



## EDITORIAL DECISION-MAKING AND THE FIRST AMENDMENT

*Adam Candeub*<sup>\*</sup>

First Amendment protection of “editorial discretion,” “editorial control,” and “editorial judgment” has a relatively short Supreme Court history. First used in the 1970s, these terms refer to the power that broadcasters, cable systems, and newspapers retain to make decisions about their content within regulatory regimes. Editorial decision-making is an action that editors perform on others’ speech—which sometimes expresses and conveys an editor’s own message, other times not. When, as in *Miami Herald Publishing Co. v. Tornillo*, editorial decisions express and convey editors’ ideas, they receive First Amendment protection. But, as in *FCC v. Midwest Video Corp*, when they do not—or the regulatory regime at issue allows editors to express their own views, First Amendment protection is limited or non-existent. If all editorial decision-making were to receive full constitutional protection, long-established common carrier law as well as mandatory carriage of political advertisement and PEG programming would be rendered unconstitutional.

Internet platform content moderation decisions are mostly non-expressive editorial decisions. Platforms’ content moderation decisions *in toto* do not convey a message because, lacking a fixed expression, they are never communicated *in toto* to anyone—as the platforms do not publicize their decisions. Unlike First Amendment-protected editorial decisions, such as inclusion in an op-ed page, a cable system channel line-up, or a parade, an audience cannot read a list of content-moderation decisions and thereby comprehend an expressed message. Second, platforms’ editorial

---

<sup>\*</sup> Michigan State University College of Law (candeub@msu.edu). Adam Candeub is professor of law at MSU College of Law where he directs its IP, Information, and Communications Law program. He is senior fellow at the D.C.-based Center for Renewing America.

decisions express little individually. For instance, shadow banning, by which a platform renders a user’s posts invisible to all but that user, cannot convey a message because no one knows, except the platform, that it is happening. Invisible editorial decisions are not intrinsically expressive of a corporate policy because, as the Court recognized in *Rumsfeld v. FAIR*, such conduct only communicates by reference to *other* speech. Last, just as telephone companies do not express their customers’ conversations, transmitting a message, in the context of a communications network, does not express a social media platform’s own editorial decisions or speech, a position that platforms themselves have maintained vociferously in countless section 230 cases. Because content moderation decisions are largely unexpressive, social media laws such as Texas’s H.B. 20 are consistent with the First Amendment.

Introduction .....	158
I. Expression, Editorial Decision-making, and Content Moderation.....	162
II. Supreme Court Precedent Does Not Equate Speech with Editorial Discretion, Control, or Judgment.....	168
A. The Supreme Court’s Usage of “Editorial Discretion,” “Editorial Control,” and “Editorial Judgment” .....	169
B. Editorial Decision-Making As Protected Speech? .....	179
III. Editorial Decision-Making and the Supreme Court’s Theory of Expression .....	179
IV. Social Media Content Moderation: Speech or Expressive Conduct.....	189
V. Expressive Content Moderation Under First Amendment Scrutiny .....	200
Concluding Thoughts: Cheap Censorship .....	202

## INTRODUCTION

First Amendment protection of “editorial discretion,” “editorial control,” or “editorial judgment” (collectively “editorial decision-making”) has a short history at the Supreme Court. First used in the 1970s, these terms referred to the freedom that broadcasters, cable systems, or in *Miami Herald Publishing Co. v. Tornillo*, a

newspaper, retain to control their content within regulatory regimes.<sup>1</sup> These terms typically do not refer to broadcasters' or cable systems' own speech. Rather, editorial decision-making is an action that an editor does to others' speech—which is sometimes the editor's own expression, other times not. The Court has only given editorial decision-making limited First Amendment protection.<sup>2</sup> More broadly, “[t]he Supreme Court has never endorsed the position that every aspect of operating a communications network is protected speech, and the consequences of such a view would be untenable.”<sup>3</sup>

A recent appellate decision reviewing the Florida social media antidiscrimination law<sup>4</sup> asserts that the First Amendment fully protects platforms' editorial decision-making to censor, de-platform, or control users' speech for any reason.<sup>5</sup> The court thereby equates protected speech with editorial decision-making—treating *all* editorial decision-making as fully protected speech by the platform.<sup>6</sup>

This equation or elision, that the dominant Big Tech social media firms, search engines, and websites (the “platforms”) strongly urge, misapplies precedent. The Supreme Court has been clear that only some editorial decisions are expressive and, therefore, receive only limited First Amendment protection. While some cases,

---

<sup>1</sup> As discussed in Section III, the Supreme Court uses the terms “editorial discretion,” “editorial control,” and “editorial judgment” interchangeably in First Amendment cases. The first case to use “editorial discretion” in a majority opinion was *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979); the first to use “editorial control” in a majority opinion was *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and a case released that same day, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 401 (1974), quotes *Tornillo*. The first use of “editorial judgment” in a majority opinion was in *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111 (1973).

<sup>2</sup> Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 99–100 (2021) (“Editorial rights are not a form of pure speech.”); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What “The Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673, 1688 (2011) (“the Court has never held that the fact that an entity transmits speech means that regulation of such a transmitter is a regulation of the freedom of speech”).

<sup>3</sup> Ex parte letter from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law & Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec'y, FCC 1, 9 (Aug. 22, 2003), [http://www.timwu.org/wu\\_lessig\\_fcc.pdf](http://www.timwu.org/wu_lessig_fcc.pdf).

<sup>4</sup> S.B. 7072, 123d Leg., Reg. Sess. (Fla. 2021).

<sup>5</sup> *NetChoice, L.L.C. v. Att'y Gen., Fla.*, 34 F.4th 1196, 1220 (11th Cir. 2022).

<sup>6</sup> *Id.* (“social-media platforms should be treated more like cable operators, which retain their First Amendment right to exercise editorial discretion, than traditional common carriers”).

such as *Miami Herald Publishing Co. v. Tornillo*,<sup>7</sup> find that editorial decisions are fully protected speech because the edited materials *become* the editors' own expressive speech, many other cases such as *FCC v. Midwest Video Corp.*<sup>8</sup> rule the opposite way. To hold editorial decision-making as a whole to be protected speech would undermine laws regarding mandatory carriage of political advertisement as well as public interest, educational, and government programming requirements for cable television systems that have existed for nearly a half-century.

Whether decision-making automatically receives First Amendment protection depends on whether editorial decisions are expressive and communicative. To qualify as expression, the Court requires that (i) the speaker intends to convey meaning through speech or expressive conduct; (ii) the audience understands the speech or expressive conduct with common language or set of understandings placed within a comprehensible context; and (iii) the speaker uses a discrete set of words or expressive conduct or acts.<sup>9</sup>

Platform content moderation decisions are not for the most part expressive. First, platforms' content moderation decisions *in toto* are not intended to convey a message. In *Turner*, the Court found that cable systems intend to convey a message via its channel line-up, and in *Tornillo*, the newspaper does so through its op-ed page. In both cases, the editor conveys its meaning with a fixed, discrete, and particularized expression that easily conveys meaning. In contrast, platforms' content moderation decisions *in toto* are not intended to convey a message because they lack a fixed expression and are never communicated *in toto* to anyone—as the platforms either keep no lists of their decisions or keep them secret. Further, no one

---

<sup>7</sup> 418 U.S. 241 (1974).

<sup>8</sup> 440 U.S. 689 (1979).

<sup>9</sup> As discussed in Section III, this test proceeds from various statements the Court has made, most prominently in *Texas v. Johnson*, 491 U.S. 397 (1989); *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288 (1984); and *Spence v. Washington*, 418 U.S. 405 (1974). Concededly, there is another view about “editorial discretion.” Perhaps via the Press Clause, editors have absolute control over their platforms to print or not print—regardless of whether their editorial judgements are “expressive.” Applying this idea to social media, it’s not clear that social media is “the press” any more than telephone companies are. On broader First Amendment grounds, the argument would seem to reflect then-Judge Kavanaugh’s argument that communications networks have an absolute editorial control to carry or not carry any message, a view expressed in his dissent to rehearing *en banc* in *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). This Article examines this position below in Section V.

could view all of a platform's moderated content to detect the idea or ideas the moderation is intended to convey because, unlike an op-ed page, cable system channel line-up or, as in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*,<sup>10</sup> a parade, a particular user has no access to all moderated content. Even if he did, the billions of messages would be impossible to read within a human lifetime.

Second, platforms' editorial acts are mostly not expressive individually. Shadow banning, by which a platform renders a user's posts invisible to all but the user, or a platform's prioritization scheme, by which it makes certain posts more or less prominent, intends to convey no meaning because no one knows, except the platforms, that it is happening. Instead, the platforms claim these invisible editorial decisions express a corporate policy. But, as the Court recognized in *Rumsfeld v. FAIR*,<sup>11</sup> such acts, which are not "intrinsically" communicative but only communicate with reference to *other* speech, receive no First Amendment protection.

More fundamentally, a platform cannot say that mere transmission or refusal to transmit messages constitutes *its* expression in the context of a communications network. Just as telephone companies do not express their customers' conversations, transmitting a message does not make it the platform's *own* expression, a position that platforms themselves have maintained consistently and vociferously in countless section 230 cases. Mere transmission (or decision not to transmit) does not express an editorial decision unless either accompanied by an explanation or the decision creates its *own* message or expression. Mere transmission is not "inherently expressive" and therefore stands outside First Amendment protection.<sup>12</sup>

On the other hand, if a platform edits or removes a post or de-platforms an individual and communicates a reason when it does so, this action is expression. But, to the degree such actions are expressive, they are expressive discriminatory acts that state law may prohibit. Indeed, if expressive discriminatory acts were to receive First Amendment protection, not only would such protection upend centuries-old common carrier law but also public accommodation and civil rights law that protects individuals from racial, sex, and other types of discrimination in

---

<sup>10</sup> 515 U.S. 557 (1995).

<sup>11</sup> 547 U.S. 47 (2005).

<sup>12</sup> *Id.* at 66 ("we have extended First Amendment protection only to conduct that is inherently expressive").

restaurants, public transportation, retail stores, insurance, education, housing, and employment.

The Article proceeds as follows. Section I introduces the differences between editorial discretion, expression, and content moderation. Section II describes how the Supreme Court has used these concepts in First Amendment cases. Section III shows that the Supreme Court has never understood that all editorial decision-making is speech or expressive action. Section IV then examines the Supreme Court's understanding of speech and expressive action. Section V, using the Court's expressiveness test, shows that platform moderation techniques are generally not expressive. Further, to the degree platform content moderation *is* expressive, it expresses prohibited discrimination, which—outside of organizations or entities, like parade organizers or the Boy Scouts, that have as their *raison d'être* to express a viewpoint or associational ethos—lacks First Amendment protection. Finally, the Conclusion examines how protecting editorial discretion by dominant communications networks against anti-viewpoint discrimination laws facilitates public-private collusion to censor speech, undermining the government interest in free and open political debate.

#### I. EXPRESSION, EDITORIAL DECISION-MAKING, AND CONTENT MODERATION

The First Amendment protects speech, spoken and written,<sup>13</sup> graphical images,<sup>14</sup> the right to use the press and media technology,<sup>15</sup> as well as “expressive conduct,” which the Supreme Court defines as the “communication of ideas by

---

<sup>13</sup> The First Amendment prohibits the government from “abridging the freedom of speech.” U.S. CONST. amend. I; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“The freedom of speech . . . [is] secured to all persons by the Fourteenth Amendment against abridgment by a state.”). This includes nonverbal conduct that is intended to be, and likely to be understood as, expressing a particularized message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>14</sup> *Kaplan v. California*, 413 U.S. 115, 119 (1973) (observing that “[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution”).

