
SOCIAL MEDIA, RACISM, AND SPORTS: SOCIAL MEDIA PLATFORMS,
NOT GOVERNMENTS, ARE BEST POSITIONED TO CHANGE THE GAME

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I. Introduction

The widespread introduction of social media into society has revolutionized the way that athletes, fans, and sports teams interact with one another.¹ Perhaps the most impactful change effected by the social media explosion on the sports industry is the direct channel of communication between fans, teams, and players afforded by such platforms as Twitter, Instagram and Facebook.² However, sports

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¹ See Nicole Cunningham & Laura F. Bright, *The Tweet Is in Your Court: Measuring Attitude Towards Athlete Endorsements in Social Media*, INT'L J. OF INTEGRATED MKTG. COMMS. 73, 73 (Fall 2012) (discussing how social media has created a “two-way line of communication” between athletes and fans). See also Brandi Watkins, *SPORT TEAMS, FANS, AND TWITTER: THE INFLUENCE OF SOCIAL MEDIA ON RELATIONSHIPS AND BRANDING* 19 (2019) (discussing how sports teams have become more active on social media in order to connect with younger generations of fans). The argument can even be made that no invention has revolutionized the sports industry in the way that social media has since the invention of cable television. *Id.* at 20.

² See Anthony DiMoro, *The Growing Impact of Social Media On Today's Sports Culture*, FORBES (July 2, 2015), archived at <https://perma.cc/7BD4-FVQ6> (highlighting that “sports fans are 67 percent more likely to use Twitter to enhance their viewing experience compared to non-sports fans”); Cunningham & Bright, *supra* note 1 (noting that social media has profoundly impacted sports coverage

fans are not the only ones benefiting from the rise of social media platforms.³ Athletes, in particular, have also been able to capitalize on this newfound avenue for communicating more directly with their fans by leveraging their large social media followings to secure multi-million dollar endorsement deals.⁴ Top athletes, such as Cristiano Ronaldo and LeBron James, can receive up to a staggering \$44 million dollars per year in endorsements, in part just for promoting a company's products on their social media accounts.⁵

Although social media has affected the sports industry in many positive ways, drawbacks to the technology certainly exist.⁶

because fans no longer have to wait for athletes to grant formal interviews in order to follow their daily activities). *See also* Jimson Lee, *Reaching Out to the World*, 30 NEW STUDIES IN ATHLETICS 7, 7 (2015) (explaining how the introduction of social media has essentially gotten rid of the "time lag" that existed when print media was the primary source of news for sports fan).

³ *See* Cristian Perez, *Social media is changing how sports franchises and fans interact*, USC ANNENBERG SCH. FOR COMM'C'N AND JOURNALISM (Feb. 21, 2017), archived at <https://perma.cc/324C-WQZP> (describing how both fans and sports teams benefit from social media because fans get more instant access to news, and teams are able to promote their brands). *See also* Paul Jackiewicz, *5 Ways Athletes Can Profit from Social Media and Sports Marketing*, CREATIVE (Apr. 10, 2020), archived at <https://perma.cc/XJ94-G3MJ> (articulating that athletes can benefit from having a strong social media presence because it allows them to reach new people quickly, which, in turn, enables them to earn more money through sponsorships).

⁴ *See* Kurt Badenhausen, *Social Media's Most Valuable Athletes: Ronaldo, McGregor, and LeBron Score Big*, FORBES (Aug. 3, 2019), archived at <https://perma.cc/Z2KY-PEBU> (outlining how sports stars are "very monetizable" right now because of their ability to create content that fans can interact with). *See also* Chris Girandola, *Most Influential Athletes on Social Media*, STADIUM TALK (Oct. 31, 2018), archived at <https://perma.cc/KEL5-JAHQ> (explaining how athletes with large followings can utilize social media for product endorsements and receive up to \$50,000–\$100,000 for a single sponsored post).

⁵ *See* Badenhausen, *supra* note 4 (stating that Ronaldo received \$44 million dollars in 2018 from endorsements alone, and that his social media following of 177 million users played a large role in his hefty payday). *See also* Nicola Cronin, *The 2019 Instagram Rich List – Who Earns The Most From Sponsored Posts?*, HOPPER (Aug. 5, 2019), archived at <https://perma.cc/DD3L-79Z4> (listing the celebrities who earn the most money for each one of their paid Instagram posts). Among the celebrities who are on the list are athletes Cristiano Ronaldo and Neymar, who earn \$975,000 and \$722,000 per post, respectively. *Id.*

⁶ *See* Perez, *supra* note 3 (discussing how social media's introduction to the sports industry, and the immediate dispersion of information that comes with it, can be dangerous for both teams and players).

For one, social media can provide a constant and unrelenting distraction to athletes which can end up negatively affecting their performance on the playing field.⁷ In fact, the distractions that social media platforms provide to athletes have become so prevalent that many high-profile coaches have imposed bans on social media use by players during team activities, or even for entire seasons.⁸ Further, while the majority of social media users interact with their favorite athletes and teams in a positive manner, social media has also provided “internet trolls” with the ability to constantly criticize and harass athletes at any hour of the day or night.⁹ A particularly

⁷ See *Late Night Social Media Use May Decrease Athletic Performance*, CONCORDIA UNIVERSITY — CHICAGO (Jan. 9, 2019), archived at <https://perma.cc/LU3A-W7TK> (outlining a recent study that found that NBA players who were active on Twitter late at night the night before a game, saw a decline in their performances in their games the following day). See also Jim Taylor, *How Media Use Hurts Athletes*, PSYCH. TODAY (Jan. 4, 2017), archived at <https://perma.cc/AUQ6-WMWL> (articulating that the younger athletes, especially those who have grown up after the invention of the iPhone, have more trouble focusing on their coaches’ instructions, remembering their coaches’ feedback, and staying focused for the duration of team activities compared to their predecessors). One of the main reasons why younger athletes have such a hard time focusing is because they have shorter attention spans than previous generations as a result of the distractions caused by social media and smartphones. *Id.*

⁸ See Ben Kerecheval, *Mike Leach imposes social media ban for Washington State players amid three-game losing skid*, CBS SPORTS (Oct. 15, 2019), archived at <https://perma.cc/SGG2-TCLV> (detailing how Washington State head football coach, Mike Leach, imposed a social media ban on his players because he thought his players “entertain[ed] too many distractions”); Mina Kimes, *Social media bans may violate college athletes’ First Amendment rights*, ABC NEWS (Sept. 2, 2015), archived at <https://perma.cc/EPH6-LN47> (stating that the men’s basketball programs at Minnesota, Purdue, Louisville, and Iowa, the women’s basketball program at UConn, and the football programs at Clemson and Florida State had all instituted bans on Twitter). *But see* J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. UNIV. L. REV. 781, 781 (2012) (arguing that social media bans imposed by NCAA athletic programs that are not motivated by educational concerns are unconstitutional).

⁹ See Michael McKnight & Greg Bishop, *Inside the Dark World of Trolling*, SPORTS ILLUSTRATED (Mar. 29, 2018), archived at <https://perma.cc/A5PP-KBQJ> (describing how common behaviors associated with trolling includes “the anonymous sending of threats, insults or other harassment, usually online, from a distant remove”); Erik Brady & Jorge L. Ortiz, *For athletes, social media not all*

troubling form of harassment that many athletes of color have had to endure on social media sites has come in the form of dehumanizing and demeaning racial slurs and taunts.¹⁰

Unfortunately, racism in the world of sports is hardly a new phenomenon.¹¹ However, the shift from racist abuse being hurled

fun and games, USA TODAY (July 31, 2013), archived at <https://perma.cc/HW2K-RQE3> (explaining that Toronto Blue Jays catcher, Josh Thole, quit Twitter because “it was just constant negativity”); Peter Hailey, ‘Where is the humanity?’: Chris Thompson opens up on the negative side of social media, NBC SPORTS WASHINGTON (Dec. 12, 2018), archived at <https://perma.cc/X8KZ-T5AB> (discussing how the increased connection to athletes that social media provides for fans also leads to increased volatility). See also James Hanson, *Trolls and Their Impact on Social Media*, UNIV. OF NEBRASKA-LINCOLN (Feb. 11, 2019), archived at <https://perma.cc/9W7T-CQUW> (defining “internet trolling” as “creating discord on the Internet by starting quarrels or upsetting people by posting inflammatory or off-topic messages in an online community.”).

