Tulsa Law Review

Volume 58
Numbers 2 & 3

Spring 2023

Twitter Pill to Swallow: Compelled Speech Doctrine and Social Media Regulation

Henry Meyer

TWITTER PILL TO SWALLOW: COMPELLED SPEECH DOCTRINE AND SOCIAL MEDIA REGULATION

Henry Meyer*

---

*Henry Meyer, JD, summa cum laude Mitchell Hamline School of Law, is a civil litigator in Minneapolis, Minnesota. The author would like to thank Michael K. Steenson for his guidance and support in writing this Article.

I. INTRODUCTION

Donald Trump's presidency ignited a turbulent debate about the supposed danger that social media companies pose to democracy. His presidency began with concerns that a foreign power had interfered in the 2016 election by spreading disinformation on social media[1] and ended with his being banned from Twitter for inflammatory rhetoric leading up to the riot at the U.S. Capitol.[2] In an era of deep political polarization, it is perhaps surprising that so many on both the left[3] and the right[4] agree that the government should regulate speech on social media. Of course, the left and right vehemently disagree about whether it is the speech that social media companies *allow* or the speech that social media companies *ban* that threatens democracy.[5] Unsurprisingly, government regulation of how private social media companies handle speech on their platforms raises serious First Amendment issues.

Some proposals involve regulating so-called "hate speech" or "fake news" on social media. For example, in 2021, lawmakers in Colorado introduced a bill that would have created a commission to investigate whether social media platforms engage in "practices that promote hate speech; undermine election integrity; disseminate intentional disinformation; conspiracy theories; or fake news."[6] If the commission found that social media companies engage in such practices, it would have had the power to "issue . . . an order requiring the respondent to cease and desist from the practice and to take action that the commission orders."[7] Such proposals are clearly unconstitutional. In *Brandenburg v. Ohio*,[8] *Texas v. Johnson*,[9] *R.A.V. v. St. Paul*,[10] and *Matal v. Tam*[11] the Supreme Court has

---

1. Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html.

2. Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html.

3. Emily Bazelon, *Why Is Big Tech Policing Speech? Because the Government Isn't*, N.Y. TIMES MAG. (Jan. 26, 2021), https://www.nytimes.com/2021/01/26/magazine/free-speech-tech.html.

4. Nicole Fallert, *Ron DeSantis Proposes Fining Social Media Companies $100,000 if They Ban State Lawmakers*, NEWSWEEK (Feb. 3, 2021, 5:30 PM), https://www.newsweek.com/ron-desantis-proposes-fining-social-media-companies-100000-if-they-ban-state-lawmakers-1566650.

5. *Id.*; Bazelon, *supra* note 3.

6. S.B. 21-132, 73rd Gen. Assemb., First Sess. (Colo. 2021).

7. *Id.*

8. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969). The Court in *Brandenburg* vacated the conviction of a KKK member and held that merely supporting the use of violence to uphold white supremacy does not amount to incitement: "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." *Id.* This holding makes securing incitement convictions against people who engage in hateful speech very difficult in the absence of "imminent lawless action." *Id.* at 448–49; Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1164–65 (1970).

9. Texas v. Johnson, 491 U.S. 397 (1989) (invalidating a ban on flag burning). The Supreme Court in *Texas v. Johnson* reasoned that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

10. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating an ordinance that punished certain acts only if they incited anger based on race, religion, and gender). In the *R.A.V.* opinion, the Court recognized that "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.

11. Matal v. Tam, 582 U.S. 218 (2017) (invalidating as unconstitutional viewpoint discrimination a federal

been remarkably consistent in holding that the First Amendment prevents the government from singling out hateful or offensive speech for regulation simply because it is hateful or offensive. Accordingly, any law that attempts to restrict speech on social media because of its offensive content would be doomed to invalidation in the courts. Further, laws that draw content-based distinctions of any kind are almost always held presumptively unconstitutional.[12] Even laws that only target false or misleading noncommercial speech have a high First Amendment bar to clear.[13] Unless drawn so narrowly as to be virtually pointless, laws punishing the spread of "fake news" would also violate the First Amendment.

On the other end of the spectrum, some states have recently passed legislation banning social media companies from censoring user content based on viewpoint[14] or "deplatforming" candidates for political office.[15] Such laws implicate far more difficult and less settled areas of First Amendment law. Specifically, government regulations requiring social media companies to host speech or users that they would prefer not to implicates the doctrine of compelled speech.[16] This area of law is far less developed and coherent than content-based speech restrictions, and courts continue to disagree on the constitutionality of compelled speech regulations.[17]

In this Article, I will discuss how the compelled speech doctrine applies to government regulation of social media companies' content moderation policies. In Part II, I provide an overview of the Supreme Court's most important compelled speech precedents. Part III then discusses how the compelled speech doctrine might apply to House Bill 20 ("HB 20"), a Texas bill that compels social media companies to host speech without regard to the speaker's viewpoint.[18] Finally, Part IV will offer some normative arguments as to why the First Amendment protects the ability of social media companies to ban and censor their users.

II. THE COMPLEXITY OF THE COMPELLED SPEECH DOCTRINE MAKES IT DIFFICULT TO APPLY

In this Part, I will describe the broad contours of compelled speech doctrine and some of the difficulties in applying it. I will also briefly distinguish the law of compelled

---

law that prevented a rock band from trademarking a racial slur as their band name).

12. Reed v. Town of Gilbert, 576 U.S. 155 (2015) (invalidating an ordinance that imposed more restrictions on political yard signs than other yard signs). In striking down the ordinance, the Supreme Court reiterated the rule that "content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Id.* at 163.

13. United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion) (invalidating a federal law that punished individuals who falsely claimed to have won military honors). The *Alvarez* Court reasoned that "[e]ven when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.* at 719.

14. TEX. CIV. PRAC. & REM. CODE § 143A.002.

15. FLA. STAT. § 106.072.

16. *See* discussion *infra* Part III.

17. *Compare* NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022) (upholding a Texas law prohibiting social media companies from moderating content based on viewpoint), *with* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022) (invalidating a Florida law prohibiting social media companies from, among other things, deplatforming political candidates who violate the platforms' content rules).

18. H.B. 20, 2021 Leg., 87th Sess. (Tex. 2021).

commercial disclosures.

The primary difficulty in outlining the compelled speech doctrine is what Professors Amar and Brownstein describe as its "haphazard[] and inconsistent[]" precedents, which employ "inscrutable and seemingly selective consideration of various factors."[19] Similarly, Professor Volokh notes that many of the Supreme Court's compelled speech decisions are "more so than in many other corners of First Amendment law . . . hard to wrestle into a fully coherent pattern."[20] A possible source of the doctrine's inconsistency is the Court's attempt to use the conceptual framework from speech restriction cases to compelled speech cases.[21]

Nevertheless, the compelled speech doctrine is perhaps best understood as addressing four general categories of government action: (1) directly compelled speech; (2) the compelled hosting of third-party speech that affects the host's speech; (3) the compelled hosting of third-party speech that does not affect the host's speech; and (4) the compelled funding of speech.[22] Generally speaking, government action in the first two categories violates the First Amendment, while the third category of government action is constitutional.[23] There is a line of cases dealing with compelled funding of speech that is somewhat distinct from the doctrine's core precedents, and is largely outside this Article's scope.[24] This Part will focus on the first three categories of speech compulsion.

A. Directly Compelled Speech

I conceptualize directly compelled speech as government actions that compel individuals or organizations to utter, display, or endorse messages they do not wish to express. One of the most important theoretical underpinnings of the Court's approach to compelled speech is a concern for individual autonomy.[25]

The Court's earliest case dealing with directly compelled speech is *West Virginia State Board of Education v. Barnette*, which held that school children could not be compelled to recite the pledge of allegiance or salute the flag.[26] It would be nonsensical, the

---

19. Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent, and Nuanced Compelled Speech Doctrine*, 20 U. ILL. L. REV. 1, 5–6 (2020).

20. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 392 (2018).

21. *See* Amar & Brownstein, *supra* note 19, at 10.

22. *See* Volokh, *supra* note 20, at 358. Professor Volokh conceptualizes the compelled speech doctrine as containing "two strands." *Id.* The first forbids "speech compulsions that also restrict speech;" the second "forbids some 'pure speech compulsions' which do not restrict speech but which unduly intrude on the compelled person's autonomy." *Id.* His analysis certainly informs mine; however, I have attempted to develop my own, somewhat simplified, conceptual framework.

23. *See* discussion *infra* Sections II.A, II.B, and II.C.

24. *See, e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2464, 2486 (2018) (holding that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees" and reasoning that "the compelled subsidization of private speech seriously impinges on First Amendment rights."); *see also* United States v. United Foods, 533 U.S. 405, 411–14 (2001) (invalidating the compelled subsidization of generic advertising for mushrooms).

25. *Janus*, 138 S. Ct. at 2464 (warning that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning."). *See also* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.").

26. 319 U.S. 624, 634 (1943).

