LIBERTY UNIVERSITY

Helms School of Government Undergraduate Law Review

Volume 2 Article 2

2024

The Social Experiment: How the First Amendment Influences Private Social Media Companies

Collyn J. Kim
Liberty University

NOTE

THE SOCIAL EXPERIMENT: HOW THE FIRST AMENDMENT INFLUENCES PRIVATE SOCIAL MEDIA COMPANIES

Collyn Kim†

ABSTRACT

Social media has become one of the biggest mediums by which people communicate, socialize, and interact with each other. People follow political figures, cultural icons, and news outlets, among others, to gain knowledge on current events or the hot topic of the day. Many users, regardless of the platform, use their medium of choice to speak their own opinions and comment on the world's issues. From prime ministers to popular memes, social media is a never-ending timeline of speech. With the constant speech and expression exhibited on social media, two important questions must be asked. First, does the First Amendment protect social media posts? Second, if it does, do private social media companies have the right to censor or moderate what is posted?

While the United States Supreme Court has yet to directly address these intertwined questions, there are several cases that can serve as a legal framework to help the Court answer these inevitable questions. While an exhaustive survey of First Amendment jurisprudence is beyond the scope of this Note, several seminal cases will be discussed and analyzed. Together, these cases demonstrate that, in order for First Amendment protection to attach to social media posts, one of three things is required: (1) the social media company must be carrying out a function traditionally performed by the government, (2) the social media company must be compelled by the government to act, or (3) the social media company must be in collaboration with the government. Once one of these grounds is met, the traditional Free Speech analysis may be performed. However, recent litigation and legislative enactments may have altered the way courts view the relation the First Amendment's applicability to social media.

---

† Collyn J. Kim is a senior at Liberty University pursuing a government degree in Law and Policy with minors in Psychology and Criminal Justice. After graduation in the Spring, Collyn plans on attending Liberty University School of Law with the intent to graduate, pass the bar, and become a lawyer focused on helping others.

INTRODUCTION

As mediums of communication change, one thing remains constant: the need for human interaction. Recording history, making announcements, carrying everyday conversations, and voicing opinions are all ways people communicate with others and express who they are and what they believe. As technology evolves, the mode by which communication is delivered evolves with it. From carrier pigeons to virtual instant messages, technology refuses to stand still.

In the current milieu, social media has become the dominant medium by which people communicate, socialize, and interact with each other. In 2005, near the advent of social media, merely 5% of the adults in the United States used one of the major social media platforms.[1] By 2021, that percentage drastically increased to about 74%.[2] As technology evolved, the protection of the First Amendment remained. However, as new issues arise, the courts have been, and will continue to be, forced to address the extent and scope of the First Amendment's protection.

The First Amendment of the U.S. Constitution protects the people's right to the exercise of religion, the freedom of speech and of press, the right to assemble peacefully, and the right to petition to the Government.[3] The U.S. Supreme Court has expounded on the Constitution's articulation of these rights by stating that a "fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[4] Most people have the misconception that all individuals and entities operate under this protection, but this is not the case. The Supreme Court has defined the scope and reach of the First Amendment as a limit on government—not private actors. Thus, to determine whether a given entity's speech falls under these protections, the Court must first determine if the entity can be qualified as a governmental or state actor. If the entity qualifies as a state actor, then its actions in censoring or moderating content fall within the scope of First Amendment protection.

I. THE LANDSCAPE OF JUDICIAL INTERPRETATION

---

[1] *Demographics of Social Media Users and Adoption in the United States*, PEW RESEARCH CENTER (Mar. 8, 2022), https://www.pewresearch.org/internet/fact-sheet/social-media/

[2] *Id*.

[3] U.S. Const. amend. I.

[4] Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

"Congress shall make no law . . . abridging the freedom of speech . . . ."[5] The U.S. Supreme Court reasoned that "the Free Speech Clause prohibits only *governmental* abridgement of speech."[6] Stated differently, the government cannot prohibit private entities from censoring speech.[7] Under this analysis, it seems that no private actors, including social media companies, are subject to the First Amendment, the result being that every social media post is at the mercy of what private social media companies allow. However, Supreme Court precedent has outlined instances in which private companies may be recognized as state actors, which would protect those social media posts under the First Amendment. It should be noted at the outset that such an analysis is not without its difficulties. As Justice Thomas rightly noted in his concurrence on this very issue, "applying old doctrines to new digital platforms is rarely straightforward."[8] Heeding that warning, we turn to the relevant case law at issue.

