There is an important difference in the language of the two provisions: as noted, Section 230(c)(2) requires a service provider to act in good faith for immunity to apply; Section 230(c)(1) does not contain a similar requirement.[132] While courts frequently apply Section 230 to dismiss lawsuits premised on a service provider's decision to remove or restrict access to another's content,[133] they are somewhat less likely to dismiss lawsuits where the good-faith requirement is involved, because a plaintiff who properly pleads and presents evidence regarding a lack of good

certain types of third-party postings).

[123] *Fair Hous. Council*, 521 F.3d at 1161, 1175.

[124] *Id.* at 1161.

[125] *Id.*

[126] *Id.* at 1167.

[127] *Id.* at 1164 (quoting 47 U.S.C. § 230(f)(3)).

[128] *Id.* at 1166.

[129] *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). *See also* Eric Goldman, *MySpace Quietly Won Goofy 230 Ruling in September–Riggs v. MySpace*, TECH. & MKTG. LAW BLOG (Nov. 30, 2009), https://bit.ly/2S3CMrW (noting that courts have "collapsed the two provisions together . . . with surprising regularity") [hereinafter Goldman, *Riggs v. MySpace*].

[130] 47 U.S.C. § 230(c)(1); Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

[131] 47 U.S.C. § 230(c)(2).

[132] *See id.* § 230(c).

[133] Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1174 (9th Cir. 2009); Mezey v. Twitter, Inc., No. 1:18-cv-21069-KMM, 2018 U.S. Dist. LEXIS 121775, at *3 (S.D. Fla. July 19, 2018); Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *23 (N.D. Cal. Nov. 2, 2016); Sikhs for Justice "SJF", Inc., v. Facebook, Inc., 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015), *aff'd*, 697 Fed. Appx. 526, 526 (9th Cir. 2017); Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. 09-4567, 2011 U.S. Dist. LEXIS 26757, at *16–24 (D.N.J. Mar. 15 2011); Riggs v. MySpace, No. CV 09-03073-GHK (CTx), 2009 WL 10671689, at *3 (C.D. Cal. Sept. 17, 2009), *aff'd*, 444 Fed. Appx. 986, 987 (9th Cir. 2011); e360Insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631 (D. Del. 2007).

faith creates a question of fact that may prevent the court from summarily dismissing the case.[134] One trial court concluded that there was a question as to Google's good faith where the plaintiff alleged that Google was "selectively enforcing" a stated policy, and that the policy itself was "entirely pretextual."[135] Another trial court concluded that a company had sufficiently alleged bad faith where it argued that Google had "falsely accused" it of violating Google's stated policy, and that Google "sought to punish [the company] because it" refused to allow Google to embed advertising in the company's video.[136]

One view is that Section 230(c)(2) applies when a provider "*does* filter out offensive material," while Section 230(c)(1) applies when providers "*refrain* from filtering or censoring the information on their sites."[137] At least one federal trial judge has noted that interpreting Section 230(c)(1) to bar suits in which a plaintiff seeks to hold a service provider liable for removing the plaintiff's own content would "swallow[] the more specific immunity in (c)(2)."[138] The court explained that:

> Subsection (c)(2) immunizes only an interactive computer service's "actions taken in good faith." If the publisher's motives are irrelevant and always immunized by (c)(1), then (c)(2) is unnecessary. The Court is unwilling to read the statute in a way that renders the good-faith requirement superfluous.[139]

Lawsuits directly challenging a website's decision to restrict or remove content, rather than to publish it, often do invoke Section 230(c)(2).[140] Thus, courts have considered the application of Section 230(c)(2), rather than Section 230(c)(1), in lawsuits involving the removal of an app from the Google Play Store,[141] the removal of websites from Google's search results,[142] the removal of videos from YouTube,[143] and decisions to filter certain IP addresses or email addresses.[144] However, this distinction between filtering content and publishing content does not always play

[134] *See, e.g.*, e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *4 (M.D. Fla. Feb. 8, 2017); *Darnaa, LLC*, 2016 U.S. Dist. LEXIS 152126, at *25; Spy Phone Labs LLC v. Google Inc., No. 15-cv-03756-KAW, 2016 U.S. Dist. LEXIS 143530, at *26 (N.D. Cal. Oct. 14, 2016); *Smith*, 2011 U.S. Dist. LEXIS 26757, at *25–26. *But see, e.g.*, *Zango, Inc.*, 568 F.3d at 1174 (applying 47 U.S.C. § 230(c)(2) to dismiss claim); *Smith*, 2011 U.S. Dist. LEXIS 26757, at *16–24 (same); *e360Insight, LLC*, 546 F. Supp. 2d at 609 (same); *Langdon*, 474 F. Supp. 2d at 631 (same).

[135] *Spy Phone Labs LLC*, 2016 U.S. Dist. LEXIS 143530, at *26.

[136] *Darnaa, LLC*, 2016 U.S. Dist. LEXIS 152126, at *25–26.

[137] Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003).

[138] *e-ventures Worldwide, LLC*, 2017 U.S. Dist. LEXIS 88650, at *9.

[139] *Id.*

[140] *See, e.g.*, Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. 09-4567, 2011 U.S. Dist. LEXIS 26757, at *16–24 (D.N.J. Mar. 15 2011); e360Insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007). *Compare* Green v. Am. Online (AOL), 318 F.3d 465, 470 (3rd Cir. 2003) (holding that Section 230(c)(1) immunity applies to AOL's "alleged negligent failure to properly police its network for content transmitted by its users"), *with id.* at 473 (holding that Section 230(c)(2) immunity applies to AOL's allegedly unlawful conduct preventing users from sending objectionable emails).

[141] Spy Phone Labs LLC v. Google Inc., No. 15-cv-03756-KAW, 2016 U.S. Dist. LEXIS 143530, at *25–26 (N.D. Cal. Oct. 14, 2016).

[142] *e-ventures Worldwide, LLC*, 2017 U.S. Dist. LEXIS 88650, at *4.

[143] Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2016 U.S. Dist. LEXIS 152126, at *25 (N.D. Cal. Nov. 2, 2016).

[144] Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1174 (9th Cir. 2009); *Smith*, 2011 U.S. Dist. LEXIS 26757, at *16–26.

out so neatly in the courts, and other decisions have applied Section 230(c)(1) immunity to bar suits that are grounded in an interactive service provider's decision to restrict content.[145]

There is one additional circumstance under which Section 230(c)(2) immunity, as opposed to Section 230(c)(1) immunity, may apply. Section 230(c)(2)(B) protects those providers or users of computer services who "enable or make available to information content providers or others technical means to restrict access to" objectionable material.[146] This provision may protect, for example, "providers of programs that filter adware and malware."[147] This immunity may apply even where an interactive computer service is not a publisher entitled to immunity under Section 230(c)(1).[148]

Thus, as a whole, Section 230 offers broad immunity to "interactive computer service" providers when a litigant seeks to hold them liable for publishing, or not publishing, a user's content.[149] Section 230(c)(1) provides immunity from any lawsuit that seeks to hold a service provider liable for publishing information that was created by an "information content provider," effectively protecting social media sites from liability for hosting content.[150] And Section 230(c)(2) provides immunity for sites that take good faith action to restrict access to content that the provider or users deem "objectionable."[151] Consequently, to the extent that private litigants or state governments would have been able to hold social media companies liable under existing law for their decisions regarding presenting or restricting access to user content, those suits have largely been barred under Section 230.[152]

First Amendment Limits on Government Regulation of Social Media Content

As discussed above, courts have often dismissed lawsuits attempting to hold social media providers liable for regulating users' content, whether because the court concludes that the First Amendment does not apply to the actions of these private actors or because the court holds that Section 230(c)(2) of the CDA bars the lawsuit. Additionally, Section 230(c)(1) may bar lawsuits

[145] *See, e.g.*, Mezey v. Twitter, Inc., No. 1:18-cv-21069-KMM, 2018 U.S. Dist. LEXIS 121775, at *2–3 (S.D. Fla. July 19, 2018); Sikhs for Justice Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015), *aff'd*, 697 Fed. Appx. 526, 526 (9th Cir. 2017); Riggs v. MySpace, No. CV 09-03073-GHK (CTx), 2009 WL 10671689, at *3 (C.D. Cal. Sept. 17, 2009), *aff'd*, 444 Fed. Appx. 986, 987 (9th Cir. 2011). And perhaps somewhat confusingly, some cases applying Section 230(c)(2) immunity cite, as part of their justification, cases that describe publisher immunity under Section 230(c)(1). *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631 (D. Del. 2007).

[146] 47 U.S.C. § 230(c)(2)(B).

[147] Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1174 (9th Cir. 2009). *See generally, e.g.*, Russell A. Miller, *The Legal Fate of Internet Ad-Blocking*, 24 B.U. J. SCI. & TECH. L. 301, 358–60 (2018). Section 230(c)(2)(B) has also been applied to entities like Facebook. Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 U.S. Dist. LEXIS 132992, at *14 (E.D.N.Y. Aug. 6, 2018). By contrast, one court concluded that Yahoo! was not entitled to immunity under Section 230(c)(2)(B) where it "did not engage in any form of content analysis of the subject text to identify material that was offensive or harmful." Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).

[148] *See, e.g.*, Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. 09-4567, 2011 U.S. Dist. LEXIS 26757, at *15 (D.N.J. Mar. 15 2011).

[149] 47 U.S.C. § 230(c).

[150] *Id.* § 230(c)(1).

[151] *Id.* § 230(c)(2).

[152] *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1358–59 (D.C. Cir. 2014) (discussing scope of immunity provided by Section 230).

that seek to hold these platforms liable because of their decisions to publish certain content. Particularly because of Section 230, there are few, if any, federal or state laws that expressly govern social media sites' decisions about whether and how to present users' content. Consequently, users' ability to post speech on social media platforms is governed primarily by the private moderation policies created by these companies.[153]

In response to broader public policy concerns about how social media entities are policing user content, some commentators and legislators have proposed federal regulation both to protect users' ability to speak freely on those platforms[154] and to require these platforms to take down, deemphasize, or clarify certain content.[155] While the First Amendment, as discussed above, may not apply in disputes between private parties,[156] a federal law regulating internet content decisions would likely qualify as state action sufficient to implicate the First Amendment.[157] After all, the First Amendment provides that "*Congress* shall make no law . . . abridging the freedom of speech."[158]

Once state action is established, the next consideration is to what extent the First Amendment protects social media platforms' content moderation decisions. Stated another way, the relevant question is when social media providers can assert that government regulation infringes on their *own* speech. Perhaps most obviously, if a social media site posts content that it has created itself, the site may raise First Amendment objections to a law expressly regulating that speech.[159] Social media providers may also argue that they are exercising protected speech rights when they are choosing whether to publish content that was originally created by users and when they make decisions about how to present that content.[160] However, the fact that a law affects speech

[153] *See, e.g.*, Klonick, *supra* note 32, at 1630–58 (describing these content moderation policies).

[154] *See, e.g.*, H.R. 492, 116th Cong. (2019) (amending the CDA to provide that "an owner or operator of a social media service . . . shall be treated as a publisher or speaker of such content" based on certain ways of displaying "user-generated content"); H.R. 4682, 115th Cong. (2017) (amending the CDA to provide that a person providing "broadband internet access service . . . may not block lawful content"); David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASS'N, https://bit.ly/2V7eCP3 (last visited Mar. 27, 2019); *see also supra* note 26.