Court observed, if the First Amendment protected "the individual's right to speak his own mind, [yet] left it open to public authorities to compel him to utter what is not in his mind."[27] In *Wooley v. Maynard*, the Court held that the same principle prevents the government from compelling drivers to display a state motto on their license plates.[28] Again, the Court emphasized a concern for individual autonomy: "where the State's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[29]

Compulsion can also take the form of "conditions that seek to leverage funding to regulate speech outside the contours of [a government] program."[30] In *Agency for International Development v. Alliance for Open Society International*, the Court invalidated a requirement that NGOs explicitly oppose prostitution in order to receive government funding.[31] In short, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same [strict] scrutiny" as content-based speech restrictions.[32] Laws directly compelling speech will nearly always be held unconstitutional in light of this high burden.

B. Compelled Hosting of Third-Party Speech that Affects the Host's Message

The Supreme Court has characterized its cases where the compelled hosting of third-party speech was held unconstitutional as "result[ing] from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[33] As with directly compelled speech, a concern for the speaker's autonomy forms an important theoretical basis for the Court's approach to the compelled hosting of third-party speech: "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the *speaker's right to autonomy over the message* is compromised."[34]

In *Miami Herald Publishing Co. v. Tornillo*, the Court invalidated a statute requiring newspapers to print replies from politicians who were criticized in editorials.[35] The Court first noted that the statute "exacts a penalty on the basis of the content of a newspaper."[36] More importantly, the statute affected the newspaper's speech by "intru[ding] into the function of editors," who have the right to decide the "treatment of public issues and public officials—whether fair or unfair."[37]

In *Pacific Gas & Electric Co. v. Public Utilities Commission*, the Court extended *Tornillo*'s protection against compelled hosting of message-altering third-party speech to

27. *Id.*
28. *Wooley*, 430 U.S at 715.
29. *Id.* at 717.
30. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013).
31. *Id. See also* Volokh, *supra* note 20, at 369. I agree with Professor Volokh's characterization of *Alliance for Open Society* as a key compelled speech case, despite the Court's limited discussion of compelled speech.
32. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).
33. Rumsfeld v. F. Acad. & Inst. Rts., Inc., 547 U.S. 47, 63 (2006).
34. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 576 (1995) (emphasis added).
35. 418 U.S. 241, 258 (1974).
36. *Id.* at 256.
37. *Id.* at 258.

non-media corporations.[38] *Pacific Gas* involved a state utility commission's decision to require a utility to include materials from its political adversaries in billing envelopes.[39] The regulation affected the utility's message because "whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views," and thus might conclude that it should not speak at all.[40] Additionally, the regulation was content-based because it granted access to the utility's billing envelopes *only* to parties who disagreed with the utility.[41] Taken together, *Pacific Gas* and *Tornillo* suggest that "[j]ust as speech restrictions with content-based exemptions are generally impermissible, so compulsory hosting rules, with the beneficiaries chosen based on the content of their speech, are generally impermissible as well."[42]

However, compelled hosting of third-party speech may be unconstitutional even when—unlike *Tornillo* and *Pacific Gas*—the government's action is facially content-neutral. In *Hurley v. Irish-American*, the Court held that a public accommodation law could not require parade organizers to include an LGBT group whose message the organizers disagreed with.[43] The Court reached this result even though the public accommodation law "[did] not, on its face, target speech or discriminate on the basis of its content."[44] A parade, the Court held, is not a public accommodation, but a "form of expression," regardless of whether or not it contains a "succinctly articulable message."[45] Requiring the parade organizers to host marchers it would otherwise exclude "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[46]

A unifying doctrine emerges from this line of case law. Namely, that the First Amendment protects individuals and organizations engaged in expressive activity from being compelled to host speech that either forces the host to respond to the third party or alters the meaning of the host's own expressive activity.[47]

C. Compelled Hosting of Third-Party Speech that Does Not Affect the Host's Message

The Court has upheld the compelled hosting of third-party speech in cases where the hosting party is not actively engaged in speech or the compulsion does not alter the host's

---

38. 475 U.S. 1, 11 (1986) (holding that "[t]he concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.").

39. *Id.* at 6–7.

40. *Id.* at 14.

41. *Id.* at 13.

42. Volokh, *supra* note 20, at 378. *See also Turner*, 512 U.S. at 655 (noting that "unlike the access rules struck down in those cases, the must-carry rules are content-neutral in application.").

43. 515 U.S. at 559.

44. *Id.* at 572.

45. *Id.* at 568–69.

46. *Id.* at 573.

47. *See* Volokh, *supra* note 20, at 361. Professor Volokh comes to a similar conclusion: "compelling speakers to include certain material in their coherent speech product, thus barring them from distributing a speech product that contains just the content that they want it to contain," is presumptively unconstitutional. *Id.* In general, my analysis places a greater emphasis on the degree to which speech is altered, as opposed to whether a "coherent speech product" is involved. *Id.*

speech.[48] In *Pruneyard Shopping Center v. Robins*, the Court upheld a state law requiring shopping malls to allow people to distribute political materials on mall property.[49] The Court briefly discusses two primary reasons for its decision, which also serve to distinguish *Wooley* and *Tornillo*.[50] First, because the mall was open to the public, the views expressed by handbillers would "not likely be identified with those of the [mall] owner."[51] Second, the law was content-neutral because "no specific message is dictated by the State to be displayed on appellants' property."[52]

In *Turner Broadcasting Systems v. FCC*, the Court faced a more complex piece of legislation, yet used a similar analysis to reach essentially the same conclusion it did in *Pruneyard*.[53] *Turner* involved federal "must-carry provisions," which required cable television systems to devote a portion of their channels to the transmission of local and noncommercial broadcast television stations.[54] Cable operators challenged the compelled hosting of broadcast stations under the First Amendment.[55]

Importantly, the Court held, as an initial matter, that cable operators "engage in and transmit speech" when they choose which channels to carry and are therefore "entitled to the protection of . . . the First Amendment."[56] The Court also held that the relaxed standard of First Amendment review it announced for broadcast television in *Red Lion Broadcasting v. FCC* "does not apply in the context of cable regulation."[57] The *Red Lion* Court upheld "fairness doctrine" regulations for broadcast television because "the scarcity of broadcast frequencies" justified certain "limited content restraints."[58] In contrast, "cable television does not suffer from the inherent limitations that characterize the broadcast medium," and thus the "application of the more relaxed standard of scrutiny adopted in *Red Lion* . . . is inapt when determining the First Amendment validity of cable regulation."[59]

Nevertheless, the Court upheld the "must carry" provisions after applying intermediate scrutiny.[60] First, unlike the laws in *Tornillo* and *Pacific Gas*, the Court found that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech," and "do not require or prohibit the carriage of particular ideas or points of view."[61] Second, the Court dismissed the concern that viewers would attribute the broadcast stations' content to the cable operators: "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[62] Finally, the Court found it relevant that

48. *See Rumsfeld*, 547 U.S. at 63–64; *see also Turner*, 512 U.S. at 655.
49. 447 U.S. 74, 88 (1980).
50. *Id.* at 85–88.
51. *Id.* at 87.
52. *Id.*
53. 512 U.S. 622 (1994).
54. *Id.* at 630–34.
55. *Id.* at 657.
56. *Id.* at 636.
57. *Id.* at 637–38.
58. *Turner*, 512 U.S. at 637–38.
59. *Id.* at 639.
60. *Id.* at 652.
61. *Id.* at 643, 647.
62. *Id.* at 655.

unlike a newspaper, "the cable operator exercises far greater control over access to the relevant medium."[63] This "potential for abuse" gives the government some additional latitude to "ensure that private interests [do] not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[64]

Turner stands for the principle that a cable operator's editorial choice of which channels to provide constitutes protected speech.[65] In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, however, the Court held that a law school's choice of whether or not to admit certain recruiters was not, in and of itself, protected speech.[66] At issue was the Solomon Amendment, a federal law providing that if law schools give access to recruiters, they must also provide the same level of access to military recruiters.[67] A law school association challenged the law, in part on the grounds that it constituted compelled hosting of speech with which the schools disagreed.[68] The *Rumsfeld* Court distinguished *Tornillo*, *Hurley*, and *Pacific Gas*, holding 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."[69] As for the risk of misattribution, the Court concluded that "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."[70] In sum, while the Court has upheld regulations that do not affect a host's speech, it remains unclear when exactly a host is "speaking."

D. A Brief Note About Compelled Commercial Speech

At least for the purposes of this paper, compelled commercial speech is distinct from the rest of compelled speech doctrine. In a literal sense, the government compels speech when, for example, it requires pharmaceutical companies to disclose certain facts in their advertising.[71] But most required disclosures of this type are presumptively constitutional.[72] Compelled commercial disclosures are governed by a separate line of cases from the rest of compelled speech doctrine.

In *NIFLA v. Becerra*, the Court clarified when it will "apply more deferential review" to compelled commercial speech.[73] *NIFLA* involved a California law that required "crisis pregnancy centers" to post notices informing clients that the state offers free and

---

63. *Turner*, 512 U.S. at 656.

64. *Id.* at 656–57.

65. *Hurley*, 515 U.S. at 570 (construing *Turner*: "[c]able operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

66. 547 U.S. 47, 60 (2006) (finding that, "[a]s a general matter, the Solomon Amendment regulates conduct, not speech.").

67. *Id.* at 53.

68. *Id.* at 47.

69. *Id.* at 64.