¹⁰ See Mike Chiari, *Boston Bruins Respond to Fans' Racist Tweets After Game 1 vs. Canadiens*, BLEACHER REPORT (May 2, 2014), archived at <https://perma.cc/63VD-NM4F> (detailing how Montreal Canadiens African American defenseman, P.K. Subban, was racially abused on Twitter after scoring a game-winning goal against the Boston Bruins); Jerry Bembry, *Sachia Vickery isn't having it with racist trolls*, THE UNDEFEATED (June 13, 2018), archived at <https://perma.cc/C94F-T2FG> (detailing that after years of racist abuse online, female tennis player, Sachia Vickery, began hitting back at internet trolls); Jamie Jackson, *Manchester United 'disgusted' with racial abuse of Paul Pogba*, THE GUARDIAN (Aug. 20, 2019), archived at <https://perma.cc/9QT2-HCG6> (detailing how Manchester United midfielder, Paul Pogba, was racially abused on Twitter following a missed penalty kick).

¹¹ See Jamie Cleland, *Racism, Football Bans, and Online Message Boards: How Social Media Has Added a New Dimension to Racist Discourse in English Football*, 38 J. OF SPORT AND SOC. ISSUES 415, 415–16 (detailing how racism has existed in the English soccer system since its establishment in 1863, but that it was not until the late 1970's and early 1980's that overt and hostile racism by fans became a fixture within stadiums across England). See also *Drawing the Color Line: 1860s to 1890s*, LIBR. OF CONG. (Feb. 11, 2020), archived at <https://perma.cc/A93W-5UNA> (outlining how despite the fact that both whites and African Americans played baseball in the mid to late 1800s, baseball remained largely segregated until the 1940s); *Breaking the Color Line: 1940 to 1946*, LIBR. OF CONG. (Feb. 11, 2020), archived at <https://perma.cc/Q7R5-B78J> (explaining that the color barrier in baseball was not broken until Jackie Robinson played for the Brooklyn Dodgers in April of 1947). See also Ryan Snelgrove & Victoria Kabetu, *Don Cherry debacle highlights the whiteness of hockey*, THE

across sports stadiums, to anonymous internet trolls posting racial slurs on social media platforms, has added a complicated dimension to the issue of racism in sports.¹² Unlike racism that occurs at live sporting events, where the perpetrators can often be identified and the reach of such comments is generally limited to those in attendance, racism spread anonymously via social media has the potential to be seen by millions of users, from almost anywhere, in an instant.¹³ This new dimension of racism in sports has called into question whether social media platforms and governments are doing enough to regulate hate speech directed towards athletes online.¹⁴ As social

CONVERSATION (Nov. 13, 2019), *archived at* <https://perma.cc/8WVG-A9AE> (explaining that there is also a long history of racism within the sport of hockey that still lingers to this day.) In Canada, black hockey players in the 1890s and early 1900s were forced to form their own league so that they could play the sport. *Id.* While this league folded in the 1930s, the first black player in the NHL did not make his debut until 1958. *Id.*

¹² See Cleland, *supra* note 11, at 427–28 (opining that technological advances in the 21st century, including the introduction of social media platforms and online message boards, have allowed the racist views of some sports fans to be spread across the Internet). Cleland argues that “the advent of social media has only added to the complexity of attempting to tackle racism” within the sports industry. *Id.* at 427. See also Ana-Maria Bliuc et al., *This is how racism is being spread across the internet*, WORLD ECONOMIC FORUM (Feb. 18, 2019), *archived at* <https://perma.cc/W7P8-CA2L> (stating that while the Internet has allowed for the world to become more interconnected, it has also allowed for far-right groups to spread “divisive ideas”).

¹³ See NEIL FARRINGTON ET AL., *Sport, Racism, and Social Media* 3 (2015) (noting that social media has provided a medium for the mass publication of racist abuse towards sports stars). See also Rob Eschman, *The Internet Is Unmasking Racism. Here’s What That Means to Young People of Color.*, THE BRINK (July 30, 2019), *archived at* <https://perma.cc/R469-XPZZ> (explaining that outwardly racist views are more likely to be seen on internet sites that allow users to post content anonymously than they are to be seen in open, public settings).

¹⁴ See *How is football tackling racism on social media?*, BBC (Apr. 17, 2019), *archived at* <https://perma.cc/7A5Z-DAFA> (noting that figures within the sports industry believe social media platforms are too slow and not good enough at marking comments as racist and removing them). See also Amira Elghawaby, *Social Media’s Self-Regulation Isn’t Enough*, CTR. FOR INT’L GOVERNANCE INNOVATION (Aug. 2, 2018), *archived at* <https://perma.cc/RV9U-FFT8> (opining that although social media companies are investing money in structures that are intended to rid their platforms of hate speech, this is more to win the public

media sites strive to achieve the sometimes conflicting goals of promoting free speech values and ensuring speech on their platform meets community guidelines, the debate over whether there is too much or too little censorship on social media will inevitably rage on.¹⁵

II. History

One of America's core founding principles, the First Amendment's protection of freedom of expression, was intended to allow for the creation of an "uninhibited marketplace of ideas" within society.¹⁶ Prior to the introduction of the internet, print sources, such as newspapers, magazines, and pamphlets, provided the most prominent avenue by which Americans were able to access this "uninhibited marketplace of ideas."¹⁷ In recent years, however, the United States Supreme Court has recognized that cyberspace, and

relations battle than it is to actually tackle the issue of hate speech). The only way that social media platforms will take hate speech more seriously is if legislation is passed that holds social media platforms liable for third-party content that is posted on their sites. *Id.*

¹⁵ See Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1037 (2018) (detailing that social media sites censor user content in order to "strike an appropriate balance between free expression and abuse prevention while preserving platforms' market share."). See also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1599, 1625 (2018) (explaining why social media platforms moderate users' posts even though they are not required to do so under the law).

¹⁶ See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that if free speech rights are not protected, then society will be deprived of "an uninhibited marketplace of ideas."). See also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 878 (1963) (stating that "[t]he fundamental purpose of the first amendment was to guarantee the maintenance of an effective system of free expression.").

¹⁷ See Klonick, *supra* note 15, at 1603 (explaining that print publishers were the most prominent constraint on Americans' First Amendment rights because Americans did not have any other way of reaching their audience). See also Paul Grabowicz, *Tutorial: The Transition to Digital Journalism*, BERKELEY GRADUATE SCHOOL OF JOURNALISM (Apr. 16, 2020), archived at <https://perma.cc/KR29-9GEW> (describing how more and more people are foregoing traditional print sources as their preferred news outlets, and how they are turning to online news outlets instead).

social media platforms in particular, have become increasingly important forums for the exchange of views between individuals.¹⁸ Social media platforms have taken their role as the 21st century's main marketplace for the discourse of competing views seriously, and, for the most part, have allowed American free speech values to guide their platforms' individual speech policies.¹⁹ This section will explore how the current legal framework in the United States, through both constitutional protections and statutory immunization, grants social media platforms enormous freedom in choosing how, and if, they will combat racist content that is directed towards professional athletes by their users.²⁰

¹⁸ See *Packingham v. North Carolina*, 137 U.S. 1730, 1735–36 (2017) (opining that cyberspace has become the most important place for exchanging views since the establishment of online forums and social media). See also Klonick, *supra* note 15, at 1603 (noting that YouTube, Facebook, and Twitter “have established themselves as dominant platforms in content sharing”); Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, CONG. RESEARCH SERV. (Mar. 27, 2019), archived at <https://perma.cc/AXN5-JYZ7> (articulating that the U.S. Supreme Court found that social media platforms allow users to exercise a variety of free speech rights protected under the First Amendment); David L. Hudson Jr., *Free Speech or censorship? Social media litigation is a hot legal battleground*, ABA J. (Apr. 1, 2019), archived at <https://perma.cc/P9UX-SL2Q> (discussing how Justice Kennedy referred to social media platforms as “public forums” which were “among the most important places . . . for the exchange of views.”).