A. Private Actors v. State Actors

When DeeDee Halleck and Jesus Melendez released a film about the Manhattan Neighborhood Network (MNN) on the New York public access channel, they believed that their expression of MNN's negligence of the East Harlem community would be protected under their First Amendment rights.[9] MNN, the City of New York's private nonprofit corporation responsible for the public access program that Halleck and Melendez used, ultimately suspended both Halleck and Melendez.[10] The two producers filed suit on the grounds that MNN violated their First Amendment rights when it suspended their use of the public access channels based on the content of their film.[11] The District Court disagreed, however, and dismissed the producers' First Amendment claim, reasoning that MNN was a private actor and was in no way subject to the First Amendment restrictions reserved for state actors.[12]

---

[5] U.S. Const. amend. I.

[6] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[7] *Id.*

[8] Biden v. Knight First Amend. Inst. at Columbia Univ., 209 L. Ed. 2d 519 (2021) (J., Thomas, concurring).

[9] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[10] *Id*. at 1927.

[11] *Id*.

[12] *Id.*

On appeal, the Second Circuit Court reversed, rationalizing that public forums are usually operated by the government and that, in this specific instance, MNN was operating as a state actor.[13] The U.S. Supreme Court granted certiorari, paving the way to address and clarify when a private actor should be considered a state actor.[14]

Ultimately, the Court concluded that there are instances where private entities may be considered state actors.[15] However, it went on to hold that MNN was not one of them.[16] The Court noted three situations when private entities may be considered state actors: (1) when the private entity performs actions that are traditionally exclusive to public functions, (2) when the government compels private entities to take a specific or particular action, or (3) when the government acts in collaboration with a private entity.[17]

The Court reasoned that the facts before the Court fell under the first category and that MNN was "exercis[ing] traditional, exclusive public function when it operates the public access channels."[18] The Court stressed that there are very few actions that fall into this category; an example of one is running for elections and using social media to promote a candidate.[19]

In the *Halleck* case, operating a public access channel on a cable system was not considered traditionally and exclusively performed by the government and, therefore, did not warrant classifying MNN as a state actor.[20] Halleck argued that when the government provides a forum for speech, known as a public forum, the government is constrained by the First Amendment, and the speech is protected.[21] The Court disagreed, noting that a private entity can provide a forum for speech but is "not ordinarily constrained by the First Amendment because the private entity is not a state actor."[22] With this rationale, the

---

[13] *Id.* at 1928 (citing Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 301 (2d Cir. 2018)).

[14] *Id*.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* (showing what was considered traditional, the Court found that "traditional" qualified as "exclusive public function within the meaning of our stat-action precedents, the government must have traditionally *and* exclusively performed the function").

[19] *Id*.

[20] *Id*.

[21] *Id*. at 1930.

[22] *Id*.

Court held that MNN could not be subject to First Amendment scrutiny because it could not be established as a state actor.[23] In sum, the Court emphasized an important distinction: "[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[24] This distinction proved critical in deciding future cases.

B. Life after Halleck

The U.S. Supreme Court has yet to hold that private social media companies perse fall within the state actor doctrine. However, the U.S. Court of Appeals for the Second Circuit has held that First Amendment protection extends to private citizens engaging with government officials on social media platforms.[25] In *Knight First Amendment Institute at Columbia v. Trump*, President Trump used this Twitter account to engage with the public, make official statements on a variety of topics, and, through the nature of the Twitter app, people were able to respond and engage with the original posts that the President would "tweet."[26] President Trump would exclude people, or "block" them, from commenting and interacting with his posts if they expressed views with which he disagreed.

The Knight First Amendment Institute sued President Trump because of this censorship, claiming that the "blocking" or censoring of certain individuals deprived them of their First Amendment right.[27] The question before the Court was then whether President Trump, in his personal capacity, could be considered a state actor. The Second Circuit noted that "a straightforward application of state action and public forum doctrines, congruent with Supreme Court precedent" was necessary.[28]

During oral arguments, President Trump's counsel argued that the President's use of the Twitter account was not pursuant to official

---

[23] *Id*.

[24] *Id*. at 1930.

