

Social Media, the Modern Public Square, and Constitutional Analogies in the Supreme Court's Case Law

The hosting and content moderation of a social media company is in no form expressive conduct, for it conveys no message whatsoever. Social media companies are not newspapers, which only consider articles from specific and qualified writers, edit the writing to fit the standards of the paper, and then make selective decisions regarding what to publish and what to toss. Rather, social media platforms generally allow any user to write or create anything—without editing, prerequisites, or any review at all—before posting it online. Only once the speech is online do the company moderators comb through and strike posts according to the content policy.

However, the ruling below held that these “‘content-moderation’ decisions constitute protected exercises of editorial judgment.” 34 F.4th at 1203. The Supreme Court’s precedents would indicate otherwise.

Editorial discretion is indeed protected as expressive speech, and, in many cases, by the freedom of the press. Fittingly, the Court’s precedents “reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views.” *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. at 391 (1973). Therefore, as was held in *Miami Herald Publishing Co. v. Tornillo*, “[g]overnment may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.” 418 U.S. 241, 263 (1974) (Brennan, J., concurring). *Miami Herald* arose from Florida’s right-of-reply statute, requiring the Miami Herald to publish state house candidate Pat Tornillo’s reply to a critique in its pages. See Fla. Stat. § 104.38 (1971). Ruling for the Herald, the Supreme Court determined the paper had a First

Amendment right to editorial discretion in what it chose to publish. “The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official—whether fair or unfair—constitute the exercise of editorial control and judgment,” a form of expressive conduct clearly protected under the First Amendment. *Id.*

In finding the social media companies’ actions protected under the First Amendment, the Eleventh Circuit held that the platforms “exercise editorial judgment that is inherently expressive” and protected under *Miami Herald*. 34 F.4th 1196, 1213. However, there is a fundamental difference between the work of a newspaper and a social media platform, for “[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising” and a social media platform is not. *Id.*, at 258. Furthermore, the right-of-reply law at issue in *Miami Herald* “exact[ed] a penalty on the basis of the content of a newspaper,” whereas the Florida statute makes no distinction between content moderation favoring one viewpoint that favoring another. *Id.*, at 256.

The Court’s precedent in *PruneYard v. Robins*, 447 U.S. 74 (1980) better governs how hosting of speech by a third party, essentially the entire business of social media companies, may be regulated more broadly by the state. Beginning with *PruneYard*, it concerned a group of students removed from the PruneYard Shopping Center while canvassing for a political cause. In the wake of a controversial United Nations resolution condemning Zionism as “a form of racism and racial discrimination,” the students set up a table and sought signatures for a petition of protest. U.N. Gen. Assemb. Res. 3379. Because permission was never given by the shopping center,

security removed the protesters who filed suit claiming their freedom of speech had been infringed. Although the Court “has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only,” this applies only to the federal right to free speech. *Lloyd Corp. v. Tanner*, 407 U.S. at 568 (1972). States, in this case California, may “broadly proclaim speech and petition rights” that extend into speech hosted by a private party. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347 (1979). *PruneYard* established that “neither appellants’ federally recognized property rights nor their First Amendment right[s]” are “infringed by . . . a right of appellees to exercise state protected rights of expression and petition on appellants’ property.” 447 U.S. 88.

The subsequent decision in *Pacific Gas & Electric Co. v. Public Utilities Comm’n*, that a law requiring a corporation “use its property for spreading a message with which it disagrees” is unconstitutional, does not apply to the general case of social media. 475 U.S. 1, 17 (1986). In *Pacific Gas*, it was held that the state “impermissibly burdens [one’s First Amendment rights [when] it forces [one] to associate with the views of other speakers.” *Id.*, 20. However, it would be absurd to think that the speech of a social media user is the opinion of the social media company. If this were not enough, platforms are still free to express their own viewpoints or clarify that all posts reflect only the view of the user. “Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner’s exercise of his own right to speak.” *Id.*, 12. This concern is again notably absent here. Further distinguishing *Pacific Gas*, there the Public Utilities Commission required *PG&E* include in its monthly newsletter statements from Toward Utility Rate Normalization that directly rebutted the message of the

letter. Social media companies have no message whatsoever respecting the posts on their platform or their content moderation decisions, and therefore the standard in *Pacific Gas* is inapposite.

Corroborating the precedent set in *PruneYard*, the Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) also demonstrates the content moderation of social media companies not to be expressive. *FAIR* arose from a coordinated protest to the military's "Don't ask, don't tell" policy, which prohibited openly homosexual persons from serving in the armed forces. See Dept. of Defense Directive 1304.26. When law schools opposed to the policy refused to permit military recruiters on campus in protest, Congress passed the Solomon Amendment to withheld federal funding from any school that "prohibits, or in effect prevents . . . [the military] from gaining access to campuses, or access to students . . . for purposes of military recruiting . . ." 10 U.S.C. § 983(b). *FAIR*, an association of law schools, sued and claimed their First Amendment right not to associate with the military (and by extension, its "Don't ask, don't tell" policy) was infringed. However, as the Court held, "[t]he Solomon Amendment neither limits what laws schools may say nor requires them to say anything." *FAIR*, 60. Because "[l]aw schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . . the Solomon Amendment regulates conduct, not speech." *Id.*

Further supporting the application of *FAIR* is the inability of a viewer to know if and what a social media company is purportedly expressing with a content moderation decision. As the Supreme Court found in *FAIR*, "[a]n 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 [or] all the law school's interview rooms are full." *Id.*, at 66. Notwithstanding the law schools' claim that their conduct was expressive, there is no way for an observer to determine whether a message is being conveyed by their conduct, and if so, what it might be. Likewise, when a user is banned or censored, "[a]n observer . . . could not know why." *Paxton*, 49 F.4th, at 490 n. 41. If the observer noticed the user switch to speaking on a different platform, "[m]aybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason." *Id.* Social media companies rarely if ever offer explanatory notes on their platforms, stating either what action was taken or why, so "[w]ithout more information, the observer has no basis for inferring a 'particularized message' that [the platform] disapproved [a censored] post." *Id.* In fact, the observer has no basis for inferring any message or expression whatsoever.

Because there is no apparent message in the censorship and moderation of a social media platform, these actions cannot be considered expressive in light of *PruneYard* and *FAIR*. Quite simply, "[t]he First Amendment protects speech: It generally prevents the government from interfering with people's speech or forcing them to speak." *Paxton*, 49 F.4th 494. What the First Amendment does not protect is conduct, and because "[t]he platforms are not newspapers," "[t]heir censorship is not speech." *Id.*