¹⁹ See Citron, *supra* note 15, at 1036–37 (discussing how social media sites largely looked to the First Amendment to craft their speech policies). However, social media companies did carve out some exceptions to this policy when they banned certain types of content, such as child pornography and hate speech, among others. *Id.*

²⁰ See Danielle Keats Citron & Helen Norton, *Intermediaries & Hate Speech: Fostering Digital Citizenship For Our Information Age*, 91 B.U. L. REV. 1435, 1439 (2011) (detailing how intermediaries are essentially free from legal constraints when it comes to choosing whether to regulate hate speech or not). See also Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 204, 205 (stating that courts have consistently concluded that “passive” online intermediaries, such as social media platforms, “are immune from liability for their users’ online conduct and content”).

A. *First Amendment Protections for Social Media Platforms*

1. The State Action Requirement as a Shield Against Private Lawsuits

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”²¹ The Supreme Court later extended First Amendment protections to apply to actions taken by state governments as well as the federal government through the Fourteenth Amendment’s Due Process Clause.²² Given that the courts have only extended First Amendment protections to apply to actions taken by either the federal government or state governments, the First Amendment generally does not place affirmative obligations on private citizens or organizations to ensure that they do not infringe upon an individual’s free speech rights.²³ This doctrine is known as the “state action requirement.”²⁴ Nevertheless, the Supreme Court has held that a narrow subset of private actors may owe affirmative obligations under the First Amendment if those private actors exercise “powers traditionally exclusively reserved to the State” or have “a sufficiently close relationship” to the government.²⁵

²¹ See U.S. CONST. amend. I (stating that the United States Congress could not pass a law that infringed upon U.S. citizens’ fundamental right to freedom of expression).

²² See 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996) (explaining that the First Amendment’s Free Speech Clause applies to the States, as well as to Congress, under the Due Process Clause of the Fourteenth Amendment).

²³ See Brannon, *supra* note 18, at 5 (detailing how First Amendment protections only apply to actions taken by federal or state governments in most situations). See also John Samples, *Why the Government Should Not Regulate Content Moderation on Social Media*, 865 CATO INST. POL’Y ANALYSIS 1, 4 (Apr. 9, 2019) (articulating that the First Amendment only protects an individual’s freedom of speech from state action).

²⁴ See Brannon, *supra* note 18, at 4 (noting that the requirement that an action be taken by a state actor in order for First Amendment protections to apply is known as the state action requirement).

²⁵ See *Marsh v. Alabama*, 326 U.S. 501, 502 (1946) (holding that because a town owned entirely by a corporation had all the characteristics of a regular town, the corporation was equivalent to a state actor and was obligated to guarantee First

The Supreme Court first addressed whether a private actor could owe affirmative obligations under the First Amendment in the case of *Marsh v. Alabama*.²⁶ In *Marsh*, Grace Marsh, a Jehovah's Witness, was arrested for criminal trespass for distributing religious literature on a sidewalk in Chickasaw, Alabama.²⁷ The fact that the arrest occurred in Chickasaw was notable because the town was wholly owned by Gulf Shipbuilding Corporation, a private corporation.²⁸ The Supreme Court reversed Marsh's conviction of trespass holding that a company-owned town that functioned the same as any other traditional municipality could not curtail the First

Amendment rights). *See also* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (explaining that the "public function" test is met when private actors exercise powers that are "traditionally and exclusively reserved to the state"); *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 462 (1952) (holding that where a private entity has a sufficiently close relationship to the government, the applicability of the First Amendment is warranted). *See also* Brannon, *supra* note 18, at 5–7 (describing the narrow circumstances where the Supreme Court has extended First Amendment protections against private actors).

²⁶ *See* Klonick, *supra* note 15, at 1609 (discussing how the U.S. Supreme Court definitively addressed the differences between state actors and private actors for First Amendment purposes in their ruling in *Marsh v. Alabama*). *See also* Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL OF RTS. J. 461, 471–72 (1998) (outlining how the Supreme Court extended the reach of the First Amendment to privately owned sidewalks in towns wholly owned by private companies).

²⁷ *See Marsh*, 326 U.S. at 503 (noting that Grace Marsh distributed religious literature in the company-owned town of Chickasaw, Alabama in violation of a notice posted by the town managers that required a person to have a permit in order to distribute such literature). Marsh argued that "the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings." *Id.* Marsh was then asked to leave the sidewalk, and was subsequently arrested by the sheriff for criminal trespass after she refused to do so. *Id.* at 503–04.

²⁸ *See id.* at 502 (highlighting that the town of Chickasaw, Alabama was a suburb of Mobile, Alabama and that it was owned in its entirety by Gulf Shipbuilding Corporation). The Supreme Court went on to note that Chickasaw consisted of "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." *Id.* Further, the Supreme Court stated that town of Chickasaw and its surrounding neighborhood could not be distinguished from the Gulf property. *Id.* at 502–03.

Amendment rights of its residents.²⁹ Although this ruling could have been read as a sweeping expansion of the obligations owed by private actors under the First Amendment, in the 70 years that have followed the *Marsh* decision, the Supreme Court has rarely, and only very narrowly, applied their ruling to place affirmative obligations on private actors under the First Amendment.³⁰

Other instances where the Supreme Court has held that private individuals or entities may owe obligations under the First Amendment as state actors can be found in cases where private parties have a sufficiently close relationship to the government in order to justify being designated as “state actors.”³¹ In these cases, the question courts must ask is “whether there is a sufficiently close nexus between the State and the challenged action of the regulated

²⁹ See *Marsh*, 326 U.S. at 508–09 (holding that citizens who lived in Chickasaw were entitled to the same Constitutional protections as citizens who lived in more traditional, publicly-owned and operated municipalities). The court reasoned it was imperative that citizens in company towns have the same constitutional protections as all other citizens because otherwise they would not be able to make properly informed decisions. *Id.* at 508.

³⁰ See Siegel, *supra* note 26, at 472–75 (noting that at first the Supreme Court appeared to adopt a more expansive reading of *Marsh*, but this expansive reading was overturned in *Hudgens v. NLRB*, 424 U.S. 507 (1976)). In *Hudgens*, the court held that just because private property is held open for public use does not mean that the private actor owes any affirmative duties to individuals under the First Amendment. *Hudgens*, 424 U.S. at 516–17. For the owner of private property to have any such affirmative obligations, the private property must be functionally equivalent to an entire town. *Id.* See also Samples, *supra* note 23, at 4–5 (outlining a number of Supreme Court cases that followed the Court’s *Marsh* ruling that limited the duties that private actors owed under the First Amendment). The Supreme Court ruled that private actors, such as shopping malls, “did not constitute a public forum and thus need not obey the First Amendment.” *Id.*

³¹ See Brannon, *supra* note 18, at 6–7 (articulating that the Supreme Court has held that private actors who have a sufficiently close relationship to the government may owe affirmative obligations to individuals under the First Amendment). See also *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 462 (1952) (holding that there was a sufficiently close relationship between the radio service and the Federal Government to justify the Court in considering whether there was an infringement of the plaintiff’s First Amendment rights). However, the Supreme Court ultimately held that there was no violation of the plaintiff’s First Amendment rights in this case because there was no evidence that “the programs interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places.” *Id.* at 463.

entity so that the action of the latter may be fairly treated as that of the State itself.”³² Accordingly, evidence that a private actor is subject to extensive government regulation may be persuasive, but by itself, is not sufficient to impose the “state actor” designation on a private party.³³

So far, the state action requirement has shielded social media platforms from liability in lawsuits brought by individuals claiming that platforms violated their First Amendment rights by either retroactively taking down content they had previously posted, or by restricting users from posting certain content at all.³⁴ Despite a number of plaintiffs attempting to argue that social media platforms should be designated as state actors in these situations, trial courts have consistently rejected these arguments.³⁵ Nevertheless, the Supreme Court has yet to rule on whether social media providers may be treated as state actors within the context of First Amendment protections, so it is possible, although highly unlikely, that social

³² See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (stating that while evidence that a privately owned and operated company is subject to “extensive state regulation” may show there is a strong relationship between the private actor and the government, this evidence is not enough, without more, to treat a private actor as a state actor).

