

PLATFORMS, POWER, AND THE PUBLIC SQUARE: THE DEBATE ON EDITORIAL RIGHTS IN THE AGE OF SOCIAL MEDIA

DONOVAN SMITH*

ABSTRACT

Social media has taken a hold on society and continues to tighten its grip; its influence is undeniable. Today, billions of people all over the world use social media for news, weather updates, communication, commerce, and self-expression every day. With the increasing dependence on social media, it is essential that the civil liberties and fundamental rights of social media users remain protected. Over the last decade, censorship of users and content on social media has become a key political talking point, especially when coupled with concurring events like elections and global pandemics. But is any of this censorship even allowed? Ultimately, this article will explore editorial rights, the rise of social media and the subsequent rise of censorship, and the current state of social media free speech jurisprudence. Most importantly, it will address why social media platforms should not be afforded the same editorial rights as other traditional editorial platforms.

I. INTRODUCTION

The First Amendment of the United States Constitution states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹ Among these protected rights, freedom of speech

* *Juris Doctor* Candidate, May 2026, St. Thomas University College of Law. I would like to thank all of my friends and family for their support throughout the writing of this Article and giving me the confidence to get it published in the *St. Thomas Law Review*. A special thanks to Professor Seigfried Wiessner, J.D., LL.M., Dr.iur, who first introduced me to the First Amendment and whose mentorship continued as I had the privilege of serving as his Teaching Assistant. I am also grateful for Professor Brian Potts, J.D., whose encouragement and insistence that I fully develop and complete this Article were crucial in bringing this Article to publication.

¹ See U.S. CONST. amend. I.

occupies a unique place within our society because it provides a free and open marketplace of ideas that promote the goals of democratic government.² These protections extend far beyond pure speech or written word, it includes everything from conduct without words to political contributions and even the right to not speak.³

Despite social media being a relatively new phenomenon, it has grown immensely and has become the largest and most pivotal space for free speech and public discourse, not just in America but across the world. An October 2024 study estimated that 62.6% of the world's population, over 5 billion people, use some sort of social media every day.⁴ That number does not seem to be slowing down anytime soon; the same study saw a 259-million-user increase from 2023 to 2024.⁵ Billions of people use platforms like Facebook, X (formerly Twitter), Instagram, and countless other platforms for daily communication, news, commerce, and self-expression.⁶

Unfortunately, the growing dependence on social media is accompanied by the potentially devastating effects of content moderation and censorship. Even though social media companies control an unprecedented amount of speech, they are private entities and are not bound by First Amendment limitations. In fact, social media platforms may possess their own First Amendment protections in the form of editorial discretion. But should social media platforms be afforded these rights given the differing structure and power of the platform compared to other traditional news and communication platforms? And what if the First Amendment rights of the social media company violates the First Amendment rights of its users?

The conflicting and undefined rights of the user and the platforms have raised many important and highly debated issues over the last few years. How can the users' rights be balanced with the platforms' editorial rights? Can a social media platform permanently ban a former president with over 80 million followers?⁷ Can social media companies censor and moderate content on their platforms at will?⁸ What if a government official becomes involved in the

² See Gene Policinski, *What is a Marketplace of Ideas?*, FREEDOM F., <https://www.freedomforum.org/marketplace-of-ideas/> [perma.cc/WN6J-FSLK] (last visited Oct. 26, 2025) (“The ‘marketplace of ideas’ embodies a simple First Amendment concept: If everyone can speak freely, then the best ideas will rise to the top and be implemented, to the benefit of all of society.”).

³ See Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RSCH. SERV. (Mar. 28, 2024), <https://www.congress.gov/crs-product/IF11072> [perma.cc/SP7A-DECG].

⁴ See Dave Chaffey, *Global Social Media Statistics Research Summary*, SMART INSIGHT (Feb. 14, 2025), <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/> [perma.cc/W88K-EDTQ].

⁵ See *id.*

⁶ See *Social Media Fact Sheet*, PEW RSCH. CTR., (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [perma.cc/HJ4Z-4J2L] (“Many Americans use social media to connect with one another, engage with news content, share information and entertain themselves.”).

⁷ See *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

⁸ See *Murphy v. Missouri*, U.S. 603 U.S. 43, 44 (2024).

ensorship?⁹ Can individual states prohibit platforms from participating in censorship?¹⁰ Can the government completely shut down a platform with 170 million American users?¹¹

With plenty of questions to be answered, this Article focuses on whether social media platforms should be afforded the same First Amendment editorial rights traditionally reserved for newspapers and broadcasts. Part II.A will provide an overview of the Freedom of Speech clause including its history, jurisprudence, and importance in America.¹² Part II.B explores “compelled speech” and how it has shaped the modern idea of editorial decision.¹³ Part III.A will look at the history and growth of social media along with the rise of censorship on platforms.¹⁴ Part III.B analyzes the current rights of social media users and platforms.¹⁵ Part IV argues that social media platforms, due to their structure and power, should not be afforded the same editorial rights as traditional media and will address key distinctions between social media platforms and other platforms traditionally afforded editorial rights.¹⁶ Finally, Part V concludes by reaffirming the need for a new legal framework that acknowledges the distinct role social media plays in public discourse and limits their editorial immunity accordingly.¹⁷

II. OVERVIEW OF FREE SPEECH AND EDITORIAL RIGHTS

A. FREE SPEECH OVERVIEW

The Freedom of Speech and Press were addressed in the First Amendment of the Bill of Rights because American Colonists had just been subjected to two centuries of anti-sedition and prior restraint laws.¹⁸ Since the invention of the printing press, the English monarchy required that an individual or entity wishing to publish anything had to obtain a royal stamp from the Monarch out of fear that the publication may shine a negative light on the king.¹⁹ Some prominent Founding Fathers, like Thomas Jefferson and James Madison, greatly supported efforts to protect the people’s Freedom of Speech. Jefferson believed

⁹ See *id.* at 78.

¹⁰ See *Moody v. NetChoice, LLC*, 603 U.S. 707, 743–44 (2024).

¹¹ See *TikTok, Inc. v. Garland*, 604 U.S. 56, 80 (2025).

¹² See *infra* Part II.A.

¹³ See *infra* Part II.B.

¹⁴ See *infra* Part III.A.

¹⁵ See *infra* Part III.B.

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part V.

¹⁸ See NOAH F. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW*, 972 (21st ed. 2022); see also *Primer on the First Amendment & Religious Freedom*, ANTI-DEFAMATION LEAGUE (Sep. 1, 2016), <https://www.adl.org/resources/backgrounder/primer-first-amendment-religious-freedom> [perma.cc/B26U-587D].