70. *Id.* at 65.

71. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 474–75 (2016).

72. NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018) ("we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.").

73. *Id.* at 2372.

low-cost abortions.[74] The Court held that the *Zauderer* standard, which permits the government to compel the disclosure of "purely factual and uncontroversial information" in "commercial advertising," provided it is not "unjustified or unduly burdensome," did not apply because the notice requirement did not address an uncontroversial topic and was not related to the services provided by the centers.[75] Further, the Court refused to "recognize[] 'professional speech' as a separate category of speech" subject to less First Amendment protection.[76] Ultimately, the Court held that the clinics were likely to succeed in their First Amendment claim because the notice requirement was not content-neutral and "'alter[ed] the content' of petitioners' speech."[77] It remains to be seen how the Court will apply *NIFLA* to commercial speech in the future. The Ninth Circuit, for example, has interpreted it as prescribing a three-part test for "First Amendment claim[s] involving compelled commercial speech."[78]

Compelled commercial speech is not central to this paper's inquiry. Nevertheless, the preceding discussion is necessary to reinforce the following point: a lower standard of review will not necessarily apply simply because a commercial enterprise is speaking.[79]

E. The Difficulties in Applying the Compelled Speech Doctrine

The Court has not definitively enunciated the factors it considers in addressing compelled speech cases.[80] However, this review of the Court's major compelled speech precedents reveals six relevant factors: (1) whether the compelled or regulated activity is sufficiently expressive;[81] (2) whether the speaker is compelled to speak, display a message, or host a third-party's speech;[82] (3) the extent to which the host's message is affected by the third-party speech it is compelled to host;[83] (4) whether the government action is content-neutral, including as to the beneficiaries of compelled speech;[84] (5) the risk of misattribution;[85] and, (6) whether the speaker has a "monopolistic opportunity to shut out some speakers."[86]

It is hard to dispute Professors Amar and Brownstein's contention that the Court's

---

74. *Id.* at 2365.

75. *Id.* (quoting Zauderer v. Off. Disciplinary Couns. of Sup. Ct. Ohio, 471 U.S. 626, 651 (1985)).

76. *Id.* at 2366.

77. *NIFLA*, 138 S. Ct. at 2371 (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

78. Am. Beverage Ass'n v. City & Cnty. S.F., 916 F.3d 749, 756 (9th Cir. 2019) (upholding a preliminary injunction against enforcement of a warning label requirement for sugary drinks and reasoning that "[t]he *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.").

79. *Id.* at 756–58. *See also Hurley*, 515 U.S. at 574 ("nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally.").

80. *See, e.g.*, Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47 (2006); W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624 (1943); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); *and* Pac. Gas and Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986).

81. *See Rumsfeld*, 547 U.S. at 63.

82. *Compare Barnette*, 319 U.S. at 634, *with Pruneyard*, 447 U.S. at 87–88.

83. *See Rumsfeld*, 547 U.S. at 66.

84. *Compare Turner*, 512 U.S. at 643, *with Pac. Gas*, 475 U.S. at 13.

85. *See Turner*, 512 U.S. at 654; *see also Pruneyard*, 447 U.S. at 87.

86. *Hurley*, 515 U.S. at 577 (construing *Turner*).

consideration of these six factors has at times been "selective" and "inscrutable."[87] For example, Professor Volokh points out that, despite the *Wooley* Court striking down the compelled display of a state's motto on private property, *Rumsfeld* upheld a "require[ment] that the law schools use their private property as a platform for the State's ideological message."[88] For their part, Professors Amar and Brownstein take issue with the Court's decision in *Pacific Gas*, arguing that "PG&E was not chilled from billing or communicating with its customers. Nor was there any likelihood of misattribution."[89] Indeed the Court itself has not "decide[d] on the precise significance of the likelihood of misattribution."[90] A final point of uncertainty is the fact that the Court struck down speech compulsions in *Tornillo* and *Pacific Gas* in large part because they "conferred benefits to speakers based on viewpoint."[91] Yet, the law in *Rumsfeld* conferred benefits only to pro-military speakers.[92] Hence, the significance of content-neutrality in compelled speech doctrine is also unclear.[93]

In sum, applying the Court's current approach to compelled speech doctrine to social media regulation is necessarily imprecise and involves a degree of guesswork in prioritizing the many issues involved. On some issues, existing precedent may provide clear answers. In others, rough analogies must be drawn between the unique aspects of social media and the factual situations the Court has faced in the past.

III. CAN THE GOVERNMENT PREVENT SOCIAL MEDIA COMPANIES FROM CENSORING USERS?

This Part discusses whether, and to what degree, the First Amendment protects the right of social media companies to ban and censor their users. The goal is not to assess the constitutionality of every law or legislative proposal on the subject—no doubt there are certain proposals, both real and hypothetical, which would change or complicate the analysis. Rather, the purpose of this Part is to broadly examine how the compelled speech doctrine applies to laws regulating how social media companies police content on their platforms. For years, many politicians and commentators on the political right have accused social media platforms of anti-conservative bias in their content moderation policies.[94] To address this alleged bias, Republican lawmakers on both the state and federal level have introduced legislation designed to limit the ability of social media platforms to

87. Amar & Brownstein, *supra* note 19, at 6.

88. Volokh, *supra* note 20, at 373–74. Professor Volokh proposes two possible explanations for the tension between *Rumsfeld* and other compelled speech cases, neither of which were explicitly cited by the Court. First, there is a significant difference between being compelled to personally display a message on private property and being compelled to host a third-party's speech. *Id.* Second, *Rumsfeld* creates a special rule for the compelled hosting of government speech. *Id.* at 375–76.

89. Amar & Brownstein, *supra* note 19, at 39.

90. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 577 (1995).

91. *Turner*, 512 U.S. at 654 (construing *Tornillo* and *Pac. Gas*). *See also* Volokh, *supra* note 20, at 373–74 (pointing out the same inconsistency).

92. *See* Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47, 48 (2006).

93. *Id.*

94. Jessica Guynn, *Ted Cruz Threatens to Regulate Facebook, Google and Twitter Over Charges of Anti-Conservative Bias*, USA TODAY (Apr. 10, 2019, 4:50 PM), https://bit.ly/2GoJsNA.

moderate content.[95]

At the federal level, these proposals generally involve amending 47 U.S.C. § 230 ("Section 230").[96] Section 230 grants online platforms and providers civil immunity from (1) claims based on content posted by third-parties and (2) the platforms' decisions on how to moderate that content.[97] For example, lower courts have consistently held that Section 230 shields social media companies from liability for third-party posts that advocate for, or celebrate, violence.[98] Courts have also held that Section 230 protects online platforms from suits based on their decisions to remove or censor content that the platforms deem harmful.[99] Even if Section 230 were amended or repealed, the First Amendment may still protect social media companies from congressional attempts to regulate their content moderation policies.[100] As for state proposals, there is a question as to whether Section 230 would preempt state laws restricting social media platforms' ability to moderate content.[101] Again, that topic is beyond the scope of this Article, which is primarily concerned with the narrower question of whether such state laws violate the First Amendment.

Perhaps the best example of a law that clearly implicates the compelled speech doctrine is Texas' HB 20, which prohibits social media platforms from censoring user content based on viewpoint.[102] The statute provides, in relevant part, that "[a] social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression."[103] In *Netchoice, L.L.C. v. Paxton*, the Fifth Circuit Court of Appeals upheld the constitutionality of HB 20 after an industry group brought a First Amendment challenge.[104] The court held that the statute neither "forces the Platforms to speak [n]or interferes with their speech."[105]

HB 20 does not define "viewpoint," and so encompasses several types of expression that social media companies routinely censor.[106] For example, Twitter prohibits users from expressing certain bigoted viewpoints.[107] By preventing social media platforms from

---

95. *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); S.B. 228, 64th Leg., Gen. Sess. (Utah 2021).

96. *See* S. 1914, 116th Cong.

97. 47 U.S.C. § 230.

98. Force v. Facebook, Inc., 934 F.3d 53, 64–67 (2d Cir. 2019) (holding that Section 230 barred private suit against Facebook for failing to remove posts made by a terrorist group).

99. Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 604, 607 (S.D.N.Y. 2020) (holding that Section 230 barred suit against a video sharing site, which removed plaintiff's anti-gay "conversion therapy" videos).

100. *See* Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47, 63–64 (2006).

101. For a discussion of this topic, *see* Eugene Volokh, *Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment?*, THE VOLOKH CONSPIRACY (Jan. 23, 2021, 7:02 PM), https://reason.com/volokh/2021/01/23/might-federal-preemption-of-speech-protective-state-laws-violate-the-first-amendment/.

102. TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

103. *Id.* The statute contains a few narrow exceptions, like for user content involving "specific threats of violence" against individuals based on their membership of a protected class. *Id. See also* TEX. CIV. PRAC. & REM. CODE § 143A.006.

104. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 465 (5th Cir. 2022).

105. *Id.*

106. TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

107. *Hateful Conduct Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Feb. 16, 2023).

excluding speech that they do not want to be associated with, the bill compels the platforms to host third-party speech.[108] In applying the compelled speech doctrine to HB 20, I will use the six factors described in Section II.E as a guide.