³³ See *id.* (noting that extensive government regulation of a private entity, along with evidence that the private actor operates a governmentally protected monopoly, will likely lead to the private actor being more readily found to be a state actor than if the actor lacked these characteristics).

³⁴ See Brannon, *supra* note 18, at 4 (explaining that the state action requirement provides a barrier for social media users attempting to sue social media providers for taking down content).

³⁵ See *Jayne v. Google Internet Search Engine Founders*, 63 Fed. Appx. 268, 268 (3d Cir. 2008) (per curiam); *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3rd Cir. 2003); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *25–26 (N.D. Cal. Mar. 26, 2018); *Nyabwa v. Facebook*, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at *2 (S.D. Tex. Jan. 26, 2018); *Quigley v. Yelp, Inc.*, No. 17-cv-03771-RS, 2017 U.S. Dist. LEXIS 103771, at *6 (N.D. Cal. July 5, 2017); *Buza v. Yahoo!, Inc.*, No. C 11-4422 RS, 2011 U.S. Dist. LEXIS 122806, at *2 (N.D. Cal. Oct. 24, 2011); *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 U.S. Dist. LEXIS 116530, at *9 (N.D. Cal. Oct. 25, 2010); *Estavillo v. Sony Comput. Ent. Am. Inc.*, No. C-09-03007 RMW, 2009 U.S. Dist. LEXIS 86821, at *5 (N.D. Cal. Sept. 22, 2009); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007); *Nat’l A-1 Advert. v. Network Solut., Inc.*, 121 F. Supp. 2d 156, 169 (D. N.H. 2000); *Cyber Promotions v. Am. Online*, 948 F. Supp. 436, 445 (E.D. Penn. 1996).

media sites may be determined to owe affirmative obligations to their users under the First Amendment.³⁶

2. The State Action Requirement as a Deterrent Against Federal Regulation

The state action requirement has not only prevented private parties from holding social media providers liable for censoring their content, it has also aided in deterring the federal government from passing any laws regulating how social media providers determine whether or not to allow users to post certain content on their platforms.³⁷ Understanding that the federal government is a state actor by definition, and that the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech,” it makes sense that a federal law regulating social media platforms’ freedom of expression, or the freedom of expression of the platforms’ users, would likely implicate the First Amendment.³⁸

With that being said, the Supreme Court has recognized that not all speech is entitled to the same amount of protection under the First Amendment, and has therefore been willing to allow for government regulation of seemingly protected speech in special circumstances.³⁹ For example, if the type of speech being regulated is commercial speech or threatening speech that advocates for violence, the Supreme Court has allowed for government regulation

³⁶ See Klonick, *supra* note 15, at 1610–11 (noting that while the claim that social media providers should be treated as state actors was weak, the decision in *Packingham v. North Carolina* may have revitalized the argument and given it some support).

³⁷ See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (opining that a provision of the Communications Decency Act affecting free speech rights was not tailored narrowly enough to make it constitutional). See also Brannon, *supra* note 18, at 16 (stating that “a federal law regulating internet content decisions would likely qualify as state action sufficient to implicate the First Amendment.”).

³⁸ See U.S. CONST. amend. I (articulating that the federal government may not pass a law which limits the First Amendment right of freedom of speech). See also Samples, *supra* note 23, at 4 (discussing how the federal government could infringe upon a social media platform’s rights protected under the First Amendment).

³⁹ See Brannon, *supra* note 18, at 17 (explaining that while there is a general protection of free speech under the First Amendment, that protection is not the same in all circumstances).

in the past.⁴⁰ Further, the Supreme Court has held that if a medium displays special characteristics, it may justify greater government regulation of speech that appears on that particular medium.⁴¹

However, when tasked with the question of whether the internet in general presented the special characteristics needed to warrant government regulation of speech, the Supreme Court held that it did not.⁴² In *Reno v. ACLU*, the Supreme Court wrestled with the issue of whether provisions of the Communications Decency Act (“CDA”), which protected minors from “indecent” and “patently offensive” communications on the internet, unconstitutionally infringed upon the First Amendment rights of internet users.⁴³ The

⁴⁰ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (opining that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that states may prohibit speech advocating violence if that speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

⁴¹ See *Red Lion Broad. Co. v. Fed. Trade Comm’n*, 395 U.S. 367, 386 (1969) (noting that the characteristics of new media differed from those that made it reasonable for the government to regulate the broadcast media industry). See also Klonick, *supra* note 15, at 1612 (stating that the elements of the broadcast media industry that justified government regulation included its “invasive nature, history of extensive regulation, and the scarcity of frequencies.”).

⁴² See *Reno*, 521 U.S. at 868–70 (holding that the factors used to justify regulating the broadcast media industry did not apply to the Internet in general).

⁴³ See *Reno*, 521 U.S. at 849 (discussing the issue that the Supreme Court was tasked with deciding in *Reno v. ACLU*). The two statutory provisions that were challenged in this case were 47 U.S.C.A. § 223(a) (Supp. 1997) and 47 U.S.C.A. § 223(d) (Supp. 1997). *Id.* at 859–60. 47 U.S.C.A. § 223(a) provided,

(a) Whoever--(1) in interstate or foreign communications--(B) by means of a telecommunications device knowingly--(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Supreme Court held that although the congressional intent to protect children via these provisions was admirable, the internet did not present the same special characteristics as other mediums, such as the broadcast media industry, the existence of which could justify government regulation of speech.⁴⁴ Taking all of this into account, to date, the First Amendment has effectively shielded social media sites from civil liability concerning their choices to restrict users' ability to post content on their networks, while also deterring the federal government from passing any law regulating how social media sites determine which user content is displayed and how that displayed content is presented.⁴⁵

47 U.S.C.A. § 223(a) (Supp. 1997). The second provision, 47 U.S.C.A. § 223(d), stated,

(d) Whoever--(1) in interstate or foreign communications knowingly--(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C.A. § 223(d) (Supp. 1997).

⁴⁴ See *Reno*, 521 U.S. at 868–70 (holding that the Internet did not present the characteristics needed in order to justify government regulation of the medium). In cases where the Supreme Court held that broadcast media did have characteristics that justified greater government regulation of the medium, the characteristics they looked to were that broadcast media had a long history of extensive government regulation, broadcast media's "invasive nature," and the scarcity of frequencies when broadcast media was first invented. *Id.* at 868.

⁴⁵ See Brannon, *supra* note 18, at 4 (explaining that the state action requirement provides a barrier for social media users attempting to sue social media providers for taking down content). See also *Reno*, 521 U.S. at 882 (opining that a provision of the CDA affecting free speech rights was not tailored narrowly enough to make it constitutional); Brannon, *supra* note 18, at 16 (stating that "a federal law regulating internet content decisions would likely qualify as state action sufficient to implicate the First Amendment.").