[155] *See, e.g.*, H.R. 1, § 4207(b)(1), 116th Cong. (2019) (requiring specified disclosures for certain online political advertisements); Press Release, Rep. Adam Schiff, Schiff Sends Letter to Google, Facebook Regarding Anti-Vaccine Misinformation (Feb. 14, 2019), https://bit.ly/2XOQqmX; *see also supra* note 20.

[156] *Cf., e.g.*, Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 128 (1992) ("The First Amendment is not likely to be an effective sword for information service providers seeking to use it as an affirmative source of equal access rights. Only if the FCC or the Congress or another governmental entity imposes specific affirmative requirements on private information service providers is the conduct of the service provider likely to be sufficient state action to implicate the First Amendment.").

[157] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 882 (1997) (striking down as unconstitutional under the First Amendment provisions of the CDA that prohibited the transmission of indecent or patently offensive messages to minors); *cf., e.g.*, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 n.24 (2018) (questioning whether a federal statute "allowing, but not requiring" private third parties to take certain actions is "sufficient to establish governmental action" under the First Amendment).

[158] U.S. CONST. amend. I (emphasis added).

[159] *Cf., e.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that FCC's net neutrality rule "reflects a fear that the real threat to free speech today comes from private entities such as Internet service providers," but rejecting this argument because "the First Amendment is a restraint *on the Government* and protects private editors and speakers *from Government regulation*"); U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 741–42 (D.C. Cir. 2016) (noting that "insofar as a[n internet] broadband provider might offer its own content—such as a news or weather site—separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of internet content").

[160] *E.g.*, Stuart Minor Benjamin, *Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1680 (2011). *Cf., e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *12

protected by the First Amendment does not necessarily mean that it is unconstitutional. As explained below, the First Amendment allows some regulation of speech and does not prohibit regulation of conduct.

Background Principles: First Amendment Protections Online

While the First Amendment generally protects the "freedom of speech,"[161] its protections do not apply in the same way in all cases. Not every government regulation affecting content posted on social media sites would be analyzed in the same way. A court's analysis would depend on a number of factors.

First, a court would inquire into the nature of the precise action being regulated, including whether it is properly characterized as speech or conduct.[162] Laws that target conduct and only incidentally burden speech may be permissible.[163] But "speech" is not always easy to identify. Lower courts have held that computer code and programs may be entitled to First Amendment protection, so long as they communicate "information comprehensible to human beings."[164] Courts have also concluded that in some circumstances, domain names might constitute protected speech.[165] And more generally, the Supreme Court has said that "inherently expressive" conduct can receive First Amendment protections.[166]

If a law does regulate speech, a court would consider the type of speech being regulated to determine how closely to scrutinize the regulation. For example, a court may ask whether that speech is commercial[167] and, as such, deserving of less protection under the First Amendment.[168]

(W.D. Okla. May 27, 2003) (holding that Google's PageRanks "are constitutionally protected opinions").

[161] U.S. CONST. amend. I.

[162] *See* Ashcroft v. Free Speech Coal., 535 U.S, 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); *see also, e.g.*, Junger v. Daley, 209 F.3d 481, 484–85 (6th Cir. 2000) (noting that encryption source code "has both an expressive feature and a functional feature," but ultimately concluding that "[b]ecause computer source code is an expressive means for the exchange of information and ideas about computer programming, . . . it is protected by the First Amendment").

[163] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006) (upholding law where "the compelled speech . . . is plainly incidental to the [law's] regulation of conduct"). However, even if a law *generally* regulates conduct, it may still be subject to heightened scrutiny if it is *applied* to speech. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

[164] Univ. City Studios, Inc. v. Corley, 273 F.3d 429, 450 (2d Cir. 2001); *see also, e.g.*, Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.").

[165] *See, e.g.*, Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 586 (2d Cir. 2000) ("[W]hile we hold that the existing [generic Top Level Domains (gTLDs)] do not constitute protected speech under the First Amendment, we do not preclude the possibility that certain domain names . . . could indeed amount to protected speech . . . ."); *cf.* Nat'l A-1 Advert. v. Network Sols., Inc., 121 F. Supp. 2d 156, 171 (D.N.H. 2000) (noting that domain names might be "expressive of some sort of message or idea," but holding that the challenged names are not protected speech because "the *space* occupied by second-level domain names does not constitute a discrete 'forum' for speech").

[166] *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. at 66.

[167] The Court has defined purely commercial speech as speech that "does 'no more than propose a commercial transaction,'" *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)), or is "related solely to the economic interests of the speaker and its audience," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

[168] *Cent. Hudson*, 447 U.S. at 562–63 ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *see also, e.g.*, Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (holding that decision to block certain search results was not commercial speech, because the "search results at issue in [that] case . . . relate[d] to matters of public concern and [did] not themselves propose transactions").

Advertisements posted on social media sites would likely qualify as commercial speech.[169] If speech is *not* purely commercial and is instead, for example, political advocacy, that speech may receive greater protection.[170] Certain categories of speech receive even less protection than commercial speech.[171] For example, the Supreme Court has said that states may prohibit speech advocating violence if that "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[172] Thus, certain types of threatening or violent speech posted on social media may not be entitled to First Amendment protection. However, perhaps in light of the fact that it can be difficult to determine whether speech is protected, the Court has sometimes held that criminal statutes targeting disfavored speech must include a mental state requirement.[173] For example, in *United States v. X-Citement Video*, the Court noted that, with respect to a federal law prohibiting the distribution of child pornography,[174] criminal liability turned on "the age of the performers"—as did First Amendment protection for the materials, given that "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment."[175] Accordingly, although the statute was unclear on this point, the Court held that the law applied only if a person distributing such materials knew that the performers were underage.[176]

Even if a statute does target a category of speech that is traditionally proscribable, it may still be invalid if it is overbroad, in the sense that it prohibits a substantial amount of protected speech, as well.[177] Thus, for example, in *Ashcroft v. Free Speech Coalition*, the Supreme Court held that a federal statute prohibiting "sexually explicit images that appear to depict minors"[178] was unconstitutionally overbroad.[179] The statute encompassed pornography that did "not depict an actual child," prohibiting images that were "created by using adults who look like minors or by

[169] *See Cent. Hudson*, 447 U.S. at 563.

[170] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988).

[171] For example, the First Amendment does not prohibit states from regulating obscenity, defamation, or fighting words. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992). The Court has frequently described these categories of speech as unprotected, *see, e.g.*, Miller v. California, 413 U.S. 15, 20–23 (1973), but more recently, the Court has questioned whether this is technically true, instead emphasizing that these areas of speech may be more freely regulated, *see R.A.V.*, 505 U.S. at 383–84. Notably, "hate speech" is not, as such, one of these disfavored categories. *See, e.g.*, Julian Baumrin, *Internet Hate Speech & the First Amendment, Revisited*, 37 RUTGERS COMPUTER & TECH. L.J. 223, 226 (2011). *See generally* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (describing regulable categories of speech).

[172] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[173] *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (holding that a state could not prosecute a person who posted threats on Facebook where the law did not include a mental state requirement requiring the defendant to intend to issue a threat or know that the communication would be seen as a threat); United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (concluding that the word "knowingly" in a federal criminal statute extended to both elements of the crime); Smith v. California, 361 U.S. 147, 155 (1959) (holding that a city could not prohibit bookstores from possessing obscene books where the law did not require booksellers to know that the books were obscene).

[174] As described by the Court, "[t]he Protection of Children Against Sexual Exploitation Act of 1977, as amended, prohibit[ed] the interstate transportation, shipping, receipt, distribution, or reproduction of visual depictions of minors engaged in sexually explicit conduct." 513 U.S. at 65–66.

[175] *Id.* at 72–73.

[176] *Id.* at 78 ("[W]e conclude that the term 'knowingly' in [18 U.S.C.] § 2252 extends both to the sexually explicit nature of the material and to the age of the performers.").

[177] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[178] 535 U.S. 234, 239 (2002).

[179] *Id.* at 256.

using computer imaging."[180] Thus, the Court held that the statute violated the First Amendment because it "proscribe[d] a significant universe of speech that is neither obscene . . . nor child pornography," as those two categories had been defined in prior Supreme Court cases.[181]

A court would also look to the nature of the regulation itself, and primarily whether it is content-neutral, or whether it instead discriminates on the basis of content or viewpoint, subjecting that law to strict scrutiny.[182] The Court has said that "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed."[183] In a strict scrutiny analysis, the government must prove that the "restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[184] If a regulation is content-neutral, which is to say, "justified without reference to the content of the regulated speech," a court employs an intermediate scrutiny analysis, asking whether the restriction is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information."[185] Accordingly, for example, a federal court of appeals held in *Universal City Studios, Inc. v. Corley* that government restrictions on posting or linking to decryption computer programs did regulate speech protected by the First Amendment, but ultimately upheld those restrictions as permissible content-neutral regulations.[186]

These first two inquiries are distinct, although they do overlap. If a statute targets speech rather than conduct, it is likely that it will target that speech based on its content, and therefore will not be content-neutral.[187] And by contrast, a statute that targets conduct will likely be content-neutral on its face. In *Universal City Studios, Inc.*, the court held that the challenged government regulations were content-neutral *because* they "target[ed] only the nonspeech component" of the prohibited actions[188] by focusing on the "functional" aspects of computer code that operate without any human involvement.[189] It is possible, though, that a law targeting speech would nonetheless be content-neutral. For example, the Court has said that "a prohibition against the use

[180] *Id.* at 239–40.

[181] *Id.* at 240.

[182] *E.g.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (outlining test for content neutrality).

[183] *Id.*

[184] Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wisconsin Right to Life, Inc., 551 U.S. 448, 464 (2007)).

[185] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). *Ward* and some subsequent cases emphasized governmental purpose as a key element in the inquiry into content neutrality, asking whether the government "adopted a regulation of speech because of disagreement with the message it conveys." *Id.*; *see also, e.g.*, Hill v. Colorado, 530 U.S. 703, 719 (2000). In *Reed v. Town of Gilbert*, the Supreme Court said that "the crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." 135 S. Ct. at 2228.

[186] 273 F.3d 429, 449, 453–58 (2d Cir. 2001).

[187] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010).

[188] 273 F.3d at 454 (saying that a regulation "target[ing] only the nonspeech component" of a particular action is "content-neutral, just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells, even though some of the keys happened to bear a slogan or other legend that qualified as a speech component").

[189] *Id.* at 451. *See also id.* at 454 ("Neither the DMCA nor the posting prohibition is concerned with whatever capacity DeCSS might have for conveying information to a human being, and that capacity, as previously explained, is what arguably creates a speech component of the decryption code. The DMCA and the posting prohibition are applied to DeCSS solely because of its capacity to instruct a computer to decrypt CSS.").

of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising."[190]

A court might also look to the particular nature of the medium being regulated, asking whether there are special characteristics that might justify greater regulation.[191] The Supreme Court has said that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[192] The Court has been willing to extend First Amendment protections that historically applied to speech communicated in traditional public forums such as streets and sidewalks[193] to new mediums for communication, including video games[194] and the internet.[195] But the Court has also recognized that the principles developed "in the context of streets and parks . . . should not be extended in a mechanical way to the very different context of" newer media.[196] While the Court has characterized social media as "the modern public square,"[197] it has not fully clarified what standards should apply to government regulation of that medium—particularly with respect to social media platforms' roles as hosts for others' speech.