¹⁹ See *Prior Restraint: Strong Protection Against Government Censorship*, FIRST AMEND. WATCH AT N.Y.U. (Sep. 11, 2017), <https://firstamendmentwatch.org/prior-restraint/> [perma.cc/3NGB-PMLX].

that everyone had the right to free consciousness, and that our ideas and opinions follow “involuntarily the evidence proposed to [our] minds[.]”²⁰ Jefferson was saying that we subconsciously form opinions or feelings based on the world around us, and the First Amendment guarantees the ability to express those opinions or feelings. Opinions allow for a better representative and democratic government, where the people truly have a say, can express their opinions (negative or positive), and are encouraged to express those opinions.²¹

Contrary to popular belief, anti-sedition and prior restraint laws did not end right after the Revolutionary War or after the Bill of Rights was ratified. In 1798, the federalist-controlled Congress wanted to stop Democratic-Republican criticism related to foreign affairs with France, so Congress passed the Alien and Sedition Act of 1798.²² The Act raised many obvious First Amendment concerns regarding the suppression of speech, but with the Act’s expiration in 1801 and the yet to be defined judicial power of the Supreme Court, these concerns were never addressed.²³

Before we look at the First Amendment itself, it must be remembered there needs to be some sort of “State Action” on behalf of the government or government actor for an individual to have standing to sue for a violation of their civil rights.²⁴ This issue first arose during Congress’ attempts to force private citizens into non-discriminatory practices. In the *Civil Rights Cases*, Justice Bradley wrote “[t]he wrongful act of an individual, unsupported by any such [government] authority, is simply a private wrong, or a crime of that individual . . . if not sanctioned in some way by the State, or not done under State authority, [the injured party’s] rights remain in full force[.]”²⁵

²⁰ See Thomas Jefferson, *A Bill for Establishing Religious Freedom (1779)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/thomas-jefferson-a-bill-for-establishing-religious-freedom> [perma.cc/W4AR-V3JD] (last visited Oct. 26, 2025).

²¹ See *id.*; see also Jeffery Rosen, *From Jefferson to Brandeis: The First Amendment, the Declaration, and the Constitution*, NAT’L CONST. CTR. (May 22, 2022), <https://constitutioncenter.org/go/firstamendment> [perma.cc/HP2C-D6ZB] (discussing the ideas Thomas Jefferson set forth in *A Bill for Establishing Religious Freedom*).

²² See *Alien and Sedition Acts (1798)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/alien-and-sedition-acts> [perma.cc/G8BJ-L4HM] (last visited Oct. 26, 2025).

²³ See *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (establishing the Supreme Court’s power of judicial review but it was not heard until after the Alien and Sedition Act of 1798 expired); see also Christopher D. Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence 1* (Apr. 26, 2000) (M.A. thesis, Marshall University) (on file with Marshall Digital Scholar) (“Because no defendant convicted under the Act appealed to the Supreme Court, the Court never had the opportunity to review the Act’s constitutionality before its expiration in 1801.”).

²⁴ See *State Action Requirement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/state_action_requirement [perma.cc/ZDQ3-JR9H] (last visited Oct. 26, 2025) (explaining that to have standing in constitutional claims, “state action” must be proven, meaning the challenged conduct is attributable to the government).

²⁵ *The Civil Rights Cases*, 109 U.S. 3, 17 (1883).

The First Amendment is very clear that “Congress” cannot make laws violating an individual’s freedom of speech.²⁶ The First Amendment’s protections and limitations originally only applied to the federal government, but through the Fourteenth Amendment, the Incorporation Doctrine, and 42 U.S.C. § 1983, these protections and limitations were extended to state and local governments.²⁷ However, the state action requirement adds more questions regarding social media censorship and regulation. Social media platforms are private entities but given their immense power and the vast amount of speech hosted on their platforms, they should be bound by First Amendment limitations.

The Supreme Court has recognized a few exceptions to the state action doctrine including the “Public Function Exception” and “Judicial Enforcement.” The Public Function Exception has been applied to “company towns” which are towns or municipalities owned and operated by private companies rather than the actual government. The Supreme Court has held that even though these are private companies, they are filling the role of a traditional government and perform traditional public functions; therefore, they are bound by the limits of the Constitution and Bill of Rights.²⁸ The judicial enforcement exception applies when there is no state action except for when the Court enforces the violation of a fundamental right. The most famous example is when courts attempt to enforce a private agreement that violates an individual’s fundamental rights, the judicial enforcement of said agreement would constitute state action.²⁹

State action can also be met if the individual violating another’s rights, is doing so on behalf of the government. These individuals are known as “government actors” and make satisfying the state action requirement much easier. For example, if the police ask your neighbor to sneak in your house and collect evidence of a crime, that would be a violation of your right to be free from

²⁶ See U.S. CONST. amend. I (“Congress shall make no law . . .”).

²⁷ See U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); see also 42 U.S.C. §1983 (2025)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.; *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming that freedom of speech and press which are protected by the First Amendment against Congress are also protected from state impairment through the Fourteenth Amendment).

²⁸ See *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946) (holding a company’s law unconstitutional even though the statute was implemented by a private entity because the town was acting as a government entity and thus serving a “public function” and a small municipality the same size could not have implemented the statute).

²⁹ See *Shelley v. Kraemer*, 334 U.S. 1, 13–14, 20 (1948) (holding that a private racial restrictive covenant itself does not violate the Fourteenth Amendment, but judicial enforcement of that racial covenant would violate the Equal Protections Clause).

unreasonable searches and seizures. The government action does not need to be this direct either, courts will look at whether the government encouraged, coordinated, or pressured a private actor into the violation of an individual's rights, and if there is a connection, the private action could be considered state action. In terms of social media platforms, it has been established that government officials in multiple agencies have directed social media platforms to censor specifically targeted content and users.³⁰

Once the state action requirement has been satisfied, a court will then determine whether the conduct or message being suppressed is the kind of "speech" the First Amendment protects. Spoken word clearly falls under First Amendment protections, but for an individual's conduct to be considered protected speech, the individual must convey a message that is likely to be understood by someone who views the conduct. But, if additional speech is needed for a viewer to understand the message, then the conduct would not be considered speech under the First Amendment.³¹ However, even if an individual's speech or conduct is considered protected speech under the First Amendment, the speech could still be suppressed if it falls into one of the categories of "unprotected speech."

Free speech has been broadly protected throughout American history, but "it is well understood that the right of speech is not absolute at all times and under all circumstances."³² A famous example of a free speech limitation comes from Justice Oliver Wendell Holmes, Jr., who proclaimed, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."³³ Over time, the Supreme Court has worked to further clarify and define these limitations, establishing specific categories of unprotected speech, such as: incitement to violence, defamation, obscenity, commercial speech, and much more.

Social media platforms are private entities, and while they do host more speech, expression, and debate than any other expressive medium in history, they are not bound by the limitations of the First Amendment. This does not mean that every social media platform completely disregards the Freedom of Speech; some social media platforms are attempting to protect users' free

³⁰ See *Murthy v. Missouri*, 603 U.S. 43, 51–52, 60, 66, 89 (2024) (describing evidence that federal officials across multiple agencies pushed social media platforms to suppress certain content, but ultimately dismissing the case for lack of standing).

³¹ See *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that Congress can limit an individual from burning their draft card even if the action is protected expressive conduct); see also *Texas v. Johnson*, 491 U.S. 397, 406, 408, 414 (1989) (holding that a State cannot ban flag burning as the regulation is aimed at suppressing speech). But see *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006) ("The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection . . .").

³² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech . . .").