*B. Statutory Protections for Social Media Platforms -
Section 230 of the CDA*

The Communications Decency Act (“CDA”) was passed in 1995 in order to regulate obscenity online.⁴⁶ Section 230(c)(1) of the CDA, which was intended to incentivize good faith intermediary blocking of offensive material online, states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁷ For the purposes of Section 230, an interactive computer service is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service.”⁴⁸ Using this definition, courts throughout the United States have determined that social media platforms, such as Facebook and Twitter, are “interactive computer services” under the CDA.⁴⁹ In general, Section 230 of the CDA has granted social media platforms broad immunity from tort liability arising from their choice to either block or screen offensive material, while also immunizing

⁴⁶ See Klonick, *supra* note 15, at 1605 (discussing how Senator James Exon introduced the CDA to regulate obscenity online “by making it illegal to knowingly send or show minors indecent online conduct”). See also Samples, *supra* note 23, at 4 (stating that Congress passed the CDA for two reasons). First, Congress hoped to encourage the unregulated development of free speech on the internet. *Id.* Second, Congress passed the CDA to encourage interactive computer services and their users to self-police any obscenity or other offensive material that appeared online. *Id.*

⁴⁷ See 47 U.S.C. § 230(c)(1) (2012) (outlining that parties who merely provide a means by which third-party users are able to access and post content will be treated as the publisher of any content that appears on that platform). See also Klonick, *supra* note 15, at 1605 (detailing that the intended purpose of Section 230 was to protect good samaritan blocking of offensive material).

⁴⁸ See 47 U.S.C. § 230(f)(2) (defining what an interactive computer service is for the purpose of the CDA).

⁴⁹ See *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (holding that Facebook was an interactive computer service under the CDA); *Fields v. Twitter*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016) (holding that Twitter was an interactive computer service under the CDA); Chi. Law.’s’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (holding that Craigslist was an internet service provider under the CDA).

them from having any affirmative duty to block such content.⁵⁰ This broad grant of immunity has largely shaped the private governance systems used by social media platforms which regulate user content today.⁵¹

1. Section 230(c)(1) of the CDA

The main purpose of Section 230(c)(1) of the CDA is to distinguish between parties who actually create content from those parties who merely provide a means to access that content.⁵² This section grants immunity from tort liability to parties who only provide a means to access content on the internet, while providing no immunity to actual content creators.⁵³ Though courts have recognized that social media platforms fit within the definition of “interactive computer services” under the CDA, generally subjecting them to the immunity provided by Section 230(c)(1), they have also recognized that social media platforms may be content creators in

⁵⁰ See Brannon, *supra* note 18, at 9–10 (explaining that Section 230 of the CDA’s broad grant of immunity has barred plaintiffs from bringing a variety of tort claims against social media providers). See also Klonick, *supra* note 15, at 1606 (detailing that Section 230 of the CDA not only provides immunity to social media platforms in situations where they choose to block or screen offensive material, but also when they elect not to block or screen offensive material).

⁵¹ See Klonick, *supra* note 15, at 1603 (noting that the broad immunity provided by section 230 of the CDA allowed for the development of private governance systems that regulate user content); Sylvain, *supra* note 20, at 216 (stating that even absent government regulation requiring social media platforms to moderate user content, popular applications, such as YouTube and Reddit, have developed their own private governance systems to regulate user content).

⁵² See *Ricci v. Teamsters Union Loc. 456*, 781 F.3d 25, 28 (2d Cir. 2015) (holding that a plaintiff defamed on the internet can sue the original poster, but they cannot sue the platform that merely acted as the messenger). See also Brannon, *supra* note 18, at 11 (detailing that Section 230(c)(1) distinguishes between “interactive computer services” and “interactive content providers”).

⁵³ See Brannon, *supra* note 18, at 11 (noting that interactive computer services are provided immunity under Section 230(c)(1) of the CDA, while interactive content providers are not provided immunity). See also Sylvain, *supra* note 20, at 215–16 (articulating that courts have read Section 230 of the CDA broadly so that social media companies cannot be held liable for content posted by their users even if that content is “compromising private photographs” of a user’s ex-girlfriend or an advertisement that encourages sex trafficking).

specific situations as well.⁵⁴ In order to determine whether a social media platform is acting as both an interactive computer service and a content creator, the key question to consider is whether the alleged actions of the social media platform were responsible for creating the underlying content at issue.⁵⁵

Therefore, Section 230(c)(1) immunity for social media platforms turns on whether a platform's actions constituted actual creation of content versus merely providing a platform where third-party users were able to post their own content.⁵⁶ Courts have generally held that a platform's choice to control what content users are able to post is not enough to constitute creation of content.⁵⁷ In addition, social media platforms may be immune from suit under Section 230 even if they make small editorial changes to content posted on their platforms.⁵⁸ Conversely, if a social media platform is the sole creator, or materially contributes to the creation or development of content on their platform, then courts have held that

⁵⁴ See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (holding that where an interactive computer service participates in developing the alleged illegal content, then they become content creators and lose the immunity that Section 230 of the CDA provides them).

⁵⁵ See *id.* (holding that an interactive computer service that participates in developing the illegal content loses the immunity provided by section 230(c)(1) of the CDA); Brannon, *supra* note 18, at 11 (stating that the "critical inquiry for applying section 230(c)(1) is whether, with respect to the particular actions alleged to create liability, the service provider developed the underlying content.").

⁵⁶ See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–1102 (9th Cir. 2009) (stating that "[w]hat matters is not the name of the cause of action . . . but whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.").

⁵⁷ See *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (holding that "a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online"); Brannon, *supra* note 18, at 12 (discussing how social media sites that control the content their users post, without more, is not enough to turn an interactive computer service into a content creator).

⁵⁸ See *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (holding that just because an interactive computer service made "minor alterations" to content created by another party, that did not take them out of Section 230 of the CDA immunity); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) (opining that an interactive computer service working closely with a content creator to correct errors made by the content creator is not enough to make the computer service a content creator).

the social media platform may be held liable for their actions as “interactive content providers.”⁵⁹ Thus, as a whole, Section 230(c)(1) of the CDA offers broad immunity to social media platforms in cases where plaintiffs attempt to hold these platforms liable for merely allowing offensive material to be posted by third-party users.⁶⁰

C. How User Content is Currently Moderated on Social Media

Although the legal framework in the United States does not require social media platforms to moderate content on their sites, all social media platforms currently engage in some form or another of content moderation.⁶¹ Each platform has its own set of rules, usually

⁵⁹ See Brannon, *supra* note 18, at 12–13 (explaining that when an interactive computer service who is wholly or partially responsible for creating or developing content, they are not entitled to the immunity provided by Section 230(c)(1)). It also notes that some courts have adopted a “material contribution test” to determine whether an interactive computer service is also an interactive content provider which asks “whether a service provider ‘materially contributed to the illegality’ of the disputed content, or ‘in some way specifically encouraged development of what is offensive about the content.’” *Id.* See *id.* (quoting *Jones v. Dirty World Entm’t Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014) and *Fed. Trade Comm’n v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009)).

⁶⁰ See Brannon, *supra* note 18, at 13 (discussing the difference between Section 230(c)(1) and Section 230(c)(2) and how Section 230(c)(1) is generally thought to apply in situations where plaintiffs are attempting to hold interactive computer services liable for publishing information created by another party). See also *How Can Social Media Firms Tackle Hate Speech*, WHARTON (Sept. 22, 2018), archived at <https://perma.cc/7WRH-ULVN> [hereinafter WHARTON] (describing that Section 230 of the CDA created “a safe harbor for Good Samaritan blocking of obscene, filthy, harassing or objectionable material, to give companies as conveyors of information latitude to exercise some editorial discretion without liability, to balance these concerns”).

⁶¹ See TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* 5 (2018) (articulating that although social media platforms initially aspired to be truly “open” spaces, the chaos and contention on the internet prevented this from happening).

found in the platform’s “terms of service” or “community guidelines” documents, which outline the platform’s expectations of what is appropriate behavior on the site and what is not.⁶² The “community guidelines” or “terms of service” documents for the majority of social media platforms prohibits users from posting much of the same content, including hate speech, harassment, content promoting violence or illegal activity, or content that displays nudity, sex, or pornography.⁶³ In order to moderate which user content violates these rules, many social media sites currently employ a combination of Artificial Intelligence (“AI”) and teams of human content

Platforms must in some form or another, moderate: both to protect one user from another, or one group from its antagonists, and to remove the offensive, vile, or illegal—as well as to present their best face to new users, to their advertisers and partners, and to the public at large.

Id.