[25] Knight First Amendment Inst. at Columbia Univ. v. Trump, 953 F.3d 216 (2d Cir. 2020).

[26] *Id*. at 218.

[27] The Knight First Amendment Institute litigates cases specifically pertaining to free speech and expression in the "shifting landscape of the digital age". KNIGHT FIRST AMEND. INST., https://knightcolumbia.org/page/about-the-knight-institute (last visited March 29, 2023).

[28] *Knight*, 953 F.3d at 217.

business and thus did not amount to a state action.[29] However, because the President tweeted information in his "capacity as the nation's chief executive and Commander-in-Chief," the court found that it was difficult to find anything to be a "right or privilege created by the State" if this instance was not one of them.[30] Further, the President and his staff

> use[d] the Account as an official channel of communication with the public on matters of public concern. [. . .] White House staff members are involved in the drafting and posting of tweets to the Account, and the National Archives and Records Administration requires the preservation of the President's tweets as official records under the Presidential Records Act.[31]

Because President Trump would post announcements, news, and created opportunities for people to debate in a public forum and because he was not the only individual from the White House that used this account, this case gave the Second Circuit the opportunity to show that there are instances where private individuals can be considered state actors under the *Halleck* rationale. The Second Circuit reasoned that while the act of "blocking" is a feature that is available to all users, because the former President blocked individuals from access to an official account, he was, according to Court precedent and the standard solidified in *Halleck*, putting restrictions on individuals' rights to interact with a public forum, thus transforming President Trump's blocking on Twitter into state action subject to First Amendment scrutiny.[32]

President Trump appealed the case to the U.S. Supreme Court.[33] However, he left office during the pendency of the appeal, making the case moot.[34] Justice Thomas wrote a lengthy concurrence that gave insight as to how the Court might have ruled if the case had been properly and fully heard.[35]

In determining whether speech could fall within the First Amendment's purview, Justice Thomas reasoned that the boundaries of

---

[29] *Id*. at 219.

[30] *Id*.

[31] *Id*. at 235.

[32] *Id*. at 221.

[33] *Id*.; Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

[34] *Id*.

[35] Knight First Amendment Inst. at Columbia Univ. v. Trump, 953 F.3d 216 (2d Cir. 2020); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

the First Amendment are largely determined by who or what has control of the space of the speech.[36] If the government has control over any given space, then First Amendment protections would apply, and when private parties control the avenue of speech, precedent has shown that there are secondary effects on the application of the First Amendment.[37]

Further, Justice Thomas determined that, while President Trump has some control over the space, he does not have enough control to constitute Twitter as a "government-controlled space." Rather, Twitter has "unbridled control" over that digital space.[38] Justice Thomas agreed that President Trump, like every other Twitter user, has some control over the digital space. However, as Justice Thomas noted, "[a]ny control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account 'at any time for any or no reason.'"[39] While President Trump blocked several users from interacting with his posts, Twitter banned the President from interacting with and even using the platform as a whole. Due to Twitter's "unbridled control," Justice Thomas concluded that the space is not a public government-controlled space. Thomas noted that part of the solution to this question may be found in old doctrines that limit the right of a private party to exclude an individual's freedom of speech, specifically the common carrier doctrine and the public accommodation doctrine.[40]

Justice Thomas introduced the idea that, in many ways, digital platforms can look like traditional common carriers. Although there are differences between physical and digital carriers, the primary function of both is to "carry information from one user to another."[41] Thomas likened digital carriers to the newspaper to explain how digital platforms can be viewed as common carriers. Newspapers are organizations that deliver physical copies of private speech to the general public. Social media platforms also transfer speech from one individual to another but in the sense that the mode of transportation is digital. In the way that newspaper companies are not to be "treated as the publisher or speaker" but merely as distributors, so too are social media platforms, as they provide a space where individuals can

---

[36] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

[37] *Id*.

[38] *Id*. at 1222.

[39] *Id*.

[40] *Id*. at 1224.