<sup>15</sup> Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 461 (2012).

conduct.”<sup>16</sup> Such conduct must be “inherently expressive”<sup>17</sup> and must convey a “particularized message.”<sup>18</sup> The Court has classified as expressive such conduct as hoisting a red communist flag,<sup>19</sup> saluting an American flag,<sup>20</sup> burning an American flag,<sup>21</sup> movies,<sup>22</sup> and naked dancing.<sup>23</sup> In addition, the First Amendment protects conduct that may be combined with words, such as walking in a public place with signs.<sup>24</sup>

“Editorial discretion,” “editorial control,” or “editorial judgment,” which the Court appears to use equivalently, here in this Article referred to generally as “editorial decision-making,” combine speech and conduct. They are actions performed on others’ speech. Editorial decision-making is sometimes expressive; other times, not. Consider the editor of a poetry anthology. Each poem selected reflects the editor’s chosen theme and ideas he wishes to express, i.e., formal, thematic, cultural, or historical. The reader is encouraged to see the connections, similarities, and differences between and among the chosen works, which the editor believes important and wants to point out to the reader.

This editorial discretion is expressive because it intends to convey ideas in a certain context—and both the editor and his audience comprehend the context. There is a precedent and history of anthologies of literary works, going back to the Tudor period and Richard Tottel’s *Songs and Sonnets* (1557). In this context, readers know that editors’ decisions reflect judgments about literary value and provide insight into the nature and development of literature.

Now consider other types of editorial decision-making: arranging works in an

---

<sup>16</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968); see generally John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 94 (2021).

<sup>17</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2005).

<sup>18</sup> *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>19</sup> *Abrams v. United States*, 250 U.S. 616, 622 (1919).

<sup>20</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>21</sup> *Texas v. Johnson*, 491 U.S. 397, 401 (1989).

<sup>22</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”).

<sup>23</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>24</sup> *United States v. Grace*, 461 U.S. 171, 173 (1983).

anthology by author's last name rather than date authored, using a certain kind of paragraph indentation, or placing the page numbers on the corner rather than the bottom middle of the page. These types of decision-making can potentially express something. An editor could express his fondness for sans serif typeface by choosing to use such a typeface—or express his dislike for W.B. Yeats by listing poems alphabetically by author's name so that Yeats' poems appear at the end of the volume. But these types of editorial discretion don't express anything because they lack context for people to infer meaning from these decisions. While an editor might intend to convey meaning in these decisions, these decisions are not part of a common convention, set of mutual understandings, or "language," and, therefore, he does not communicate or express.

Consider the editor who *intends* to convey his dislike for Yeats by using alphabetical indexing and placing Yeats' "Easter, 1916" last in his anthology of twentieth century poetry. His exercise of editorial discretion would not convey a message because there is no established convention, shared understanding—or "language"—of alphabetic arrangement. Most people would not see indexing choice as expressing a quality judgment. Putting a poet's poems last in the anthology has no accepted meaning or, as the Supreme Court would say, it is not "inherently expressive"<sup>25</sup>—and thus the editors' intended meaning is opaque to any reader and has no expressiveness.

In short, some types of editorial decisions express nothing. To take but one legal example, consider the Americans with Disabilities Act's applicability to websites. The statute has been understood to require certain types of fonts and organizations of text for certain business's websites.<sup>26</sup> Surely the ADA imposes upon "editorial discretion," but courts have upheld the ADA's requirements without even considering First Amendment considerations.<sup>27</sup> Why? Because decisions concerning

---

<sup>25</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("we have extended First Amendment protection only to conduct that is inherently expressive").

<sup>26</sup> See, e.g., *ADA Best Practices Tool Kit for State and Local Governments, Website Accessibility Under Title II of the ADA*, ADA.GOV, <https://tinyurl.com/4ch57zf4>.

<sup>27</sup> See, e.g., *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1342 (S.D. Fla. 2017), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021); *Haynes v. Dunkin' Donuts L.L.C.*, 741 F. App'x 752, 754 (11th Cir. 2018) (holding a plaintiff stated a claim by pleading "the alleged inaccessibility of Dunkin' Donuts' website denies Haynes access to the services of the shops that are available on Dunkin' Donuts' website"); *Gustafson v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist.*, No. 4:18-CV-2074



certain types of editorial discretion, like font-size, convey no recognizable message.

And the Supreme Court, even in the oft-cited dicta in *Turner*, has never equated fully protected speech to “editorial discretion,” “editorial control,” or “editorial judgment.”<sup>28</sup> Rather, as shown in the following section, the term emerges as a regulatory boundary demarcating those aspects of broadcasting and cable programming subject to government control, and often involving control over non-expressive editorial decisions which have no First Amendment significance. Sometimes, editorial discretion *can* receive protection as in *Tornillo* and *Turner*; but only if they sufficiently express the editors’ views—or, if the regulatory requirements prevent a platform or editor from expressing its own views.

Social media companies assert that they exercise editorial discretion and decision-making when content moderating their platforms in a way that conveys messages that deserve First Amendment protection. It’s not clear that they do. First, most of their editing is *sub rosa*. Techniques such as shadow banning are invisible to all users. They cannot possibly convey meaning, nor are they intended to do so.

Second, in the context of communications networks like telegraphs, telephones, and social media, the act or conduct of mere transmission or failure to transmit is not inherently expressive.<sup>29</sup> It’s not expressive of the speech itself because transmission of speech is not understood as endorsement or adoption of speech. Tweets convey users’ messages—not Twitter’s.

Many courts’ interpretation of Section 230(c)(1) of the Communications Decency Act<sup>30</sup> underscores the understanding that merely transmitting, or even

---

CAS, 2019 WL 2342434, at \*5 (E.D. Mo. May 31, 2019).

<sup>28</sup> Benjamin, *supra* note 2, at 1688 (“Turning to the Supreme Court’s jurisprudence, the Court has never held that the fact that an entity transmits speech means that regulation of such a transmitter is a regulation of the freedom of speech.”).

<sup>29</sup> John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 374 (2012) (“Telephone carriers are not viewed as engaging in editorial expression by merely transmitting voices across their networks, and the public does not attribute the content of voice calls to the telephone network.”); Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 FIRST AMEND. L. REV. 282, 303 (2014) (“The content transmitted by a common carrier—unlike that transmitted by a newspaper publisher—is not subject to editorial control or discretion.”); Daniel Brenner, *Telephone Company Entry into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 106 n.24 (1991).

<sup>30</sup> 47 U.S.C. § 230(c)(1) (2018).

content-moderating, others' speech is not expressive. This provision reads, "No provider or user of an interactive computer service [i.e., internet platform or social media firm] shall be treated as the publisher or speaker of any information provided by another information content provider [i.e., a user or anyone that places content on the internet]." If this transmitted speech is "provided by another," then it is not the platforms' own speech. If it were, then the platforms would be liable for it under section 230(f).<sup>31</sup>

Following this logic, in countless litigations, the platforms have insisted that they do not engage in expressive speech when they carry, transmit, or even edit or content moderate their users' speech. Rather, they claim that they simply transmit content "provided by another information content provider." Instead of providing their *own* content or expression, they provide "neutral means for users to share information, ideas, and other content";<sup>32</sup> "merely provid[e] a neutral forum on which some actors engage in offensive or hateful speech";<sup>33</sup> or, are a "platform for third-party generated content . . . analogous to the prototypical online messaging board."<sup>34</sup> And, arguing that they do not create content pursuant to section 230(f), the platforms claim that their algorithms "operate solely in conjunction with content that third parties choose to publish" and "do not themselves create or alter content."<sup>35</sup>

As the platforms, themselves, urge in these numerous lawsuits, mere transmissions or failure to transmit messages are not intrinsically expressive editorial decisions. Unlike the editor of an anthology, social media's content moderation decisions to prioritize, censor, or de-platform do not produce a coherent work that transmits its own message—for the simple reason that unlike a poetry anthology, no one is aware of all of a social media's content moderation and thereby comprehends the themes, messages, or ideals the content moderation conveys. One cannot

---

<sup>31</sup> *Id.* § 230(f). See also Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 152 (2021) ("Putting these provisions together, if an interactive computer service creates "in whole or part" content then it becomes an internet content provider, at least with respect to that content—and stands outside section 230(c)(1) protection").

<sup>32</sup> *Crosby v. Twitter, Inc.*, No. 2:16-cv-14406 (E.D. Mich. 2017) (MTD 34, Doc. 29).

<sup>33</sup> *Gonzalez v. Google LLC*, No. 4:16-cv-03282 (N.D. Cal. 2017) (MTD 25, Doc. 61).

<sup>34</sup> *Green v. YouTube, LLC*, No. 1:18-cv00203 (D.N.H. 2018) (MTD Mem. 12, Doc. 48-1).

<sup>35</sup> *Force v. Facebook, Inc.*, No. 18-397 (2d Cir. 2018) (Appellee Br. 22–23, Doc. 129); see *NetChoice, LLC v. Paxton*, No. 21-51178 (5th Cir. 2021) (Reply Br., Doc. 159).

look at content moderation decisions as a whole and conclude they reflect a set of corporate values. This message only becomes apparent when accompanied by *additional* speech in the form of content moderation policies, but, as discussed below, such “expression” does not receive First Amendment protection under *Rumsfeld*.<sup>36</sup>

Courts recognize that mere transmission of a message does not necessarily convey any message. For instance, in the context of a libel suit, a court recently rejected the notion that “retweeting a statement is the same as making the statement in the first instance.”<sup>37</sup> Instead, transmission of another’s tweet conveys no message because “[t]here are many reasons that someone might retweet a statement; a retweet is not necessarily an endorsement of the original tweet, much less an endorsement of the unexpressed belief system of the original tweeter.”<sup>38</sup>

Retweeting is a transmission of a message. Retweeting is also a conscious and reflective act—which one person typically controls. It creates a list of retweets that people can read and from which they can infer a conveyed message or viewpoint. In contrast, social media companies automatically transmit billions of messages without any real ability to control the message they communicate. Further, social media firms transmit too many to create a list of transmitted messages from which one could infer a message. If an individual’s retweeting does not convey a message that is “overwhelmingly apparent,”<sup>39</sup> then certainly social media’s mere transmissions of messages do not express a message.

In contrast to transmission, social media’s decision, accompanied by a statement or reason, to censor or de-platform clearly does convey an idea, i.e., Twitter de-platforms a user because he is gay, black, Jewish, etc. But, if an act simply expresses unlawful discrimination, the First Amendment does not protect it.<sup>40</sup> To

---

<sup>36</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2005).

<sup>37</sup> *Flynn v. CNN*, No. 1:21-cv-02587-GHW-SLC, 2022 WL 3334716, at \*4 (S.D.N.Y. Aug. 12, 2022).

<sup>38</sup> *Id.* at \*5.

<sup>39</sup> *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>40</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“Even if the Unruh Act does work some slight infringement on Rotary members’ right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (“In any event, even if enforcement of the Act[’s anti-sex discrimination requirement] causes some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate

counter that conclusion, one could say that while a state may lawfully prohibit discrimination based on status and prohibit expressive status discrimination, it may not prohibit discrimination based on viewpoint. A state law, such as H.B. 20, would impede on the platform's ability to express disagreement with certain positions, such as communism or nationalism, through the means of removing all posts favorable to such positions. However, private entities do not have absolute control over views expressed on their premises as numerous state laws prohibit employers from restricting or punishing political speech.<sup>41</sup> Further, many civil rights laws prohibit discrimination against political viewpoint.<sup>42</sup> And, prohibitions against religious discrimination are, in the end, prohibitions against viewpoint discrimination.

## II. SUPREME COURT PRECEDENT DOES NOT EQUATE SPEECH WITH EDITORIAL DISCRETION, CONTROL, OR JUDGMENT

The Supreme Court has never held that either “editorial discretion,” “editorial control,” or “editorial judgment” is the same as pure speech and *never* has afforded editorial decision-making full First Amendment protection.<sup>43</sup> Rather, the Court has

---

purposes. As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”).

<sup>41</sup> Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012) (“About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation. Some of these jurisdictions protect employee speech generally. Others protect only employee speech on political topics. Still others protect only particular electoral activities such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution.”).

<sup>42</sup> Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 NYU J. L. & LIB. 709 (2021); Meredith N. Will, *Screeches from the Red Hen: Public Accommodations Laws and Political Affiliation Discrimination in the United States and Louisiana*, 80 LA. L. REV. 959, 972 (2020) (“The District of Columbia, Seattle, and the U.S. Virgin Islands include political affiliation as a protected class . . . .” (citing D.C. CODE ANN. STAT. § 2:1402.31; SEATTLE, WASH., MUN. CODE § 14:06.030(B)(5); V.I. CODE ANN. § 10:64(3))).