A. Social Media Companies are Engaged in Protected Speech

The first factor in my analysis is whether the compelled or regulated activity is sufficiently expressive to garner First Amendment protection.[109] In other words, are social media companies engaged in speech at all when they transmit user content? This inquiry is essential because, as illustrated by *Rumsfeld*, the Court is likely to uphold compelled hosting of third-party speech if the law in question regulates conduct rather than speech.[110] This factor overlaps significantly with the question of whether a regulation affects the host's speech.[111] Consequently, this factor will also be discussed in Section III.C.

Social media companies' editorial decisions about their users' content almost certainly qualify as speech within the meaning of the First Amendment.[112] The main counterargument, articulated by the Fifth Circuit in *Paxton*, is that "[u]nlike newspapers [in *Tornillo*], the Platforms exercise virtually no editorial control or judgment" over user content.[113] Social media companies, the argument goes, are mere passive conduits for the raw speech of hundreds of millions of users, and therefore the companies do not make any meaningfully expressive editorial judgments.[114]

Yet, this argument is unpersuasive. Like the protected speech of cable operators,[115] social media companies transmit content originally produced by others.[116] The *Hurley* Court held that parades *are* protected speech, even though they are mere conduits for the speech of the participants.[117] The logic of *Hurley* can easily be applied to social media platforms.

Notably, the Court has already rejected a lower standard of First Amendment scrutiny in the Internet context.[118] In *Reno v. ACLU*, the Court hearkened back to *Turner*'s rejection of the *Red Lion* standard of review for modern media,[119] holding that "[t]hose [*Red Lion*] factors are not present in cyberspace. Neither before nor after the enactment of

108. *See* TEX. CIV. PRAC. & REM. CODE § 143A.002(a).

109. *See* Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47, 63 (2006).

110. *Id.* at 64.

111. *Id.*

112. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 456 (5th Cir. 2022).

113. *Id.* at 459. *But see* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1213 (11th Cir. 2022) (reasoning that "social-media platforms' content-moderation decisions are . . . closely analogous to the editorial judgments that the Supreme Court recognized in *Miami Herald*.").

114. *Paxton*, 49 F.4th at 456.

115. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 570 (1995) (recognizing that *Turner* stands for the proposition that "[c]able operators . . . are engaged in protected speech activities.").

116. *Paxton*, 49 F.4th at 456.

117. *Hurley*, 515 U.S. at 568.

118. Reno v. ACLU, 521 U.S. 844 (1997) (overturning the Communications Decency Act as an "abridge[ment of] 'the freedom of speech' protected by the First Amendment.").

119. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 639 (1994).

the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry."[120] Finally, the Eleventh Circuit, invalidating a statute similar to HB 20,[121] concluded that "[b]ecause a social-media platform itself 'speaks' by curating and delivering compilations of others' speech . . . a law that requires the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights."[122] In sum, though there is disagreement among the circuits, it is likely that social media companies are engaged in protected speech when they make decisions about the content they allow on their platforms.

B. HB 20 Affects Social Media Companies' Speech by Forcing Them to Host Third-Party Speech

As discussed in the introduction to this Part, laws that would restrict social media companies' ability to police users' content would essentially force the platforms to host third-party speech. Unlike direct speech compulsions, proposals like HB 20 do not force social media companies to engage in any speech themselves.[123] The remaining question then, is whether laws that force social media companies to host third-party speech unconstitutionally affect the companies' speech.

Whether the compelled hosting of third-party speech affects the host's speech is arguably the decisive factor in assessing the speech compulsion's constitutionality.[124] In fact, content-neutrality and the risk of misattribution are perhaps best viewed as subsidiary factors in determining the degree to which a compelled hosting law unconstitutionally affects the host's speech.[125]

In *Turner*, both the content-neutral nature of the law in question and the lack of any misattribution risk led the Court to uphold the constitutionality of a compelled hosting law.[126] In contrast, *Hurley* dealt with a content-neutral law and emphasized that the compelled hosting of third-party speech that the host disagrees with "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[127] Then again, *Rumsfeld* upheld a requirement that law schools host military recruiters despite the hosts' vehement disagreement with the military recruiters' message.[128] These cases provide no clear guideposts for determining whether

---

120. *Reno*, 521 U.S. at 868–69.

121. FLA. STAT. § 106.072. In *Paxton*, the Fifth Circuit concluded that Florida's law and HB 20 "are dissimilar laws in many legally relevant ways. Much of the Eleventh Circuit's reasoning is thus consistent with or irrelevant to our resolution of the Platforms' claims in this case." 49 F.4th at 488. While this claim is certainly debatable, the Fifth and Eleventh Circuits disagree on the crucial point as to whether "a private entity has a First Amendment right to control 'whether, to what extent, and in what manner to disseminate third-party-created content to the public.'" *Id.* at 490 (quoting *NetChoice*, 34 F.4th at 1212).

122. *NetChoice*, 34 F.4th at 1217.

123. *See* H.B. 20, 2021 Leg., 87th Sess. (Tex. 2021) (lacking any positive speech requirement for social media companies).

124. *See* Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47, 63 (2006).

125. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

126. *Id.*

127. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 573 (1995).

128. *Rumsfeld*, 547 U.S. at 70.

a compelled hosting law unconstitutionally alters the host's speech.[129] For the purposes of this subsection, I will discuss the direct effects of compelled hosting on social media companies' speech, and discuss content-neutrality and the risk of misattribution separately.

In compelled hosting cases, the type of speech or activity involved may impact whether the host's speech has been impermissibly altered.[130] A simple question illustrates how the Court might approach the issue: are social media companies more like the cable operators and law schools in *Turner* and *Rumsfeld*, or are they more like the parade organizers in *Hurley*?[131]

Beginning with the analysis in *Turner*, it may seem obvious that social media companies' content moderation decisions are more like transmitting cable channels than choosing participants for a parade. Indeed, the *Hurley* Court distinguished *Turner* by noting: "[u]nlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."[132] Like the broadcasting company in *Turner*, a platform like Twitter consists entirely of "individual, unrelated segments that happen to be transmitted together."[133] Further, the *Hurley* Court emphasized that "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*."[134] This description hardly fits Twitter. Few people would perceive a tweet from, say, Taco Bell's corporate account and a tweet from the Dalai Lama as "contribut[ing] something to a common theme."[135]

On the other hand, simply because a speaker transmits diffuse and diverse messages does not mean that the messages cannot be unconstitutionally altered by a compelled hosting law. The *Hurley* Court held that, even though the parade organizers in question were "rather lenient in admitting participants," they nonetheless did "not forfeit constitutional protection simply by *combining multifarious voices*, or by failing to edit their themes to isolate an exact message."[136] Similarly, Twitter is rather lenient in admitting participants, and Twitter's expression precisely consists of combining multifarious voices rather than presenting an exact message.[137]

---

129. *See Hurley*, 515 U.S. at 573; *Rumsfeld*, 547 U.S. at 70; *and* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

130. *See* Volokh, *supra* note 20, at 358–59, 361–62. Professor Volokh proposes that the Court affords greater protection for "coherent speech products" like parades. *Id.* at 361. However, I would argue that the fact that the Court designated the transmission of cable channels as protected speech renders this distinction rather vague. *Id.* at 364–65. Indeed, Professor Volokh acknowledges that it isn't clear whether a platform like Twitter would qualify as a "coherent speech product." *Id.*

131. *See id.* at 364–65.

132. *Hurley*, 515 U.S. at 576.

133. *Id.* at 558.

134. *Id.* at 577 (emphasis added).

135. *Id.* at 576.

136. *Id.* at 569 (emphasis added).

137. *See* NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 474 (2022); *Hateful Conduct Policy*, *supra* note 107.

Further, companies like Twitter and Facebook attempt to exercise a significant degree of editorial control over their platforms.[138] For example, Facebook employs around 15,000 moderators to enforce its content policies[139] and strives to create an environment free from "intimidation and exclusion," including "harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal" directed at protected classes.[140] Twitter, meanwhile, prohibits harassment based on protected classes, gory images, posts that encourage self-harm, deceptive use of false identities, non-consensual nudity, and election interference.[141] So, while these platforms combine "multifarious voices," they are nonetheless curated spaces.[142] Their policies suggest an "overall message" that can be "distilled from the individual presentations," meaning that these platforms are digital spaces that value racial and gender equality, civic integrity, transparency, and certain minimum standards of civility.[143]

Social media companies' content policies also express an implicit disagreement with certain viewpoints.[144] For example, by instituting a policy against misgendering transgender people,[145] Twitter implicitly states that it disagrees with the viewpoint—common in some conservative circles—that transgender people should be referred to by their biological sex.[146] A law forcing a social media company to host speech that expresses this view of gender pronouns would run afoul of *Hurley*'s holding that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[147] In other words, social media platforms may be more like a parade than they

---

138. *See, e.g.*, Kate Conger, *Twitter Expands Content-Moderation Rules to Cover Crises Like War and Disasters*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/business/twitter-content-moderation.html; John Koetsier, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day*, FORBES (June 9, 2020, 8:08 PM), https://www.forbes.com/sites/johnkoetsier/2020/06/09/300000-facebook-content-moderation-mistakes-daily-report-says/?sh=867748254d03.