The Supreme Court said in *Reno v. ACLU* that when considering government regulation of "the Internet" in general, factors that had previously justified greater regulation of other media did not apply.[198] In that case, the Court held unconstitutional two provisions of the CDA that criminalized the transmission of certain "indecent" or "patently offensive" material to minors over the internet.[199] The Court rejected the government's argument that the regulation was permissible because the internet is analogous to broadcast media, where the Court has permitted greater regulation of speech.[200] The Court noted that unlike the broadcast industry, "the vast democratic fora of the Internet" had not traditionally "been subject to the type of government supervision and regulation that has attended the broadcast industry," and said that "the Internet is not as 'invasive' as radio or television."[201] Accordingly, the Court stated that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[202] However, as will be

[190] Cincinnati v. Discovery Network, 507 U.S. 410, 428 (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

[191] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.").

[192] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

[193] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (discussing traditional public forums).

[194] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("[V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

[195] *E.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (recognizing "cyberspace" as "the most important place[] . . . for the exchange of views"). As lower courts have recognized, however, this dicta from the Court does not necessarily mean that "*all* conceivable means of communication associated with the Internet necessarily constitute 'fora' for protected speech." Nat'l A-1 Advert. v. Network Sols., Inc., 121 F. Supp. 2d 156, 171 (D.N.H. 2000); *see also, e.g.*, Hargis v. Bevin, 298 F. Supp. 3d 1003, 1010–12 (E.D. Ky. 2018) (holding that state governor's social media pages are not public fora because the governor is speaking personally, on his own behalf, and has not opened the pages for others' speech).

[196] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–73 (1998).

[197] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[198] Reno v. ACLU, 521 U.S. 844, 870 (1997) (holding that the factors that justified "qualifying the level of First Amendment scrutiny that should be applied to" broadcast media did not apply to the Internet").

[199] *Id.* at 885.

[200] *Id.* at 867, 868–70.

[201] *Id.* at 868–69.

[202] *Id.* at 870.

discussed in more detail below, some scholars have argued that *Reno*, decided in 1997, does not specifically address government regulation of modern social media sites, which may present unique concerns from those discussed in *Reno*.[203]

Social Media Sites: Providing a Digital Public Square

Social media sites provide platforms for content originally generated by users. In that capacity, social media sites decide whether to host users' content and how that content is presented, and may alter that content in the process.[204] Whether these editorial functions are "speech" protected by the First Amendment presents an especially difficult question. As one federal appellate court noted, "entities that serve as conduits for speech produced by others" may "receive First Amendment protection" if they "engage in editorial discretion" when "selecting which speech to transmit."[205] On the other hand, the court said, such an entity might not be "a First Amendment speaker"[206] if it indiscriminately and neutrally transmits "any and all users' speech."[207]

Some have argued that social media sites' publication decisions are protected under the First Amendment.[208] Until recently, academic debate focused largely on whether the algorithms employed by search engines to retrieve and present results are properly characterized as the speech of those search engines.[209] One scholar argued that search engines' publication activities meet at least one of the criteria necessary to qualify for First Amendment protection: these sites are publishing "sendable and receivable substantive message[s]"—or, in other words, they are communicating content.[210] Another scholar countered this argument by saying that indexing search results is not equivalent to communicating protected ideas, arguing that to be entitled to First Amendment protections, content must be "adopted or selected by the speaker as its own."[211]

[203] *See infra* notes 307 to 312 and accompanying text.

[204] *Cf., e.g.*, Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883, 884 (2012).

[205] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 742 (D.C. Cir. 2016).

[206] *Id.* at 743.

[207] *Id.* at 742. *See also, e.g.*, Rest. Law Ctr. v. New York City, No. 17 Civ. 9128 (PGG), 2019 U.S. Dist. LEXIS 19378, at *25 (S.D.N.Y. Feb. 6, 2019) ("Under the First Amendment, an entity's mere transmission of others' speech does not necessarily constitute speech of that entity.").

[208] *See, e.g.*, Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (And It's Not a Close Question)*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 2018), https://bit.ly/2R6Ii12 [hereinafter Goldman, *First Amendment Protects Google and Facebook*].

[209] *Compare, e.g.*, Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013) ("[I]f we accept Supreme Court jurisprudence, the First Amendment encompasses a great swath of algorithm-based decisions—specifically, algorithm-based outputs that entail a substantive communication."), *and* Volokh & Falk, *supra* note 204, at 884 (arguing that "search engines are speakers"), *with* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability In the Law of Search*, 93 CORNELL L. REV. 1149, 1193 (2008) ("It is highly questionable that search results constitute the kind of speech recognized to be within the ambit of the First Amendment according to either existing doctrine or any of the common normative theories in the field."), *and* Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1528–30 (2013) (arguing that search results are not speech protected by the First Amendment).

[210] Benjamin, *supra* note 209, at 1461. Professor Benjamin argues only that this element is necessary, and acknowledges that it likely is not sufficient for First Amendment protections, asking instead "whether applying the criteria identified above plus the exceptions the Court has articulated would be inconsistent with some elements of the Court's jurisprudence." *Id.* at 1462.

[211] Wu, *supra* note 209, at 1529–30.

There are not many court decisions evaluating whether a social media site, by virtue of reprinting, organizing, or even editing protected speech, is itself exercising free speech rights. While a few federal courts have held that search engine results[212] and decisions about whether to run advertisements[213] are speech protected by the First Amendment, these decisions are, so far, limited to trial courts and therefore not precedential beyond the facts of those cases. This relative dearth of cases is likely due in large part to the fact that, as discussed above,[214] Section 230 of the CDA bars a significant number of lawsuits that seek to hold social media providers liable for publishing others' content,[215] often making it unnecessary to consider whether the First Amendment protects these publication decisions.[216] Section 230 has sometimes been described as an attempt to protect the freedom of speech on the internet,[217] suggesting that its displacement of the First Amendment is an implicit consequence of Section 230's speech-protective nature. In other words, Section 230 creates immunity even where the First Amendment might not.[218]

Due to the lack of case law examining the issue, commentators have largely analyzed the question of whether a social media site's publication decisions are protected by the First Amendment by analogy to other types of First Amendment cases. At least one scholar has argued that there are three possible frameworks a court could apply to analyze governmental restrictions on social media sites' ability to moderate user content.[219] The first analogy would treat social media sites as equivalent to company towns.[220] Under this scenario, social media sites would be treated as state actors who are themselves bound to follow the First Amendment when they regulate protected speech. The second possible framework would view social media sites as analogous to special industries like common carriers or broadcast media, in which the Court has historically allowed greater regulation of the industries' speech in light of the need to protect public access for *users*

[212] *See* e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *11–12 (M.D. Fla. Feb. 8, 2017); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *12 (W.D. Okla. May 27, 2003).

[213] Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[214] *Supra* "Section 230 of the CDA."

[215] 47 U.S.C. § 230.

[216] *See, e.g.*, Google LLC v. Equustek Sols. Inc., No. 5:17-cv-04207-EJD, 2017 U.S. Dist. LEXIS 182194, at *7 n.2 (N.D. Cal. Nov. 2, 2017) (holding that it was unnecessary to reach the defendant's claim that its activity was protected by the First Amendment because the defendant was entitled to immunity under Section 230); Ramey v. Darkside Prods., No. 02-730, 2004 U.S. Dist. LEXIS 10107, at *12 (D.D.C. May 17, 2004) (same).

[217] *E.g.*, Zeran v. Am. Online, Inc. 129 F.3d 327, 330–31 (4th Cir. 1997).

[218] *Cf., e.g.*, Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 422 (S.D.N.Y. 2001) ("Section 230 reflects a 'policy choice,' not a First Amendment imperative, to immunize ISPs from defamation and other 'tort-based lawsuits,' driven, in part, by free speech concerns." (quoting *Zeran*, 129 F.3d at 330–31)). Interestingly, however, Section 230 creates immunity by providing that service providers cannot be treated as a publisher or speaker of content created by another. *E.g.*, Kimzey v. Yelp! Inc., 836 F.3d 1263, 1268 (9th Cir. 2016); *see also id.* at 1271 ("Simply put, proliferation and dissemination of content does not equal creation or development of content."). By contrast, First Amendment protection would likely depend on the providers being seen as the publishers of others' content. *See, e.g.*, Goldman, *First Amendment Protects Google and Facebook*; Volokh & Falk, *supra* note 204, at 884. Section 230 was enacted in direct response to a court decision that had concluded that an internet service provider should be considered a publisher of defamatory statements that a third party had posted on a bulletin board that it hosted, and could therefore be subject to suit for libel. *See* S. REP. NO. 104-230, at 194 (1996); 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox) (discussing Stratton-Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *10–11 (N.Y. Sup. Ct. May 26, 1995)). Arguably, this decision suggests that perhaps absent Section 230 liability, courts *would* have viewed service providers as publishers. *But cf., e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (holding CompuServe could not be held liable unless "it knew or had reason to know of the allegedly defamatory . . . statements" posted on its site).

[219] Klonick, *supra* note 32, at 1658.

[220] *Id.*

of their services.[221] The third analogy would treat social media sites like news editors, who generally receive the full protections of the First Amendment when making editorial decisions.[222]

It is likely that no one analogy can account for all social media platforms, or all activities performed by those platforms. Some social media platforms may exercise more editorial control over user-generated content than others, and any given social media company performs a wide variety of different functions. Consequently, determining which line of case law is most analogous will likely depend on the particular activity being regulated.

Social Media Sites as Company Towns

As discussed in more detail above,[223] although the First Amendment generally applies only to government action, the Supreme Court has held that in limited, special circumstances, private actors should be treated as the government and must comply with constitutional standards when interacting with others.[224] The archetypal case is that of the company town: in *Marsh v. Alabama*, the Supreme Court held that the residents of a company-owned town—a town that was functionally identical to any ordinary town, but for the fact of its ownership—were entitled to the protections of the First Amendment when distributing religious literature on the streets and sidewalks in that town.[225] Courts have largely held that, under existing Supreme Court precedent, social media providers do not meet the First Amendment's state action requirement.[226]

Commentators have argued, however, that dicta in Supreme Court cases may suggest that social media sites should be treated differently.[227] As an initial matter, there is language in *Marsh* suggesting that privately owned property may be subject to the First Amendment if it is opened for public use:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[228]

At least one scholar has argued that, with respect to online forums, "*Marsh* should be expanded and read functionally."[229] He suggests that courts should ask whether a given online space is the

[221] *Id.* at 1660.

[222] *Id.* at 1659–60.

[223] *Supra* "First Amendment: State Action Requirement."

[224] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).

[225] 326 U.S. 501, 507–09 (1946).

[226] *See supra* note 63.

[227] *See* Klonick, *supra* note 32, at 1659; Peters, *supra* note 18, at 1023; Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 2018), https://bit.ly/2Tbl1YP.