³³ *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

speech rights as much as possible.³⁴ But despite the concerted effort by some platforms, it is still not enough to provide social media users with the full and complete rights afforded to them by the First Amendment.

The previously defined categories of unprotected speech can act as a guide for what should and should not be censored or moderated on social media. However, this Article will examine speech that does not fall into one of those categories yet has been subject to the censorship power of social media platforms. Recent developments show that social media censorship has extended far beyond these defined exceptions, even going as far as censoring users and posts based on the viewpoint and content of the information. Viewpoint and content-based censorship/regulation is held to the highest judicial scrutiny when applied to the government and always should be, especially on social media.³⁵

B. COMPELLED SPEECH AND EDITORIAL RIGHTS

While the Freedom of Speech is typically associated with actual words and expressive conduct, it extends the opposite way to an individual's right to not speak, but it did not start this way. In *Minersville School District v. Gobitis*, the Supreme Court upheld, by an 8-1 vote, a policy that required students to stand and salute the flag in school.³⁶ This case was decided after a father, who was a Jehovah's Witness, sued the school on behalf of his children for compelling them to stand and salute the flag.³⁷ Justice Frankfurter, writing for the Court, stated that the government can compel standing and saluting the flag as a means of achieving national unity.³⁸

Justice Stone, the one opposing vote, dissented, emphasizing that "[t]he very essence of the liberty which [First Amendment Freedoms] guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion."³⁹ Justice Stone continued to say that if First Amendment protections and civil liberties are to actually mean something, they should not be overridden simply because the government deems a policy beneficial or important.⁴⁰

³⁴ See Elliot Drago, *Elon Musk and Free Speech*, JACK MILLER CTR., <https://www.jackmiller-center.org/article/elon-musk-and-free-speech> [PERMA.CC/5V83-8NFE] (last visited Oct. 26, 2025) (discussing Elon Musk's commitment to free speech after he purchased the social media platform Twitter, now X); see also Joel Kaplan, *More Speech and Fewer Mistakes*, META (Jan. 7, 2025), <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/> [perma.cc/KNR2-SYP8] (discussing Mark Zuckerberg's plan to promote more free speech on Meta's social media platform and the end of Meta's fact-checking program).

³⁵ See *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) ("Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . .").

³⁶ See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–93 (1940).

³⁷ See *id.*

³⁸ See *id.* at 595–96.

³⁹ *Id.* at 604 (Stone, J., dissenting).

⁴⁰ See *id.* ("If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates

In *West Virginia State Board of Education v. Barnette*, the Court overturned *Gobitis*.⁴¹ Justice Jackson, writing for the majority, declared that the government cannot compel individuals to express ideas or values they do not agree with. He reasoned that abstaining from saluting the flag does not constitute a clear and present danger and compelling this type of expression would violate the dissenter's rights.⁴² Justice Jackson continued to say that the Bill of Rights was implemented to protect an individual's fundamental rights from a vote, a powerful majority, or the government.⁴³ Justice Jackson even analogized these sorts of governmental actions to those of the Spanish Inquisition and the Siberian Exiles as those too were an attempt to achieve "national unity."⁴⁴

This First Amendment limitation on the government, known as compelled speech, has been further developed into editorial rights and discretion. Editorial rights are provided to individuals or entities that engage in curating or selecting speech rather than just transmitting speech. With editorial rights, those entities cannot be compelled to display speech or content they do not agree with or would not have otherwise published. The seminal case establishing editorial rights is *Miami Herald Publishing Company v. Tornillo*, where the Supreme Court struck down a Florida statute requiring newspapers to give political candidates a "right to reply" when the newspaper published "criticism and attacks on [their] record."⁴⁵

In the case, a candidate for the Florida House of Representatives sued the Miami Herald when it refused to publish the candidate's replies to comments the newspaper had previously published regarding his candidacy.⁴⁶ The Circuit Court found the statute to be unconstitutional stating that "dictating what a newspaper must print was no different from dictating what it must not print."⁴⁷ However, the Florida Supreme Court reversed this ruling, finding that the right to reply statute enhanced speech and increased the free flow of information to the public.⁴⁸

The U.S. Supreme Court, in a unanimous decision, reversed the Florida Supreme Court's ruling and held that the right to reply statute violated the First Amendment rights of the Miami Herald Newspaper.⁴⁹ In the opinion, the Court found that a newspaper is not simply a conduit or host for information and news, but rather the newspaper itself is the speech and expression of the writers and

religious convictions, whatever may be the legislative view of the desirability of such compulsion.").

⁴¹ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁴² See *id.* at 633–34.

⁴³ See *id.* at 638.

⁴⁴ See *id.* at 641.

⁴⁵ See *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 243–44, 247 (1974).

⁴⁶ See *id.* at 243–44.

⁴⁷ See *id.* at 245.

⁴⁸ See *id.*

⁴⁹ See *id.* at 258.

editors working for the newspaper.⁵⁰ A newspaper's ability to highlight or even ignore specific issues is expressive conduct and protected under the First Amendment.

The Supreme Court also addressed the fact that physical newspapers contain limited space and compelling them to include certain speech, which a newspaper may not wish to publish, would limit the newspaper's ability to include speech they do wish to publish.⁵¹ Finally, the Court found that requiring newspapers to publish certain speech would dampen the vigor of public debates. If newspapers are required to publish replies to their past comments, a newspaper may avoid publishing the original material all together for fear of retaliation or backlash, leading to less public debate and discourse overall.⁵²

Similar issues were raised in *Pacific Gas and Electric Company v. Public Utilities Commission of California*, which involved a 62-year-old practice where the Pacific Gas and Electric Company ("PGEC") sent a newsletter along with a customer's bill in the mail that contained "political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills."⁵³ In 1980, the Public Utilities Commission of California ("PUC") forced the PGEC to include third party messages in the newsletter.⁵⁴

The Supreme Court found this regulation to be unconstitutional based on reasoning similar to that used in *Tornillo*.⁵⁵ First, the access given to the third party was based on the viewpoint of the newsletters being distributed by the PGEC.⁵⁶ The PGEC was including its own political ideas in the newsletter and because of those political ideas, PUC compelled the PGEC to carry political ideas on the other side of the spectrum.⁵⁷ Much like *Tornillo*, the State wanted to "advance free discussion" but was really just punishing the PGEC for expressing certain political views.⁵⁸ And second, because the State was compelling PGEC to carry speech that wasn't theirs, the State was essentially suppressing speech that the PGEC might have wanted to include there instead.⁵⁹

The Court further addressed the issue of compelled speech and the limits of editorial rights in the case of *PruneYard Shopping Center v. Robins*. PruneYard was a privately owned shopping center in California open to the public and contained dozens of commercial establishments.⁶⁰ However, PruneYard had a

⁵⁰ See *id.*

⁵¹ See *Tornillo*, 418 U.S. at 256–57.

⁵² See *id.* at 257.

⁵³ See *Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 4–5 (1986).

⁵⁴ See *id.* at 5–7.

⁵⁵ See *id.* at 9–12, 20–21.

⁵⁶ See *id.* at 6–7, 10.

⁵⁷ See *id.* at 13–14.

