

CENSORSHIP BY PROXY: SOCIAL MEDIA, FREE SPEECH, AND THE DANGERS OF GOVERNMENT INTRUSION

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*“[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles” of the First Amendment “do not vary.”*²

In the digital age, the First Amendment’s guarantee of freedom of speech³ continues to be a core American value, still rigorously protected by the United States Supreme Court.⁴ Social media now plays a significant role in the exercise of free speech and the democratic process at large.⁵ The United States Supreme Court has held that governmental attempts to limit social media platforms’ editorial discretion are detrimental to First Amendment values.⁶ Such laws limit social media companies’ First Amendment right to choose what to host, display, and publish.⁷ If these laws were to pass constitutional muster, social media platforms would be obligated to host *all* content, regardless of its nature, which could lead to weakened public trust in online political discourse.⁸

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² *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2403 (2024) (quoting *Brown v. Ent. Merchs. Ass’n.*, 564 U.S. 786, 790 (2011)).

³ U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech . . .”).

⁴ *Moody*, 144 S. Ct. at 2388 (recognizing that the government cannot control social media to impose its own vision of what online speech should look like).

⁵ See David A. Strauss, *Social Media and the First Amendment Fault Lines*, in *SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY* 3, 3 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (“The popularity of social media has exposed fault lines in the law of the First Amendment.”).

⁶ *Moody*, 144 S. Ct. at 2402.

⁷ See Lora Strum, *Eight Supreme Court Cases to Watch*, ACLU (May 16, 2024), <https://www.aclu.org/news/civil-liberties/eight-supreme-court-cases-to-watch>. (“[U]nder the Texas law, which requires “viewpoint neutrality,” a platform that publishes posts about suicide prevention would also have to publish posts directing readers to websites that encourage suicide.”).

⁸ *Id.*

Without First Amendment protections and judicial checks on the constitutionality of these laws, social media could become a tool for manipulating public opinion.⁹ Such government restriction would undermine the very essence of free speech, particularly online.¹⁰ On the other hand, there is an inherent danger in large social media companies' broad capacity to filter and remove their own users' posts, running the risk of controlling popular opinion.¹¹ This article will analyze the United States Supreme Court's ruling in *Moody v. NetChoice, LLC*, where the Court reviewed First Amendment challenges to state laws that sought to regulate how social media platforms moderate content.¹²

I. *MOODY V. NETCHOICE, LLC*

Driven by the perception that social media platforms disproportionately silence conservative voices, Texas and Florida passed laws granting their state governments the authority to regulate the manner in which social media companies curate users' posts.¹³ Soon after these laws were enacted, NetChoice, LLC ("NetChoice") and other trade associations representing social media companies, including Facebook and YouTube, sued in Texas and Florida alleging facial First Amendment violations.¹⁴ *Moody v. NetChoice, LLC* ascended to the United States Supreme Court with two questions presented: (1) whether the First Amendment protects every choice a social media company makes as to what user-generated content it hosts and how it arranges that

⁹ *Moody*, 144 S. Ct. at 2392 ("A State cannot prohibit speech to rebalance the speech market.").

¹⁰ *Id.* at 2423 (Alito, J., concurring) ("[W]hat platforms call 'content moderation' of the news or user comments on public affairs can have a substantial effect on popular views.").

¹¹ *Id.* at 2400 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 249-50 (1974)) ("[M]odern media empires had gained ever greater capacity to 'shape' and even 'manipulate popular opinion.'").

¹² *Id.* at 2383.

¹³ See Strum, *supra* note 7.

¹⁴ *Moody*, 144 S. Ct. at 2396.

content; and (2) more specifically, whether Texas’s House Bill 20¹⁵ and Florida’s Senate Bill 7072¹⁶ violate the First Amendment by regulating mega social media companies’ activities.¹⁷

A. Procedural History

On review of preliminary injunctions, the Texas and Florida cases came to the United States Supreme Court at an early stage.¹⁸ District courts in both states entered preliminary injunctions precluding the statutes’ enforcement.¹⁹ The Court of Appeals for the Fifth Circuit reversed the injunction, finding that the Texas law did not regulate any speech, and thus did not implicate the First Amendment at all.²⁰ The Court of Appeals for the Eleventh Circuit upheld the preliminary injunction, finding that the Florida law was not likely to survive First Amendment scrutiny.²¹ The United States Supreme Court ultimately vacated both decisions on procedural grounds, holding that neither Court of Appeals properly addressed the facial nature of NetChoice’s challenge.²² In its reasoning, however, the Court explained that key First Amendment precedent²³ protecting intermediaries that compile and publish third-party speech apply fully to platforms like Facebook and YouTube.²⁴

B. The First Amendment’s Applicability to Social Media

¹⁵ See H.B. 20, 87th Leg., 2d Spec. Sess. (2021).