[228] *Marsh*, 326 U.S. at 506 (citation omitted). *See also, e.g.*, Evans v. Newton, 382 U.S. 296, 302 (1966) ("A park . . . traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town in *Marsh v. Alabama* . . . , the predominant character and purpose of this park are municipal." (citations omitted)).

[229] Peters, *supra* note 18, at 1023.

"functional equivalent" of a traditional public forum[230] and should engage in a First Amendment analysis that treats private ownership as "one factor" when balancing "the autonomy rights of property owners against the expressive rights of property users."[231] But courts, by and large, have rejected the broader implications of this language in *Marsh*,[232] and the Supreme Court has held that the mere fact that a private space is open to the public is not sufficient to "entitle" the public to the protections of the First Amendment in that space.[233]

Another scholar, however, has argued that notwithstanding "this more narrow conception of the public function exception," social media sites should still be treated as equivalent to the state under *Marsh*.[234] He claims that social media sites perform a "public function"[235] under *Marsh* by "providing a space that has the *primary* purpose of serving as a forum for public communication and expression, that is *designated* for that purpose, and that is *completely open* to the public at large."[236] In his view, "[s]ince managing public squares and meeting places is something that has traditionally been done by the government, social network websites therefore serve a public function that has traditionally been the province of the state."[237] As mentioned above, however, trial courts have declined to extend *Marsh* to social media sites, disagreeing that the provision of a public forum[238] or "the dissemination of news and fostering of debate"[239] are public functions that were traditionally and *exclusively* performed by the government.[240]

Others have argued that a more recent Supreme Court decision, *Packingham v. North Carolina*,[241] might "signal a shift" in the state action analysis.[242] In *Packingham*, the Court struck down a North Carolina law that prohibited a registered sex offender from accessing any "commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."[243] Critically, the Court stated that "cyberspace" is today "the most important place[] . . . for the exchange of views" protected by the First Amendment, analogizing Facebook, LinkedIn, and Twitter to traditional public forums[244] and characterizing social media sites as "the modern public square."[245] In light of the importance

[230] *Id.* He suggests that "several considerations would guide that assessment: (1) the nature of the private property interests at issue, and (2) whether the space is operated for general use by the public for expressive purposes, or whether the operation is itself a public function, either of which would favor a finding of state action." *Id.* at 1024.

[231] *Id.* at 1023.

[232] *See, e.g.*, Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *25–26 (N.D. Cal. Mar. 26, 2018) (noting but rejecting the "broader language" in *Marsh* "that could be construed to support Plaintiff's position that because Defendants hold out and operate their private property (YouTube) as a forum dedicated to allowing its users to express diverse points of view, Defendants should be treated as state actors").

[233] Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

[234] Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 146 (2014).

[235] *Marsh*, 326 U.S. at 506.

[236] Jackson, *supra* note 234, at 146.

[237] *Id.*

[238] Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *26 (N.D. Cal. Mar. 26, 2018).

[239] Quigley v. Yelp, Inc., No. 17-cv-03771-RS, 2017 U.S. Dist. LEXIS 103771, at *4 (N.D. Cal. July 5, 2017).

[240] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[241] 137 S. Ct. 1730, 1735 (2017).

[242] Klonick, *supra* note 32, at 1659. *See also* Whitney, *supra* note 227.

[243] 137 S. Ct. at 1733 (quoting N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e) (2015)) (internal quotation mark omitted).

[244] *Id.* at 1735.

[245] *Id.* at 1737 ("Social media allows users to gain access to information and communicate with one another about it on

of these forums, the Court concluded that the statute was too broad and not sufficiently tailored to serve the government's asserted interest.[246]

Some have suggested that, if the Court views social media as "the modern public square,"[247] it may be more willing to say that social media companies "count as state actors for First Amendment purposes."[248] Indeed, Justice Alito declined to join the majority opinion in *Packingham* because he was concerned about the scope of the Court's "musings that seem to equate the entirety of the internet with public streets and parks."[249] He argued that this broader language was "bound to be interpreted by some"—erroneously, in his view—as limiting the government's ability to "restrict . . . dangerous sexual predators" from some activities online.[250] At least one court, however, has rejected some of the broader implications of this case, noting that "*Packingham* did not, and had no occasion to, address whether *private social media corporations* like YouTube are state actors that must regulate the content of their websites according to the strictures of the First Amendment. Instead, . . . *Packingham* concerned whether *North Carolina* ran afoul of the First Amendment . . . ."[251]

If social media sites were treated as state actors under the First Amendment, then the Constitution itself would constrain their conduct when they act to restrict users' protected speech.[252] Under this framework, Congress could enact legislation to remedy violations of free speech rights by social media entities.[253] For instance, Title III of the Civil Rights Act of 1964 authorizes the Attorney General to bring a civil action against governmental facilities that deny a person equal access "on account of his race, color, religion, or national origin,"[254] essentially granting the Attorney General the power to sue to enjoin certain acts that would violate the Fourteenth Amendment's Equal Protection Clause.[255] To take another example, 42 U.S.C. § 1983 allows any person who has been deprived by a state actor "of any rights, privileges, or immunities secured by the Constitution" to bring certain civil actions to vindicate those rights in court.[256]

By contrast, commentators have argued that under this framework, the problems associated with social media sites hosting too much speech—that is, problems caused by the dissemination of

any subject that might come to mind. By 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." (citation omitted)).

[246] *Id.*

[247] *Id.*

[248] Whitney, *supra* note 227.

[249] *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring).

[250] *Id.*

[251] Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *24 (N.D. Cal. Mar. 26, 2018).

[252] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[253] *Cf., e.g.*, City of Boerne v. Flores, 521 U.S. 507, 512 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976))).

[254] 42 U.S.C. § 2000b.

[255] *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 197 (3d Cir. 1980).

[256] *See, e.g.*, Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1951 (2018) (considering whether plaintiff sufficiently alleged a "First Amendment claim for retaliatory arrest" under Section 1983).

things like misinformation and hate speech—would be exacerbated.[257] If these companies were considered equivalent to state actors and their sites were seen as equivalent to traditional public forums, their ability to regulate speech would be relatively circumscribed.[258] And in turn, so would the government be limited in its ability to require these platforms to take down certain types of content, if that content qualified as protected speech.[259] Thus, one scholar predicted that under this framework, "[a]ll but the very basest speech would be explicitly allowed and protected—making current problems of online hate speech, bullying, and terrorism, with which many activists and scholars are concerned, unimaginably worse."[260]

However, to the extent that a federal regulation infringed on speech properly attributed to the social media sites, rather than their users—and this speech could include not only content originally generated by the social media companies, but also their editorial decisions about user-generated content—it could implicate an open First Amendment question. State and local governments are constrained by the First Amendment when they interact with individuals, but the Supreme Court has never squarely resolved whether states and municipalities could themselves assert First Amendment rights against the federal government.[261] At least one scholar has argued that the First Amendment should protect government speech in certain circumstances.[262] And in a 2015 case, the Supreme Court said that a private party could not force a state to include certain messages in its own speech, suggesting that governments do have some right to speak for themselves.[263] On the other hand, Justice Stewart argued in a 1973 concurring opinion that the government has no First Amendment rights, significantly, maintaining that the Court should not treat broadcasters as state actors because it would "simply strip" them of their First Amendment rights.[264] Lower courts have largely followed Justice Stewart's view and assumed that state actors

[257] *E.g.*, Keller, *supra* note 76, at 13 ("[H]old[ing] platforms to the same rules as the government . . . . would . . . require platforms to preserve speech that many people find obnoxious, immoral, or dangerous."); Klonick, *supra* note 32, at 1659 ("Interpreting online platforms as state actors . . . would also likely create an internet nobody wants. Platforms would no longer be able to remove obscene or violent content.").

[258] While the category of "traditional public forums" has been interpreted relatively narrowly, the "same standards" that apply there apply also in "designated public forums," spaces that "the government has 'intentionally opened up for [the] purpose'" of providing a public forum. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). Lower courts have concluded that at least some government sites on social media qualify as public forums. *See, e .g.*, Davison v. Randall, 912 F.3d 666, 682 (4th Cir. 2019).

[259] *Cf., e.g.*, *Davison*, 912 F.3d at 687 (concluding that local government official engaged in unconstitutional viewpoint discrimination when she banned a private party for posting a comment alleging governmental corruption).

[260] Klonick, *supra* note 32, at 1659.

[261] Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, WASH. POST. (June 24, 2015), https://wapo.st/2HJRQt8; *see also* United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (stating that the Court "need not decide" whether public libraries could assert First Amendment rights against a federal regulation).

[262] David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640 (2006) (arguing that government speech should be protected "where the expressive conduct at issue is constitutive of the public function of the entity speaking, so that restricting expression would rob the speaker of a core purpose for which it was created" and if "the government speech at issue furthers the First Amendment value of democratic self-government").

[263] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015) ("[J]ust as Texas cannot require [the Sons of Confederate Veterans (SCV)] to convey 'the State's ideological message,' SCV cannot force Texas to include a Confederate battle flag on its specialty license plates." (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977))). It can be difficult, however, to discern government speech from private speech. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1757–58 (2017); *Walker*, 135 S. Ct. at 2245, 2250.

[264] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government. To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights.").

may not claim the protection of the First Amendment.[265] Accordingly, it is possible that treating social media sites like state actors would "strip [them] of their own First Amendment rights."[266]

Social Media Sites as Broadcasters or Cable Providers

Alternatively, courts could analogize social media sites to certain industries, like broadcast media, where the Supreme Court has traditionally allowed greater regulation of protected speech.[267] These cases have their roots in the common law doctrines related to common carriers.[268] Historically, a common carrier is an entity that "holds itself out to the public as offering to transport freight or passengers for a fee."[269] Often, these companies received government licenses authorizing their operations.[270] Common carriers have traditionally been subject to heightened legal duties and generally could not refuse paying customers.[271] Some of these common law doctrines have been incorporated into modern regulation of communications industries: federal statutes treat providers of telecommunications services as common carriers that are subject to certain requirements,[272] and authorize the regulation of radio and television broadcasters.[273] While acknowledging that these companies are private entities who do retain First Amendment rights, the Supreme Court has nonetheless allowed some regulation of these rights, in light of the heightened government interests in regulating such entities.[274] As one federal appellate court has put it, the general "absence of any First Amendment concern" with "equal access obligations" in this area "rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right."[275] However, courts have not treated all entities equated to common carriers identically.[276]

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[265] *See* Fagundes, *supra* note 262, at 1643; *cf. id.* (arguing that these cases are "not as unanimous as it has often been described").

[266] *Columbia Broad. Sys., Inc.*, 412 U.S. at 139. *Cf., e.g.*, *Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. at 2255 (Alito, J., dissenting) ("Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection.")

[267] *See* Klonick, *supra* note 32, at 1612; Genevieve Lakier, *The Problem Isn't the Use of Analogies but the Analogies Courts Use*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 2018), https://bit.ly/2Mw9fpo.

[268] *Cf., e.g.*, Klonick, *supra* note 32, at 1660; Klint Finley, *Former FCC Chair Tom Wheeler Says the Internet Needs Regulation*, WIRED (Feb. 27, 2019, 7:00 AM), https://bit.ly/2tE8ulP.