⁵⁸ See *id.* at 10.

⁵⁹ See *Pacific Gas*, 475 U.S. at 10–11; see also *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256–57 (1974).

⁶⁰ See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

strict policy that restricted expressive conduct not directly related to the commercial activity of the shopping center.⁶¹ One day, a few high school students were passing out pamphlets and asking for signatures on a petition for their political cause in a peaceful and non-disruptive manner.⁶² After a short time, the students were told to leave the premise, which they did, and then later sued PruneYard in the California Superior Court.⁶³

The California Superior Court initially held that the high school students had no state or federal right to express their rights on PruneYard's private property.⁶⁴ However, the California Supreme Court reversed, holding that the California Constitution protects the students' rights, even if the shopping center was privately owned.⁶⁵ The United States Supreme Court affirmed, holding that PruneYard's First Amendment rights were not violated when the students exercised their right to free speech on PruneYard's privately owned property.⁶⁶

In its decision the Court looked at many arguments made by PruneYard, most of which concerned property rights and takings by the government, but those will not be addressed here.⁶⁷ However, the Supreme Court also looked at PruneYard's argument that requiring the students to exercise free speech on appellant's private property violated the precedents set in *Barnette* and *Tornillo*.⁶⁸ The Court dismissed these arguments because the State was not compelling or forcing PruneYard to affirm any government-sanctioned belief or idea, and due to the public and open access of the property any speech made by people on the property would likely not be attributed to PruneYard itself.⁶⁹

The Supreme Court's past decisions paint a clear path of what can be considered compelled speech, when is it compelled, and who editorial rights are offered to. These decisions show that those exercising editorial rights are actively engaged in expression rather than just being a medium for the transfer of information. This understanding of editorial rights along with the immense scale of social media only go to show that social media platforms should not be afforded editorial rights to the same extent that classic news and information platforms have been.

⁶¹ See *id.* at 77.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.* at 77–78.

⁶⁵ See *id.* at 78.

⁶⁶ See *PruneYard*, 447 U.S. at 79.

⁶⁷ See *id.* at 80–85.

⁶⁸ See *id.* at 87–88.

⁶⁹ See *id.* at 88.

III. SOCIAL MEDIA AND THE NEED FOR FREE SPEECH PROTECTIONS

A. THE RISE OF SOCIAL MEDIA

Social media and the advances of technology have completely rewritten the rules of society. Long gone are the days of handwritten letters and physical newspapers. A majority of society now has world-wide instant messaging capabilities and access to websites and videos that can provide all the information a person could possibly imagine.⁷⁰ From news clips, to skits, to memes, to food reviews, it is all there at the click of just a few buttons. At this point, it may take less than just a few clicks; modern algorithms automatically populate social media feeds with the exact content an individual would want, or what the algorithm thinks that individual wants.⁷¹

In order to see the development of social media, we must explore the origins of the platforms themselves. Six Degrees was created in 1996 and is considered the first “modern” social media platform.⁷² It included features, which remain as foundational pieces of today’s social media platforms, such as individualized profiles and friends lists. However, accessing social media and the internet was difficult and limited during this time; relatively few people had internet access readily available to them like it is today, and even fewer knew how to use it effectively.⁷³

As time progressed, technology improved, and the internet became more accessible, social media platforms rapidly evolved, expanding the ideas of their predecessors and obtaining substantially more users. Just eight years after Six Degrees, arguably the most influential and controversial social media site in history was born. Facebook was launched in February 2004, by Harvard student and now celebrity Mark Zuckerberg.⁷⁴ While the creation of Facebook itself is riddled with controversy, it is not an overstatement to say that Facebook was and is one of the primary drivers of social media’s dominance in today’s society.

Facebook was revolutionary given its unique capabilities and user-friendly interface. To start, it allowed almost anyone to join, if a person had access to the internet and had an email, they could create their own personalized account. Facebook provided a platform for individuals to share endless pictures, videos,

⁷⁰ See Chaffey, *supra* note 4.

⁷¹ See *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 471 (2023) (“As the parties represent things, the algorithms here match any content with any user who is more likely to view that content, and the platforms perform little to no front-end screening on any content before it is uploaded.”).

⁷² See Chenda Ngak, *Then and Now: A History of Social Networking Sites*, CBS NEWS (July 6, 2011, at 4:55 PM EDT), <https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/> [perma.cc/XK7J-86RY].

⁷³ See *1960s–1990s: Internet*, ELON UNIV., <https://www.elon.edu/u/imagining/time-capsule/150-years/back-1960-1990/> [perma.cc/98XT-QNQT] (last visited Oct. 26, 2025).

⁷⁴ See Mary Bellis, *The History of Facebook and How it was Invented*, THOUGHTCO. (Apr. 30, 2025), <https://www.thoughtco.com/who-invented-facebook-1991791> [perma.cc/GRR5-VKVG].

and messages with not only their friends, but anyone using the platform. Facebook later introduced a feature that would allow a person to post their “relationship status” on their profile. Although seemingly minor, this feature had significant psychological implications on the users of the platform. Relationships were no longer private matters, rather couples had to be “Facebook Official” for a relationship to mean anything.⁷⁵

Facebook, along with countless other social media platforms, fundamentally changed how individuals and society conduct themselves. It was a mental game of sorts. Social media platforms used notifications, likes, comments, algorithm-driven feeds, and infinite scrolling to get their users “addicted” to the platform.⁷⁶ This has led to some negative effects on the mental health of social media users.⁷⁷ Individuals began to feel societal pressure to engage on social media, simply because all their friends were, but when they see other people on trips or attractive men or women, it can lead to a lowering of the user’s own self-esteem.⁷⁸ As interesting and debated as this topic is, it will be addressed minutely in this Article. However, it is important to understand that this “addiction” and societal pressure to be available on social media are key factors in changing our society.

At the time of their creation social media platforms were only accessible through the use of laptops and computers. Even with the success of early social media platforms, communication, news, and entertainment remained largely unchanged for a few more years. It was not until 2007, with the introduction of the first iPhone, that the popularity and availability of social media exploded.⁷⁹

⁷⁵ See Gábor Oroszl et al., *Elevated Romantic Love and Jealousy if Relationship Status is Declared on Facebook*, FRONTIERS IN PSYCH. (Feb. 25, 2015), <https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2015.00214/> [perma.cc/J28N-ASX6].

⁷⁶ See Kelsey Hansen, *Our Social Media Addiction*, HARV. BUS. REV. (Nov.–Dec. 2022), <https://hbr.org/2022/11/our-social-media-addiction> [perma.cc/G398-L645] (discussing social media and the addictive traits the platforms and phones have).

⁷⁷ See Hilary Andersson, *Social Media Apps Are ‘Deliberately’ Addictive to Users*, BBC (July 3, 2018), <https://www.bbc.com/news/technology-44640959> [perma.cc/VE2Q-XCYD]; see also Jacqueline Sperling, PhD, *Scrolling and Stress: The Impact of Social Media on Mental Health*, DECONSTRUCTING STIGMA (July 5, 2025), <https://deconstructingstigma.org/guides/social-media> [perma.cc/LYR4-KYYT] (describing that social media impacts mental health, such as depression and anxiety).