<sup>43</sup> Bhagwat, *supra* note 2, at 99–100 (“Editorial rights are not a form of pure speech. When a platform carries third-party content, interference with editorial freedom does not involve suppression of the regulated entity's own speech. Social media owners are different from traditional media such as newspapers in this regard; though they control the speech available on their platforms, they do not generate it, nor do they choose what should be displayed for most content (though as we shall see, many platforms do exercise control over what content attains prominence.”); Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79

most often used the terms in the regulatory context to refer to types of broadcast or cable decisions that Congress did not intend to regulate—decisions that only raise First Amendment concerns when they are expressive.

The following examines how the Supreme Court has developed the concepts of “editorial discretion,” “editorial control,” and “editorial judgment.” The section concludes that the Court extends First Amendment protection to editorial decision-making when the decisions qualify as the editor’s expressive conduct. In other words, the First Amendment only protects an editor’s decisions in which (i) the editor intends to convey meaning through speech or expressive conduct; (ii) the audience understands the speech or expressive conduct with common language or set of shared understandings; and (iii) the editor uses a discrete set of words or expressive conduct or acts. Section III will then examine these requirements for expressive conduct.

**A. *The Supreme Court’s Usage of “Editorial Discretion,” “Editorial Control,” and “Editorial Judgment”***

The term “editorial control” first appears in a dissent in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.<sup>44</sup> This case involved the right of broadcasters to refuse absolutely, with approval from the FCC, to sell any part of their advertising time to groups or individuals wishing to speak out on controversial issues of public importance.<sup>45</sup> The term “editorial control” did not refer to the broadcasters’ *own* speech, but to advertisers’.

The Court upheld the FCC’s authority to *permit* broadcasters to refuse controversial advertising—which concededly supports the notion of platform control. But the majority did not rely on First Amendment protection for broadcasters’ editorial control to reach its decision. Its decision was based primarily on regulatory accountability and fear of monied interests controlling public discourse.<sup>46</sup> Rather,

---

N.Y.U. L. REV. 1030, 1065 (2004) (“editorial rights themselves—the choice of carriage of channels on a cable network—are somewhat attenuated”); Cristian DeFrancia, *Ownership Controls in the New Entertainment Economy: A Search for Direction*, 7 VA. J.L. & TECH. 1, 91 (2002) (“As we step further away from the journalistic core of editorial speech to a system operator’s editorial rights to make programming decisions, the First Amendment value of the editorial right ostensibly remains at least partially intact.”).

<sup>44</sup> 412 U.S. 94, 189 (1973) (Brennan, J., dissenting).

<sup>45</sup> *Id.* at 98–100.

<sup>46</sup> *Id.* at 130 (requiring carriage of editorial advertising “would serve to transfer a large share of

it is the dissent that uses the term “editorial control.” In dissent, Justice Brennan referred to the rights of “members of the public [who] have at least some opportunity to take the initiative and editorial control into their own hands.”<sup>47</sup>

Here, “editorial control” means access and control by advertisers of their own content; it does not mean broadcasters’ rights to pick and choose advertisers or, more broadly, control over others’ speech. Justice Brennan did not state that broadcasters have a First Amendment right of “editorial control” over commercials shown. Rather, it was a power to be shared between broadcasters and advertisers.

The next year, the term “editorial control” appeared in *Miami Herald Publishing Co. v. Tornillo*.<sup>48</sup> There, the Court said the First Amendment protected “editorial control” of a newspaper op-ed page and declared unconstitutional a Florida law requiring newspapers to print replies to editorials. The Court stated, “[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . . —whether fair or unfair—constitute the exercise of editorial control and judgment” upon which the State cannot intrude.<sup>49</sup>

The *Tornillo* Court found that the First Amendment protected the *Miami Herald*’s editorial control of its opinion-editorial page because the control reflected its *own* expression. Certainly, a newspaper intends to convey a set of ideas in its choice of op-ed pieces to publish; i.e., a newspaper tells readers that it holds the opinions expressed on its op-ed page or considers them thought-provoking or otherwise worthwhile. The newspaper uses a discrete and particularized set of words or actions, i.e., articles on the op-ed page, and everyone understands what an op-ed conveys given the history and context of newspaper opinion articles.

The Court’s objection to the Florida statute was its restriction of the newspaper’s expressive rights. “Florida’s statute interfered with [the newspaper’s] ‘editorial control and judgment’ by forcing the newspaper to tailor its speech to an opponent’s agenda.”<sup>50</sup> The *Tornillo* Court said that “[a] journal does not merely print

---

responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost”).

<sup>47</sup> *Id.* at 189 (Brennan, J., dissenting).

<sup>48</sup> 418 U.S. 241 (1974).

<sup>49</sup> *Id.* at 258; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

<sup>50</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 10 (1986) (plurality opin.)

observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation . . . .”<sup>51</sup> The Court found that the Florida law would limit the *Miami Herald’s own* speech, stating “under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.”<sup>52</sup> Thus, here editorial control was expressive of the platform’s views. This is a different situation than *Columbia Broadcasting System, Inc.*, in which editorial control was an act, which could or could not be expressive, that broadcasters performed on advertisers’ speech.

A few years later, in *FCC v. Midwest Video Corp.*,<sup>53</sup> the Court first used the term “editorial discretion,” which it employed interchangeably with the term “editorial control.”<sup>54</sup> At issue in that case was a Federal Communications Commission rule<sup>55</sup> that required cable systems in “the top 100 television markets to design their systems to include at least 20 channels and to dedicate 4 of those channels for public, governmental, educational [so-called ‘PEG’ programming], and leased access.”<sup>56</sup> The FCC’s rules thereby deprived cable operators of discretion regarding who may exploit their channels and nearly all control over what may be transmitted over such channels.<sup>57</sup>

The Supreme Court rejected the FCC’s rule on the grounds that although the authorizing statute, 47 U.S.C. § 151, “afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.”<sup>58</sup> Because “[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include,”<sup>59</sup> the FCC

---

(commenting on *Tornillo*).

<sup>51</sup> *Tornillo*, 418 U.S. at 258 (citing 2 ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)).

<sup>52</sup> *Id.* at 257.

<sup>53</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

<sup>54</sup> *Id.* at 707.

<sup>55</sup> FCC, Report and Order, No. 20508, 59 F.C.C. 2d 294 (1976).

<sup>56</sup> *Midwest Video Corp.*, 440 U.S. at 691.

<sup>57</sup> *Id.* at 693.

<sup>58</sup> *Id.* at 706.

<sup>59</sup> *Id.* at 706–08. Interestingly, the statutory provision that the Court reasoned showed Congressional intent to allow cable editorial freedom was 47 U.S.C. § 151(h), which states that broadcasters are not “common carriers.” *Id.* at 705. Particularly relevant for state social media laws, which impose

could not rely upon the jurisdictional weak reed of section 151. The Court viewed editorial discretion as power to control content— a regulatory category; it did not view the public access rules as interfering with a cable operator’s own expression because the Court recognized that as with phones—and social media—simply because a cable system transmits a channel does not make the transmitted content the cable system’s own expression.

In *FCC v. Midwest Video Corp.*, the Court invited Congress to impose limits on this editorial discretion, stating: “We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.”<sup>60</sup> There was never any indication from the Court that such a statute would impermissibly invade upon First Amendment rights—or, indeed, would violate the expressive rights of cable operators.<sup>61</sup>

Congress took the Court’s advice, passing the Cable Communications Policy Act of 1984,<sup>62</sup> which authorized state and local governments to require cable operators to set aside channels on their cable systems for public and leased access. The statute has been upheld against First Amendment challenge,<sup>63</sup> and PEG cable and leased access channels have become for over a generation a feature of American life.<sup>64</sup>

The Court’s next use of the term “editorial discretion” was within the context of broadcast regulation—but again in the context of third-party speech which the Court ruled did not involve the broadcaster’s own expression. In *Columbia*

---

a mild common carrier-type non-discrimination obligation on social media, had Congress imposed common carrier obligations on cable systems, the Court would have upheld such requirements. The *Midwest Video* Court explains its holding in *CBS v. DNC* thus: “Congress . . . may devise some kind of limited right of access that is both practicable and desirable.” *Id.* State social media laws, such as H.B. 20, certainly qualify as this type of “limited right of access.”

<sup>60</sup> *Id.* at 708.

<sup>61</sup> See also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (in dicta, relying on *Midwest Video*, for the idea that “editorial control” does not refer to the platform’s speech, but that of advertisers).

<sup>62</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 5b, 98 Stat. 2779, 2802 (1984).

<sup>63</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

<sup>64</sup> See *Public, Educational, and Governmental Access Channels* (“PEG Channels”), FCC, <https://tinyurl.com/kem4c2vj>.



*Broadcasting System, Inc. v. FCC*,<sup>65</sup> the Court resolved a dispute over section 312(a)(7) of the Communications Act of 1934, as added by Title I of the Federal Election Campaign Act of 1971.<sup>66</sup> This provision authorized the FCC to revoke any broadcasting station's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."<sup>67</sup> The Carter-Mondale Presidential Committee challenged the major broadcasters' decision to decline to offer time to present a documentary outlining the record of President Carter's administration in conjunction with its re-election announcement. The FCC found that the broadcasters were in violation of the statute.

In upholding the FCC, the Court ruled that the Commission balanced the demands of section 312 in "a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their *discretion* but demanding that they act in good faith."<sup>68</sup> The FCC required broadcasters to make good-faith efforts to carry political advertising but did not require broadcast licensees to accept all paid political advertisements.<sup>69</sup> Editorial discretion was not fully protected speech but rather a regulatory zone of control that could be enlarged or diminished, and here it had to accommodate "the First Amendment interests of candidates and voters, as well as broadcasters."<sup>70</sup>

Here, in way similar to *Midwest Video*, the Court did not say that broadcasters expressed their own messages through exercising "editorial discretion" to carry more or fewer political advertisements. The Court did not grant, therefore, First Amendment protection to exercising this discretion. Rather, editorial discretion was a power of control of *speakers' own speech* that had to be apportioned according to the applicable regulatory regime.

---

<sup>65</sup> 453 U.S. 367 (1981).

<sup>66</sup> 47 U.S.C. § 312(a)(7).

<sup>67</sup> *Id.*

<sup>68</sup> *Columbia Broad. Sys.*, 453 U.S. at 390 (emphasis added).

<sup>69</sup> See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377, 379 (1984) (commenting on *Columbia Broad. Sys.*).

<sup>70</sup> *Columbia Broad. Sys.*, 453 U.S. at 396.

In *City of Los Angeles v. Preferred Communications, Inc.*,<sup>71</sup> the Court reaffirmed its understanding that “editorial discretion” was *not* the same as fully protected First Amendment speech in a context even outside of the comprehensively regulated broadcast industry. Here, a cable television franchise brought legal action against the City of Los Angeles for its failure to issue permits allowing it to use municipal pole attachments to provide cable services. Preferred Communications alleged this denial was in violation of the First Amendment and the Sherman Act. The Court ruled that cable systems’ activities implicated the First Amendment, so that further factual development was required to determine if their rights were violated—reversing a lower court order that found First Amendment rights were violated.

*City of Los Angeles* did not state that the City’s refusal to issue a permit constituted a regulation of Preferred Communications’ speech, entitling it to full First Amendment protection. While the Court, citing *FCC v. Midwest Video Corp.*, said that cable operators exercise “a significant amount of editorial discretion regarding what their programming will include,” it cautioned that “where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests.”<sup>72</sup>

Similarly, in another case decided the same year as *City of Los Angeles*, the Court struck down a California state public utility commission order that required Pacific Gas and Electric’s newsletter to provide space to fundraise for a non-profit group that acted as a watchdog of state utilities. The Court overturned the law because it “impermissibly burden[ed] appellant’s *own expression*.”<sup>73</sup> The Court struck down the commission order, not because it forced the utility to transmit a message but because “the danger that appellant will be required to alter its own message as a consequence of the government’s coercive action is a proper object of First Amendment solicitude.”<sup>74</sup> Just as in *Tornillo*, in which the Court worried that Florida state law would result in “political and electoral coverage ... be[ing] blunted or reduced,”<sup>75</sup> the California regulation would diminish the utility’s ability to transmit

---

<sup>71</sup> 476 U.S. 488, 494–95 (1986).