139. Koetsier, *supra* note 138.

140. *Hate Speech*, META, https://transparency.fb.com/policies/community-standards/hate-speech/ (last visited Feb. 6, 2023).

141. *See Hateful Conduct Policy*, *supra* note 107. It remains to be seen the extent to which Twitter's "mercurial" new ownership will continue the platform's longstanding content moderation policies. Cat Zakrzewski et al., *Musk's 'free speech' agenda dismantles safety work at Twitter, insiders say*, WASH. POST (Nov. 22, 2022, 8:07 AM), https://www.washingtonpost.com/technology/2022/11/22/elon-musk-twitter-content-moderations/.

142. *See Hateful Conduct Policy*, *supra* note 107; *Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards/ (last visited Mar. 16, 2023); *and* Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 558, 569–70 (1995) (outlining how the parade in question curated its presentation).

143. *Hurley*, 515 U.S. at 577. Facebook also "remove[s] content that is likely to directly contribute to interference with the functioning of political processes and certain highly deceptive manipulated media." *Misinformation*, META, https://transparency.fb.com/policies/community-standards/misinformation/ (last visited Feb. 6, 2023).

144. *See Facebook Community Standards*, *supra* note 142.

145. *Hateful Conduct*, TWITTER HELP CTR., https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Mar. 16, 2023). Again, the continuance of such policies is currently in question. Zakrzewski, *supra* note 141.

146. Zack Ford, *After Mormon Contributor Objects, The Federalist Admits Its Anti-Transgender Policies*, THINKPROGRESS (July 3, 2015), https://archive.thinkprogress.org/after-a-mormon-contributor-objects-the-federalist-admits-its-anti-transgender-policies-e069cb3a1745/.

147. *Hurley*, 515 U.S. at 576.

first appear.

Another important distinction between the law at issue in *Turner* and the proposal here involves the consumer's perspective. The "must carry" rules in *Turner* did not discernably change cable operators' speech from the cable television viewer's vantage point.[148] Depending on the circumstances, the regulations at issue in *Turner* required cable operators to carry as few as three broadcast stations—and up to a maximum of one-third of their available channels—for broadcast stations who request carriage.[149] It is unlikely that the average cable television consumer would notice—much less object to—the inclusion of anodyne local broadcast content in their cable packages.[150]

In contrast, given the breadth of HB 20's prohibition on viewpoint discrimination,[151] the average Twitter user might be exposed to millions of bigoted Tweets appearing on the platform.[152] Further, it is likely that proponents of HB 20 and similar legislation intended[153] to prevent Twitter from banning President Trump and 70,000 other conspiracy theorists following the riot at the U.S. Capitol.[154] The January 6 riot illustrates that, beyond bigoted content posted by obscure, nameless users, laws like HB 20 would likely require social media companies to host conspiratorial and offensive content posted by prominent figures.[155] In any event, it is clear that the types of content that social media companies would be required by law to host are far more message-altering than the inclusion of a handful of local TV stations in *Turner*.[156]

In *Rumsfeld*, the Court upheld a requirement that law schools host military recruiters despite the schools' disagreement with the military's message.[157] The Fifth Circuit relied

---

148. *See* Volokh, *supra* note 20, at 364, 374, 385–86, 386 n.153.

149. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 630–31 (1994).

150. *See* Stephen Lovely, *2022 Update: Paying for Channels You Don't Watch,* CORDCUTTING (July 13, 2022), https://cordcutting.com/research/paying-for-channels-you-dont-watch/ ("Cable and satellite TV customers are still wasting money on their packages: the average user today has access to 190 channels but only regularly watches 15 of them."); Rani Molla, *Americans are still paying for cable because it's bundled with their internet*, VOX (Mar. 20, 2018), https://www.vox.com/2018/3/20/17139756/reasons-americans-us-pay-cord-cable-tv.

151. TEX. CIV. PRAC. & REM. CODE § 143A.002. Again, the statute only allows social media companies to censor bigoted speech that constitutes "specific threats of violence." *Id.* § 143A.006.

152. *See* Ford, *supra* note 146. It is certainly possible that Twitter's algorithm might reduce the average user's exposure to bigoted content. Josiah Hughes, *Blog: How the Twitter Algorithm Works [2023 GUIDE]*, HOOTSUITE (Dec. 14, 2022), https://blog.hootsuite.com/twitter-algorithm/#What_is_the_Twitter_algorithm. However, HB 20 not only prevents social media companies from removing bigoted content but also provides that platforms like Twitter may not "deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." TEX. CIV. PRAC. & REM. CODE § 143A.001(1). It is at least plausible that the breadth of this language would increase the visibility of bigoted content on social media platforms.

153. Florida's Lieutenant Governor Jeanette Nuñez said that Florida's Senate Bill 7072 was intended to combat "effort[s] to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations." *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, FLA. GOVERNOR RON DESANTIS (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech (hereinafter *Censorship of Floridians*).

154. Jon Porter, *Twitter Bans 70,000 Qanon Accounts as Conservatives Report Lost Followers*, THE VERGE (Jan. 12, 2021), https://www.theverge.com/2021/1/12/22226503/twitter-qanon-account-suspension-70000-capitol-riots.

155. *Censorship of Floridians*, *supra* note 153; Porter, *supra* note 154.

156. *See* cases cited *supra* note 129.

157. Rumsfeld v. F. Acad. and Inst. Rts., Inc., 547 U.S. 47, 64–65 (2006). Recall that *Rumsfeld* held that a law school's speech was not unconstitutionally altered because law schools are not engaged in speech when they host recruiters. *Id.*

on *Rumsfeld*'s reasoning in *NetChoice L.L.C. v. Paxton* and held that, if refusing to host military recruiters is not expressive, then neither is social media platforms' refusal to host certain content.[158] The *Paxton* court stated that "[i]n terms of the conduct's inherent expressiveness, there is simply no plausible way to distinguish the targeted denial of access to only military recruiters in *Rumsfeld* from the viewpoint-based censorship regulated by HB 20."[159]

The problem with this argument is that the *Rumsfeld* Court's conclusion that "accommodation of a military recruiter's message is not compelled speech" was derived from the fact that "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."[160] To that list the Court could have added cable broadcasting, because the Court has held that cable operators "are engaged in protected speech activities even when they only select programming originally produced by others."[161] Contrary to the Fifth Circuit's conclusion, social media platforms are far closer to parades, editorial pages, and cable broadcasters than they are to law school recruiting services.[162] Like the former, social media platforms' purpose is broadcasting speech "originally produced by others."[163] In contrast, the purpose of law schools' recruiting services is to "assist their students in obtaining jobs," and any speech burdened by the regulation of that activity is "incidental."[164]

Applying *Rumsfeld* to the regulation of social media companies is difficult because the Court heavily relied on the perceived lack of expression involved in recruiting services.[165] Viewed from this angle, *Rumsfeld* stands for the proposition that whether the compelled hosting of third-party speech impermissibly affects the host's message may depend on how expressive the regulated conduct is.[166] However, it is not clear how to measure the relative "expressiveness" of social media platforms compared to the conduct at issue in *Rumsfeld*.[167] Nevertheless, social media platforms are certainly qualitatively different from recruiting services because they are first and foremost a means for broadcasting speech.[168] As the Eleventh Circuit held in *Netchoice, LLC v. Attorney General*, "[s]ocial-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech."[169] At the very least, *Rumsfeld* does not offer decisive support to the constitutionality of HB 20.[170]

Defenders of HB 20 and similar statutes cite *Pruneyard* as analogous to the social

158. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 458–64 (5th Cir. 2022).
159. *Id.* at 461–62.
160. *Rumsfeld*, 547 U.S. at 64.
161. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 570 (1995) (construing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)).
162. *Paxton*, 49 F.4th at 474.
163. *Id.*; *Hurley*, 515 U.S. at 570.
164. *Rumsfeld*, 547 U.S. at 48–49, 62, 64, 67.
165. *Id.* at 49, 64.
166. *Id.* at 48–49, 62, 64, 67.
167. *Paxton*, 49 F.4th at 461.
168. *Id.* at 474; *Hurley*, 515 U.S. at 570.
169. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1216 (11th Cir. 2022).
170. *Paxton*, 49 F.4th at 461–62.

media context.[171] In *Pruneyard*, the Court held that the "[]most important" reason why it was constitutional to compel a shopping mall owner to host speech on his property was that the property in question was "a business establishment that is open to the public to come and go as they please."[172] Broadly speaking, social media platforms are also businesses establishments that are open to the public.[173] However, before entering a shopping mall, you are not asked to sign a document in which you agree not to say certain things.[174] By contrast, that is exactly what a person must do to sign up for a social media account.[175] By creating an account, users agree to abide by the platform's terms of service, which includes content moderation policies.[176] So while most social media platforms are indeed "open to the public" in a general sense, users are forewarned that they are entering a space in which they must abide by specific rules of conduct.[177] Users who violate the terms of the user agreement may no longer "come and go as they please."[178]

In addition, the law at issue in *Pruneyard* did not prevent shopping malls from prohibiting certain kinds of *content*; it prevented shopping malls from excluding "any publicly expressive activity."[179] Shopping malls may be useful fora for speech, but their primary purpose is to facilitate retail transactions.[180] Social media platforms are unlike shopping malls because they are spaces designed for the sole purpose of consuming and transmitting expressive content in accordance with defined standards.[181] This fact also distinguishes social media companies from the law school recruitment services in *Rumsfeld*.[182] In essence, the *Pruneyard* Court found it acceptable for the government to require the owner of a non-expressive space to host some expressive activity.[183] It is another matter entirely to require the owners of expressive platforms to host speech with which they expressly disagree.