⁷⁸ See *The Social Dilemma: Social Media and Your Mental Health*, KIDSMATTER, <https://kidsmatter2us.org/social-media-and-your-mental-health/> [perma.cc/7HW9-7WQX] (last visited Oct. 26, 2025) (“To boost self-esteem and feel a sense of belonging in their social circles, people post content with the hope of receiving positive feedback. Couple that content with the structure of potential future reward, and you get a recipe for constantly checking platforms.”).

⁷⁹ See Zachary Liston, *How the iPhone Changed the Future of Society*, SCI., TECH., & SOC’Y (Dec. 4, 2020), <https://web.colby.edu/st112a-fall20/2020/12/04/how-the-iphone-changed-the-future-of-society> (“This technology has allowed many to recognize the interconnectedness of our planet, and has led our society to develop closer links with regions across the world. Despite these positive impacts to society, there have been many negative influences as well.”). See generally *The Rise of the New Social Media Smartphones*, SOC. MEDIA TODAY (Sep. 9, 2010), <https://www.socialmediatoday.com/content/rise-new-social-media-smartphones> [perma.cc/MCK8-889J] (providing insight to the growth of social media and the iPhone from a blogger in 2010).

The iPhone's unique full-front touchscreen display and ability to allow users to access social media platforms from virtually anywhere started the social media boom.⁸⁰ With this type of technology at their fingertips, millions, and eventually billions, of people flocked to social media.⁸¹ While the original “message and stay connected with friends” idea of social media remains relevant, social media has completely overtaken classic forms of entertainment.

Social media has not just replaced classic consumption of entertainment like broadcasts and radio, it has also fundamentally changed how people consume news. More and more people are regularly obtaining their news from social media rather than traditional news mediums like newspapers and news broadcasts.⁸² According to a 2024 study, 53% of adults under 30 have a lot or some trust in information they receive on social media while only 56% of those same individuals have a lot or some trust in national news organizations.⁸³ Adults under 30 are only trusting social media more and more; rising to a point where more adults under 30 may start trusting social media more than national news organizations.

Social media allows for instant communication and mass publication of news and alerts, which is light speed (almost literally)⁸⁴ compared to the traditional news mediums. This consumption of news, the rapid spread of information, and the growing trust of information on social media platforms has created the problem of misinformation, which is defined as inaccurate or false information, commonly referred to as “Fake News.”⁸⁵

Misinformation was previously not a huge issue because classic news mediums had to uphold editorial standards and journalistic ethics by professional

⁸⁰ See Rani Molla, *How Apple's iPhone Changed the World: 10 Years in 10 Charts*, VOX (June 26, 2017, 11:24 PM), <https://www.vox.com/2017/6/26/15821652/iphone-apple-10-year-anniversary-launch-mobile-stats-smart-phone-steve-jobs> [perma.cc/F668-TZDE] (explaining that the iPhone became the device that “explod[ed] mobile internet traffic” because of the accessibility to new applications and social media platforms).

⁸¹ See Chaffey, *supra* note 4 (explaining the reach social media has on society).

⁸² See Christopher St. Aubin & Jacob Liedke, *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sep. 17, 2024), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/> [perma.cc/D6GV-YXD6] (finding that over half of the adults in the United States get at least some of their news from social media); see also Fred Dews & Eric Bull, *The Decline of Newspapers, in Four Charts*, BROOKINGS (Oct. 23, 2014), <https://www.brookings.edu/articles/the-decline-of-newspapers-in-four-charts/> [perma.cc/LM4P-HEBX] (providing graphs and data on the decline of newspaper usage and ad revenue).

⁸³ See Elisa Shearer & Kirsten Eddy, *Republicans Have Become More Likely Since 2024 to Trust Information From News Outlets, Social Media*, PEW RSCH. CTR. (May 8, 2025), <https://www.pewresearch.org/short-reads/republicans-have-become-more-likely-since-2024-to-trust-information-from-news-outlets-social-media/> [perma.cc/PE3W-PHBN] (providing the statistics of adults who rely on social media rather than traditional news outlets).

⁸⁴ See Fergal Toomey, *Data, The Speed of Light and You*, TECHCRUNCH (Nov. 8, 2015), <https://techcrunch.com/2015/11/08/data-the-speed-of-light-and-you/> [perma.cc/27AT-YH65] (stating that Google Fiber moves data at around two-thirds the speed of light).

⁸⁵ See Zoë Adams et al., *(Why) is Misinformation a Problem?*, 18 ASS'N FOR PSYCH. SCI. 1436, 1437 (2023).

organizations and the general public. Even during the times where these standards were upheld, there was always some level of distrust toward national news organizations. This distrust can be attributed to the growing divide in political ideology and the change in medium of how news is delivered.⁸⁶ Some believe that this increasing distrust originated from Rush Limbaugh and his radio show which essentially started super adversarial and super partisan aligned talk shows.⁸⁷

The need to protect the public from fake news directly conflicts with the protection of the free speech rights of the users. This problem only becomes increasingly mangled when it becomes impossible for social media platforms to differentiate between actual misinformation and simply biased content.⁸⁸ This issue rose to the forefront of news outlets during the 2016 U.S. presidential election, and it was around this time that the term “fake news” first appeared.⁸⁹ The 2016 election saw two very different political ideologies go head-to-head, especially online, and involved one of the most polarizing and powerful figures of the twenty-first century, Donald Trump.

Facebook was widely criticized during this time for “spreading” misinformation perpetuated by its users.⁹⁰ In response to the criticism, Facebook introduced a fact-checking program designed to monitor, flag, censor, or remove disputed posts and articles.⁹¹ This program was met with mixed reactions, but in January of 2025 Mark Zuckerberg announced that Meta, Facebook’s parent company, would end its third-party fact-checking program. There is still debate about how effective the program actually was, however, what is certain is that

⁸⁶ See Jesse Holcomb, *Media Mistrust Has Been Growing for Decades – Does it Matter?*, PEW CHARITABLE TRUSTS (Oct. 17, 2024) <https://www.pewtrusts.org/en/trend/archive/fall-2024/media-mistrust-has-been-growing-for-decades-does-it-matter> [perma.cc/9VKU-P6PP] (analyzing trends that led to a mistrust in national news organizations).

⁸⁷ See Megan Duncan, *Talk Radio and the Lasting Impact of Rush Limbaugh*, VA. TECH NEWS <https://news.vt.edu/articles/2021/02/unirel-rush> [perma.cc/4U7N-EALW] (last visited Oct. 26, 2025) (“I think he’ll most be remembered by media scholars for the way he changed how people want their politics news delivered. From someone who doesn’t hide their bias, who confidently takes pride in their bombastic delivery, and who gives a soft-entry point into political conversations.”).

⁸⁸ See Adams et al., *supra* note 85, at 1443 (discussing how social media platforms and the users have trouble differentiating between true and false news and biased and objective content).

⁸⁹ See Mike Wendling, *The (Almost) Complete History of ‘Fake News’*, BBC (Jan. 21, 2018), <https://www.bbc.com/news/blogs-trending-42724320> [perma.cc/WLP9-JGBM] (explaining the history of how fake news started, or more specifically, when it was mainly being used).