[41] *Id*.

exchange thoughts and opinions.[42] In analyzing whether digital platforms are considered common carriers, the fact that there are other means to distribute speech bore no consequence in Thomas' eyes. Thomas explained that an individual can choose not to pay a toll at a toll bridge by swimming across a river or hiking the Oregon Trail to reach their destination. However, the latter is not a reasonable or comparable alternative, and in the same way that there are not comparable alternatives to digital social media platforms, Justice Thomas reasoned that the existence of other means of distribution raises no concerns with the common carrier doctrine.[43] Ultimately, Justice Thomas concluded that, if this analysis is correct, the only way to ensure that an individual's freedom of speech is not being infringed, would be to restrict the digital platform's right to exclude and censor.[44]

While definitions vary between states, a public place of accommodation has generally been defined as a company or organization that "provides 'lodging, food, entertainment, or other services to the public.'"[45] Justice Thomas used this definition to suggest that Twitter and other social media platforms resemble the definition very closely. However, Justice Thomas noted that the Courts are split on whether public federal accommodation laws apply to any location other than a physical location that provides those services.[46] Thomas noted that no party in the instant issue noted or identified any public accommodation restriction that could apply there.[47] Because Courts are split on whether this doctrine applies to digital space, a case of first impression heard by the Supreme Court would be necessary to solidify whether this doctrine is solely limited to physical space or could expand to reach digital platforms, like Twitter.

Justice Thomas noted in his concurrence that the question presented to the Court in *Biden v. Knight* was only whether a government actor was violating the First Amendment when he blocked users from interacting with his Twitter posts.[48] This question, Thomas writes, turns on "ownership and the right to exclude," both of which were not able to fully be addressed by the Court due to the shift of power between presidents.[49] Justice Thomas reasoned that by considering that the true

---

[42] *Id*.
[43] *Id*. at 1226.
[44] *Id*. at 1225.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 1226.
[48] *Id*. at 1227.
[49] *Id*.

power to silence speech lies most powerfully in the hands of private digital platforms and that, if the aim is to ensure the preservation of the freedom of speech, then the "more glaring concern must perforce be the dominant digital platform themselves."[50]

Even though a private social media company has never been deemed a state actor by the Supreme Court, the issue was recently addressed by the U.S. Court of Appeals for the Ninth Circuit.[51] In *Prager University v. Google LLC.*, YouTube, a private organization, was sued under the First Amendment for "moderating" or censoring videos that Prager University sought to publish on [52] YouTube, "the world's largest forum in which the public may post and watch video based content."[53] One of the Terms of Service and Community Guidelines that a user must accept before posting a video is that YouTube has the right to remove or censor what it deems to be restricted content or to deem certain content "age-inappropriate,"[54] which makes it inaccessible to users in "Restricted Mode."[55] The videos in the *Prager* case that were deemed age-inappropriate for users in Restricted Mode were classified as such by YouTube's "Restricted Mode Guidelines."[56] YouTube tagged several dozen of Prager University's videos for the Restricted Mode, which meant that people could not watch some of Prager's videos and that those videos would not be advertised by third parties.[57] Prager University sued YouTube, and, in turn, YouTube's parent company, Google LLC, for a violation of Prager's First Amendment right, claiming that YouTube's censorship of Prager's videos was unconstitutional under the First Amendment.[58]

The Second Circuit reiterated that the U.S. Supreme Court's past precedent on state actors was a high standard for YouTube, a private

---

[50] *Id*.

[51] Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020).

[52] *Id.* Prager University was created as a nonprofit educational and media organization that informed the public on popular viewpoints and perspectives on public issues. *Id.*

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*. An automated algorithm would examine videos and tags which would then classify a video as a Restricted Video or a Non-Restricted Video. These videos were "videos that contain potentially mature content – such as videos about '[d]rugs, and alcohol', '[s]exual situations', and other '[m]ature subjects' may become unavailable in Restricted Mode". *Id.*

[57] *Id*.

[58] *Id*.

organization, to meet.[59] Prager did not dispute that YouTube was a private entity or even that there was a lack of state involvement.[60] Instead, Prager argued that YouTube became a state actor when operating its own private property as "a public forum of speech."[61]

Rejecting this argument, the Second Circuit relied heavily on *U.S. v. Halleck*, noting that such a ruling would "eviscerate the state action doctrine's distinction between government and private entities."[62] Furthering this point, the court stated that, if they followed this rationale, "all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints."[63]