<sup>72</sup> *Id.* at 494.

<sup>73</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 13 (1986) (emphasis added).

<sup>74</sup> *Id.* at 16.

<sup>75</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

its *own* message.

The Court reinforced the notion of control or editorial decision-making as being different from speech—and primarily a category to define control rather than expression—in a slightly different context: public school teachers’ and administrators’ editing of speech. In *Hazelwood School District v. Kuhlmeier*,<sup>76</sup> the Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>77</sup>

Finally, we arrive at the case most identified with the notion that editorial discretion is speech, the first *Turner* case.<sup>78</sup> But, while this case is often cited as ruling that “editorial discretion” receives speech-like protection,<sup>79</sup> an examination of the case does not support such a claim. The following passage is often quoted for the proposition that “editorial discretion” is entitled to some First Amendment protection:

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through “original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,” cable programmers and operators “see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.”<sup>80</sup>

But, here, the Court does *not* say that editorial discretion is cable systems’ own speech, as the first sentence can best be interpreted as meaning that cable programmers engage in speech while operators “transmit” it—and “editorial discretion” is

---

<sup>76</sup> 484 U.S. 260, 273 (1988).

<sup>77</sup> *Id.*

<sup>78</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). After remand for further factual development, the case returned to the Court in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

<sup>79</sup> See, e.g., *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 430 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“In short, the Supreme Court’s *Turner Broadcasting* decisions mean that Internet service providers possess a First Amendment right to exercise their editorial discretion over what content to carry and how to carry it.”).

<sup>80</sup> *Turner Broad. Sys.*, 512 U.S. at 636 (quoting *Preferred Commc’ns, Inc.*, 476 U.S. at 494).

different and distinct from fully protected speech.<sup>81</sup> On the other hand, the *Turner* Court ruled explicitly that unlike *CBS, Midwest Video*—or even the case where the quotation was taken, *City of Los Angeles*—editorial discretion is expressive.

What gets forgotten is that *Turner* had a precise understanding about *how* cable operators' editorial control over its channel line-up is expressive.<sup>82</sup> As the above-passage points out, programmers express themselves through the content of the programs. In contrast, cable operators, like the internet social media platforms, have no control whatsoever over the content of the programming they transmit and do not even know what it will contain, *i.e.*, when a cable operator contracts to carry A&E, the operators don't control the programming and certainly don't review all of it. Cable operators, therefore, express their views by creating a channel line-up, exercising editorial decision-making over which stations or programs to include in its repertoire.

The Court's understanding of the way cable operators express themselves is revealed further in its statement that “[a]lthough the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming.”<sup>83</sup> Thus, cable operators express something different and distinct from the content of the channels they carry. They express themselves simply through the channel lineup: “ABC (local affiliate), ESPN, A&E, and MSNBC” as opposed to the channel lineup “ESPN, A&E, and Fox News.”

Thus, in *Turner* the Supreme Court did not rule that mere transmission is

---

<sup>81</sup> Benjamin, *supra* note 2, at 1690 (“This passage is not consistent with the proposition that bare transmission implicates the First Amendment. Otherwise, the Court presumably would have said as much and let the matter rest there. Instead, the Court stated that the First Amendment applied because cable programmers and operators ‘engage in and transmit speech.’”); *see also* Bhagwat, *supra* note 2, at 104 (“The *Turner* litigation (and other cable television cases) thus establish that, while cable operators have significant editorial rights to control their channel lineup, Congress may interfere with those rights if it has sufficiently important policy objectives.”).

<sup>82</sup> It should be remembered that at this time that cable operators for the most part transmitted channels from programming networks, such as local broadcasters or HBO, but some did produce original programming. Lisa Robin Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 URBAN L. ANN. 179, 183 (1981); SLOAN COMMISSION ON CABLE COMMUNICATIONS ON THE CABLE: THE TELEVISION OF ABUNDANCE 24–27 (1971).

<sup>83</sup> *Turner Broad. Sys., Inc.*, 512 U.S. at 643–44.

expression. Rather, it ruled the opposite: simply transmitting speech does not render the content of such speech the expressions of the platforms—contrary to the conclusions of the Eleventh Circuit in the challenge to the Texas social media law discussed below. Transmission is simply not expressive in the electronic media context. And, this is not simply an abstract distinction. The fact that Comcast transmits A&E, without controlling or even viewing beforehand the programming it carries, does not express Comcast’s agreement, fondness, or contempt for A&E’s programming. The viewer would have no idea how A&E is viewed in the Comcast C-suite. The only thing a viewer would know for sure is that Comcast’s transmission of A&E expresses the cable operator’s decision that the programming will make it money.<sup>84</sup>

The concept of editorial discretion was next explored in a legally obscure context—the rights of operators of PEG channels to censor obscene and similar material. In *Denver Area Educ. Telecomms. Consort., Inc. v. FCC*,<sup>85</sup> the Court upheld a statute that *restored* the ability to censor patently offensive material to PEGs and leased access channel operators, but the Court struck down, on First Amendment grounds, the statute’s requirements to segregate patently offensive material on leased access channels. It also held that permitting operators to prohibit patently offensive or indecent programming on public access channels violates the First Amendment.

Given the complexity of the case and its splintered pluralities, it is difficult to extract too much precedential principle. But what is clear is that the Court treated editorial discretion as referring to decisions that regulation did not address—not speech deserving necessarily of First Amendment protection. Speaking of the Cable Act of 1984, the Court noted that “[b]etween 1984 and 1992, federal law (as had much pre-1984 state law, with respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels.”<sup>86</sup> If the Court understood the government could extinguish editorial control for eight years, editorial

---

<sup>84</sup> Ashutosh Bhagwat, *When Speech Is Not “Speech,”* 78 OHIO ST. L.J. 839, 878–79 (2017) (“the First Amendment does not protect the editorial discretion of broadband providers. . . . [because] [b]roadband providers are seeking to block some websites, and to provide enhanced access to others, for technical and financial reasons, not ideological ones”).

<sup>85</sup> 518 U.S. 727, 737–38 (1996).

<sup>86</sup> *Id.* at 734.

control is not necessarily expression deserving of full First Amendment rights.

The *Denver* Court's equivocal attitude towards editorial decision-making as speech, as evidenced by its use of quotations marks, underscores the Supreme Court's longstanding view that editorial decision-making is not identical to speech. "[T]he editorial function itself is an aspect of 'speech' and a court's decision that a private party, say, the station owner, is a 'censor,' could itself interfere with that private 'censor's' freedom to speak as an editor."<sup>87</sup> Speaking "as an editor" is different from fully protected First Amendment expression.

Finally, the Court used "editorial discretion" recently in *Manhattan Community Access Corp. v. Halleck*.<sup>88</sup> There, the court ruled that public access channels are not state actors even if highly regulated by state government. New York state regulations "restrict MNN's [the public access station's] editorial discretion and in effect require MNN to operate almost like a common carrier."<sup>89</sup> But, again, the court treats editorial discretion as a regulatory term, conveying limits to governmental control—but not constituting speech.

And although not using the language "editorial discretion," the Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* returned to the language of editorial control and judgment found in *Tornillo*, stating that "[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . .—whether fair or unfair—constitute the exercise of editorial control and judgment upon which the State cannot intrude."<sup>90</sup>

Here, the Court did indeed say this type of editorial control, which involved deciding which groups were permitted to march, receives full First Amendment protection. However, the Court made clear that the editorial control was expressive and, therefore, merited protection. It said that "[t]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."<sup>91</sup>

---

<sup>87</sup> *Id.* at 737–38.

<sup>88</sup> 139 S. Ct. 1921 (2019).

<sup>89</sup> *Id.* at 1932.

<sup>90</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (citing *Tornillo*, 418 U.S. at 258).

<sup>91</sup> *Id.* at 573.

### B. Editorial Decision-Making As Protected Speech?

The history of the terms “editorial discretion,” “editorial judgment,” and “editorial control” reveal that sometimes editorial decision-making receives First Amendment protection; other times, not. When regulation is so great that it impinges upon a broadcaster’s ability to express its own views, the regulation is not upheld as in *FCC v. Midwest Video Corp.* The Court extended First Amendment protection in *Tornillo*, *Turner*, and *Hurley* because the editorial decision-making was expressive—and because an audience could likely understand that expression and attribute it to the editor or platform owner. In all three cases, there was an intended message to convey (the *Miami Herald* endorses the views expressed in their op-eds or at least finds them significant; the Turner company finds its programming lineup as including important and interesting channels; and the St. Patrick’s Day parade organizers approve of each particular marcher’s message); a discrete and identifiable expression communicated this message (an op-ed, a cable system line-up, and a parade line-up), and the speakers employed a context that people would understand.

In other cases, such as *CBS v. DNC* or *Midwest Video*, editorial decisions were not considered expressive of the platforms’ position. An audience would not consider placement of political advertisement as particularly expressive, nor is a cable operator considered to be conveying a message by being required to carry PEGs. In these cases, the Court suggested that the limiting of editorial decision-making was simply not sufficiently expressive to be worthy of First Amendment protection. Thus, the question of how and when editorial decision-making is expression that receives First Amendment protection is central in determining the constitutionality of state anti-discrimination social media laws. And, it is to that question we now turn.

### III. EDITORIAL DECISION-MAKING AND THE SUPREME COURT’S THEORY OF EXPRESSION

The First Amendment’s guarantee of “freedom of speech” extends beyond verbal or written communication to “expression,”<sup>92</sup> a category that includes symbolic

---

<sup>92</sup> Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 10 (2016) (“[w]riting and speaking are, of course, quintessential ‘speech,’ but the First Amendment also provides qualified protection to a wide array of expressive conduct” (cleaned up)); *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (“the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First

or expressive conduct.<sup>93</sup> While expressive conduct receives First Amendment protection, not all conduct is expressive.<sup>94</sup> Flag burning and naked dancing are, but not social dancing or discriminatory exclusion of military recruiters.<sup>95</sup>

Editorial decision-making—the act of including certain written statements or works in a larger structure—partakes of both conduct and speech. Consequently, the Supreme Court has never treated it like pure speech.<sup>96</sup> To the degree editorial decision-making is expressive conduct, it is First Amendment protected. To the degree it is just conduct, it is not. And the constitutionality of state antidiscrimination social media laws turns on whether the law regulates expressive aspects of editorial decision-making.

To determine whether editorial decision-making is, itself, expressive, we should start at understanding what the Court considers to be speech or falling within the broader term “expression.” The test for expressiveness is spread out in numerous cases, and the following extracts from these opinions a test that reflects the Court’s thinking on the matter over the years. The *locus classicus* for distinguishing protected expressive conduct from unprotected conduct is the *Spence*

---

Amendment”).

<sup>93</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments” (cleaned up)). This understanding of expressive conduct as part of speech extends at least as far back as the early Republic. Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1071 (2009) (“the report of Mezzara’s Case (1817), apparently the earliest American case involving symbolic libel—there, a painting of the plaintiff with donkey’s ears—likewise indicates that free speech and press principles were seen as applying to such symbolic expression”).

<sup>94</sup> Campbell, *supra* note 92, at 3 (“A familiar, if sometimes nebulous, distinction between ‘expression’ and ‘nonexpressive conduct’ undergird modern free speech doctrine. Expressive acts—from speaking and publishing to burning flags and dancing in the nude—generally ‘bring the First Amendment into play,’ triggering closer judicial scrutiny. But when the regulated conduct is non-expressive, courts often say that the First Amendment does not apply at all.”); *see Spence v. Washington*, 418 U.S. 405, 409 (1974) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,” (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968))).

<sup>95</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“‘Speech’ encompasses verbal and written expression, as well as ‘symbolic speech’ expressed through symbols and conduct.”).