[269] BLACK'S LAW DICTIONARY (10th ed. 2014).

[270] *See, e.g.*, Landstar Express Am., Inc. v. Fed. Mar. Comm'n, 569 F.3d 493, 494 (D.C. Cir. 2009); TRT Telecomms. Corp. v. FCC, 876 F.2d 134, 137 (D.C. Cir. 1989); Am. Trucking Ass'ns v. Interstate Commerce Comm'n, 770 F.2d 535, 543 (5th Cir. 1985).

[271] BLACK'S LAW DICTIONARY (10th ed. 2014). *See also, e.g.*, Barbara A. Cherry, *Utilizing "Essentiality of Access" Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 COMMLAW CONSPECTUS 251, 256–57 (2003).

[272] *See, e.g.*, Direct Commc'ns Cedar Valley, LLC v. FCC, 753 F.3d 1015, 1094 (10th Cir. 2014) (discussing Title II of the Telecommunications Act of 1996, 47 U.S.C. § 153).

[273] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369–70 (1969) (discussing the Communications Act of 1934, 47 U.S.C. § 301).

[274] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 868 (1997) (reviewing some of the "special justifications for regulation of the broadcast media that are not applicable to other speakers").

[275] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 741 (D.C. Cir. 2016).

[276] *Cf., e.g.*, Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 134–35 (2015) (arguing that "common carrier essentialism provides a fundamentally unstable framework for the Commission to develop Internet policy" in part because "it is far from clear what comprises the essence of a common carrier").

Broadcasters

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court approved of a specific application of the Federal Communication Commission's (FCC's) "fairness doctrine."[277] The FCC rule challenged in *Red Lion* required broadcasters to give political candidates a reasonable opportunity to respond to any personal attacks published by the broadcaster or to any editorials in which a broadcaster endorsed or opposed particular candidates.[278] The broadcasters argued that these regulations violated the First Amendment, abridging "their freedom of speech and press" by preventing them from "exclud[ing] whomever they choose" from their allotted frequencies.[279]

The Supreme Court noted the unique nature of the broadcast industry, stating that due to "the scarcity of radio frequencies,"[280] "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[281] This is why, the Court said, it had previously allowed regulations of broadcast media—namely, a licensing system—that might otherwise violate the First Amendment.[282] The Court emphasized that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," highlighting "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[283] Ultimately, the Court held that "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views," the challenged regulations were constitutional.[284]

In subsequent cases, the Supreme Court has reaffirmed that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[285] The Court has recognized that broadcasters do engage in speech activity protected by the First Amendment, most notably when a broadcaster "exercises editorial discretion in the selection and presentation of its programming."[286] The Court has said that "[a]lthough programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."[287] Notwithstanding this conclusion, however, the Court has said that in this area, when evaluating broadcasters' First Amendment claims, it will "afford great weight to the decisions of Congress and the experience of the [FCC]."[288]

[277] *See* 395 U.S. at 375.

[278] *Id.* at 373–75.

[279] *Id.* at 386.

[280] *Id.* at 390.

[281] *Id.* at 388.

[282] *Id.* at 389. Ordinarily, licensing systems applied to speech might raise First Amendment concerns under the doctrine generally disfavoring prior restraints. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). But in *Red Lion*, the Court confirmed that denying a broadcast "license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion*, 395 U.S. at 389 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943)).

[283] *Red Lion*, 395 U.S. at 390.

[284] *Id.* at 400–01.

[285] FCC v. Pacifica Found., 438 U.S. 726, 793 (1978).

[286] Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

[287] *Id.*

[288] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973).

Cable Television

Significantly, the Supreme Court has declined to extend this special deference to government regulation of broadcasters to other forms of media. For example, in *Turner Broadcasting Systems v. FCC*, the Court concluded that the "less rigorous" First Amendment scrutiny that applies to broadcast regulation should not be extended to the "regulation of cable television."[289] The Court was considering the FCC's "must-carry" regulations, which required cable television broadcasters to set aside a portion of their channels for the transmission of local broadcast television stations.[290] The Court said that cable television "does not suffer from the inherent limitations," in terms of the scarcity of frequencies, "that characterize the broadcast medium," consequently concluding that the "unique physical characteristics of cable transmission . . . . do not require the alteration of settled principles of our First Amendment jurisprudence."[291] Accordingly, the Court has subjected laws that restrict cable providers' protected speech to greater scrutiny than restrictions on broadcast media.[292]

But the Court noted in a subsequent decision that "[c]able television, like broadcast media, presents unique problems . . . which may justify restrictions that would be unacceptable in other contexts."[293] And in *Turner Broadcasting* itself, the Court did cite "special characteristics of the cable medium" to justify applying a lower level of scrutiny.[294] The Court recognized that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns" that trigger strict scrutiny.[295] But notwithstanding this general rule, the Court explained that "heightened scrutiny is unwarranted where," as with the must-carry provisions, the "differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[296] Courts have sometimes interpreted *Turner Broadcasting* to mean that at least certain types of regulations on cable television will receive less scrutiny than, for example, a regulation affecting speech in a traditional public forum.[297]

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[289] 512 U.S. 622, 638 (1994).

[290] *Id*. at 630–32.

[291] *Id.* at 639.

[292] *Compare, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 745–51 (1978) (upholding FCC sanction of broadcast containing "patently offensive words" even though it targeted constitutionally protected speech, because broadcasting's pervasiveness and its availability to children "justify special treatment"), *with, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 809, 827 (2000) (holding that federal statute restricting the availability of "sexually explicit [cable] channel[s]" discriminated on the basis of content and was unconstitutional under a strict scrutiny analysis).

[293] *Playboy Entm't Group*, 529 U.S. at 813. In particular, the Court noted the possibility of "unwanted, indecent speech that comes into the home." *Id.* at 814. However, the Court nonetheless applied strict scrutiny to the content-based regulations challenged in that case, distinguishing *Pacifica*, *see supra* note 292, based on "a key difference between cable television and the broadcasting media": the fact that households can block cable channels. 529 U.S. at 815.

[294] 512 U.S. at 661.

[295] *Id.* at 659.

[296] *Id.* at 660–61 (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983)). In particular, the Court said that the must-carry provisions were justified by "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Further, the Court said that because the regulations were "broad-based" and widely applicable to "almost all cable systems," they were "not structured in a manner that carries the inherent risk of undermining First Amendment interests." *Id.*

[297] *See, e.g.*, Denver Area Educ. Telecoms. Consortium v. FCC, 518 U.S. 727, 769 (1996) (Stevens, J., concurring) (noting that *Turner Broadcasting* was decided "without reference to our public forum precedents," and arguing that when regulating cable, the federal government "deserves more deference than a rigid application of the public forum doctrine would allow"); *see also, e.g.*, Comcast Cable Communs., LLC v. FCC, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (stating that the Supreme Court's ruling that the "must-carry provisions might satisfy

Ultimately, however, the *Turner Broadcasting* Court cited two justifications for applying intermediate scrutiny, rather than strict scrutiny, to the FCC's must-carry provisions, making it unclear which rationale the Court relied on to uphold the regulations. Prior to its discussion of cable's special characteristics, the Court concluded that intermediate scrutiny was appropriate because the must-carry provisions were "content-neutral restrictions that impose[d] an incidental burden on speech."[298] The Court noted that while the rules did "interfere with cable operators' discretion . . . , the extent of the interference [did] not depend upon the content of the cable operators' programming."[299] Although the must-carry provisions *did* "distinguish between speakers," that discrimination was "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry," and, therefore, the rules were content-neutral on their face.[300] Thus, it is somewhat unclear to what extent the Court's decision to apply intermediate scrutiny in *Turner Broadcasting* rested on "special characteristics of the cable medium" and to what extent it depended on a more overarching First Amendment principle regarding content neutrality.[301]

Treating Social Media Like Broadcast or Cable

While the Supreme Court has identified "unique problems" that may justify greater regulation of broadcast and cable,[302] it has expressly held that the factors that justify more extensive regulation of the broadcast media "are not present in cyberspace."[303] In *Reno v. ACLU*, decided in 1997, the Court said that the internet had not historically "been subject to the type of government supervision and regulation that has attended the broadcast industry," that the internet was not "as 'invasive' as radio or television" because a person had to take affirmative action to receive a particular communication on the internet, and that the internet could "hardly be considered a 'scarce' expressive commodity."[304] Consequently, in the Court's view, the factors that justified "qualifying the level of First Amendment scrutiny that should be applied to" broadcast media did not apply to the internet.[305] In *Reno*, the Court ultimately held that two provisions of the CDA that criminalized speech based on its content were unconstitutionally vague and overbroad.[306]

Several legal scholars have argued that, contrary to the Court's conclusion in *Reno*, the internet *is* analogous to traditional broadcast media and therefore should be subject to greater regulation.[307]

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intermediate First Amendment scrutiny . . . rested . . . on special characteristics of the cable medium") (internal quotation mark omitted).

[298] *Turner Broad. Sys.*, 512 U.S. at 662.

[299] *Id.* at 643–44. Further, the Court noted that the "overriding congressional purpose" was "unrelated to the content of expression disseminated by cable and broadcast speakers." *Id.* at 647.

[300] *Id.* at 645; *see also id.* ("So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.").

[301] *See id.* at 653–61. *Cf.* United States v. Playboy Entm't Group, 529 U.S. 803, 809, 813–15 (2000) (applying strict scrutiny to content-based speech restriction regardless of the "unique problems" presented by the cable medium).

[302] *Playboy Entm't Group*, 529 U.S. at 813.

[303] Reno v. ACLU, 521 U.S. 844, 868 (1997).

[304] *Id.* at 868–70.

[305] *Id.* at 870.

[306] *See id.* at 871–72.

[307] *E.g.*, Bracha & Pasquale, *supra* note 209, at 1191; Klonick, *supra* note 32, at 1660–61. In addition, the D.C. Circuit upheld an FCC order classifying broadband service as a common carrier against a First Amendment challenge, concluding that internet broadband providers "act as 'mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections,'" noting that broadband providers do not, in fact, exercise significant control over the content that internet users access. 825 F.3d 674, 741 (D.C. Cir. 2016) (quoting *In re*

Scholars have argued that as the internet has developed, it has "reproduce[d] the traditional speech-hierarchy of broadcasting": "small, independent speakers [are] relegated to an increasingly marginal position while a handful of commercial giants capture the overwhelming majority of users' attention and reemerge as the essential gateways for effective speech."[308] Thus, as one scholar argued, "the hold of certain platforms" over "certain mediums of speech" has "created scarcity."[309] Further, especially as compared to the internet in the late 1990s, when *Reno* was decided, the internet is "now more invasive in everyday life"—arguably more invasive even than television and radio.[310] Another commentator has claimed that rather than traditional broadcast media, search engines might be more analogous to cable providers.[311] In her view, search engines, "like cable companies," "provide access to the speech of others" but also "exercise some degree of editorial discretion over whom they provide access to."[312] The analogy may be extended to social media sites, as well, because, like search engines, they also exercise editorial discretion regarding who can post and view content on their sites, and regarding how user-generated content is presented.