Similar to *Halleck*, the Second Circuit found it was "not enough" that YouTube, a private company, hosted a public forum or that the function that it served was "traditionally and exclusively" a prerogative of the state.[64] The court bemoaned that "[b]oth sides say that the sky will fall if we [the courts] do not adopt their position."[65] Prager wanted to protect citizenry from "big tech" companies, and YouTube wanted to make sure that the "undoing of the internet" would not ensue due to the lack of protection from speech regulation.[66] The court stated that each of the opposing side's opinions "do not figure into our straightforward application of the First Amendment."[67] In line with the analogous precedent, namely *Halleck*, the court affirmed the decision of the District Court and dismissed Prager University's First Amendment claim.[68]

B. State Actor? If Yes, Then What?

While there are no cases exemplifying where a private individual or company can qualify as a state actor, courts have articulated what follows once a state actor has been established. Though *Packingham v. North Carolina* never addressed the state actor doctrine, it was one of the first cases to ever discuss the correlation of the First Amendment

---

[59] *Id*. (citing *Halleck*, 139 S.Ct. at 1928).
[60] *Id.*
[61] *Id*. (citing *Halleck*, 139 S.Ct. at 1930).
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*. Notably, the Second Circuit's ruling in *Prager* would then guide its decision in future cases, such as *Knight v. Trump*.

and social media.[69] The case arose in 2017 when a registered sex offender posted on Facebook.[70] In 2002, Lester Packingham, a 21-year-old college student pled guilty to taking "indecent liberties with a child."[71] Under North Carolina law, Packingham had to register as a sex offender for 30 years or more.[72] The North Carolina Statute also prohibited him from communicating with minors on social media. Later, in 2010, a traffic ticket was dismissed against Packingham, and, in response, he posted a statement of relief on his Facebook page.[73] Members of the Durham Police Department investigating registered sex offenders noticed that Packingham used social media, and Packingham was indicted by a grand jury.[74] Packingham then appealed his case all the way to the U.S. Supreme Court on the grounds that his First Amendment rights were violated.[75]

The Supreme Court had to decide if the North Carolina Statute violated Packingham's First Amendment right to free speech. It ultimately found that the statute was overly broad and violated Packingham's constitutional rights.[76] In *Packingham*, the Court dealt with a state statute and did not raise the state actor question because the regulator (North Carolina) was already clearly a state actor. Because the regulator was already a state actor, the Supreme Court turned to the content of the speech that was being regulated. Content-based regulations are those that discriminate against speech based on the specific substance of what is being communicated.[77] Content-neutral speech applies to "expression without regard to its substance."[78] The North Carolina Statute, according to Justice Kennedy, was content-neutral and thus had no specific substance that was being regulated.[79] As such, intermediate scrutiny was triggered.[80]

To pass intermediate scrutiny, a law must not "burden substantially more speech than is necessary to further the government's legitimate

---

[69] Packingham v. North Carolina, 582 U.S. 98 (2017).

[70] *Id*. at 101.

[71] *Id*. at 102.

[72] *Id*. (citing N.C. Gen. Stat. Ann. § 14–202.5).

[73] *Id.*

[74] *Id*.

[75] *Id*. at 104.

[76] *Id*. at 109.

[77] David L. Hudson, "Content Based," Content Based, accessed March 22, 2022, https://www.mtsu.edu/first-amendment/article/935/content-based.

[78] *Id*.

[79] *Packingham,* 582 U.S. at 102 (citing N.C. Gen. Stat. Ann. § 14–202.5).

[80] *Id.*

interest."[81] In *Packingham*, the Court recognized that there is a legitimate governmental interest in situations where the sexual abuse of a child is at stake.[82] However, the Court found that, while the legislature may pass laws in order to protect that interest, the statute at issue was too broad, and the burden on speech was substantially more than necessary to protect the "legitimate governmental interest."[83] While a law prohibiting the use of social media to contact a minor would not have been overly burdensome, the Court found that a law completely banning a sex offender from using social media at all is overly burdensome on an individual's right to free speech.[84] The Court found that there may be instances where a broad, sweeping law may be necessary or legitimate to serve a governmental purpose, but, in this case, it was not.[85]

In *Packingham*, the Court recognized that the internet created a space requiring free speech protections.[86] When specifically looking at North Carolina law, the Court found that posts on the internet are equivalent to words said in a park or on the street.[87] The "space" or "cyberspace" was so protected that even a convicted felon maintained the right to speak freely on the internet.[88] The *Packingham* case established that social media and the internet created a space protected by the First Amendment, and cases succeeding *Packingham*, like *Halleck* and *Prager*, created frameworks and definitions for who could regulate the speech in those spaces based on the state actor doctrine.[89]