⁹⁰ See Krysten Crawford, *Stanford Study Examines Fake News and the 2016 Presidential Election*, STAN. REP. (Jan. 18, 2017), <https://news.stanford.edu/stories/2017/01/stanford-study-examines-fake-news-2016-presidential-election> [perma.cc/RUQ6-3M3V] (stating various social media sites, like Facebook, were popular in the spread of misinformation).

⁹¹ See Betsy Reed, *Facebook to Begin Flagging Fake News in Response to Mounting Criticism*, GUARDIAN (Dec. 15, 2016, at 15:05 EST), <https://www.theguardian.com/technology/2016/dec/15/facebook-flag-fake-news-fact-check> [perma.cc/8WTX-DU3D].

the program made too many mistakes, resulting in users and content being wrongfully censored.⁹²

The debate on content-moderation and misinformation has only intensified during events such as the Covid-19 pandemic, the 2020 and 2024 presidential elections, and other high-profile world events.⁹³ At the beginning, most censorship was carried out by the platform itself, but as the issues continued on, multiple government agencies and officials became directly involved in the censoring of users and content on social media.⁹⁴ However, Mark Zuckerberg recently revealed that some agencies and officials were directly engaged in Facebook's attempt to censor users and posts, based on the content or viewpoint of the user or post.⁹⁵

Content moderation and censorship can be a useful tool when attempting to combat misinformation. It is essential that the public is protected against false stories and information, even if that misinformation does not fall squarely into a category of unprotected speech.⁹⁶ Social media platforms should be granted some level of control over content to remedy the issue of misinformation. However, that is where it should stop, social media platforms should not be afforded the full extent of editorial rights.

B. CURRENT INTERNET AND SOCIAL MEDIA JURISPRUDENCE

Before social media rose to the level it is at today, some courts had already heard free-speech challenges regarding content regulation on the general internet. The first case to debate internet regulation occurred in 1997 after Congress enacted the Communications Indecency Act (CDA), specifically section 223(a).⁹⁷ This provision prohibited the transmission of any "obscene or indecent" material to anyone eighteen years old or younger via the internet.⁹⁸ The government's argument relied on three prior Supreme Court cases that upheld

⁹² See Stuart A. Thompson, *Meta Says Fact-Checkers Were the Problem. Fact Checkers Rule That False.*, N.Y. TIMES (Jan. 7, 2025, at 2:47 PM EST), <https://www.nytimes.com/2025/01/07/business/mark-zuckerberg-meta-fact-check.html> [perma.cc/NV4S-JUG5] ("Mark Zuckerberg, Meta's chief executive, blamed the company's fact-checking partners . . . saying in a video . . . 'fact-checkers have been too politically biased' and have 'destroyed more trust than they created.'"); see also Bruna Horvath et al., *Meta is Ending its Fact-Checking Program in Favor of a 'Community Notes' System Similar to X's*, NBC NEWS (Jan. 7, 2025, at 10:54 AM EST), <https://www.nbcnews.com/tech/social-media/meta-ends-fact-checking-program-community-notes-x-rcna186468> [perma.cc/X447-RRN5] ("[Zuckerberg] also said the systems the company had created to moderate its platforms were making too many mistakes . . .").

⁹³ See Gennie Gebhart, *How COVID Changed Content Moderation: Year in Review 2020*, ELEC. FRONTIER FOUND. (Dec. 24, 2020), <https://www.eff.org/deeplinks/2020/12/how-covid-changed-content-moderation-year-review-2019> [perma.cc/MNV6-REAM].

⁹⁴ See *Murthy v. Missouri*, 603 U.S. 43, 51–53 (2024).

⁹⁵ See JOE ROGAN EXPERIENCE, #2255 – *Mark Zuckerberg*, at 13:17 (Spotify, Jan 10, 2025).

⁹⁶ See Adams et al., *supra* note 85, at 1440 ("In short, declining trust in media, doubtful source credibility, and the blurring of the dichotomy between false and true news are suspected effects of misinformation that worry some.").

⁹⁷ See 47 U.S.C. § 223(a) (1997).

⁹⁸ See *Reno v. ACLU*, 521 U.S. 844, 859 (1997).

government regulation of other indecent materials, broadcast media, and adult movie theaters.⁹⁹ However, the Court distinguished the regulations in those cases from the regulations present in the CDA.¹⁰⁰

Internet users are given a significant amount of discretion when browsing online content. Unlike television and radio where content appears as you scroll through channels, the internet requires deliberate action taken by the user to access information. Recognizing this difference, the Supreme Court ruled against the government and upheld an injunction against the CDA, stating “we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”¹⁰¹

The landscape of the internet and social media has completely changed since it was first brought to the Supreme Court’s attention in 1997. Internet and social media use is no longer an option for many people, it has become necessary for many to fully participate in society. Despite this enormous shift, only a few cases have addressed the issues of censorship on social media,¹⁰² whether the government can limit that censorship,¹⁰³ or whether the government can actively participate in the censorship.¹⁰⁴ While these questions have been presented to the Supreme Court, refusals to answer them, procedural issues, and ongoing legal uncertainties have prevented the Court from definitively answering them. However, within the few available opinions, the Supreme Court has reaffirmed its past precedent to give lower courts better instruction for future disputes. Even without ample opportunity, the Supreme Court has clearly articulated how important social media is in today’s society, calling it “inescapable”¹⁰⁵ and that “one of the most important places to exchange views is cyberspace[.]”¹⁰⁶

In *Packingham v. North Carolina*, the Supreme Court answered the question of whether the government can limit an individual’s access to social media. North Carolina enacted a statute which made it a felony for registered sex

⁹⁹ See *id.* at 867–68; see also *Ginsberg v. New York*, 390 U.S. 629, 631–33 (1968) (upholding a statute that banned the sale of obscene materials to individuals seventeen years old or younger, even if not considered obscene to adults); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 730–31 (1978) (holding that radio stations could be regulated and constitutionally sanctioned for obscene or indecent broadcasts); see also *Renton v. Playtime Theaters*, 475 U.S. 41, 43–46 (1986) (upholding a zoning ordinance that prohibited adult movie theaters in residential areas).

¹⁰⁰ See *Reno*, 521 U.S. at 864–68.

¹⁰¹ *Id.* at 885.

¹⁰² See *Murthy v. Missouri*, 603 U.S. 43, 46 (2024).

¹⁰³ See *Moody v. NetChoice, LLC*, 603 U.S. 707, 710 (2024).

¹⁰⁴ See *Lindke v. Freed*, 601 U.S. 187, 194–95 (2024); see also *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017).

¹⁰⁵ See *NetChoice*, 603 U.S. at 716 (“They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments. The novel services they offer make our lives better, and make them worse—create unparalleled opportunities and unprecedented dangers.”).