The argument to extend the logic of *Pruneyard* into the digital sphere is weak. In *Hurley*, the Court refused to extend *Pruneyard*'s holding to parades, observing that "[t]he principle of speaker's autonomy was simply not threatened in that case."[184] In other words, the Court focused on the question of whether the party forced to host another's speech had their own message altered.[185] As the preceding discussion shows, there are compelling reasons to believe that restricting social media companies editorial control over the content on their platforms *does* affect their speech.

---

171. *Id.* at 455.
172. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).
173. *See Paxton*, 49 F.4th at 474.
174. *Id.* at 456.
175. Cadie Thompson, *What You Really Sign Up for When You Use Social Media*, CNBC (May 20, 2015), https://www.cnbc.com/2015/05/20/what-you-really-sign-up-for-when-you-use-social-media.html.
176. *Id. See also* Koetsier, *supra* note 138.
177. Thompson, *supra* note 175.
178. *Id.*; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).
179. *Pruneyard*, 447 U.S. at 77, 83–84, 88.
180. *Id.*
181. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 492 (5th Cir. 2022).
182. *Id.*
183. *Pruneyard*, 447 U.S. at 87.
184. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 580 (1995).
185. *Id.*

In sum, social media companies exercise significant editorial control over the content on their platforms in an effort to maintain a certain social and moral atmosphere.[186] Forcing social media companies to host speech with which they do not want to be associated alters their speech in a far more significant way than the regulations in *Turner*, *Rumsfeld*, and *Pruneyard*.[187] Social media companies' speech is more akin to the parade organizers in *Hurley*, and will be subject to a similar level of distortion under laws like HB 20.[188]

C. The Bill is Content-Neutral

In *Turner*, the Court reinforced the principle that "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous [strict] scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[189] Accordingly, the Court applied intermediate scrutiny to the content-neutral regulation at issue.[190] Among the core compelled speech cases discussed in this Article, content-neutrality was an essential factor in *Tornillo*, *Pruneyard*, *Pacific Gas*, and *Turner*.[191] In each of those cases, the content-neutral law was upheld and the content-based law was struck down.[192]

Two cases provide a foil to the importance of content neutrality in compelled speech jurisprudence: *Hurley* and *Rumsfeld*.[193] While the statute at issue in *Hurley* was content-neutral, the Court did not dwell on this factor in its analysis.[194] In contrast, the statute in *Rumsfeld* was upheld without any discussion of content-neutrality, despite the fact that the law was content-based in that it "conferred benefits to speakers based on viewpoint"—i.e., pro-military speakers.[195]

So, despite the *Turner* Court's cut-and-dry characterization of content-neutrality analysis, it is clear that, in some cases, other factors can supersede the usual content-neutrality analysis. In *Hurley*, it was the fact that the government action so clearly infringed on the speaker's autonomy by altering its message.[196] In *Rumsfeld*, it was the fact that the

---

186. *See, e.g.*, *Hate Speech*, META, https://transparency.fb.com/policies/community-standards/hate-speech/ (last visited Mar. 15, 2023); *Hateful Conduct Policy*, *supra* note 107.

187. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Rumsfeld v. F. Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

188. *Hurley*, 515 U.S. 557.

189. *Turner*, 512 U.S. at 642 (internal citations omitted).

190. *Id.* at 661–62, 664–65.

191. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 13 (1986) (reasoning that "[a]ccess to the newspaper" envelopes in *Tornillo* was not "content neutral" because "(i) it was triggered by a particular category of newspaper speech, and (ii) it was awarded only to those who disagreed with the newspaper's views."); *Pruneyard*, 447 U.S. at 77, 87 (holding that "no specific message is dictated by the State to be displayed on appellants' property."); *Turner*, 512 U.S. at 655 (holding that "the must-carry rules are content-neutral in application.").

192. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); *Pruneyard*, 447 U.S. at 88; *Pac. Gas*, 475 U.S. at 19–21; *Turner*, 512 U.S. at 661–68.

193. *Hurley*, 515 U.S. at 557, 564, 572; *Turner*, 512 U.S. at 654–55.

194. *Hurley*, 515 U.S. at 557, 564, 572 (holding that the public accommodation law "does not, on its face, target speech or discriminate on the basis of its content.").

195. *Turner*, 512 U.S. at 654–55 (construing *Tornillo* and *Pac. Gas*). *See also* Volokh, *supra* note 20, at 373–74 (pointing out the same issue in *Rumsfeld*).

196. *Hurley*, 515 U.S. at 573.

Court determined that the law in question affected conduct, not speech.[197]

As for HB 20, the law is content-neutral.[198] Far from treating speech differently based on its content, HB 20 mandates that social media companies treat nearly all content the same, or at least in a viewpoint-neutral manner.[199] Thus, the bill "impose[s] burdens and confer[s] benefits without reference to the content of speech."[200]

Based on the holdings in *Tornillo*, *Pruneyard*, *Pacific Gas*, and *Turner*, the bill's content-neutrality certainly weighs in favor of its constitutionality. However, as explained in Section III.C, *Hurley* illustrates that the message-altering effect on social media companies' speech may outweigh the bill's content-neutrality.[201]

D. HB 20 Creates Little Risk of Misattribution

In many of the Court's compelled speech cases, the risk of misattribution is a relevant factor.[202] Misattribution refers to the likelihood that an observer would assume an individual or institution agrees with, or endorses, the third-party speech it is forced to host.[203] Generally speaking, the Court has viewed a low risk of misattribution as weighing in favor of a law's constitutionality.[204] The ease with which the host can disavow any connection to the third-party's speech is also relevant.[205] Conversely, it weighs against the constitutionality of a law if observers would naturally assume that the host agreed with the speech it was forced to host.[206] In *Hurley*, for example, the Court observed that LGBT "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."[207]

In contrast to how people perceive parade participants, reasonable observers do not assume that social media companies agree with the posts on their platforms. True, the

197. Rumsfeld v. F. Acad. & Inst. Rts., Inc., 547 U.S. 47, 69–70 (2006).

198. TEX. CIV. PRAC. & REM. CODE § 143A.002 (protecting all users, expressions, and viewpoints regardless of content).

199. *Id.*

200. *Turner*, 512 U.S. at 643.

201. *Hurley*, 515 US at 578–81.

202. *See Turner*, 512 U.S. at 655–56; *Hurley*, 515 U.S. at 577; NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1216–18 (2022); *Rumsfield*, 547 U.S. at 64–65; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 9, 12–13 (1986); *and* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–58 (1974).

203. *See Turner*, 512 U.S. at 655–56; *see also Hurley*, 515 U.S. at 577.

204. *See Rumsfeld*, 547 U.S. at 65–66 (reasoning that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters."); *see also Turner*, 512 U.S. at 655 (noting "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.").

205. *Compare Pruneyard*, 447 U.S. at 87–88 ("[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."), *with Hurley*, 515 U.S. at 575–77 ("[T]here is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade.").

206. *Hurley*, 515 U.S. at 575–76.

207. *Id.* at 575.

platforms implicitly endorse certain *values* by banning specific kinds of content.[208] However, social media companies explicitly disavow any agreement with all user content.[209] Even if social media companies didn't include such disclaimers in their terms of service, the platforms' design makes the source of a post clear.[210] In this respect, social media companies are like the cable operators in *Turner*, where "the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable."[211] Even if Twitter were concerned that the content foisted on it by HB 20 would be attributed to Twitter itself, the platform already has a system in place for "flagging" content.[212] In short, the bill creates no risk that third-party content would be misattributed to Twitter, and this factor weighs in favor of the bill's constitutionality. However, it is important to recall that the Supreme Court has not determined the "precise significance of the likelihood of misattribution."[213]

E. Social Media Companies Do Not Have a Monopolistic Opportunity to Shut Out Speakers

Turner Broadcasting System, Inc. v. FCC is the solitary case in which the Supreme Court cited an entity's power to silence other speakers as weighing in favor of the constitutionality of the compelled hosting of third-party speech.[214] However, this factor deserves consideration here because the regulation of social media—like the cable operators in *Turner*—involves large corporations who transmit massive amounts of information to billions of people.[215] The question of whether social media companies are powerful or "monopolistic" enough to effectively silence certain speakers is too complex to be fully explored here. However, there is no doubt that the size and power of social media companies has drawn intense criticism from across the political spectrum, as well as the attention of federal regulators.[216] Discussion of this topic will be limited, for the purposes of this Article, to the relevant factual circumstances that the Court cited in *Turner* and why similar

---

208. *See Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos ("We do not endorse . . . any opinions expressed via the Services.").