<sup>96</sup> Bhagwat, *supra* note 2, at 108.



case, which states that expressive conduct requires that “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>97</sup>

As the following argues, the Court has elaborated the *Spence* test into a three-prong test mentioned above: (i) the speaker intends to convey meaning through speech or expressive conduct; (ii) the audience understands the speech or expressive conduct with common language or set of understandings placed within a comprehensible context; and (iii) the speaker uses a discrete set of words or expressive conduct or acts.

The *Spence* decision explains the first requirement, which is hardly controversial. Expression, either speech or conduct, involves “[a]n intent to convey a particularized message.” The speaker must intend to convey a message or a specific idea using an identifiable set of words or actions. The *O’Brien* case also states this requirement, writing “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>98</sup> Speech cannot be self-regarding; i.e., it must be intended to communicate to another.<sup>99</sup> Expressive conduct must be “imbued with elements of communication.”<sup>100</sup>

---

<sup>97</sup> *Spence*, 418 U.S. at 410–11.

<sup>98</sup> *O’Brien*, 391 U.S. at 376 .

<sup>99</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (“[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind”); John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341 (2008) (“We can say, then, that communicative acts are those intended to convey mental states and performed in ways that are reasonably understood to be for that purpose.”). The question of the First Amendment status of uncommunicated speech is difficult. See Bhagwat, *supra* note 84, at 854–55, 874–75. Bhagwat points out that “[a]s with prayer, whether the First Amendment protects private diaries and intrapersonal communication turns on whether the word ‘speech’ in the First Amendment refers to language, or to communication. The answer, however, is not self-evident.” *Id.* at 855. This Article would argue that Supreme Court precedent requires that protected speech must be *intended* to be communicated. As discussed *infra*, much of content-moderation is not *intended* to be communicated either to users or even widely within a social media firm. This is opposed to what Bhagwat cleverly calls “intrapersonal communication,” such as talking to oneself or prayer, that is intended for the audience of the self or another. Depending upon one’s theory of mind and/or theology, this intrapersonal communication is, indeed, intended to communicate and, therefore, better merits some First Amendment protection than content moderation decisions intended to be hidden.

<sup>100</sup> *Spence*, 418 U.S. at 409 (“[Because] appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently

Second, there must be more than an intended meaning—there must be a significant “likelihood . . . that the message would be understood by those who viewed it.”<sup>101</sup> To be understood by an audience, the audience must understand the symbols or conduct with common language or placed within a context of shared understandings. The Court states that First Amendment scrutiny requires “careful consideration of the actual circumstances surrounding such expression.”<sup>102</sup>

The importance to communication of common language and comprehensible context of shared understandings has been recognized by commentators.<sup>103</sup> The Court explicitly continues to require a common language and comprehensible context after *Spence*.<sup>104</sup> For instance, the Court has stated that the First Amendment protects “a message [that] may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”<sup>105</sup>

The Court’s protection of flag burning is based upon the symbolic nature of the

---

imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”); *see also* Benjamin, *supra* note 2, at 1697–98 (“The Court and theorists have always required substantive communication or self-expression as a requirement for the application of the First Amendment.”); Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 920 (1979) (“The Court is saying that the communication of ideas is at once the essential First Amendment purpose and the essential First Amendment property.”).

<sup>101</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>102</sup> *Id.* at 409.

<sup>103</sup> David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515, 1532–33 (2003) (“As these examples show, categorical approaches to the constitutional protection of code are misleading to the extent they try to transcend social context. As with English, the First Amendment governs the regulation of code by analyzing a complex mixture of the social context and function of practices that well-socialized persons understand as expressive, the aims of the regulation, and the values the First Amendment advances.”); Lee Tien, *Publishing Software as a Speech Act*, 15 BERK. TECH. L.J. 629, 638 (2000) (“But the intention that matters isn’t merely the speaker’s or the hearer’s, or even both. It is a complex function that includes ‘social context.’”); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995) (“The examples we have been considering, however, suggest that the constitutional recognition of communication as possibly protected speech also depends heavily on the social context within which this triadic relationship is situated.”).

<sup>104</sup> Post, *supra* note 103, at 1255.

<sup>105</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

flag, as well as of burning, because both have intended meaning and both rely upon a common lexicon of shared cultural understandings.<sup>106</sup> The notion of a shared understanding or common language is expanded upon in *Barnette*'s discussion of why flags express meaning: "Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."<sup>107</sup> In *Johnson*, the Court states, "[T]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."<sup>108</sup>

And *Spence* itself makes clear the importance of context. Quoting *Tinker*, the Court states that "the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities."<sup>109</sup> The *Spence* Court found that the arm bands communicated an "unmistakable message" because the "appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment."<sup>110</sup>

The social dancing case<sup>111</sup> and the nude dancing cases<sup>112</sup> again demonstrate the importance of shared language in comprehensible context. In the former, the Court found no expressive conduct, and the Court, in the latter, found only the lowest types of expression, barely meriting First Amendment protection.<sup>113</sup> Dance certainly can have an intended meaning, and, in some contexts, employs a discrete set of symbols or actions that the dancer intends to express this meaning—and the audience understands the symbols or action using common language, in an

---

<sup>106</sup> *Johnson*, 491 U.S. at 405.

<sup>107</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black arm bands); *Brown v. Louisiana*, 383 U.S. 131, 146–47 (1966) (Brennan, J., concurring) (participating in silent sit-in library); *Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag).

<sup>108</sup> *Johnson*, 491 U.S. at 406.

<sup>109</sup> *Tinker*, 393 U.S. at 505–14.

<sup>110</sup> *Spence v. Washington*, 418 U.S. 405, 410 (1974).

<sup>111</sup> *Stanglin*, 490 U.S. at 25.

<sup>112</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–71 (1991); see also *City of Erie v. Pap's A.M.*, 529 U.S. 277, 278 (2000) ("Although being 'in a state of nudity' is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection.").

<sup>113</sup> *Barnes*, 501 U.S. at 565–71.

understandable context. For instance, classical ballet fits this bill. It tells a story, which the audience is at least presumed to know, as 19th and 20th century audiences generally did, and ballet uses stylized gestures, often known to followers of the art form, that express elements of the story. Again, context and language are crucial. A person unfamiliar with the story of *Swan Lake*—or a person viewing a performing dancer outside the context of a theater at, say, the supermarket—would not comprehend fluttering arms to signify flying swans, as opposed to an expression of despair that there is no Charmin toilet paper on aisle six.

In contrast, social dancing rarely has a story to tell. People move to a rhythm according to a set of rules that express nothing—or at the very most, and in unusual cases, are expressive as is naked dancing, i.e., a dancer who expresses exuberance in the polka or sexual tension in the tango. But social dancing fails the *Spence* test because people rarely intend to express an idea through social dancing and there is no widely understood language to convey that intended meaning. As the Court states, “The teenagers who congregate [to engage in social dancing] are not members of any organized association, and most are strangers to one another. The dance hall admits all who pay the admission fee, and there is no suggestion that the patrons take positions on public questions or perform other similar activities.”<sup>114</sup>

*Barnes*’ naked dancing stands between two poles, so to speak, of social dancing and ballet—showing the importance of context and shared language.<sup>115</sup> Individual naked dancing performances can convey a sort of meaning—presumably using a “universal language” of human movement. No doubt Salome dancing before Herod expressed some raw feeling or inchoate ideas—but, unlike ballet, Salome employs no established lexicon of motions nor tells a recognizable story. As such, to the minimal degree she is expressive, *Barnes* gives minimal First Amendment protection.

Justice Scalia’s concurrence in *Barnes* recognizes the need for context and shared language. His emphasis on the notion of “convention” underscores the Court’s understanding that only conduct and acts that employ an accepted mutual language and shared understandings in comprehensible contexts are expressive from a First Amendment perspective. He writes:

[I]t is easy to conclude that conduct has been forbidden because of its communicative

---

<sup>114</sup> *Stanglin*, 490 U.S. at 19.

<sup>115</sup> *Barnes*, 501 U.S. at 565–71.

attributes when the conduct in question is what the Court has called “inherently expressive,” and what I would prefer to call “conventionally expressive”—such as flying a red flag. I mean by that phrase (as I assume the Court means by “inherently expressive”) conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else.<sup>116</sup>

Justice Scalia’s use of the term “conventionally expressive” explicitly recognizes that the First Amendment protects discrete expression through which the speaker intends to convey an idea—referencing the red communist flag held protected in *Stromberg*.<sup>117</sup> An idea can only be conveyed to an audience using *convention*. In other words, it is an expression that employs a socially recognized practice, which includes a mutually comprehensible language and places such expression in a customary context in which its meaning would be understood.

The requirement of convention is not a Supreme Court invention. Going back to the 18th and 19th centuries, laws regarding speech restrictions included expressive conduct. But they apparently only regulated speech that relied upon clear and established social conventions. Eugene Volokh documents a wide variety of conducts that were considered expressive: “burning . . . [and] hanging an effigy of a person, engaging in a procession carrying a representation of the plaintiff in effigy, painting a man with a fool’s cap, coat, or with horns, or asses ears, . . . hanging wool upon a tree near the highway, which was understood to suggest that the plaintiff was a wool thief, lighting a lantern outside a person’s house, implying the house was a brothel, or carrying a fellow about with horns, . . . which implied the plaintiff’s wife was unfaithful.”<sup>118</sup>

Notice, these actions rely on highly conventional, even stylized, social meanings. Parades, effigies, cuckold’s horns, and wool hanging are conduct imbued with established social rituals and symbols. They have accepted and understood meanings, employing a common social language. Only a common social language allows for *Barnette*’s claim that “[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”<sup>119</sup>

---

<sup>116</sup> *Id.* at 577 n.4 (Scalia, J., concurring).

<sup>117</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>118</sup> Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1065 (2009) (cleaned up).

<sup>119</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943); see also Randall P. Bezanson, *Speaking Through Others’ Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV.

Third, as a corollary of the first two requirements, speech or expressive conduct must employ a discrete set of expressions, i.e., symbols or actions that the speaker intends to express his meaning. This is because particular words and expressive conduct have meaning—but adding to them changes that meaning. If your girlfriend texts you “I love you,” that text has a very different meaning if followed by another, “jj.” Communication and expression require some fixation in a discrete set of words or conduct—or the listener or audience cannot be said to understand it. In order to express a message, the audience must understand when the expression “ends” so that it can be interpreted. “[S]omething special about a communicative act, beyond the actor’s communicative intention, beyond audience recognition, and beyond its combination with words, must exist for the act to count as speech; otherwise, it is mere conduct.”<sup>120</sup> And that “something special” is no doubt related to a discrete expressive product.

In short, to express something, even an edited work, means to convey an idea using an expression, i.e., a word, or phrase, or identifiable collection or conduct. The speaker must be able to point to words or conduct or an identifiable edited collection and say: “This conveys my meaning, message, theme, or idea.” This requirement has been somewhat implicit in Supreme Court cases, but this requirement is found in *all* cases in which the Court found expressive conduct. This is true in the expressive conduct cases, e.g., *Stromberg* (red flag); *Tinker* (black arm bands); *Barnette* (flag salute); *Spence* (upside-down flag adorned with peace symbol); and *Johnson* (burning flag). In addition, the requirement for a discrete expression is also found in those cases where the Court found editorial decision-making to be protected, e.g., in *Turner*, editorial discretion was expressed in its channel lineup of between 40 and 60 channels its cable systems carried at the time; *Hurley* (parade); *Tornillo* (op-ed page). It is not clear whether social media satisfies this requirement as discussed below.

Moreover, when conduct is not discrete, when it involves large numbers of actions some of which are meaningful, others not, the conduct is expressive only when accompanied with verbal explanation distinguishing the expressive from

---

983, 1046 (2003) (“Message-specific communicative intent presents one prerequisite for a First Amendment qualifying speech selection judgment. The requirement that speech—or speaking—must have a message-specific communicative intent, coupled with a roughly correlating communicative effect, arose in the setting of expressive conduct claims.”).