¹⁶ See 2021 Fla. Sess. Law Serv. Ch. 2021-32, § 4 (S.B. 7072).

¹⁷ *Moody*, 144 S. Ct. at 2393.

¹⁸ *Id.* at 2394.

¹⁹ Both District Courts found that NetChoice’s challenge was likely to prevail because the statutes infringed upon the constitutionally protected “editorial judgment” of NetChoice’s members about what content they choose to display. See *NetChoice v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021); *NetChoice v. Paxton*, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

²⁰ *Moody*, 144 S. Ct. at 2394.

²¹ *Id.*

²² Justice Kagan, writing for the majority, stated “[i]n sum, there is much work to do below on both these cases, given the facial nature of NetChoice’s challenge. But that work must be done consistent with the First Amendment, which does not go on leave when social media are involved.” *Id.*

²³ See generally *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm’n. of Cal.*, 475 U.S. 1 (1986); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1997); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (“The Court has repeatedly held that ordering a party to provide a forum for someone else’s views implicates the First Amendment if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt.”). *Moody*, 144 S. Ct. at 2388.

²⁴ *Moody*, 144 S. Ct. at 2409.

“To the extent that social-media platforms create expressive products, they receive the First Amendment’s protection.”²⁵ Such expressive activity includes presenting a curated compilation of speech originally created by others.²⁶ As the Court described in *Moody*, major social media companies curate their feeds by combining “multifarious voices” to create a distinctive expressive offering.²⁷ As such, the Court reaffirmed its holding in *Turner Broadcasting System, Inc. v. FCC*; a private party’s collection of third-party content into a single speech product is itself expressive, and intruding upon that activity must be justified under the First Amendment.²⁸ Therefore, “[t]he editorial function itself is an aspect of speech.”²⁹

C. Editorial Discretion

Social media platforms regularly make decisions about which third-party speech to display and how to display it on users’ feeds.³⁰ “Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups.”³¹ For example, Facebook removes or adds warnings to a wide range of content in order to foster authenticity, safety, privacy, and dignity.³² Similarly, Twitter strives “to ensure all people can participate in the public conversation freely and safely” by removing content that it views as embodying hate, glorifying violence, promoting suicide, or containing election misinformation.³³ Thus, editorial discretion allows social media companies to decide “not to

²⁵ *Moody*, 144 S. Ct. at 2393.

²⁶ *Id.* at 2400.

²⁷ *Id.* at 2391 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 569 (1995)).

²⁸ *Id.* at 2401 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997)).

²⁹ *Id.* at 2401-02 (citing *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. 727, 737 (1996)).

³⁰ *Id.* at 2393 (“In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it.”).

³¹ *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022)).

³² Christian Shaffer, *Deplatforming Censorship: How Texas Constitutionally Barred Social Media Platform Censorship*, 55 TEX. TECH L. REV. 893, 929 (2023) (citing *NetChoice, LLC*, 34 F.4th at 1212; Meta, *Facebook Community Standards*, <https://transparency.fb.com/policies/community-standards> (last visited Oct. 13, 2024)).

³³ *NetChoice, LLC*, 34 F.4th at 1213; *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Oct. 13, 2024).

propound a particular point of view,”³⁴ without the government intruding to advance its own interest in “protecting a diversity of ideas.”³⁵

II. GOVERNMENT CONTROL AND ONLINE POLITICAL DISCOURSE

The government may not restrict expressive activities merely because it disagrees with a speaker’s ideas.³⁶ Texas’s law was motivated by the State’s belief that social media feeds were skewed against politically conservative voices.³⁷ In *Moody*, the United States Supreme Court reaffirmed its holding that it is not the government’s job to decide what counts as the right balance of private expression—to “un-bias” what it believes to be biased, rather than to leave those judgments to speakers and their audiences.³⁸ The Court explicitly stated that the same principle applies to social media platforms just as it does to other forms of expression.³⁹

Amicus briefs in support of NetChoice argued that forcing social media companies to carry specific speakers’ content, including political candidates, violated the rule set out by the United States Supreme Court in *Miami Herald Publishing Co. v. Tornillo*.⁴⁰ In *Tornillo*, the Court held that it is impermissible for the government, regardless of motive, to mandate that a private editor “publish that which reason tells [it] should not be published.”⁴¹ Because the Florida law would

³⁴ *NetChoice, LLC*, 34 F.4th at 1213.