One lower court rejected these arguments, with respect to search engines, in *Zhang v. Baidu.com, Inc*.[313] In that case, the plaintiffs argued that Baidu, a Chinese search engine, had violated federal and state civil rights laws by blocking "from its search results . . . information concerning 'the Democracy movement in China' and related topics."[314] Baidu argued that its decisions to block these search results were protected by the First Amendment.[315] The judge noted that "some scholars" had argued that under *Turner Broadcasting*, search-engine results should receive a "lower level of protection."[316] However, in the court's view, the First Amendment "plainly shield[ed]" the search engine from this particular lawsuit because the plaintiff's own suit sought "to hold Baidu liable for, and thus punish Baidu for, a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects."[317] Accordingly, the court said that "*Turner*'s three principal rationales for applying a lower level of scrutiny to the must-carry cable regulations—namely, that cable companies were mere conduits for the speech of others, that they had the physical ability to silence other speakers, and that the regulations at issue were content-neutral—[we]re inapplicable" to the case before it.[318] The court concluded that Baidu was acting as more than a conduit for others' speech, at least according to the plaintiffs' allegations, that Baidu lacked "the

Protecting and Promoting the Open Internet, No. 15-24, 30 FCC Rcd. 5601, 5870 (2015)), *cert. denied*, 139 S. Ct. 475 (2018). *Accord, e.g.*, Jack M. Balkin, *Free Speech and Press in the Digital Age: The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 430 (2009) (arguing that net neutrality rules do not violate the First Amendment because they "treat network providers as conduits for the speech of others and regulate them in their capacity as conduits"). The FCC subsequently reversed its original order. *See In re* Restoring Internet Freedom, No. 17-166, 33 FCC Rcd. 311 (2018).

[308] Bracha & Pasquale, *supra* note 209, at 1158.

[309] Klonick, *supra* note 32, at 1661.

[310] *Id.*

[311] Lakier, *supra* note 267.

[312] *Id.*

[313] 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014).

[314] *Id.* at 434–35.

[315] *Id.* at 440.

[316] *Id.* at 439.

[317] *Id.* at 440.

[318] *Id.*

physical power to silence anyone's voices," and that a judicial decision penalizing "Baidu precisely because of what it does and does not choose to say" would not be content-neutral.[319]

If courts treated social media sites like broadcast media or like cable providers, they would be more likely to uphold government regulation of social media providers. As a preliminary inquiry, a court would likely ask what regulations could be justified by specific characteristics of the regulated medium.[320] If a court believed that the internet in general, or social media in particular, shared relevant characteristics with either traditional broadcast media or with cable providers, then it would be more likely to allow the types of regulations that have traditionally been permitted in those contexts. Thus, a court might ask whether social media sites, like cable companies, exercise a "bottleneck monopoly power"[321] or whether, like broadcast television or radio, social media platforms suffer from a "scarcity" problem in terms of the number of platforms for speech or are so "invasive" as to justify regulation to address these problems.[322] Related, courts might also ask whether the regulations are intended to increase the amount of information or expression available to the public.[323] Thus, if social media sites present distinct problems that threaten the use of the medium for communicative or expressive purposes,[324] courts might approve of regulations intended to solve those problems—particularly if those regulations are content-neutral.[325] These same types of considerations would likely apply both to regulations requiring these platforms to carry certain content and to those requiring the platforms *not* to carry certain content.[326] But, at least for the time being, without an intervening change in the law, lower courts seem likely to follow *Reno* and conclude that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the internet.[327]

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[319] *Id.* at 441.

[320] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 661 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

[321] *Turner Broad. Sys.*, 512 U.S. at 661.

[322] Reno v. ACLU, 521 U.S. 844, 868 (1997). For example, Facebook reportedly collects data about users from other apps, even if the user of those apps "has no connection to Facebook." Sam Schechner & Mark Secada, *You Give Apps Sensitive Personal Information. Then They Tell Facebook.*, WALL STREET J. (Feb. 22, 2019, 11:07 AM), https://on.wsj.com/2GFskWf. Assuming that this is true, a regulation aimed at the invasiveness of Facebook's data collection activities might qualify for review under the lower standards of *Red Lion* or *Turner Broadcasting* even if it does also regulate protected speech. *See also, e.g.*, Kashmir Hill, *I Cut the 'Big Five' Tech Giants from My Life. It Was Hell*, GIZMODO (Feb. 7, 2019, 12:00 PM), https://bit.ly/2BjWyKb (describing the difficulty of avoiding using Amazon, Facebook, Google, Microsoft, and Apple).

[323] *See, e.g.*, *Turner Broad. Sys.*, 512 U.S. at 663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) ("[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.").

[324] *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

[325] *Cf., e.g.*, Turner Broad. Sys. v. FCC, 520 U.S. 180, 213 (1997) (concluding that must-carry provisions "ensure[] that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations"); *see also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998) (saying that while the First Amendment does not "of its own force . . . compel public broadcasters to allow third parties access to their programming, neither would it necessarily "bar the legislative imposition of neutral rules for access to public broadcasting").

[326] In the realm of broadcast media, the Supreme Court has applied the same type of analysis when considering, for example, the fairness doctrine, *see* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969), as when considering FCC action censoring offensive words, *see* FCC v. Pacifica Found., 438 U.S. 726, 745–51 (1978).

[327] Reno v. ACLU, 521 U.S. 844, 870 (1997).

Social Media Sites as Editors

The third analogy courts might use to analyze whether social media sites moderating user content are exercising protected speech rights is that of the newspaper editor.[328] In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held that when newspapers "exercise . . . editorial control and judgment," such as choosing what "material [will] go into a newspaper," and making "decisions . . . as to limitations on the size and content of the paper, and treatment of public issues and public officials," they are exercising free speech rights protected by the First Amendment.[329] The Court in that case was considering the constitutionality of a state law that gave political candidates the "right to reply to press criticism" of the candidate.[330] A newspaper challenged this statute, arguing that forcing it to print content that it would not otherwise publish violated the First Amendment.[331] The government argued that its law was necessary due to the fact that relatively few news outlets exercised essentially a "monopoly" on "the 'marketplace of ideas.'"[332] The regulation, in the state's view, "[e]nsure[d] fairness and accuracy" and "provide[d] for some accountability."[333]

The Supreme Court unanimously rejected this argument, noting that while "press responsibility" may be a "desirable goal," it was "not mandated by the Constitution" and could not "be legislated."[334] The state law impermissibly "exact[ed] a penalty on the basis of the content of the newspaper" by forcing newspapers to spend money to print the replies and by "taking up space that could be devoted to other material."[335] Further, the Court held, "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply," the law violated the First Amendment "because of its intrusion into the function of editors."[336] Because newspapers exercise "editorial control and judgment," the Court said, they are "more than a passive receptacle or conduit for news, comment, and advertising," and instead engage in protected speech.[337]

The Court has recognized this First Amendment protection for editorial judgments outside the context of newspapers, stating more generally that "compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech."[338] For example, the Supreme Court said in *Arkansas Educational Television Commission v. Forbes* that "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its

[328] *E.g.*, Klonick, *supra* note 32, at 1612. A related but distinct analogy might treat social media sites like booksellers, who have the "First Amendment right to distribute and facilitate protected speech." Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (holding that the owner of a blog had "a First Amendment right to distribute and facilitate" comments on that blog, even though the blogger "did not produce the content" in the comment).

[329] 418 U.S. 241, 258 (1974).

[330] *Id.* at 247. *See also id.* at 244 (describing statute as providing "that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges").

[331] *Id.* at 245.

[332] *Id.* at 251.

[333] *Id.*

[334] *Id.* at 256.

[335] *Id.*

[336] *Id.* at 258.

[337] *Id.*

[338] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 9 (1986).

programming, it engages in speech activity."[339] And in *Pacific Gas & Electric Co. v. Public Utilities Commission*, the Court recognized that a utility company had a First Amendment interest in selecting the content contained in its monthly newsletter.[340] The Court said in *Pacific Gas & Electric Co.* that a state regulatory commission could not require the utility to grant access to entities who disagreed with the utility's views.[341] This regulation infringed on the utility company's First Amendment rights by compelling it "to assist in disseminating the speaker's message" and by requiring it "to associate with speech with which [the company] may disagree," forcing the company to respond to those arguments.[342]

To take another example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that the private organizers of a parade had a First Amendment right to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from the parade.[343] GLIB had sued the parade organizers, arguing that their exclusion violated Massachusetts's antidiscrimination laws by barring them from a public accommodation on the basis of sexual orientation, and state courts had agreed that GLIB's exclusion violated state law.[344] The parade organizers, however, claimed that the parade was an expressive activity and that forcing them to include GLIB's speech in the parade violated their First Amendment rights.[345] The Supreme Court held first that a parade did qualify as "protected expression," even though most of the speech in the parade was *not* that of the organizers themselves.[346] The Court said that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[347] As an example, the Court noted that "[c]able operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."[348] Accordingly, the Court concluded that the selection of parade participants was protected activity under the First Amendment.[349]

Consequently, in the *Hurley* Court's view, characterizing the parade as a public accommodation under the state's antidiscrimination law "had the effect of declaring the sponsors' speech itself to be the public accommodation," and this exercise of state power "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[350] GLIB argued that this application of the state's public accommodation law should be upheld under *Turner Broadcasting*,[351] claiming that the parade organizers, "like a cable operator," were "merely a conduit for the speech of participants in the parade rather than itself a speaker."[352] The Court disagreed, saying that unlike the cable operators, "GLIB's

[339] 523 U.S. 666, 674 (1998).

[340] 475 U.S. at 8–9.

[341] *Id.* at 19–20 (holding that the commission's order failed strict scrutiny).

[342] *Id.* at 15–16.

[343] 515 U.S. 557, 581 (1995).

[344] *Id.* at 561–66.

[345] *Id.*

[346] *Id.* at 569.

[347] *Id.* at 569–70.

[348] *Id.* at 570.

[349] *Id.*

[350] *Id.* at 573.

[351] Turner Broad. Sys. v. FCC, 512 U.S. 622, 661 (1994).

[352] *Hurley*, 515 U.S. at 575 (internal quotation marks omitted).

participation would likely be perceived as" a decision of the parade organizers that GLIB's "message was worthy of presentation and quite possibly of support as well."[353] The better analogy, in the Court's view, was to a newspaper.[354] The Court said that viewers understand that cable programming consists of "individual, unrelated segments that happen to be transmitted together," but in contrast, "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."[355]

By contrast, the Supreme Court has rejected the application of *Tornillo* in cases where compelling a private entity to grant access to third parties would not affect the entity's own speech.[356] First, in *PruneYard Shopping Center v. Robins*, a private shopping center, PruneYard, had "a policy not to permit any visitor or tenant to engage in any publicly expressive activity," and pursuant to that policy, asked a number of students distributing pamphlets and seeking signatures on petitions to leave.[357] In a suit brought by the students, the California Supreme Court held that PruneYard's action violated state law, holding that the students "were entitled to conduct their activity on PruneYard property."[358] PruneYard argued that this decision violated their own free speech rights, claiming that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others."[359] The Court rejected this argument, noting that the government was not forcing PruneYard *itself* to espouse any specific views, and that PruneYard could "expressly disavow any connection with" any particular message.[360] The Court said that under the circumstances, "[t]he views expressed by members of the public" would "not likely be identified with those of the owner."[361]

The Court distinguished *Tornillo* on similar grounds in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.[362] In that case, a group of law schools represented by FAIR protested the Solomon Amendment, which specified "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[363] Prior to the passage of the Solomon Amendment,

[353] *Id.*

[354] *Id.*

[355] *Id.* at 576–77.