¹⁰⁶ *Packingham*, 582 U.S. at 98.

offenders to use social media platforms that the individual knows permits minors to use.¹⁰⁷ With social media being commonplace in society, especially for the younger generation, the statute effectively banned those individuals from using any kind of social media.¹⁰⁸ Over 1,000 people had been penalized under this statute including the petitioner who was penalized after making a post regarding a positive experience he had in traffic court.¹⁰⁹

In the opinion, the Court stated that the First Amendment does not only protect the speech or expressive conduct of an individual, but also the spaces and places in which speech or conduct takes place.¹¹⁰ In today's world, social media is not just any other "space" for speech, it is arguably the most important and accessible.¹¹¹ The Court agreed that First Amendment protections certainly apply to social media platforms given the immense amount and diverse speech that occurs on them every single day.¹¹² While this does set a strong precedent, the case involves the regulation of social media by the government, not a private social media platform.

Since *Packingham*, the Supreme Court has still not given a definite answer on the government's ability to regulate social media. This issue of social media censorship reached the Court again in the 2024 case of *Moody v. NetChoice*, when Florida and Texas passed statutes limiting a social media platform's ability to censor users and their speech. The Florida bill "establishes a violation for social media deplatforming of a political candidate or journalistic enterprise and requires a social media platform to meet certain requirements when it restricts speech by users."¹¹³ Similarly, the Texas bill states:

[I]f a social media platform removes content based on a violation of the platform's acceptable use policy . . . the social media platform shall, concurrently with removal, (1) notify the user who provided the content of the removal and explain the reason the content was removed; (2) allow the user to appeal the decision to remove the content to the platforms; and (3) provide written notice to the user who provided the content¹¹⁴

NetChoice, the challenger of the statutes, is a trade organization representing online clients such as Meta, YouTube, and X.¹¹⁵ NetChoice challenged both statutes claiming that the regulation violated the platforms' First Amendment right to editorial choice.¹¹⁶ The U.S. District Court for the Northern District of

¹⁰⁷ See *id.* at 101.

¹⁰⁸ See *id.* at 99–100.

¹⁰⁹ See *id.* at 98.

¹¹⁰ See *id.* at 104.

¹¹¹ See *id.*

¹¹² See *Packingham*, 582 U.S. at 105.

¹¹³ S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

¹¹⁴ H.B. 20, 87th Leg., Reg. Sess. §§ 120.103(a)(1)–(3) (Tex. 2021).

¹¹⁵ See *Association Members*, NETCHOICE, <https://netchoice.org/about/#association-members> [perma.cc/EQC7-UCKR] (last visited Oct. 26, 2025).

¹¹⁶ See *Moody v. NetChoice, LLC*, 603 U.S. 707, 717 (2024).

Florida granted an injunction against the Florida statute.¹¹⁷ The Eleventh Circuit Court of Appeals upheld the injunction, finding that the statute involved content-regulation and was subject to heightened scrutiny, which it would likely fail.¹¹⁸ The court also found that the explanation requirement would likely fail because of the undue burden it would place on social media companies and effects on the platform's own First Amendment rights.¹¹⁹

The U.S. District Court for the Western District of Texas granted an injunction against the enforcement of the statute, finding that social media platforms have their own First Amendment right to moderate their platform. However, the Fifth Circuit Court of Appeals reversed the ruling, finding that the statute did not regulate speech at all; therefore, it did not trigger heightened scrutiny for First Amendment protections.¹²⁰ They continued on to say that even if the statute did regulate speech, the state was justified in the regulation to “protect[] a diversity of ideas.”¹²¹ Finally, it found no undue burden in enforcing the explanation requirement.¹²²

The Supreme Court has yet to decide the issue because neither of the lower courts heard the issue on its First Amendment merits.¹²³ However, the Supreme Court provided guidance to the lower courts, vacated their rulings, and remanded the case for further hearings on its First Amendment merits. In the opinion, the Court reiterated the importance of First Amendment editorial rights of the social media platforms themselves.¹²⁴ These platforms are engaged in their own speech activity when “compiling and curating” the speech of third parties.¹²⁵ Furthermore, simply wanting a greater diversity of ideas is not a sufficient interest for the government to decide when speech is imbalanced, and while the dissemination of speech may not be the best, that is not for the government to decide.¹²⁶

Murthy v. Missouri, is another case involving social media platforms censoring its users, more specifically posts about the 2020 election and the Covid-19 Pandemic. The actions discussed in this case are not solely attributed to the social media platforms. Multiple government officials and executive agencies were found to be directly involved in the censorship.¹²⁷ In the opinion, the Court looked at the actions of workers and officials in the White House, the Surgeon General, the Center for Disease Control (“CDC”), the Federal Bureau of

¹¹⁷ See *NetChoice, LLC v. Att’y. Gen. of Fla.*, 34 F.4th 1196, 1207 (11th Cir. 2022); *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1196 (N.D. Fla. 2021).

¹¹⁸ See *NetChoice, LLC*, 34 F.4th at 1209.

¹¹⁹ See *id.* at 1230–31.

¹²⁰ See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 447–48, 494 (5th Cir. 2022).

¹²¹ See *id.* at 482.

¹²² See *id.* at 484–87.

¹²³ See *Moody v. NetChoice, LLC*, 603 U.S. 707, 708 (2024).

¹²⁴ See *id.* at 727–32.

¹²⁵ See *id.* at 731.

¹²⁶ See *id.* at 733.

¹²⁷ See *Murthy v. Missouri*, 603 U.S. 43, 51–53 (2024).

Investigation (“FBI”), and the Cybersecurity and Infrastructure Security Agency (“CISA”).¹²⁸ The White House, Surgeon General, and the CDC focused mostly on the Covid-19 aspect of social media moderation, while the FBI and CISA focused on election information.¹²⁹

Unfortunately, the Court never addressed these actions based on the First Amendment issues, rather the case was dismissed because the Plaintiffs lacked standing.¹³⁰ The challengers in this case, five individuals and two states, were seeking a preliminary injunction against the social media platforms and the government officials involved in the censorship.¹³¹ A preliminary injunction only remedies future harm. The Plaintiffs were trying to remedy past harm, and because the Plaintiffs could not prove that their harm was substantially likely to occur in the future, the injunction they were seeking would not adequately remedy their past harm.¹³²

These cases illustrate the current understanding and jurisprudence of free speech on the internet and social media. While the Supreme Court has not explicitly stated that these platforms have complete and total editorial rights like those previously established, it seems like they are heavily leaning towards that future. In the next section, this article will address the crucial distinctions between social media platforms and more classic informational mediums that have been granted editorial rights.

IV. WHY SOCIAL MEDIA COMPANIES SHOULD NOT BE AFFORDED FIRST AMENDMENT EDITORIAL RIGHTS

We now must address the central question of this Article: should editorial rights be afforded to social media platforms, much like those afforded to traditional newspapers and other expressive institutions? Established understanding of the First Amendment and the differing functions of these expressive platforms show that social media platforms should not be afforded editorial rights as they are traditionally understood. There are a few key distinctions between social media platforms and classic editorial mediums that show that editorial rights should not be extended to social media platforms.

A key point the Court addressed in *Tornillo* was the limited amount of physical space available for newspapers to use.¹³³ A physical newspaper only has so much room for the speech and expression of the newspaper. Being compelled to include speech would take up that limited space and prevent the newspaper from including other speech, stories, or ideas they would have otherwise

¹²⁸ *See id.*

¹²⁹ *See id.* at 51.