³⁵ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 482 (5th Cir. 2022). In upholding Texas’s law, the Fifth Circuit stated that “the law aims at protecting a diversity of ideas and viewpoints by focusing on the large firms that constitute ‘the modern public square.’” The United States Supreme Court starkly disagreed with this sentiment. *Moody*, 144 S. Ct. at 2388.

³⁶ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428 (1996) (explaining that the government “may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion.”).

³⁷ *Moody*, 144 S. Ct. at 2394.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Brief for American Civil Liberties Union et al. as Amici Curiae in Support of Petitioners at 5; *NetChoice, LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022) (No. 4:21-cv-00220-RH-MAF).

⁴¹ *Id.* (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

mandate platforms to exercise their editorial discretion “consistently,”⁴² it would authorize the State to control what information flows to the public and when.⁴³ This is particularly harmful for online political discourse, as social media platforms would be prohibited from curating political candidates’ speech, or any speech *about* those candidates.⁴⁴ Thus, government regulation of online content could set a dangerous precedent, leading to harmful consequences for free speech, users’ autonomy, and the integrity of political discourse.⁴⁵

III. SOCIAL MEDIA’S INFLUENCE ON POPULAR OPINION

While government restrictions on speech raise concerns about censorship, there is also the risk of social media companies shaping popular and political discourse⁴⁶. These platforms, driven by algorithms⁴⁷ and private interests, can amplify misinformation, create echo chambers,⁴⁸ and minimize dissenting opinions, ultimately influencing political discourse in ways that are not democratically accountable.⁴⁹ The United States Supreme Court has considered such ways in

⁴² See Fla. Stat. Ann. § 501.2041(1)(h)(2)(b) (West 2022) (“A social media platform must apply censorship, deplatforming, and shadow banning standards in a *consistent* manner among its users on the platform.”) (emphasis added).

⁴³ *Tornillo*, 418 U.S. at 256.

⁴⁴ Brief in Support of Petitioners at 5, *NetChoice, LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022).

⁴⁵ Niam Yaraghi, Commentary, *Regulating Free Speech on Social Media Is Dangerous and Futile*, BROOKINGS (Sept. 21, 2018), <https://www.brookings.edu/articles/regulating-free-speech-on-social-media-is-dangerous-and-futile/>. (“Social media companies are all private businesses with discretion over the content they wish to promote, and any effort by [the] government to influence what social media platforms promote risks violating the First Amendment.”).

⁴⁶ Colleen McClain, Monica Anderson, & Risa Gelles-Watnick, *How Americans Navigate Politics on TikTok, X, Facebook, and Instagram*, PEW RSCH. CTR. (June 12, 2024), <https://www.pewresearch.org/internet/2024/06/12/how-americans-navigate-politics-on-tiktok-x-facebook-and-instagram/> (“[C]ompanies’ policies shape the political environment people enter when they log on.”).

⁴⁷ The problem is that algorithms can put users in a filter bubble; being in a filter bubble means these algorithms isolate users from information and perspectives they have not already expressed an interest in, meaning they may miss out on important information. *Digital Media Literacy – How Filter Bubbles Isolate You*, GCFGLOBAL (last visited Oct. 18, 2024), <https://edu.gcfglobal.org/en/digital-media-literacy/how-filter-bubbles-isolate-you/1/>.

⁴⁸ An echo chamber is an environment where users only encounter information or opinions that reflect and reinforce their own. *Digital Media Literacy – What Is an Echo Chamber?*, GCFGLOBAL (last visited Oct. 20, 2024), <https://edu.gcfglobal.org/en/digital-media-literacy/what-is-an-echo-chamber/1/>.

⁴⁹ See generally Nailul Fathul Wafiq, *The Power of Social Media: Shaping Political Discourse in the Digital Age*, MODERN DIPLOMACY (May 11, 2023), <https://moderndiplomacy.eu/2023/05/11/the-power-of-social-media-shaping-political-discourse-in-the-digital-age/>.

which modern media empires can “shape” and even “manipulate popular opinion.”⁵⁰ Although the Court expressed some concern with this issue, it ultimately found that states may not substitute “governmental regulation” for the “crucial process” of editorial choice.⁵¹

IV. CONCLUSION

As *Moody v. NetChoice, LLC* awaits its final legal determination, the future of the First Amendment’s application in the digital age remains a controversial issue.⁵² In a world increasingly reliant on social media platforms, it is important to strike an appropriate balance between protecting free speech and allowing these companies to exercise responsible editorial discretion.

⁵⁰ *Tornillo*, 418 U.S. at 249-50.

⁵¹ *Id.* at 258.

⁵² The United States Supreme Court vacated and remanded the cases back to the Fifth and Eleventh Circuits. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).