<sup>120</sup> Fee, *supra* note 16, at 88.

non-expressive aspects. The conduct is not “inherently expressive”; it needs an explainer. The Supreme Court recognized this point in *Rumsfeld*. This case involved the expressiveness of law schools’ refusal to allow the U.S. military recruiters to use law school, as opposed to university, facilities. It held this job recruiting conduct was not expressive. Because the conduct was ongoing, diffuse, and never occurred in one discrete time or place, the conduct required explanatory speech to express a message:

An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else. The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it.<sup>121</sup>

Eugene Volokh’s notion of a “coherent speech product” also reflects the requirement that expression and expressive conduct be discrete in time and place. He applies the idea of “coherent speech product” to edited works and compilations. He writes, “[r]eaders and viewers *tend to consume newspapers and particular broadcasts as a coherent product*—they may read a newspaper (or at least a section) cover to cover, or watch a whole half-hour newscast, or even keep a channel on for hours on end. . . . They do this to get an aggregate speech product, ‘today’s news’ . . . . The major platforms, on the other hand, are not generally in the business of providing ‘coherent and consistent messaging.’”<sup>122</sup>

In other words, for an edited work to communicate for First Amendment purposes, one should be able to point to an edited work and say: “*This* is what expresses my theme or meaning or purpose.” Social media, discussed further below, lacks that quality because users, not platforms, are the primary speakers. Without any sort of meaningful central architecture, its billions of posts do not convey any particularized message; by design, there is no single editorial control. Like a telephone company, social media is designed to maximize users’ communications. Further, unlike a newspaper or newscast or even a website, social media is never a discrete comprehensible expression. Social media is too vast and constantly changing for it possibly to be identified as a particular conduct—let alone one that expresses any

---

<sup>121</sup> *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

<sup>122</sup> Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 404 (2021).

particular thing.

And even the Court in *Hurley*, a case that some claim undermines the importance of a “particularized message,”<sup>123</sup> requires a discrete expression. In an oft-cited passage, the Court states that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg [sic], or Jabberwocky verse of Lewis Carroll.”<sup>124</sup>

This rather pretentious passage, complete with an incorrect umlaut,<sup>125</sup> appears to mean that the First Amendment protects ambiguous messages, i.e., broad, prolix, and inchoate messages as well as narrow, precisely articulated messages. Importantly, the Court does not reject its three-fold test for expression, for it applies to the three works of art mentioned. Certainly, Pollock, Schoenberg, and Carroll had a message to convey—albeit certainly not a “narrow” or “succinctly articulable” message. Pollock said that his paintings conveyed his “concern . . . with the rhythms of nature.”<sup>126</sup> And critics have understood his painting as expressing “physical reality at its elemental level” or “the new frontier of the space age.”<sup>127</sup> Schoenberg’s works, such as his opera *Moses und Aron*, express something

---

<sup>123</sup> See *NetChoice, L.L.C. v. Att’y Gen., Fla.*, 34 F.4th 1196, 1217 (11th Cir. 2022); see also *infra* note 152 and accompanying text.

<sup>124</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

<sup>125</sup> When the German “o” with an umlaut “ö” is transcribed into English spelling, it becomes “oe.” See *German Language 2*, GERMAN WAY & MORE, <https://www.german-way.com/history-and-culture/german-language/german-language-2/> (“two dots sometimes placed over the German vowels a, o, and u are known as an *Umlaut*. The umlauted vowels ä, ö and ü (and their capitalized equivalents Ä, Ö, Ü) are actually a shortened form for ae, oe and ue respectively”). “Before 1933 the composer [Arnold Schoenberg] spelt his name ‘Schönberg.’ His justification of the later spelling occurs in a letter of the 25th June 1947: ‘My name is to be spelt with “oe.” I changed it when I came to America, because few printers have the “ö” type and wanted to avoid the form “Schonberg.”’” Erwin Stein, *Editor’s Introduction*, in *ARNOLD SCHOENBERG LETTERS* 9 (Erwin Stein ed., 1964).

<sup>126</sup> CAMILLE PAGLIA, *GLITTERING IMAGES: A JOURNEY THROUGH ART FROM EGYPT TO STAR WARS* 143 (2012).

<sup>127</sup> *Id.* at 144; see also Clement Greenberg, *The Crisis of the Easel Picture* (1948), <https://tinyurl.com/2awbn4mz> (Pollock’s type of painting may “express a monist naturalism for which there are neither First nor last things, and which recognizes as the only ultimate distinction that between the immediate and the un-immediate”).



articulable, i.e., the Biblical story of Exodus as well as, some might claim, the tension between Moses' thought and Aaron's action, a theme made more pressing in a period of frightening political upheaval in Europe. "The Jabberwocky" expresses the story of the slaying of a monster. All three works of art used a specific, discrete expression: a painting, a musical piece, and verse. And these expressions only have meaning within a given context. For instance, Pollock's work is likely best able to convey its intended meaning if placed in an art gallery. If someone saw Pollock's patterns on a book binding or in a first-grade art class, they might not convey the same meaning. Contrary to the Eleventh Circuit,<sup>128</sup> this passage from *Hurley* does not lessen the requirement to find a particular message and its specific, discrete expression. This passage just means that particular messages with specific, discrete expressions sometimes are ambiguous or inchoate.

#### IV. SOCIAL MEDIA CONTENT MODERATION: SPEECH OR EXPRESSIVE CONDUCT

With an understanding of the Court's requirements for expression, the question is, therefore, whether state social media laws regulate expressive conduct.<sup>129</sup> And, if content moderation is expressive, then do state social media antidiscrimination laws unconstitutionally restrict it.<sup>130</sup> A recent Eleventh Circuit opinion has ruled that social media's editorial discretion *in toto* is expressive and therefore receives First Amendment protection. Similarly, many commentators have argued that social media's editorial discretion expresses company values and messages.<sup>131</sup> The following examines these claims and finds that editorial decision-making in these contexts is not expressive. The subsequent section will examine editorial discretion that is expressive—and what sort of protection it should receive.

---

<sup>128</sup> *NetChoice, L.L.C. v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022).

<sup>129</sup> Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh*, 80 PITT. L. REV. 855, 893 (2019) ("Even assuming, as the FCC does, that broadband access providers can engage in speech by exercising editorial authority, that assumption does not compel the conclusion that all decisions regarding the use of the network are editorial or expressive."); Bezanson, *supra* note 119, at 986 ("Are these speech selection judgments protected, like the newspaper's editorial choices, by the First Amendment? Some are, and some are not.").

<sup>130</sup> Bezanson, *supra* note 119, at 1098 ("The constitutional status of the selection act centers on the speech selector: did he or she intend the act to communicate; what was his or her message; were the act and its message understood communicatively by those who received it and, if not, should that fact be relevant to the status of the act as First Amendment speech?").

<sup>131</sup> See Bhagwat, *supra* note 2; Jane Bambauer et al., *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047, 1061 (2022).

So far, only Texas and Florida have laws regulating discrimination by social media firms. The laws are quite different. Texas’s focus is limited to viewpoint discrimination. It prohibits a “social media platform” from “censor[ing] a user, a user’s expression, or a user’s ability to receive the expression of another person based on the viewpoint of the user or another person.”<sup>132</sup>

In contrast, Florida’s law has a more complicated and controversial focus. It prohibits a social media platform from barring from its site any candidate for office;<sup>133</sup> using “post-prioritization or shadow banning algorithms” for content “posted by or about a user” who is known by the platform to be a candidate for office;<sup>134</sup> or taking action to “censor, deplatform, or shadow ban” a “journalistic enterprise” based on the content of its publication or broadcast.<sup>135</sup>

Striking down the Florida social media law, the Eleventh Circuit ruled that “editorial judgment” or “editorial discretion” is inherently expressive. The opinion is quite conclusory. It states that “[s]ocial-media platforms exercise editorial judgment that is inherently expressive. When platforms choose to remove users or posts, deprioritize content in viewers’ feeds or search results, or sanction breaches of their community standards, they engage in First Amendment-protected activity.”<sup>136</sup>

To support this claim, the court relied on *Miami Herald*, *Pacific Gas*, *Turner*, and *Hurley*—i.e., those few cases in which the Court found that the editor’s own editorial judgment or discretion constitutes speech. It failed to cite *Midwest Video*, *CBS v. FCC*, or the other Supreme Court cases that found editorial discretion as not necessarily expressive and therefore failed to reach the question of whether the First Amendment protects editorial expression. And, by doing so, the Court avoided the real question: is content moderation “expressive conduct” under *Spence* and its progeny?

Rather than providing an answer as to *how* content moderation is expressive conduct under *Spence* and its progeny, the Court, employing cursory analogical reasoning, just declares that it is.

---

<sup>132</sup> H.R. 20, 87th Leg., 1st Spec. Sess. § 143A.002 (Tex. 2021).

<sup>133</sup> FLA. STAT. § 106.072 (2021).

<sup>134</sup> *Id.* § 501.2041(2)(h).

<sup>135</sup> *Id.* § 501.2041(2)(j).

<sup>136</sup> *NetChoice, L.L.C. v. Att’y Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022).

Like parade organizers and cable operators, social-media companies are in the business of delivering curated compilations of speech created, in the first instance, by others. Just as the parade organizer exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator might refuse to carry a channel that produces content it prefers not to disseminate, social-media platforms regularly make choices “not to propound a particular point of view.”<sup>137</sup> Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups.<sup>138</sup>

The problem with the Eleventh Circuit’s reasoning is that the court *assumes* the various techniques of content moderation propound or express an idea without applying the Supreme Court’s tests for expressiveness. Rather than examine whether content moderation is expressive, the Eleventh Circuit goes where the Supreme Court explicitly has *not*, simply equating editorial decision-making with the editor’s own speech. Quoting *Arkansas Educational Television Commission v. Forbes*,<sup>139</sup> the Eleventh Circuit declared that a platform that exercises “editorial discretion in the selection and presentation of the content that it disseminates to its users engages in speech activity”<sup>140</sup>—an assertion the Supreme Court has rejected on numerous occasions.

Reliance on *Arkansas Educational Television* is misplaced; it is not a case about editorial decision-making. The case involved a broadcaster’s discretion to include candidates in its own televised candidate debate. No one doubts that the broadcaster was the “author” of the debate—much like the editors in *Tornillo* were the authors of the op-ed page.<sup>141</sup> Unlike the telephone company or a social media

---

<sup>137</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

<sup>138</sup> *NetChoice*, 34 F.4th at 1213.

<sup>139</sup> 523 U.S. 666 (1998).

<sup>140</sup> *NetChoice*, 34 F.4th at 1216.

<sup>141</sup> *Arkansas Television*, 523 U.S. at 673 (“Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.”); *see also* Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 FED. COMM. L.J. 687, 721 (2000) (“judicial second guessing of the public broadcasters’ editorial decision-making process. . . would lead the public broadcast media to forgo, rather than sponsor, candidate debates to

company, Arkansas Educational Television was not in the business of offering candidates opportunities to speak; it was creating its own programming. It was not acting as an editor of others' speech like social media companies or cable systems.<sup>142</sup>

And, when the Eleventh Circuit provides reasons why platform content moderation is expressive conduct, the opinion becomes incomprehensible. It states, “[j]ust as the must-carry provisions in *Turner* ‘reduce[d] the number of channels over which cable operators exercise[d] unfettered control’ and therefore triggered First Amendment scrutiny, S.B. 7072’s content-moderation restrictions reduce the number of posts over which platforms can exercise their editorial judgment.”<sup>143</sup>

The must-carry provisions involved cable systems with a limited number of channels<sup>144</sup>—thus the requirement that cable systems carry local broadcasters did, indeed, impose upon their editorial discretion by disabling them from carrying channels that they would prefer. But the internet provides essentially infinite bandwidth, and social media companies are free to express themselves as much as they wish.

Moreover, antidiscrimination laws, such as Texas’s, simply require viewpoint neutrality. They in no way limit “the number of posts over which platforms can exercise their editorial judgment.” To the contrary, by prohibiting viewpoint discrimination in de-platforming, social media anti-discrimination laws *increase* the number of posts over which platforms can exercise their editorial judgment as there will be more posts to label or express disagreement with. Further, social media laws, like Texas’s, only prohibit viewpoint discrimination. Texas’s law allows platforms to edit as much as they wish—prohibit any sort of content—provided they do so

---

avoid litigation from those excluded from the debates”).