209. *Id.*

210. *See, e.g.*, Shubham Gautam, *Twitter System Design*, ENJOY ALGORITHMS, https://www.enjoyalgorithms.com/blog/design-twitter (last visited Mar. 15, 2023) (noting that content generated by Twitter users is inherently tied to their individual account and user ID).

211. *Hurley*, 515 U.S at 576 (citing *Turner*, 512 U.S. at 684).

212. Christina Zhao, *Twitter Flagged 300,000 Election Tweets Including At Least 50 Donald Trump Posts, Retweets*, NEWSWEEK (Nov. 13, 2020, 1:45 AM), https://www.newsweek.com/twitter-flagged-300000-election-tweets-including-least-50-donald-trump-posts-retweets-1547118. It is worth noting the part of the Florida law invalidated by the Eleventh Circuit in *NetChoice* differs from HB 20 in this respect. 34 F.4th 1196, 1231–32 (2022). The court noted that "the Act defines the term 'censor' to include 'posting an addendum,' i.e., a disclaimer—and thereby explicitly prohibits the very speech by which a platform might dissociate itself from users' messages." *Id.* at 1218 (quoting FLA. STAT. § 501.2041(1)(b)).

213. *Hurley*, 515 U.S at 577.

214. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656–57 (1994).

215. *Social Media Platforms and Demographics*, LONDON SCH. ECON. & POL. SCI., https://info.lse.ac.uk/staff/divisions/communications-division/digital-communications-team/assets/documents/guides/A-Guide-To-Social-Media-Platforms-and-Demographics.pdf (last visited Feb. 3, 2023).

216. Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html.

factual circumstances do not exist with respect to social media companies.

To begin with, it is essential to distinguish whether social media companies engage in monopolistic practices generally from the more specific concerns the Court raised in *Turner*. The purpose of the regulations in *Turner* was to ensure the "survival" of broadcast television stations.[217] The Court cited congressional findings that the "physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues."[218] Crucially, the Court noted that, by itself, monopoly status does not justify granting the government greater latitude to regulate speech.[219] It reasoned that, "[a]though a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium."[220] Thus, while Facebook may indeed engage in anti-competitive or monopolistic practices,[221] that does not mean that it exercises the same control over access to online communication as cable operators do over access television.[222] In short, it was the ability to threaten the existence of other speakers, not media monopolies per se, that was relevant to the outcome in *Turner*.[223]

The Court's holding that cable operators exercised significant "control over access to the relevant medium" was premised in part on the unique "physical characteristics of cable transmission."[224] Specifically, the Court observed that "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over . . . the television programming that is channeled into the subscriber's home."[225] Hence, "[a] cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[226]

There are two reasons why social media companies do not have a cable operator's level of control over access to their medium. First, unlike cable operators, social media companies do not rely on physical access to users' homes or devices to transmit content.[227] An individual can access *all* competing social media platforms equally with an internet-connected device.[228] In this context, social media companies are like newspapers, in that "when a newspaper asserts exclusive control over its own news copy, it does not thereby

---

217. *Turner*, 512 U.S. at 647.
218. *Id.* at 632–33.
219. *Id.* at 656.
220. *Id.*
221. Kang & Isaac, *supra* note 216.
222. *See Turner*, 512 U.S. at 656–57.
223. *Id.*
224. *Id.* at 656, 659.
225. *Id.* at 656.
226. *Id.*
227. Amanda Lenhart, *Mobile Access Shifts Social Media Use and Other Online Activities*, PEW RSCH. CTR. (Apr. 9, 2015), https://www.pewresearch.org/internet/2015/04/09/mobile-access-shifts-social-media-use-and-other-online-activities/.
228. *Id.*

prevent other newspapers from being distributed to willing recipients in the same locale."[229] Hence, social media companies do not control the actual informational pipeline through which content is transmitted the way cable operators do.

Second, most major social media platforms are free,[230] whereas consumers pay a subscription fee to access cable television.[231] Cable subscribers thus have a strong economic incentive to rely on a *single* company for cable television service, giving the cable operator greater control over the content the consumer sees.[232] Meanwhile, social media users can (and often do) utilize multiple, competing platforms for no additional cost.[233]

More broadly, people who are banned or censored by a social media platform are not deprived of their ability to express themselves via the relevant medium in the manner contemplated by *Turner*.[234] The "must carry" provisions in *Turner* were designed to protect broadcasters who were in danger of becoming economically unable to continue speaking through television.[235] But if a person is banned from Twitter, they can move to another platform with little to no effort.[236] An individual would have to work rather hard to get themselves banned from *all* widely available social media platforms, especially the platforms that advertise themselves as havens for speech that is not allowed on other sites.[237] Alternatively, an individual could start their own website or email newsletter as a way to share their speech online.[238]

One counterargument is that, because a small number of companies dominate the social media landscape,[239] a person banned from the most popular platforms effectively loses their ability to meaningfully participate in public discourse online. The Supreme Court has acknowledged that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the

---

229. *Turner*, 512 U.S. at 656.

230. *See* Ramona Pringle, *Would Social Media Be Better If We Paid for It?*, CBC NEWS (Nov. 27, 2019, 3:00 AM), https://bit.ly/3NALOwV.

231. Maryalene LaPonsie, *How Much is Cable Per Month?*, U.S. NEWS (July 21, 2022, 1:57 PM), https://money.usnews.com/money/personal-finance/saving-and-budgeting/Articles/how-much-is-cable-per-month.

232. *See* Alex Sherman, *The future of cable may be no TV at all, as one small company from Arizona shows*, CNBC TECH (Mar. 3, 2019, 10:43 AM), https://www.cnbc.com/2019/03/03/cable-future-may-not-include-tv-as-cable-one-shows.html (noting that cable companies rely almost entirely on "legacy customers who are willing to pay about $100" per month for the service).

233. Emily A. Vogles et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

234. *See* Chris Kocher, *Study Shows Users Banned from Social Platforms Go Elsewhere with Increased Toxicity*, BINGHAMPTON UNIV. NEWS (July 20, 2021), https://www.binghamton.edu/news/story/3178/study-shows-users-banned-from-social-platforms-go-elsewhere-with-increased-toxicity (noting that users banned from Twitter often migrated to other, smaller platforms); *see also Turner*, 512 U.S. at 656 (highlighting the fact that cable operators can exert "far greater control over access to [their] medium" than, for instance, newspaper editors).

235. *Turner*, 512 U.S. at 665–67, 671–72 (dictum) (Stevens, J., concurring in part).

236. *See* Kocher, *supra* note 234.

237. *See, e.g.*, TRUTH SOCIAL, truthsocial.com (last visited Mar. 15, 2023) (holding itself out as "an open, free, and honest global conversation without discriminating on the basis of political ideology.").

238. There is a large and competitive market of website builders. Joe Van Brussel, *Best Website Builder for 2023*, CNET (Oct. 7, 2022, 9:00 AM), https://www.cnet.com/tech/services-and-software/best-website-builder/.

239. *See, e.g.*, S. Dixon, *Global Social Networks Ranked by Number of Users 2023*, STATISTA (Feb. 14, 2023), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

answer is clear. It is cyberspace . . . and social media in particular."[240] Obviously, there is a chance that an individual, depending on their prominence, would see their audience shrink if they were kicked off their preferred platforms.[241] But losing listeners is not the same as being silenced. For an over-the-air television broadcaster, a shrunken audience can lead, quite literally, to being silenced in the medium of television.[242] By contrast, a social media user does not need "operating revenues" in order to continue using social media.[243] True, a relatively small percentage of social media users rely on their social media audience to make a living.[244] Ultimately, the loss of a small number of followers is legally immaterial in light of the many readily available alternative forms of online communication. In sum, *Turner*'s concern about the ability of an entity to shut out speakers is inapplicable to social media companies.[245] Given the vast number of alternative means to transmit speech online, as well as the significant technical and economic differences between social media and cable television, social media users are not at serious risk of being silenced.[246]

F. Would Laws Banning Content Moderation Survive a Challenge Under the Compelled Speech Doctrine?

Of the six factors discussed in this section, only two—content neutrality and the risk of misattribution—definitively weigh in favor of the constitutionality of laws like HB 20.[247] The fact such laws require social media companies to host third-party speech—rather than speak themselves—could also be viewed as weighing slightly in their favor.[248] *Pruneyard*, *Turner*, and *Rumsfeld* illustrate that the Court is more tolerant of laws that compel the hosting of third-party speech than laws that directly compel the utterance or display of a particular message.[249] On the other hand, it seems clear that social media companies' transmission of user content is expressive enough to qualify as protected speech under *Turner* and *Hurley*. As for whether social media companies have a monopolistic opportunity to shut out some speakers, the better argument is that they do not.[250]

The decisive factor is likely to be whether, and to what degree, laws like HB 20

---

240. Packingham v. North Carolina, 582 U.S. 98, 103–04 (2017) (striking down a law prohibiting sex-offenders from accessing social media sites). It is important to note that the law in *Packingham* was incredibly broad in scope and prevented sex offenders from accessing social networks of all types. *Id.* at 101. Also, the case involved a government restriction on access to social media, which is a doctrinally distinct issue from compelling social media companies to host speech. *Id.* at 103–04.

241. *See* Dixon, *supra* note 239 (displaying the vast disparity in user counts between platforms).

242. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 632–33, 656 (1994).