[356] *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 12 (1986) (discussing and distinguishing PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980), noting that in *PruneYard*, there was no "concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based").

[357] 447 U.S. 74, 77 (1980). The state court had concluded that the California Constitution "protects 'speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.'" *Id.* at 78 (quoting Robins v. Pruneyard Shopping Ctr. 592 P.2d 341, 347 (Cal. 1979)).

[358] *Id.* at 78.

[359] *Id.* at 85. PruneYard also raised a Fifth Amendment challenge, arguing that by denying them their right to exclude others from their property, the state had unlawfully taken their property. *Id.* at 82. The Court disagreed. *Id.* at 85.

[360] *Id.* at 87. PruneYard cited *Tornillo*, among other cases, as support for its position. *Id.* at 87–88. The Supreme Court rejected this argument rather tersely, saying that *Tornillo* was based on concerns about the government intruding into the function of newspaper editors—concerns that "obviously are not present here." *Id.* at 88. In *Hurley*, the Court distinguished *PruneYard* by emphasizing that in *PruneYard*, it was unlikely that the messages would be attributed to the owner, and that the owners could disavow those messages. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580 (1995).

[361] *PruneYard*, 447 U.S. at 87.

[362] 547 U.S. 47, 63 (2006).

[363] *Id.* at 51.

some law schools had restricted military recruiting on campus on the basis that the military, through its "policy on homosexuals in the military," violated the schools' nondiscrimination policies.[364] FAIR argued that forcing the schools to "disseminate or accommodate a military recruiter's message" violated their First Amendment rights.[365] The Court first noted that the Solomon Amendment primarily regulated conduct and only incidentally compelled speech, in the form of recruiting assistance such as sending emails or posting notices.[366]

Further, the Court held that "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[367] Distinguishing *Hurley*, the Court said that "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."[368] The Court said that "the expressive component" of the schools' decisions to bar military recruiters was "not created by the conduct itself but by the speech that accompanies it."[369] Instead, as in *PruneYard*, the Court said that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," noting that the schools remained free to state that they disagreed with the military's policies.[370]

A number of federal trial courts have applied *Tornillo* to hold that search engines exercise editorial judgment protected by the First Amendment when they make decisions about whether and how to present specific websites or advertisements in search results.[371] For example, in *Zhang v. Baidu.com, Inc.*, the trial court noted that when search engines "retrieve relevant information from the vast universe of data on the Internet and . . . organize it in a way that would be most helpful to the searcher," they "inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information."[372] Ultimately, the court held that the plaintiff's "efforts to hold Baidu accountable in a court of law for its editorial judgments about what political ideas to promote cannot be squared with the First Amendment."[373]

In line with this view, some scholars have maintained that search engine results represent protected speech because search engines make editorial judgments, "reporting about others' speech" in a way that "is itself constitutionally protected speech.[374] Others have pointed out, however, that such actions would likely be protected only insofar as they do communicate something to listeners.[375] Thus, some scholars have argued that search results—at least if those

[364] *Id.* at 51–52.

[365] *Id.* at 53.

[366] *Id.* at 62.

[367] *Id.* at 64.

[368] *Id.*

[369] *Id.* at 66.

[370] *Id.* at 65.

[371] e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *11 (M.D. Fla. Feb. 8, 2017); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 439–40 (S.D.N.Y. 2014); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[372] 10 F. Supp. 3d at 438.

[373] *Id.* at 443.

[374] Volokh & Falk, *supra* note 204, at 884. *See also, e.g.*, Benjamin, *supra* note 209, at 1471.

[375] *See, e.g.*, Benjamin, *supra* note 209, at 1484. *See also, e.g.*, Whitney, *supra* note 227 (arguing that Google should not be characterized as a publisher *solely* because it "conveys a wide range of information" and that not all actions conveying information should be treated as speech).

results are automated "and experienced as 'objective'"—would not be protected under the First Amendment because the "dominant function" of these results "is not to express meaning but rather to 'do things in the world'; namely, channel users to websites."[376] On this issue, the court in *Zhang*, said that, given governing Supreme Court precedent, "the fact that search engines often collect and communicate facts, as opposed to opinions, does not alter the analysis": "As the Supreme Court has held, 'the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.'"[377] Reaching the same result through different reasoning, a different district court held that Google's "PageRanks," which rank "the relative significance of a particular web site as it corresponds to a search query," were protected under the First Amendment as subjective opinions.[378]

Commentators have argued that *Tornillo* should apply when, for example, Facebook promotes certain viewpoints over others, as Facebook is exercising editorial judgment about how to present constitutionally protected speech.[379] The trial court's opinion in *Zhang* suggests that social media sites would be engaging in protected speech insofar as they, like search engines, "make editorial judgments about what information (or kinds of information)" to display "and how and where to display that information."[380] On the other hand, the Supreme Court's decision in *FAIR* suggests that under some circumstances, an entity's decision "to allow" third parties to use their platforms might not be expressing a particular view.[381] As with search results, one critical question may be whether the content presentation decisions themselves are communicative or expressive, or whether instead they only take on an expressive meaning when combined with *other* speech.[382]

Related to the question of whether content presentation decisions themselves are expressive, one possible argument against extending the editorial analogy to social media sites is that users would be unlikely to attribute users' speech to the social media sites.[383] In *Tornillo* itself, the Court held that the newspapers' editorial judgments were protected under the First Amendment without expressly analyzing whether readers would attribute the published content to the newspaper.[384] One significant factor in the Supreme Court's various decisions about whether to extend First Amendment protection to the groups hosting others' speech was whether listeners would be likely

[376] Bracha & Pasquale, *supra* note 209, at 1194 n.239, 1193.

[377] 10 F. Supp. 3d at 438 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).

[378] Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *3, 10–12 (W.D. Okla. May 27, 2003).

[379] *See, e.g.*, Jeff John Roberts, *Like It or Not, Facebook Has the Right to Choose Your News*, FORTUNE (May 10, 2016), https://bit.ly/2BwF6SA. *See also* La'Tiejira v. Facebook, Inc., 272 F. Supp. 3d 981, 992 (S.D. Tex. 2017) (holding plaintiff's claims were barred under state law protecting free speech because they "arise directly and exclusively from Facebook's First Amendment right to decide what to publish and what not to publish on its platform"). *Cf., e.g.*, Daniel Lyons, *The First Amendment Red Herring in the Net Neutrality Debate*, FORBES (Mar. 10, 2017, 9:07 AM), https://bit.ly/2E82wQ4 (arguing that FCC net neutrality rules may violate the First Amendment rights of broadband providers).

[380] 10 F. Supp. 3d at 438.

[381] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006).

[382] *See id.* at 66; *supra* note 375 and accompanying text.

[383] *See, e.g.*, Bracha & Pasquale, *supra* note 209, at 1190–91; Whitney, *supra* note 227.

[384] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

to attribute that speech to the host, such as the parade organizer, in *Hurley*,[385] the shopping center, in *PruneYard*,[386] or the law schools, in *FAIR*.[387]

Accordingly, courts may be less likely to conclude that social media sites' decisions regarding users' content are protected by the First Amendment if third parties would be unlikely to attribute users' speech to the social media sites themselves.[388] Whether third parties would attribute user-generated content to social media platforms will likely depend on the particular site or activity being regulated. In particular, where platforms aggregate or alter user-generated content, users may be more likely to see that as the platforms' speech. If the sites aggregate user-generated content, courts may ask, as in *Hurley*, whether viewers would understand that content to "consist of individual, unrelated segments" that are "neutrally presented," or whether instead viewers would understand that each segment "is understood to contribute something to a common theme," and that the aggregate communicates an "overall message."[389] Accordingly, if a site aggregates content into a single story,[390] courts might hold that the sites are acting as more than a mere "conduit for speech produced by others."[391] By contrast, if a site published all user content without restrictions, users' communications, like "the views expressed by members of the public" in *PruneYard*, might not reasonably be "identified" as the views "of the owner."[392] So far, the trial court decisions extending the editorial analogy to search engines have not analyzed this issue in significant detail.[393]

If social media sites were considered to be equivalent to newspaper editors when they make decisions about whether and how to present users' content, then those editorial decisions would protected by the First Amendment.[394] Any government regulation of those protected editorial

[385] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 575, 576 (1995) (holding that parade organizers were more than mere conduits for others' speech "because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well," and noting that it would be difficult for the parade organizers to disavow a connection to the messages of the parade participants).

[386] PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980) ("The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner.").

[387] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006) ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies.").

[388] *See Hurley*, 515 U.S. at 575; *PruneYard*, 447 U.S. at 87. *See also, e.g.*, Keller, *supra* note 76, at 20 ("Most internet users presumably know that platforms do not endorse third party speech, and platforms could always add still more disclaimers to their user interfaces to make that clear.").

[389] 515 U.S. at 576–77.

[390] For example, Twitter sometimes creates "Moments," which it describes as "curated stories showcasing the very best of what's happening on Twitter." *About Moments*, TWITTER, https://bit.ly/2x0AxOt (last visited Mar. 27, 2019). Perhaps similarly, Facebook sometimes compiles users' content into "Memories." Oren Hod, *All of Your Facebook Memories Are Now in One Place*, FACEBOOK (June 11, 2018), https://bit.ly/2JSA48t. And in its "Search & Explore" section, Instagram compiles personalized content recommendations into one feed that users can continuously scroll through. *See Exploring Photos & Videos*, INSTAGRAM, https://bit.ly/2JvClYb (last visited Mar. 27, 2019).

[391] *See Hurley*, 515 U.S. at 577.

[392] *PruneYard*, 447 U.S. at 87 (noting that the shopping center is "a business establishment that is open to the public to come and go as they please"); *cf., e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 741 (D.C. Cir. 2016) (holding that the First Amendment does not prohibit imposing "nondiscrimination and equal access obligations" on broadband providers that "exercise little control over the content which users access on the Internet").

[393] *See* e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *11 (M.D. Fla. Feb. 8, 2017); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 439–40 (S.D.N.Y. 2014); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[394] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

functions that forced social media sites to host content that they would not otherwise transmit, or otherwise restricting those sites' "autonomy to choose the content" of their "own message,"[395] would likely be subject to strict scrutiny.[396] Similarly, regulations requiring social media providers *not* to publish protected speech on the basis of the speech's content, or punishing them for publishing that speech, might also be subject to strict scrutiny.[397] To satisfy strict scrutiny, the government must show that the speech restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[398] Government actions are unlikely to be upheld if a court applies strict scrutiny.[399] Nevertheless, the Supreme Court has, in rare instances, said that the government may "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."[400]

Additionally, even if a court held that social media sites' editorial decisions are protected under the First Amendment, it might review a government regulation affecting those decisions under a lower level of scrutiny if the regulation is content-neutral.[401] Even in a traditional public forum, the government may impose "reasonable time, place and manner restrictions" on speech.[402] Thus, for example, the Supreme Court has said that while the government may regulate noise by "regulating decibels" or "the hours and place of public discussion," it may not bar speech solely "because some persons were said to have found the sound annoying."[403] Accordingly, courts may uphold government regulations if they have only an incidental effect on speech, "serve a substantial governmental interest," and do not "burden substantially more speech than is necessary to further that interest."[404]

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[395] *Hurley*, 515 U.S. at 573.