<sup>142</sup> Bezanson, *supra* note 119, at 1110 (“One reason for this qualified protection, the *Turner* Court implied, is that a cable operators’ channel selections are abstracted from the specific material being broadcast and such wholesale judgments are not entitled to the same degree of First Amendment respect as the particularized, retail-level judgments at the specific program level, which are much closer to the model of editorial judgment applied by the Court in the setting of editorial judgments about news by newspaper editors.”); see Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of “Speech,”* 1993 WIS. L. REV. 1525, 1531–33.

<sup>143</sup> *NetChoice*, 34 F.4th at 1217.

<sup>144</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) (“With the capacity to carry dozens of channels and import distant programming signals via satellite or microwave relay, today’s cable systems are in direct competition with over-the-air broadcasters as an independent source of television programming.”).

in an even-handed, viewpoint neutral way. And, even Florida's law, which is more restrictive, does not affect "the number of posts over which platforms can exercise their editorial judgment." Unlike cable operators, which the *Turner* court said expressed themselves via the choice of lineup, social media companies do not express themselves more or less via the number of posts they transmit.

Second, the Eleventh Circuit claims that "[u]nlike the law schools in [*Rumsfeld v.*] *FAIR*, social-media platforms' content-moderation decisions communicate messages when they remove or 'shadow-ban' users or content. . . . Such conduct—the *targeted removal of users' speech* from websites whose primary function is to serve as speech platforms—conveys a message to the reasonable observer 'due to the context surrounding.'"<sup>145</sup>

This second justification is more difficult to understand than the first. Protected expressive conduct must have "[a]n intent to convey a particularized message."<sup>146</sup> Shadow banning cannot possibly be intended to convey a message because no one is aware of it save the platform that does the shadow banning. Further, without explanatory reasons, there is no way for a user to know why a user is being removed, especially as the platforms can be so inconsistent in their decisions. Silence is not a "particularized message." It's not a message at all. At the very least, it will not "reasonably be understood by the viewer to be communicative."<sup>147</sup> Similarly, de-prioritization is only known to the platform and therefore is not intended to communicate.<sup>148</sup>

Judge Newsom attempts to extricate himself from this contradiction by positing that subscribers to shadow banned individuals would no longer see postings

---

<sup>145</sup> *NetChoice*, 34 F.4th at 1217.

<sup>146</sup> *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>147</sup> *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 294 (1984).

<sup>148</sup> Shadow banning and prioritization can be viewed as expressive and First Amendment-protected in that they reflect the choice and right of the social media company to further or display speech of its choice. *See, e.g.*, Bhagwat, *supra* note 2, at 136 ("The legislation thus, in practice if not in name, entirely strips platforms of a key editorial right—the decision on what content to emphasize or deemphasize."). But that position would make sense, as discussed below, if the content were the speech of the platforms. The problem is that it's not clear that a platform expresses or adopts the views of its users simply by forwarding them. While it probably expresses something by prioritizing or shadow banning them, it does not express anything when these editorial decisions are intended to be secret.

and understand this as the platform’s speech. In effect, the Eleventh Circuit is the first court to find silence expressive. At last, for poor Cordelia, something shall come from nothing. But the court’s understanding of social media seems at odds with reality. If you follow someone on Twitter and do not see his posts, most people would assume he hasn’t posted—rather than assume Twitter de-platformed him. Given the tiny percentage of people whom the platforms de-platform, that’s a statistically grounded conclusion.

Anticipating this rejoinder, Judge Newsom writes that even while “some subset of content-moderation activities wouldn’t count as inherently expressive conduct . . . many are sufficiently transparent that users would likely . . . infer from them ‘some sort of message’ . . . [i.e.,] even if some content moderation isn’t inherently expressive, much of it is.”<sup>149</sup>

But, if some content moderation is not expressive, then the non-expressive content moderation *can* be regulated. It should be the court’s job to distinguish non-expressive content moderation—and see if state social media antidiscrimination law only regulates non-expressive content moderation. Rather than accept this task, Judge Newsom cites *United States v. Stevens*,<sup>150</sup> a case that allowed a facial First Amendment challenge to a statute because “a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.”<sup>151</sup> The case does not stand for the principle that a state may not regulate the non-expressive aspects of conduct that has both expressive and non-expressive aspects. It’s a case about facial or as applied First Amendment challenges.

In striking down a state’s ability to regulate non-expressive conduct, Judge Newsom changes Supreme Court precedent on what constitutes “expression.” Relying on the “Schoenberg” language from *Hurley* and some Eleventh Circuit precedent, he declares that *Spence*’s “particularized message” has been overruled.<sup>152</sup> So freed from precedent, he fashions a new rule for expressiveness that “[i]nstead . . . we require only that a ‘reasonable person would interpret [the

---

<sup>149</sup> *NetChoice*, 34 F.4th at 1217.

<sup>150</sup> 559 U.S. 460 (2010).

<sup>151</sup> *Id.* at 473.

<sup>152</sup> *NetChoice*, 34 F.4th at 1217.

conduct] as *some* sort of message.”<sup>153</sup> But, as discussed above,<sup>154</sup> rather than overrule *Spence*, *Johnson*, and *Clark*, this language in *Hurley* can best be read consistently with *Spence*’s requirement the protected conduct contain a “particularized message,” *Johnson*’s understanding that protected conduct’s expressiveness must be “overwhelmingly apparent,”<sup>155</sup> and *Clark*’s requirement that “a message may be delivered by conduct”<sup>156</sup> when it “is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”<sup>157</sup>

Even if it were coherent law, the Eleventh Circuit’s “some sort of message” test does not apply to social media content moderation. Judge Newsom would uphold shadow banning because it expresses “some sort of message”—perhaps one as vague and inchoate as a passage from Schoenberg. But that is *not* what the social media companies claim they are communicating. They claim not that they are expressing “some sort of” message but rather a very specific message found in their written policies. They do not shadow ban people to convey, à la Pollock, the inchoate rhythms of nature, but to convey their specific moral judgment about certain types of postings. But, as argued above, if that’s the case, then *Rumsfeld*’s rule—that the First Amendment does not protect conduct only made comprehensible and expressive through *other* speech—would apply.

Beyond failing to craft a rule that truly applies to the case at hand and by failing to apply the *Spence* test for expressive conduct, the Eleventh Circuit dangerously blurs the difference between conduct and speech, introducing considerable uncertainty into the law. If there is no need for a particular message or a likelihood of understanding, then *any* conduct arguably could intend “some sort of message.”<sup>158</sup>

---

<sup>153</sup> *Id.* at 1214 n.14 (citing *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1237, 1240 (11th Cir. 2021) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004))).

<sup>154</sup> See notes 124–128 and accompanying text.

<sup>155</sup> *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>156</sup> *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

<sup>157</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

<sup>158</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (“[V]irtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even— as some of our cases

And the test the court uses is facile; “we find it implausible that platforms would engage in the laborious process of defining detailed community standards, identifying offending content, and removing or deprioritizing that content if they *didn’t* intend to convey ‘some sort of message.’” As discussed above, intending to convey a message is only the first step to determine whether an action is expressive; the court simply skipped the others.

In short, the Eleventh Circuit’s failure to recognize that some editorial decision-making is not expressive led it to rewrite Supreme Court precedent and introduce a new rule—conduct is expressive when it conveys “some sort of message.” But this newly fashioned “some sort of message” test ignores the Supreme Court’s requirement that expressive conduct “intends . . . to express an idea,” *and must be* “sufficiently imbued with elements of communication” and “the likelihood was great that the message would be understood by those who viewed.”<sup>159</sup> As the court recognized in *O’Brien*, *Spence*, and *Rumsfeld*, virtually any action can convey “some sort of message.” By ignoring the Supreme Court’s test for expressiveness, the Eleventh Circuit blurs a key distinction in First Amendment law.

Perhaps responding to the difficulty of identifying expressive editorial decisions, commentators appear to find the overall message or “experience” to be expressive,<sup>160</sup> or speak of the expressiveness of a social media platform’s community norms.<sup>161</sup> But even advocates of this position concede that the existence of

---

have suggested—that it be justified by an ‘important or substantial’ government interest.”); *see also* Fee, *supra* note 16, at 94.

<sup>159</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>160</sup> Bambauer et al., *supra* note 131, at 1061; Bhagwat, *supra* note 2, at 111 (“Most fundamentally, the reason to grant social media platforms editorial rights is that they, unlike common carriers such as telephone companies (and unlike ISPs), are intentionally designed to provide a specific experience to users. . . . [P]latform owners are constantly tweaking and making deliberate choices about how their algorithms should operate, both for business reasons and for ideological ones (sometimes in response to public pressure).”).

<sup>161</sup> Bambauer et al., *supra* note 131, at 1061 (“The distinction between basic service providers and content platforms can be drawn and defended quite easily if it isn’t pressed too hard: the elaborate community norms that are designed and enforced by platforms like Facebook are curation decisions that have meaningful expressive value. . . . As a whole, the rules and the (at least occasional) enforcement of the rules communicate a Facebook ethos—that the messages available here, while diverse across many measures, meet some vague standard of decency and are posted without the protective veil of anonymity.”). Bambauer is quite nuanced, tentatively concluding that “if the platform has an expressive interest in restricting content across its site so that it adheres to certain



“community norms” “is not much of a message, but it is at least as articulable as the expressive interest of the parade organizer in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.”<sup>162</sup> But is it?

If the argument is that all of a platform’s content moderation decisions *in toto* express “community norms,” then you’d have the problem that they are not really intended to express anything as they are not communicated *in toto* to anyone. Unlike *Hurley* or *Turner*, in which platforms’ editorial judgments are expressed in a parade schedule or channel lineup, the social media firm cannot point to a discrete set of decisions and say “this expresses community norms” as they keep lists of their decision-making secret. Further, unexplained editing or de-platforming only expresses something if referenced to social media policy; such decisions are not “intrinsically expressive” as *Rumsfeld* requires.

*Rumsfeld* makes clear that conduct that is meaningful only in reference to *other speech* receives no First Amendment protection. Indeed, the argument from “community norms” seems very much like that of the law schools in *Rumsfeld*. There, the law schools wished to express their disapproval, as a community of institutions, of the United States military by refusing them access to their buildings for recruitment. Similarly, supporters of social media censorship wish to create communities that express disapproval of what they term “lawful but awful” speech,<sup>163</sup> which apparently includes speech that recognizes the centrality of biological sex.<sup>164</sup> It would

---

subjects or interests, or so that it adheres to minimum levels of decency, then a must-carry order would directly interfere with that message.” *Id.* at 1064. A law that prohibits specialized websites likely would be unconstitutional. The Texas social media law only targets “general purpose” social media platforms and those that are quite large. See Texas H.B. 20, Sec. 120.001(1) (“Social media platform” means an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images.”); Texas H.B. 20, Sec. 120.002 (“This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States.”).

<sup>162</sup> Bambauer et al., *supra* note 131, at 1061.

<sup>163</sup> Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

<sup>164</sup> *Id.* at 201–02 (“Misgendering and deadnaming can cause emotional and psychological harm to their targets so both practices are types of hate speech. . . . These examples demonstrate why we should speak specifically and concretely, and not abstractly, about the lawful-but-awful content that Internet services currently restrict via their house rules.”).

seem that just as the law school's scattered acts excluding recruiters failed to create "a coherent speech product,"<sup>165</sup> so would the social media's scattered acts of excluding users.

Accepting the idea that the actions of any organization with rules that reflect "community norms" constitutes expressive conduct would blur the speech/conduct distinction and grotesquely expand First Amendment protection. Government regulation of corporations, schools, or virtually any organization would face First Amendment scrutiny. "Creating an experience" would expand First Amendment protection to restaurants, casinos, resorts, amusement parks, or massage parlors. These businesses certainly provide "experiences" but to include them in First Amendment protection would undermine health and safety regulation and reflect a tremendous deviation from existing law.