II. THE LEGISLATIVE LANDSCAPE

Legislatures, past and present, have recognized technology's importance in a modern society. For example, Section 230 of the Communications Decency Act of 1996, while not completely relevant to the state actor doctrine, protects private social media companies from lawsuits.[90] Similar to how companies are not liable for slander when a customer leaves a bad review for a restaurant on their page, Section 230

---

[81] *Id*. at 105–106 (citing McCullen v. Coakley, 573 U.S. 464 (2014)).
[82] *Id.* at 108.
[83] *Id*. at 109.
[84] *Id*.
[85] *Id*.
[86] *Id*. at 108.
[87] *Id*. at 104.
[88] *Id*.
[89] *Id*.
[90] 47 U.S.C. § 230

holds that social media companies cannot be held liable for ideas, messages, or advertisements that are seen and posted by others using their platform.[91] Under Section 230, these social media companies and platforms "can't be treated as the publisher or speaker" of the posts made on their platform.[92]

In the wake of the 2015 terrorist attacks on Paris, France, the legality of Section 230 was called into question.[93] Americans who were injured in these terrorist attacks chose to file suit against various social media companies because those companies allowed terrorist cells, like ISIS, to recruit members through social media.[94] In *Gonzalez v. Google,* the families contended that because the algorithm created by YouTube (which is owned by Google) recommended these ISIS videos, Google aided and abetted the terrorist groups.[95] Google contended that, like *Twitter v. Taamneh*, aiding-and-abetting laws cannot "cover 'generic, widely available services' that aren't connected to a specific terrorist attack."[96]

If Section 230 allows private social media companies to be free from responsibility for posts that are harmful to the community, then social media companies should not have the ability to restrict speech, expression, or posts that are not harmful to the community. Social media companies should not have the ability to censor whatever they so choose, regardless of whether the post is an advertisement or is made by a private citizen if Section 230 is to be upheld.

CONCLUSION

---

[91] The Editorial Board, *ISIS, YouTube and Section 230 at the Supreme Court*, THE WALL STREET JOURNAL (Feb 20, 2023), https://www.wsj.com/articles/isis-youtube-and-section-230-supreme-court-google-internet-platforms-facebook-twitter-moderators-ai-recommendation-55aa7509.

[92] *Packingham,* 582 U.S. at 98 (citing 47 U.S.C. § 230).

[93] Amy Howe, *Justices will consider whether tech giants can be sued for allegedly aiding ISIS terrorism*, SCOTUSBLOG (Feb 19, 2023), https://www.scotusblog.com/
2023/02/justices-will-consider-whether-tech-giants-can-be-sued-for-allegedly-aiding-isis-terrorism/.

[94] *Id*. Gonzalez v. Google, 2 F.4th 871 (9th Cir. 2023).

[95] The Editorial Board, *ISIS, YouTube and Section 230 at the Supreme Court*, THE WALL STREET JOURNAL (Feb 20, 2023), https://www.wsj.com/articles/isis-youtube-and-section-230-supreme-court-google-internet-platforms-facebook-twitter-mode rators-ai-recommendation-55aa7509.

[96] *Id*. (citing Oral Argument, Twitter v. Taameh, No. 21-1496 (U.S. Feb 22, 2023)).

Given the evolution of technology and the prevalence of digital speech, the question of whether social media as a whole is protected under the First Amendment is highly important.[97] While the courts have wrestled to some extent with which specific digital speech warrants First Amendment protections, the U.S. Supreme Court has yet to resolve the issue.[98] What is clear, however, is that only when state action is at issue will social media posts be protected. The Supreme Court has consistently held that hosting a public forum itself is not enough to qualify a private company to become a state actor. While past precedent cautions that such protection could cause the proverbial sky to fall, the terrors of de facto government censorship warrant a serious and thorough resolution. In short, giving private companies, who control the digital town square, the ability to restrict any speech that they deem to be "inappropriate" or to "moderate" into oblivion individuals ascribing to a certain viewpoint would offend the very purpose of the First Amendment.

[97] "Why Being Social Is Good for You," South University, May 1, 2018; Demographics of Social Media Users and Adoption in the United States, 2021.

[98] Knight First Amendment Inst. at Columbia Univ. v. Trump, 953 F.3d 216 (2d Cir. 2020); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).