[396] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 653 (1994).

[397] *Cf., e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 29 (2010).

[398] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)) (internal quotation mark omitted).

[399] *See, e.g.*, *id.* at 2226 (noting that content-based laws "are presumptively unconstitutional"). *Cf.* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1313–14 (2007) (discussing strict scrutiny standard and its modern application to free speech); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (arguing that empirically, "strict scrutiny is . . . most fatal in the area of free speech," as compared to other constitutional areas in which the standard is applied).

[400] Denver Area Educ. Telecoms. Consortium v. FCC, 518 U.S. 727, 741 (1996) (plurality opinion); *see also, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665–66 (2015) (plurality opinion); Burson v. Freeman, 504 U.S. 191, 198–200 (1992) (plurality opinion); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[401] *Cf., e.g.*, Univ. City Studios, Inc. v. Corley, 273 F.3d 429, 454 (2d Cir. 2001); Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000). The constitutionally protected speech at issue in these two cases was computer code, rather than the editorial decisions of a site that hosts others' content; in both cases, the court analyzed the government restrictions on that speech under the standard for content-neutral laws outlined in *Turner Broadcasting*. *Id. See also supra* notes 182 to 185 and accompanying text.

[402] Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1886 (2018). *See also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("[T]ime, place, or manner restrictions . . . . are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

[403] Saia v. New York, 334 U.S. 558, 562 (1948). *See also, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding as a permissible content-neutral regulation a city ordinance that prohibited performers in a city bandshell from using their own sound equipment).

[404] *See Corley*, 273 F.3d at 454.

Considerations for Congress

The permissibility of federal regulation of social media sites will turn in large part on what activity is being regulated. To the extent that federal regulation specifically targets communicative content—that is, speech—or social media platforms' decisions about whether and how to present that content, that regulation may raise constitutional questions. While the Supreme Court has not yet weighed in on the question, lower courts have held that when search engines make decisions regarding the presentation of search results, they are exercising editorial functions protected as speech under the First Amendment.[405] If this reasoning were to be extended to social media sites' decisions regarding the presentation of users' content, Congress's ability to regulate those decisions would be relatively limited.

However, even assuming that Congress were to regulate the protected speech of social media companies, this would not necessarily doom a regulation. If, for example, the particular speech being regulated is commercial speech, such as advertisements, the regulation would likely be evaluated under a lower level of scrutiny.[406] In addition, the Court has recognized certain, relatively limited categories of speech that can be more readily regulated: "For example, speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas."[407] But even with respect to these categories of speech, the government may violate the First Amendment if it engages in further content or viewpoint discrimination within that category.[408] Thus, the Supreme Court has said as an example that while "the government may proscribe libel," "it may not make the further content discrimination of proscribing only libel critical of the government."[409] In addition, if the law imposes criminal liability, the Court may require a mental state requirement,[410] so that, for example, the government has to prove that the defendant knew the speech was obscene.[411]

Courts will also apply a lower level of scrutiny to content-neutral regulations.[412] A content-neutral law that regulates only "the time, place, or manner of protected speech" may be constitutional if it

[405] e-ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *11 (M.D. Fla. Feb. 8, 2017); Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 439–40 (S.D.N.Y. 2014); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[406] A government regulation of commercial speech would be evaluated under a standard of intermediate scrutiny as announced in *Central Hudson*. Specifically, the government must prove that its interest is "substantial," that the regulation "directly advances" that interest, and that it is "not more extensive than is necessary to serve that interest." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). *Cf. Zhang*, 10 F. Supp. 3d at 439–40 (rejecting the argument that challenged search engine results were "a form of commercial speech subject to 'relaxed' scrutiny under the First Amendment").

[407] Davenport v. Wash. Educ. Ass'n, 515 U.S. 177, 188 (2007). *See generally* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion (describing regulable categories of speech).

[408] R.A.V. v. St. Paul, 505 U.S. 377, 383–84 (1992).

[409] *Id.* at 384.

[410] *See supra* note 173.

[411] Smith v. California, 361 U.S. 147, 153–54 (1959) (saying that if a bookseller may be held criminally liable for distributing obscene books "without knowledge of the [books'] contents, . . . he will tend to restrict the books he sells to those he has inspected," and this "self-censorship" would "affect[] the whole public," by impeding "the distribution of all books, both obscene and not obscene").

[412] *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017); McCullen v. Coakley, 573 U.S. 464, 486 (2014); Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994).

is "narrowly tailored to serve a significant governmental interest."[413] If a law is not only content-neutral but also focused primarily on regulating conduct, imposing only an incidental burden on speech, a court will uphold the regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[414] Thus, for example, in *Turner Broadcasting*, the Supreme Court held that the FCC's must-carry provisions should be reviewed under an intermediate standard, rather than under strict scrutiny, because the rules were content-neutral: their application did not depend on "the content of the cable operators' programming" or the messages of the speakers carried.[415] And in *FAIR*, the Court upheld the Solomon Amendment under intermediate scrutiny after concluding that the law regulated conduct that was not "inherently expressive" and only incidentally burdened speech.[416] The Court said that the law did "not focus on the *content* of a school's recruiting policy," but on "the *result* achieved by the policy."[417]

Additionally, if Congress highlights "special characteristics" of social media to justify heightened regulation, courts may be more willing to uphold those regulations.[418] Although the Supreme Court in *Reno* rejected certain "special justifications" that the government argued should allow greater regulation of the internet at large, some have argued that special characteristics of social media might justify limited regulation to address those issues,[419] particularly if those justifications are distinct from the ones rejected in *Reno*,[420] or if there is evidence that conditions have changed since that decision was issued.[421] To date, however, no courts have found that such special justifications exist, let alone approved of regulations addressing those issues.

Finally, Congress may consider how any new regulation would fit into the existing legal framework of the CDA's Section 230. Section 230 creates immunity from most civil lawsuits that seek to treat service providers as the "publisher or speaker" of content created by another, and also provides that interactive service providers may not be held liable for taking good faith action to restrict access to content that the provider or users deem "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[422] Insofar as any new federal regulations would subject social media providers to liability for publishing content created by

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[413] *McCullen*, 573 U.S. at 477 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[414] *Turner Broad. Sys.*, 512 U.S. at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)) (internal quotation marks omitted).

[415] *Id.* at 643–45.

[416] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66–67 (2006) ("Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.").

[417] *Id.* at 57.

[418] *See Turner Broad. Sys.*, 512 U.S. at 661.

[419] In particular, a number of commentators and regulators have expressed concerns about the possible monopoly nature of the biggest social media companies, as well as the amount of information they have about users. *See, e.g.*, Finley, *supra* note 268; Kelly, *supra* note 26; Aja Romano, *Don't Ask Whether Facebook Can Be Regulated. Ask Which Facebook to Regulate.*, VOX (Apr. 12, 2018, 9:10 AM), https://bit.ly/2Y4MbUd; Sen. Warren, *supra* note 26.

[420] Reno v. ACLU, 521 U.S. 844, 868 (1997) (holding that the "special justifications" allowing "regulation of the broadcast media," including "the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its 'invasive' nature," "are not present in cyberspace" (citations omitted)).

[421] *See, e.g.*, Keller, *supra* note 76, at 18–19; Klonick, *supra* note 32, at 1612. For example, while the Court said in 1997 that the internet was "not as 'invasive' as radio or television," *Reno*, 521 U.S. at 869, it has since recognized the pervasiveness of social media sites, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

[422] 47 U.S.C. § 230(c).

users, or for restricting access to that content, those regulations might conflict with Section 230,[423] and Congress may consider expressly setting out the relationship between those new regulations and Section 230. As a general principle of law, courts are reluctant to imply that new statutes repeal prior laws unless the "two statutes are in 'irreconcilable conflict,' or . . . the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"[424] Accordingly, if a new law does not explain how it relates to Section 230, courts will attempt to read the statutes harmoniously, giving effect to both.[425]

If Congress were to create an express exception from Section 230, one issue would be determining the proper scope of that exception, so that Congress is allowing liability only for certain specific activity that it is seeking to discourage.[426] Section 230 was enacted, in part, in response to a trial court decision ruling that an internet service provider should be considered a "publisher" of defamatory statements that a third party had posted on a bulletin board that it hosted, and could therefore be subject to suit for libel.[427] Critical to the court's decision was the fact that the service provider had moderated its message boards, qualifying the site as a publisher for purposes of the libel claim in the view of the court.[428] By specifying that no provider of an interactive computer service "shall be treated as the publisher or speaker" of another's content, Congress sought, among other things, to overturn this decision.[429] A number of Representatives, including one of the bill's sponsors, said at the time that they wanted to ensure that "computer Good Samaritans" would not "tak[e] on liability" by regulating offensive content.[430] As discussed, courts subsequently interpreted this provision to bar liability for a wide variety of legal claims, not solely suits for defamation.[431] Section 230, enacted in 1996, has often been described as central to the development of the modern internet.[432] One scholar asserted that "no other sentence

[423] *See, e.g.*, Romano, *supra* note 419 (arguing that the "proposed Honest Ads Act" would "directly contravene" Section 230).

[424] Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality opinion) (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)). *See also, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings . . . .").

[425] *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

[426] *See, e.g.*, Joshua A. Geltzer, *The President and Congress Are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25, 2019, 3:40 PM), https://bit.ly/2ToY3g6.

[427] Stratton-Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *1 (N.Y. Sup. Ct. May 26, 1995).

[428] *Id.* at *10–11.

[429] *See* S. REP. NO. 104-230, at 194 (1996); 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox). *See also, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . . Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.").

[430] 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox); *see also id.* at H8470 (statement of Rep. Joe Barton) (arguing this amendment provides "a reasonable way to . . . help [service providers] self-regulate . . . without penalty of law"); *id.* at H8471 (statement of Rep. Rick White) (arguing the responsibility for "protect[ing children] from the wrong influences on the Internet" should lie with parents instead of federal government); *id.* at H8471 (statement of Rep. Zoe Lofgren) (arguing that amendment should be adopted to "preserve . . . open systems on the Net"); *id.* at H8471 (statement of Rep. Bob Goodlatte) ("The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.").

[431] *See supra* "Section 230 of the CDA."

[432] *E.g.*, Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About To Change*, NPR (Mar. 21, 2018, 5:11 AM), https://n.pr/2DKa342.

in the U.S. Code . . . has been responsible for the creation of more value than that one."[433] Therefore, while Congress may want to modify this broad immunity, it is important to first understand how that immunity currently operates, and why it was created in the first place.[434]

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Disclaimer

[433] David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, VOLOKH CONSPIRACY (Aug. 27, 2015), https://wapo.st/2TN5eUuhttps://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/.

[434] *See, e.g.*, Mark Sullivan, *The 1996 Law that Made the Web Is in the Crosshairs*, FAST COMPANY (Nov. 29, 2018), https://bit.ly/2Wd3vVh.