⁶² See GILLESPIE, *supra* note 61, at 45–46 (outlining how social media sites present their rules in either the “terms of service” or the platform’s “community guidelines”). The “terms of service” document is similar to a contract in that it spells out “the terms under which user and platform interact, the obligations users must accept as a condition of their participation, and the proper means of resolving a dispute should one arise.” *Id.* at 46. Gillespie goes on to note that the “terms of service” document is intended to indemnify the social media platform “as broadly as possible” if a user attempts to hold the platform liable for another user’s actions. *Id.* The document usually referred to as the “community guidelines” clearly lays out what the platform considers to be acceptable behavior on the site and what is unacceptable behavior. *Id.* Working together, the “terms of service” and “community guidelines” documents provide social media platforms with their best opportunity to articulate what content may be censored, and justify why that content should be censored. *Id.* at 45.

⁶³ See Dan Misener, *Social media sites censor a range of content, new report says*, CBC NEWS (Nov. 22, 2016), *archived at* <https://perma.cc/MLQ5-5LZ8> (noting that social media platforms remove content like hate speech, “fake news,” and nudity). See also Ron Porat, *Two ways social networks could control toxic content*, FAST COMPANY (Jan. 14, 2020), *archived at* <https://perma.cc/B78B-7VYH> (describing how social media companies attempt to remove content, such as homophobic harassment, child pornography, and white supremacy imagery, from the platforms); GILLESPIE, *supra* note 61, at 52–66 (outlining the types of content that the “community guidelines” or “terms of service” documents prohibit from being posted on their sites).

moderators.⁶⁴ AI allows platforms to keep user experiences safe by “rapidly learn[ing], improv[ing], and in some cases even predict[ing]” what content is in violation of the platform’s rules, while the human content moderators are tasked with better understanding the context in which content that appears to be in violation of the platform’s rules appears.⁶⁵ Despite these efforts by social media platforms to moderate explicit content, it is evident that torrents of toxic posts are still able to make it through their moderation channels and can be found across social media today.⁶⁶

III. Facts

Professional athletes from all over the world, in a variety of sports, ranging from hockey, to tennis, to soccer, have been the

⁶⁴ See Porat, *supra* note 63 (articulating that large social media companies, such as Facebook, use human content moderators in addition to AI technologies to detect violations of the platform’s rules because algorithms, on their own, have difficulty “spotting nuances in human interactions that could signal something nefarious is happening.”).

⁶⁵ See *id.* (describing how the advent of AI has allowed for social media companies to moderate content on their platforms at scale). Without AI, Porat argues that it would have taken thousands of human content moderators to sift through all of the content that AI is able to moderate. *Id.* While the addition of human content moderators has helped catch things that AI would have missed on its own, the toxic and intense content that the human moderators must look through may have a “lasting negative psychological impact” on the moderators. *Id.*

⁶⁶ See *id.* (arguing that moderation efforts by social media platforms have largely failed because AI is merely lines of code that cannot factor in the human trait of empathy). AI has failed so far because the people writing the code for it don’t think like online predators or bullies. *Id.* Due to this, it is not surprising that AI has not been able to recognize nuances in users’ interactions that may signal problematic content. Porat, *supra* note 63. *But see* GILLESPIE, *supra* note 61, at 10 (arguing that while the efforts of social media platforms to moderate content are not always successful, this is largely because moderation is extremely difficult). “Their efforts may be driven by a genuine desire to foster a hospitable community, or by a purely economic imperative...I found them genuinely committed to their work, and well aware of the difficulty of the task they have taken on.” *Id.*

victims of racial abuse on social media platforms in recent years.⁶⁷ This section will explore three high profile instances where athletes were subject to such racist abuse.⁶⁸ First, Section A will examine the racial abuse that P.K. Subban, an African American professional hockey player in the National Hockey League (“NHL”), suffered on Twitter after he scored a game winning goal in overtime of a game in the 2014 NHL Playoffs.⁶⁹ Section B will detail the racial abuse that African American professional tennis star Sachia Vickery has endured on Twitter and Facebook over the course of her career.⁷⁰ And finally, Section C will examine the racial abuse that Black professional soccer players Marcus Rashford and Paul Pogba suffered after they both missed penalty kicks during the 2019-2020 English Premier League season.⁷¹

⁶⁷ See FARRINGTON, *supra* note 13, at Table of Contents (outlining that professional athletes participating in soccer, cricket, boxing, hockey, and basketball, in both the United States and the United Kingdom, regularly suffer racial abuse on social media platforms).

⁶⁸ See Chiari, *supra* note 10 (detailing how Bruins fans directed racial slurs at P.K. Subban following his series winning goal against them in the 2014 NHL playoffs); Bemby, *supra* note 10 (explaining how female tennis star Sachia Vickery has begun hitting back at social media users who have directed racial slurs at her); Jackson, *supra* note 10 (examining how Paul Pogba became the third soccer player in England within a week to suffer racial abuse on social media after he missed a penalty kick in an English Premier League game).

⁶⁹ See Chiari, *supra* note 10 (noting that there were so many racial slurs directed at P.K. Subban on Twitter that a racial slur began trending on Twitter in the Boston area).

⁷⁰ See Bemby, *supra* note 10 (detailing how female tennis star, Sachia Vickery, has been called racial slurs on Twitter and Facebook such as, “monkey, slave, the N-word, housekeeper, the help – pretty much every racist name out there on planet Earth.”).

⁷¹ See Jackson, *supra* note 10 (explaining that Paul Pogba had racist tweets directed at him after missing a penalty kick, and that the racist abuse of soccer players online was getting “out of control”); Mattha Busby, *Manchester United’s Marcus Rashford target of racist abuse on Twitter*, THE GUARDIAN (Aug. 24, 2019), archived at <https://perma.cc/5HYN-AQ47> (noting that Rashford was called the “n-word” by a number of Twitter users after he missed a penalty kick).

A. *Professional Hockey - P.K. Subban and the 2014 NHL Playoff*

In the 2014 NHL Eastern Conference Semifinals, the Montreal Canadiens were playing their storied rivals the Boston Bruins.⁷² Game one of the series saw the Bruins twice come back from deficits in the third period in order to force the game into overtime.⁷³ However, with a little more than four minutes remaining in the second overtime period of the game, the Canadiens won a faceoff in the Bruins' defensive zone and eventually worked the puck to P.K. Subban, an African American defenseman for the Canadiens, who then scored his second goal of the game to secure a win for the Canadiens.⁷⁴ Bruins fans within the arena, understandably upset by the gut-wrenching loss, responded by throwing towels and cups onto the ice as the Canadiens' players celebrated the win and then returned to their locker room.⁷⁵ This knee-jerk reaction by Boston's fans, although not advisable, was tame compared to that of a large number of Bruins' fans on social media.⁷⁶

⁷² See *P.K. Subban lifts Habs to 2OT win over Bruins in series opener*, ESPN (May 2, 2014), archived at <https://perma.cc/FR96-96MD> [hereinafter *Subban lifts Habs*] (detailing that the Montreal Canadiens defeated the Boston Bruins in Game 1 of the 2014 NHL Eastern Conference Semifinals). See also *Opponents – Boston Bruins*, CANADIENS (Nov. 17, 2019), archived at <https://perma.cc/ZC8G-DAQY> (noting that the Canadiens rivalry with the Boston Bruins has existed for a long time and that no other two teams in the NHL have played each other more than the Bruins and Canadiens).

⁷³ See *Subban lifts Habs*, *supra* note 72 (noting that the Bruins were losing 2-0 to the Canadiens at the beginning of the third period, and then losing 3-2 during the third period, before they tied the game and forced overtime).

⁷⁴ See *id.* (detailing how P.K. Subban scored a powerplay goal with four minutes remaining in the second overtime period to defeat the Bruins in Game 1 of the Eastern Conference Semifinals).

⁷⁵ See *id.* (noting how Boston's fans within TD Garden littered the ice with cups and free giveaway towels they received at the game after P.K. Subban scored his second goal to win the game for the Canadiens).