243. *Id. See also* Pringle, *supra* note 230.

244. John Koetsier, *2 Million Creators Make 6-Figure Incomes on YouTube, Instagram, Twitch Globally*, FORBES (Oct. 5, 2020, 5:21 PM), https://www.forbes.com/sites/johnkoetsier/2020/10/05/2-million-creators-make-6-figure-incomes-on-youtube-instagram-twitch-globally/?sh=720ec9db23be.

245. *Turner*, 512 U.S. at 656–57.

246. *See id.* at 632–33, 656; *see also* Pringle, *supra* note 230; LaPonsie, *supra* note 231; *and* Kocher, *supra* note 234.

247. *See* discussion *supra* Sections III.C–III.F.

248. *See* TEX. CIV. PRAC. & REM. CODE § 143A.002.

249. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 77, 79–80, 85–88 (1980); *Turner*, 512 U.S. at 623, 642–46, 652, 655–57; *and* Rumsfeld v. F. Acad. & Institutional Rts, 547 U.S. 47, 48–49, 60, 63–65 (2006).

250. *See* discussion *supra* Section III.F.

affect social media companies' speech. The Supreme Court's reasoning in *Hurley* provides a strong argument that such laws unconstitutionally tamper with social media companies' speech, especially given the fact that these platforms' policies evince a strong disagreement with the speech laws like HB 20 would force them to host.[251] Finally, even if the Court were to apply intermediate scrutiny, as it did in *Turner*, there is a chance that the bill's sweeping scope would cause the Court to find that it fails the narrow tailoring requirement.[252]

IV. BROADER FIRST AMENDMENT IMPLICATIONS

Stepping back from the tangled minutiae of the compelled speech doctrine, it is worth considering the core First Amendment values at stake when the government regulates social media. The gathering political consensus about the danger social media companies pose to American democracy is no reason to weaken First Amendment protections.[253] As Justice Jackson wrote in the Court's first compelled speech case, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[254] The compelled speech doctrine has developed over time, but its core principle that "freedom of speech prohibits the government from telling people what they must say" remains.[255] That freedom includes the speaker's "autonomy to choose the content of his own message."[256] Neither the First Amendment, nor the principles upon which it is based, support using government power to burden the speech of one party in order to amplify the speech of another.[257] History suggests that state power is more frequently the enemy of free expression than its savior. Using government regulation to solve the issue of private censorship is akin to demolishing a house to solve an ant problem.[258]

As for whether protections against compelled speech should apply to corporations, I disagree with Professors Amar and Brownstein when they argue that "human dignity is essentially an interest of human beings. It is not an interest of large business entities or corporations, which, of course, are not human."[259] Needless to say, Professors Amar and

---

251. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 574–77 (1995).

252. *See* McCullen v. Coakley, 573 U.S. 464, 490, 493–94 (2014) (finding a content-neutral law mandating "buffer zones" around abortion clinics unconstitutional because it "burden[ed] substantially more speech than necessary to achieve the [government's] asserted interests."); *see also* Packingham v. North Carolina, 582 U.S. 98, 105–06 (2017) (finding a law prohibiting sex-offenders from accessing social media sites unconstitutional, even under intermediate scrutiny, because it was not narrowly tailored).

253. Johan Farkas, *Disguised Propaganda on Social Media: Addressing Democratic Dangers and Solutions*, 25 BROWN J. WORLD AFF., no. 1, 2018, at 1–2, 5–6, https://repository.library.brown.edu/studio/item/bdr:1082541/PDF/?embed=true.

254. W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 638 (1943).

255. *Rumsfeld*, 547 U.S. at 61.

256. *Hurley*, 515 U.S. at 573.

257. *See* U.S. CONST. amend. I; *see also Hurley*, 515 U.S. at 574–75.

258. Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech* 1, 3–8 (Hoover Inst., Aegis Series Paper No. 1902, 2019), https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech.

259. Amar & Brownstein, *supra* note 19, at 23–24.

Brownstein believe *Pacific Gas* was wrongly decided.[260] In that case, the Court invoked notions of autonomy when describing how corporations are protected against speech compulsions: "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say."[261] Amar and Brownstein suggest that the Court should apply "minimum rationality review" when the government compels "large for-profit corporate entities" to express things "where the only harm would be dignitary in nature."[262]

While true, in a literal sense, that corporations are not capable of possessing an emotional sense of dignity, the same is true of small corporations and nonprofit entities. Professors Amar and Brownstein spend little time justifying why "dignitary" concerns are relevant if a corporation is merely medium-sized or a nonprofit.[263] Surely, they would agree with *Tornillo*'s holding that the government cannot compell large for-profit *media* corporations, like The New York Times Company, compelled to print speech.[264] Further, "the press does not have a monopoly on either the First Amendment or the ability to enlighten."[265] Many corporations that do not create speech themselves—like social media companies—are nonetheless in the business of distributing speech. The decisions businesses make about how and whether to distribute certain speech are not always solely a matter of profit.[266] At a modest scale, a feminist bookstore might refuse to sell a popular book it considers misogynistic. It seems obvious that a law requiring a bookstore to sell books they find objectionable infringes on the principle of a speaker's autonomy, even though the speaker is a business.[267] On a larger scale, an online auction site might refuse to facilitate the sale of art it considers racist.[268] Decisions about whether to distribute speech may be made in accordance with a business' sense of self-interest. Yet they may also reflect the aggregate values of a corporation's employees, shareholders, managers, or owners.[269]

---

260. *Id.* at 24–25, 39.

261. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986).

262. Amar & Brownstein, *supra* note 19, at 33.

263. *Id.* at 22, 43–44.

264. Mia. Herald Publ'g Co., v. Tornillo, 418 U.S. 241, 257–58 (1974) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

265. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 782, 784–85 (1978) (striking down a law that prevented certain businesses from spending money to influence the outcome of referenda).

266. GUILLERMO C. JIMENEZ & ELIZABETH PULOS, GOOD CORPORATION, BAD CORPORATION: CORPORATE SOCIAL RESPONSIBILITY IN THE GLOBAL ECONOMY 13, 15, 18–19 (2016) (ebook).

267. *See* Volokh, *supra* note 20, at 365. Professor Volokh offers the example of a bookstore's decision about its inventory to illustrate the difficulty in determining whether the compelled hosting of third-party speech is constitutional. *Id.* at 365 n.64.

268. Steven Tweedie, *eBay is Removing Listings for the Dr. Seuss Books that the Author's Estate Pulled Due to their Racist Imagery*, BUS. INSIDER (Mar. 5, 2021, 10:53 AM), https://www.businessinsider.com/discontinued-dr-seuss-books-with-racist-imagery-removed-by-ebay-2021-3.

269. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 702, 709, 719 (2014). The Court in *Hobby Lobby* upheld the Free Exercise rights of a large, for-profit corporation that was closely held by a single family, stating:

> Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so.

Id. at 703 (internal citations omitted).

V. CONCLUSION

As stated at the beginning of this Article, the compelled speech doctrine is made up of a somewhat tangled and inconsistent line of cases. Nevertheless, laws that prohibit social media companies from censoring user content likely violate the First Amendment under the compelled speech doctrine. This conclusion is based on the fact that three of the six compelled speech factors described in this Article weigh against the constitutionality of such laws.

First, social media companies are engaged in expressive activity when they decide what content to allow on their platforms. Such decisions are more analogous to parade organizing or selecting broadcast channels than to allowing recruiters on a college campus. Second, prohibiting social media companies from censoring user content based on viewpoint impermissibly alters the platform's expressive activity. This is because social media companies exercise editorial control of user content and generally wish to promote a certain moral and social atmosphere on their platforms. Third, social media companies do not exercise monopolistic control over the medium of online communication because most services are free and there are a multitude of readily accessible alternative means of online communication. This distinguishes social media companies from cable and broadcast television providers.

Lastly, philosophical underpinnings of the First Amendment weigh strongly against the constitutionality of laws which seek to regulate the content-moderation decisions of social media companies. One of the most important theoretical bases for the compelled speech doctrine—and indeed the freedom of speech in general—is the principal that individuals have the power to decide what they do and do not say. Proponents of laws like HB 20 seem to have a distorted view of the nature of free speech. Freedom of speech is not a freewheeling right to use the resources or property of another to disseminate one's thoughts.[270] Rather, the purpose of the First Amendment is to secure, against government intrusion, the "freedom to think as you will and to speak as you think," as both a means to "political truth" and as an end in itself.[271] The Constitution protects this freedom, whether it is exercised by individuals or collectives.[272] If the government is permitted to force social media companies to host speech, the values at the heart of the First Amendment will be gravely undermined.

---

270. Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. Bos., 515 U.S. 557, 574–75 (1995) (holding that, rather than compelling the dissemination of another's thoughts, the city council "clearly decided to exclude a message it did not like . . . and that is enough to invoke its right as a private speaker to shape its expression.").

271. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

272. *See generally* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

> The suggestion in Mr. Justice White's dissent . . . that the First Amendment affords less protection to ideas that are not the product of 'individual choice' would seem to apply to newspaper editorials and every other form of speech created under the auspices of a corporate body. No decision of this Court lends support to such a restrictive notion.

Id. at 783 n.19.