¹³⁰ *See id.* at 56.

¹³¹ *See id.* at 49–50.

¹³² *See id.* at 69.

¹³³ *See Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974).

included, and consequently place additional financial burdens on the newspaper.¹³⁴

This same reasoning cannot be expanded to the internet and social media platforms. These new age platforms are, for all intents and purposes, endless, only limited by the imagination of the user. An individual posting a picture on Instagram or posting a video on YouTube would not prevent the platform from posting its own pictures or videos. There is no tradeoff between allowing a user's speech and the platform's speech. Both the platform and user can speak and express their ideas without any concern that either of them will have their speech suppressed to permit the other's speech. Given the endless nature of the internet, there is no danger in limiting the platform's editorial discretion as this would not prevent the inclusion of the platform's speech.

A second distinction arises from the facts and holding of *PruneYard*, while the shopping center in the case was technically private property, it covered multiple city blocks, had dozens of shops and restaurants, and was completely open to the general public.¹³⁵ Based on these facts the Court found that the owner's First Amendment rights were not violated under compelled speech.¹³⁶ A reasonable person would likely not attribute a third party's speech to the owners of that property and requiring them to host that third party would not compel that private individual's speech.¹³⁷

Like the mall in *PruneYard*, social media platforms are large areas generally open to the public for enjoyment. However, social media encompasses a much more expansive area compared to that of *PruneYard* and is available for anyone to use regardless of physical distance. Using this comparison, user speech on social media is even less likely to be attributed to the platform or its overseers.¹³⁸ A reasonable person understands that an individual's posts or content is the expression of that individual, and the platform is nothing more than a host for that expression rather than an endorsement of that individual's expression. No reasonable person would believe a random member of the general public's post is endorsed or could be attributed to Elon Musk or Mark Zuckerberg.

Building on this reasoning, we can see that traditional platforms like newspapers or newsletters have a strikingly different function compared to the social media platforms of today. A newspaper actually curates, selects, and edits every single story or article they produce to the public. This type of conduct is the very reason these platforms have been afforded editorial rights, because the

¹³⁴ See *id.* at 256–57.

¹³⁵ See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

¹³⁶ See *id.* at 88.

¹³⁷ See *id.* at 87.

¹³⁸ See *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023) (holding that social media platforms generally do not create, inspect, or endorse user content, and thus user speech is not reasonably attributed to the platform itself).

content and expression of that platform is the actual expression of the writers and editors.

Compare this to social media, which acts more like a conduit or facilitator of speech rather than being actively engaged in expressive conduct.¹³⁹ These platforms are not expressing themselves in the same way that traditional platforms typically have. Allowing social media platforms to have this power could disrupt the entire purpose of free speech protections. Based on the recent content and viewpoint-based censorship that has occurred recently, it can be understood that social media platforms only allowing for content from one side of an issue is not a good thing. While newspapers and traditional mediums do this, they are engaged in their own expression and are protected under editorial rights to do so. Traditional mediums are better compared to a single user on a platform rather than the entirety of the platform.

Some may counter this point by addressing the precedent set in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.* In this case, the Supreme Court held that the organizers of the Boston St. Patrick's Day–Evacuation Day Parade could not be compelled to include floats that displayed speech the organizers did not agree with.¹⁴⁰ Critics argue that this compelled speech can be analogized to social media in the sense that the organizers or leaders of the platform, i.e. the parade, would have the speech attributed to them if they were required to carry speech they did not agree with.

However, this reasoning is flawed. In *Hurley*, the floats and individuals in the parade are approved by a committee before they are ever displayed to the public.¹⁴¹ On social media, individuals can post ideas and content without any oversight from the social media platform itself. Content only becomes censored after it is reported or after it is found to be in violation of the platform's guidelines. Furthermore, the parade in this sense is a very different type of medium than social media. Social media is, essentially, a completely wide-open platform for people to express their ideas and content. The parade, while for the public, is organized and controlled by a private group that have total control over what speech and floats are displayed in the parade. So, while *Hurley* provides further protections for the speech of organizers, this analogy cannot apply to social media platforms censoring and moderating speech.

In *NetChoice v. Bonta*, the California Court discussed the algorithms social media platforms use to populate the user's feed.¹⁴² This further shows that

¹³⁹ See Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-Opt the First Amendment. Courts Shouldn't Let Them.*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Dec. 9, 2021), <https://knightcolumbia.org/blog/social-media-companies-want-to-co-opt-the-first-amendment-courts-shouldnt-let-them> [perma.cc/QT2S-EX4Y] (“But social media platforms are different from newspapers in important ways. They are primarily vehicles for others’ speech, rather than their own.”).

¹⁴⁰ See *Hurley v. Irish-American Gay*, 515 U.S. 557, 580–81 (1995).

¹⁴¹ See *id.* at 560–61.

¹⁴² See *NetChoice v. Bonta*, 761 F. Supp. 3d 1202, 1220–21 (N.D. Cal. 2024).

social media platforms are not engaged in expressive conduct, but rather simply hosting user speech and conduct. One of the main arguments in favor of social media platforms receiving editorial protections is that platforms “pick” the content seen by the user. Typically, it was an actual person, an editor or writer, that picks and chooses what an individual saw on the front cover of a newspaper and how that information was presented.

While social media companies do function in a comparable way, there is no human engaging in expressive editorial conduct like a newspaper has. Instead, social media platforms use mathematical algorithms to pick and choose what content is shown to the user based on the user’s past interactions with the platform including the user’s likes and comments, and even how long the user interacts with specific content and posts.¹⁴³ Besides the creation and implementation of the algorithm, there is almost no human expression involved on behalf of the social media platform. And unlike traditional mediums, social media platforms do not get to determine how the information is presented to the viewer. The platform provides the information in the same manner as the creator, with no oversight from the platform.

V. CONCLUSION

Social media is not going away anytime soon. In fact, this may just be the beginning of the social media boom. Social media platforms already control an unforeseen amount of speech and expression. In this new world, we must remember our most important and fundamental rights, the right to speak on issues and express yourself as you see fit. And now we must acknowledge that these rights are expressed on social media more and more every day. Even with the lengthy history of First Amendment jurisprudence, it has provided little guidance to address the issues of free speech on social media. The United States Supreme Court has generally accepted that social media platforms do have editorial rights, comparing them to other traditional mediums. But this comparison is flawed. Social media platforms are fundamentally different from traditional mediums in scope, function, and accessibility. Given the pivotal role that these new platforms play in our society, they should not be free to censor content with no limitations. Instead, the law must evolve to properly protect the spirit of the First Amendment in this new digital age.

¹⁴³ See *Twitter, Inc.*, 598 U.S. at 499; see also Dorcas Adisa, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOC. (Oct. 30, 2023), <https://sproutsocial.com/insights/social-media-algorithms> [perma.cc/E4QW-PRX6] (stating that social media algorithms analyze user’s likes and comments, the time of their interactions, who long they interact, and many other factors to populate a person’s feed).