⁷⁶ See *id.* (describing how fans threw cups and towels at the Canadiens' players as they filed into their locker room following their victory). See also Chiari, *supra* note 10 (detailing how many Boston fans directed racial slurs at P.K. Subban immediately following his game-winning goal against the Bruins in the 2014 Eastern Conference Semifinals).

Following his dramatic overtime winner, P.K. Subban should have been free to celebrate his momentous achievement with his teammates, but instead he was left to read over a deluge of racial taunts and slurs that were directed toward him on Twitter immediately following his goal.⁷⁷ Statements that were tweeted at Subban included racist remarks such as, “That stupid n***** doesn’t belong in hockey #whitesonly,” “F***** YOU N***** SUBBAN YOU BELONG IN A F***** HOLE NOT AN ICE RINK,” and “subban is the definition of a n*****.”⁷⁸ In total, Subban’s name and the N-word were used together in approximately 17,000 tweets following his Game 1 performance, and the N-word was trending on Twitter in the Boston area by the end of the night.⁷⁹

Many parties within the Bruins and Canadiens organizations were quick to condemn the racist remarks made by Bruins fans on Twitter.⁸⁰ The President of the Bruins at the time, Cam Neely,

⁷⁷ See Chiari, *supra* note 10 (detailing how Twitter was flooded with racist remarks directed toward Subban by Boston fans following his game winning goal in the 2014 NHL playoffs).

⁷⁸ See *Twitter Blows Up With Racist Reactions After P.K. Subban Scores Game Winner in 2nd OT*, CBS DETROIT (May 2, 2014), *archived at* <https://perma.cc/2TCS-R88D> [hereinafter *Twitter Blows Up*] (quoting a number of racist tweets that were directed toward P.K. Subban). *But see P.K. Subban targeted by racist tweets after Habs win*, CBC News (May 2, 2014), *archived at* <https://perma.cc/4GPP-F3TA> [hereinafter *Subban Targeted*] (detailing that although Subban’s name and the N-word were used many times in conjunction with one another, many of those tweets were from fans who were disappointed in those who were making the racist statements).

⁷⁹ See *Subban Targeted*, *supra* note 78 (stating that according to Influence Communications, a Montreal media monitoring company, Subban’s name and the N-word were used together in 17,000 tweets). However, Influence Communications also noted that the majority of these tweets did not actually use Subban’s name and the N-word in a negative manner. *Id.*

⁸⁰ See Chiari, *supra* note 10 (detailing the reactions that the Bruins organization, the Bruins players, the Bruins head coach, and the Canadiens head coach had to the deluge of racist remarks directed at P.K. Subban); Chris Peters, *P.K. Subban addresses racist tweets directed at him, defends Bruins*, CBS SPORTS (May 3, 2014), *archived at* <https://perma.cc/JG4V-BTSX> (noting how P.K. Subban reacted to the racist remarks following Game 2 of the series between the Bruins and Canadiens by defending the Bruins organization and fanbase). *See also Bruins fans praise P.K. Subban’s class in response to racist remarks*, MONTREAL GAZETTE

released a statement that read, “The racist, classless views expressed by an ignorant group of individuals following Thursday’s game via digital media are in no way a reflection of anyone associated with the Bruins organization.”⁸¹ Bruins and Canadiens players and coaches echoed Neely’s statement by saying that anyone who expressed such racist views were not true fans of Boston, and that there was no place for such “ignorant” and “classless” remarks within the hockey world.⁸² Subban, himself, came out and said that he did not believe the racist remarks directed toward him represented the views of the Bruins organization or of the Boston fanbase as a whole.⁸³ Despite Subban’s mature and reserved response, it goes without saying that no person, professional athlete or not, should be subjected to the inhumane abuse that Subban was forced to endure following his game winning heroics against the Boston Bruins.⁸⁴

(May 5, 2014), *archived at* <https://perma.cc/27BU-RZVF> (outlining the NHL Commissioner’s statement in response to the racial abuse directed at P.K. Subban, which read, “I fully endorse and support the comment that Cam Neely and the Bruins issued. We are about diversity and inclusiveness. We condemn bias and hatred. It has no place in our game and it’s not acceptable.”).

⁸¹ See Amalie Benjamin, *Bruins condemn racist comments directed at P.K. Subban*, BOSTON GLOBE (May 2, 2014), *archived at* <https://perma.cc/L9JE-SFHG> (quoting Boston President Cam Neely). *But see* Chiari, *supra* note 10 (noting that Neely’s statement was partially incorrect because the Bruins fans who made these racist remarks were, in fact, associated with the Bruins organization and contributed toward the organization’s reputation).

⁸² See Benjamin, *supra* note 81 (detailing the statements made by Bruins head coach Claude Julien, Bruins player Patrice Bergeron, and Canadiens player Mike Weaver). *See also* Chiari, *supra* note 10 (discussing the reactions of Canadiens head coach Michael Therrien and Bruins player Zdeno Chara).

⁸³ See Peters, *supra* note 80 (noting that although P.K. Subban had every right to react angrily toward Boston’s fans, he instead reacted in a more reserved manner and gave little attention to the fans who had actually racially abused him). Subban elected to focus his comments more on the fact that the vast majority of Boston fans did not react in such an inhumane way. *Id.*

⁸⁴ See Allan Muir, *Cam Neely: Racist fans don’t represent Boston Bruins*, SPORTS ILLUSTRATED (May 2, 2014), *archived at* <https://perma.cc/L2PQ-RKMC> (comparing the racist views expressed by Bruins’ fans on social media resembled those that existed in the 18th century). *See also* Peters, *supra* note 80 (outlining P.K. Subban’s classy response to the tweets that were directed towards him).

B. *Professional Tennis - Sachia Vickery Hits Back*

Sachia Vickery broke onto the women's professional tennis scene in the spring of 2018 after she defeated Garbine Muguruza, the number three ranked player in the world at the time, in three sets at the BNP Paribas Open.⁸⁵ This breakthrough victory, coupled with strong performances in other recent tournaments, vaulted Vickery into the world top 100 rankings for the first time in her career and exposed Vickery to a new following of fans.⁸⁶ Although Vickery's breakout victory brought her to the forefront of the tennis scene, it was the celebration that followed her victory that acted as Vickery's introduction to the outside world.⁸⁷ After defeating Muguruza, Vickery flashed the "Wakanda forever" salute from the Marvel film *Black Panther*, which is best known for its groundbreaking celebration of black culture.⁸⁸

⁸⁵ See Jerry Bembry, *Sachia Vickery's career on the rise heading into Wimbledon*, THE UNDEFEATED (July 2, 2018), archived at <https://perma.cc/2YMS-6EM4> [hereinafter *Sachia Vickery's career on the rise heading into Wimbledon*] (describing how Sachia Vickery had been a child prodigy in tennis, but that her breakthrough in professional tennis did not come until her victory over Garbrine Muguruza in the summer of 2018).

⁸⁶ See *id.* (outlining how Sachia Vickery's win over Garbrine Muguruza led to Vickery jumping from the 105th ranked tennis player in the world to the 89th ranked player in the world). See also *Sachia Vickery Ranking*, CORETENNIS.NET (Jan. 30, 2020), archived at <https://perma.cc/53F3-J49R> (listing the history of Sachia Vickery's world ranking history, which reached a career-best 73rd in August of 2015).

⁸⁷ See *Sachia Vickery's career on the rise heading into Wimbledon*, *supra* note 85 (highlighting how actors from *Black Panther*, Chadwick Boseman and Letitia Wright, inboxed Vickery on Twitter as a result of her "Wakanda forever" salute celebration following her victory over Gasbrine Muguruza). See also Matthew Dessem, *Black Athletes Have Started Celebrating Their Victories With the "Wakanda Forever" Salute from Black Panther*, SLATE (Mar. 11, 2018), archived at <https://perma.cc/FM5H-DHZ3> (documenting how a number of black professional athletes, including Paul Pogba, Jesse Lingard, and Gael Monfils, had started celebrating goals and wins with the "Wakanda forever" salute from the film *Black Panther*).