Further, the Supreme Court would not classify social media as an "expressive association" that has First Amendment rights which trump civil rights and public accommodation law. In *Boy Scouts of America v. Dale*,<sup>166</sup> the Supreme Court ruled that the Boy Scouts of America had an expressive associational right to exclude gay scoutmasters against a claim under New Jersey's public accommodation law, which prohibits discrimination on the basis of sexual orientation. The Court stated the principle that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."<sup>167</sup>

But, according to the Court, not all groups "engage in expressive association."<sup>168</sup> Expressive associations are those groups for which "[t]he forced inclusion of an unwanted person in [the] group infringes the group's freedom of expressive association [because] the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>169</sup>

The Court ruled that the Boy Scouts did engage in expressive associational activity because "[d]uring the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both

---

<sup>165</sup> Volokh, *supra* note 122, at 404.

<sup>166</sup> 530 U.S. 640 (2000).

<sup>167</sup> *Id.* at 647.

<sup>168</sup> *Id.* at 648.

<sup>169</sup> *Id.*

expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.<sup>170</sup> Thus, the forced inclusion of a scoutmaster in violation of the Boy Scout's values violated the group's First Amendment right to expressive association.

In contrast, with the Jaycees, the Court ruled that “[t]here is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views.”<sup>171</sup> Similarly, with the Rotarians, the California anti-sex discrimination law “does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, goodwill, and peace.”<sup>172</sup>

Social media firms seem to be more like the Rotary Club and Jaycees than the Boy Scouts as far as their expressiveness. The large social media firms, of the sort the Texas social media law regulates,<sup>173</sup> do not require, as do the Boy Scouts, members to profess a creed. The Supreme Court found it significant that the Scout's oath and law were mandatory when finding the group to have expressive association.<sup>174</sup> Rather, like the Jaycees, social media firms do not “employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds.”<sup>175</sup>

Prohibiting viewpoint discrimination does not limit social media firms' ability to express their own views for several reasons. Merely transmitting a message in the context of a communications network that conveys billions of messages does not necessarily express anything. Thus, if a social media firm were forced to carry a message that expressed a viewpoint with which the firm disagreed, the mere carriage would not necessarily alter any message the firm wished to express. Further, social media companies are free to comment on posts or make any other statement to express their own views—thus “forced inclusion” of other viewpoints would not diminish their *own* message.

---

<sup>170</sup> *Id.* at 649–50.

<sup>171</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984).

<sup>172</sup> *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

<sup>173</sup> Texas H.B. 20, Sec. 120.002 (“This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States.”).

<sup>174</sup> *Boy Scouts*, 530 U.S. at 649.

<sup>175</sup> *Roberts*, 468 U.S. at 621.

### V. EXPRESSIVE CONTENT MODERATION UNDER FIRST AMENDMENT SCRUTINY

On the other hand, editorial decision-making can be, in certain instances, expressive. It is not clear that merely transmitting a message is expressive. No one would say that a phone company “expresses” the conversations it carries—or a parcel company an idea if it refused carriage for people of a certain race or religion or political beliefs. Librarians who place *Mein Kampf* on a library shelf do not express support for Nazism. But, when editorial decisions create a coherent speech product that conveys its *own* message, such as an op-ed page, cable channel lineup, or parade lineup, then it is expressive and does convey a message.<sup>176</sup>

While it does not seem that social media companies create a coherent speech product as a whole, individual decisions very well might.<sup>177</sup> Thus, shadow-banning or prioritization might simply reflect a protected choice to forward (or not forward) a particular message. And if a social media company shadow bans or prioritizes a message, this argument would conclude that it expresses a certain viewpoint and conveys a certain message. But this argument does not seem right. No one would say that Facebook or Twitter adopts or expresses its own views or conveys its own messages in the billions of messages it transmits—just as no one would say the telephone “expresses” itself in the millions of calls it carries.

Concededly, if Facebook or Twitter said, “we like MSNBC and, therefore, we are prioritizing this message,” that would be expressive and likely First Amendment protected. But Facebook and Twitter do not do that. They do not express their prioritization or shadow-banning schemes; rather, they keep them secret and hidden. But it is precisely the description of these schemes, preferences, and content moderation algorithms that convey editorial judgment. The mere fact of transmission in the context of a communications network, as with telephone calls, does not.

---

<sup>176</sup> Christopher S. Yoo, *Free Speech and the Myth of the Internet As an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 742 (2010) (“The [Turner] Court reaffirmed that cable operators’ exercises of editorial discretion promote important free speech values”).

<sup>177</sup> Volokh, *supra* note 122, at 452 (“I thus tentatively think that barring platforms from editing will unconstitutionally ‘interfere[] with [the platform’s] desired message,’ by ‘alter[ing] the expressive content’ of the conversations that they are seeking to create. A curated conversation will no longer be a form of speech that the platform can legally provide.” (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2005))); Bhagwat, *supra* note 2, at 136 (legislation thus, in practice if not in name, entirely strips platforms of a key editorial right—the decision on what content to emphasize or deemphasize).

Additionally, consider a social media network that de-platforms a person for a specific reason. That, too, would be expressive. The Texas law would prohibit expressive removals of content from platforms that discriminated against a certain viewpoint. Certainly, this is viewpoint neutral as it requires viewpoint neutrality from a private entity. The question is whether it would survive First Amendment scrutiny. As argued, requiring hosting in a non-discriminatory way would not violate free speech protections.<sup>178</sup> Provided that social media continues its current architecture of not providing a “coherent speech product,” *i.e.*, most speech it hosts is, and is perceived to be, the speech of its users, then it has no legal right to exclude.<sup>179</sup> Like the shopping center in *Pruneyard*, the expressive value of removing individuals would simply be the expressive value of not following a legitimate law—which is not protected First Amendment expression.

Further, finding expressive value in unlawful discrimination would undermine public accommodation and antidiscrimination law. If a dominant social media company can exclude individuals for any reason in order to make an expressive point—to create a community of people who abhor “lawful but awful” speech,<sup>180</sup>—or a “curated conversation” in which certain groups are excluded,<sup>181</sup> then lunch counters can exclude those who fail to express a solidarity with particular racial community, telephone companies can exclude those who do not express their religious, or other, views—and so on until the First Amendment swallows civil rights law.

Finally, a ban on *viewpoint* discrimination, of the sort the Texas social media law prohibits, regulates lightly and does not limit expression. Platforms are free to exclude any type of content, such as nudity, profanity, or harassment—but must do so in a way that is not viewpoint discriminatory. Similarly, platforms may sponsor “curated conversations” but must provide similar opportunities for all—if it offers a Republican discussion group, it must also provide a Democratic discussion group. Unlike media with limited bandwidth such as cable television, social media firms can express *their* views to users without excluding others.

The Texas law will likely withstand, therefore, even the most extreme position

---

<sup>178</sup> Volokh, *supra* note 122, at 429.

<sup>179</sup> Goldman & Miers, *supra* note 163, at 191.

<sup>180</sup> United States Telecom Ass’n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).

<sup>181</sup> Volokh, *supra* note 122, at 452.

concerning the First Amendment protection of editorial decision-making. In *United States Telecom Association v. FCC*, the court upheld the FCC's network neutrality rules. These rules prohibited internet service providers from discriminating against any internet user for *any* reason. Accepting the FCC's designation of ISPs as common carriers, the court upheld the regulation.

In his dissent to *en banc* consideration, then-Judge Kavanaugh wrote, "Internet service providers may not necessarily generate much content of their own, but they may decide what content they will transmit, just as cable operators decide what content they will transmit. Deciding whether and how to transmit ESPN and deciding whether and how to transmit ESPN.com are not meaningfully different for First Amendment purposes."<sup>182</sup> Therefore, Judge Kavanaugh found that ISPs have an expressive right to determine who uses their platforms, just like the cable operators in *Turner*.

But, as discussed above, a cable lineup—or even a few major websites such as ESPN.com or Netflix.com that an ISP would feature specially in contravention of the network neutrality rules, constitute a discrete expression. An ISP could list the sites to which it gives special treatment—and that list would be a discrete expression of a particularized message.<sup>183</sup> Under then-Judge Kavanaugh's reasoning, network neutrality is expressive in a way that the dominant social media platforms' content moderation is not.

In contrast, because the social media companies do not make public their diffuse content-moderation decisions, social media editorial decisions do not evidence an intent to communicate an idea and are not expressive. Further, Texas law allows a social media firm to "choose its lineup" under any set of rules it wishes provided it is viewpoint neutral. The Texas law must only impose its rules in a viewpoint neutral way.

#### CONCLUDING THOUGHTS: CHEAP CENSORSHIP

Even before this year's dramatic market correction in tech stocks, many have considered the internet to be cheap. Eugene Volokh argues that its ability to propagate "cheap speech" from poorer, judgment-proof plaintiffs has led to a new spate

---

<sup>182</sup> *United States Telecom Ass'n*, 855 F.3d at 428 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

<sup>183</sup> In fact, under current FCC regulations, ISPs currently are required to disclose such a list. See 47 C.F.R. § 8.1(a).

of laws criminalizing and otherwise punishing speech.<sup>184</sup> Jane Bambauer shows how the internet’s ability to foster “cheap friendship” leads to polarization and nastiness in online interactions.<sup>185</sup>

In the past, a government actor interested in censoring speech would face high costs in terms of monitoring, controlling, and coordinating thousands of newspapers and broadcasters—and in terms of negative publicity for both the censoring government actors and cooperating media firms. But now, a few internet platforms control major portals of global information flow through largely invisible means such as deprioritizing or shadow-banning—and can affect that flow at relatively small cost. Now internet censorship is cheap.

Government can have an enormous effect on what Americans read and see by employing *sub rosa* pressure on the platforms—which the platforms can then implement through invisible de-prioritization and shadow-banning. And the government pressure need only be slight. When censorship is cheap, it is in a private firm’s financial interest to comply with a much smaller governmental stick or carrot. Government can make censorship worthwhile by threatening a much lower cost or promising a smaller benefit than when censorship is costly. When censorship is largely invisible, government’s possible collusion with social media goes undetected, further reducing its cost.

And, while the Supreme Court upheld that cable must-carry rules on rather abstract government concerns, notably “promoting the widespread dissemination of information from a multiplicity of sources,”<sup>186</sup> government collusion is a concrete concern. Recently leaked documents<sup>187</sup> published by Senators Grassley and Hawley disclose planning by the Department of Homeland Security to work with its “partners” such as Twitter (and presumably the other dominant internet platforms) to monitor so-called “disinformation.” Similar evidence emerged for government pressure on the platforms to control information about COVID.<sup>188</sup>

---

<sup>184</sup> Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2305 (2021) .

<sup>185</sup> Jane R. Bambauer, *Cheap Friendship*, 54 U.C. DAVIS L. REV. 2341, 2342 (2021).

<sup>186</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

<sup>187</sup> See Memoranda from the U.S. Dep’t of Homeland Security to the Sec’y of Homeland Security (2021), <https://tinyurl.com/y2tb44z7> (release authorized by Sen. Grassley & Sen. Hawley).

<sup>188</sup> Ben Weingarten, *Biden-Big Tech COVID Censorship Collusion Is Tip of Ruling Class’s Spear*,

In *Turner*, the Court upheld must-carry because “[e]ven if a newspaper is a natural monopoly, it ‘does not possess the power to obstruct readers’ access to other competing publications’ and cannot ‘prevent other newspapers from being distributed to willing recipients in the same locale.’ The Court concluded, however, that ‘[t]he same is not true with cable.’”<sup>189</sup> And the same is not true with the dominant social media firms with even greater force. Social media antidiscrimination law presents a government interest novel to First Amendment analysis—preserving readers’ access to information vital for democratic deliberation in the face of dominant information carriers’ willingness to accommodate government pressure. This interest is similar to, if not more pressing than, the governmental interests in preserving and promoting free democratic deliberation that the Court has relied upon in upholding more severe limitations on dominant media firms, such as must-carry regulation,<sup>190</sup> network neutrality,<sup>191</sup> or nearly a century of media ownership limits.<sup>192</sup>

---

NEWSWEEK (July 23, 2021), <https://tinyurl.com/yehke5jf>.

<sup>189</sup> Yoo, *supra* note 176, at 746 (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 656).

<sup>190</sup> *Turner Broad. Sys., Inc.*, 512 U.S. 622.

<sup>191</sup> *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

<sup>192</sup> See Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547 (2008) (describing decades of FCC limits on ownership and cross-ownership in radio, television, cable, and newspapers).