⁸⁸ See *Sachia Vickery's career on the rise heading into Wimbledon*, *supra* note 85 (describing how Vickery celebrated her victory by flashing "Wakanda forever" salute, in part because her brother told her to do so). See also Dessem, *supra* note

While Vickery's win and celebration put her on the radar of sports fans across the globe, it also opened her up to a more ugly aspect of fame – harassment by internet trolls.⁸⁹ In June of 2018, Vickery decided she had had enough of merely enduring racial abuse on social media in silence and decided to hit back at the perpetrators herself.⁹⁰ In a twitter post Vickery said, "After years of racial abuse from internet trolls , I've decided to be queen petty and clap back at everything I'm sent from now on."⁹¹ Vickery went on to share that she decided to start hitting back at abusive social media users because "some of these people from time to time need to be checked."⁹² Vickery also shared that ever since she had joined social media, she had been subjected to hateful messages, many of which involved racial overtones, including being called "monkey, slave, the N-word, housekeeper, the help – pretty much every racist name out there on planet Earth."⁹³ Even though Vickery seemed to enjoy being "queen petty" by responding to the racial abuse that was directed toward her on social media, the fact that she had to resort to

87 (stating that the cultural impact of the Marvel movie *Black Panther* was starting to reach the world of athletics); Tre Johnson, *Black Panther is a gorgeous, groundbreaking celebration of black culture*, VOX (Feb. 23, 2018), *archived at* <https://perma.cc/UPC7-NEPV> (providing that *Black Panther* celebrates the journey of black culture and demonstrates how one day black culture could become *the* culture).

⁸⁹ See Bemby, *supra* note 10 (detailing how Vickery has received racial abuse on social media ever since she first created her accounts, which has resulted in Vickery dropping her accounts from time to time).

⁹⁰ See *id.* (noting that Vickery decided to start hitting back at social media users that racially abused her because "[a]t some point enough is enough").

⁹¹ See Sachia Vickery (@Sachiavick), TWITTER (June 11, 2018, 10:29 AM), *archived at* <https://perma.cc/3XY2-W6YT> (quoting Sachia Vickery's Twitter post that she posted in response to the racist trolls that had been harassing her ever since she joined social media).

⁹² See Bemby, *supra* note 10 (highlighting that Vickery decided to confront abusive social media users because no matter how thick someone's skin is, everyone has a breaking point where they snap). Vickery also explained that her coach had told her to just ignore the abuse she was receiving online, but that she decided to let off steam and follow through on the promise she made in her Twitter post. *Id.*

⁹³ See *id.* (summarizing the types of racial slurs that Sachia Vickery was called on social media by internet trolls).

self-help tactics exemplifies just how big of a problem the racist abuse of athletes online has become.⁹⁴

C. *Professional Soccer - Racist Abuse of Marcus Rashford and Paul Pogba*

Manchester United Football Club, which competes in the Barclays Premier League in England, is one of the richest and most-widely recognizable soccer clubs in the world.⁹⁵ However, in August of 2019, two of Manchester United's star players, who are widely worshiped and adored by fans all across the globe, were racially abused in two separate instances on social media within the span of a single week.⁹⁶ On August 19, 2019, Paul Pogba, a French midfielder for Manchester United, missed a penalty kick in the second half of a game against Wolverhampton Wanderers that would likely have given Manchester United a critical victory in their 2019-2020 Premier League campaign.⁹⁷ Five days later, Marcus Rashford, an English forward who plays for Manchester United, was presented

⁹⁴ See *id.* (outlining how racism in athletics have become a big problem throughout the world). While racial abuse of athletes online is a major issue, racial abuse of athletes happens in a variety of other ways including, fan taunting at games and graffiti of racial slurs on athletes' homes, among others. *Id.* The main issue that makes racial abuse online so dangerous is that it allows internet trolls and "keyboard thugs" to easily disguise themselves by "distance and anonymity." *Id.*

⁹⁵ See Mike Ozanian, *The World's Most Valuable Soccer Teams 2019: Real Madrid Is Back On Top, At \$4.24 Billion*, FORBES (May 29, 2019), archived at <https://perma.cc/B2EJ-F94P> (listing the world's richest soccer teams, where Manchester United falls at number three in the world with an estimated value of \$3.8 billion). See also Oliver Vesey, *World's Most Popular Football Clubs on Facebook*, BLEACHER REPORT (Nov. 21, 2013), archived at <https://perma.cc/V8NN-Q795> (listing the world's most popular soccer teams based on the amount of Facebook "likes" that each team's Facebook page had).

⁹⁶ See Jackson, *supra* note 10 (detailing how Paul Pogba suffered racist abuse on twitter following missing a penalty kick in August of 2019). See also Busby, *supra* note 71 (describing how Marcus Rashford was racially abused on social media following a missed penalty kick in a match against Crystal Palace).

⁹⁷ See James Walker-Roberts, *Wolves 1-1 Manchester United: Paul Pogba sees penalty saved in draw*, SKY SPORTS (Aug. 25, 2019), archived at <https://perma.cc/UW9E-GXB4> (noting that Paul Pogba had a 67th minute penalty kick saved that would have given Manchester United a 2-1 lead against Wolverhampton Wanderers).

with a similar opportunity in a match against Crystal Palace Football Club.⁹⁸ Unfortunately, just as Pogba had missed his penalty kick a few days earlier, Rashford similarly missed, and Manchester United ended up losing the match 2-1.⁹⁹

In the immediate aftermath of these missed penalty kicks, both Pogba and Rashford had a torrent of racist abuse directed towards them on their social media profiles.¹⁰⁰ These remarks were quickly condemned by Rashford, Pogba, their Manchester United teammates, their head coach, and the club itself.¹⁰¹ Each of these parties purposely and specifically called on social media platforms to do more to combat the racial abuse of soccer players on their sites.¹⁰² In response to this criticism, Twitter released a statement stating that, “We’re fully aware of, and share, the concerns surrounding online racist abuse towards certain footballers in the UK over recent days. We strongly condemn this unacceptable behavior . . . We maintain a dialogue with both the PFA [Professional Footballers Association]

⁹⁸ See *Manchester United 1-2 Crystal Palace: David de Gea error costs hosts*, SKY SPORTS (Aug. 24, 2019), archived at <https://perma.cc/3H39-8EHL> (describing how Manchester United earned a penalty kick in the second-half against Crystal Palace when Manchester United midfielder Scott McTominay was fouled inside of Crystal Palace’s box).

⁹⁹ See *id.* (detailing how Marcus Rashford’s second-half penalty against Crystal Palace struck the post and missed, which resulted in Manchester United losing the game 2-1).

¹⁰⁰ See *Football racism: Rashford and Pogba face abuse on social media*, BBC (Aug. 25, 2019), archived at <https://perma.cc/WYU2-7ERF> [hereinafter *Football Racism*] (stating that merely days after Paul Pogba suffered racial abuse on social media, his teammate Marcus Rashford was subjected to the same treatment).

¹⁰¹ See Jackson, *supra* note 10 (noting that Manchester United released a statement saying, in part, that,

“everyone at Manchester United is disgusted by the racial abuse aimed at Paul Pogba last night and we utterly condemn it...[t]he individuals who expressed these views do not represent the values of our great club and it is encouraging to see the vast majority of our fans condemn this on social media also.”). Harry Maguire, a teammate of Paul Pogba and Marcus Rashford, also offered his support by labeling the abuse directed at his teammates on social media as “disgusting”. *Id.*

¹⁰² See *id.* (listing Manchester United’s statement in response to the racial abuse directed toward its players as stating, “We also encourage social media companies to take action in these cases.”). Harry Maguire also called on Twitter to “do something about it” in reference to the racial abuse his teammates were subjected to on social media. *Id.*

and Kick it Out and are committed to working together to address abusive online and racist behavior across the industry."¹⁰³ Following the release of this statement, it was reported that Twitter officials also agreed to meet with Manchester United, Pogba, Rashford, and Kick It Out to determine how they can best tackle the problem of racist abuse on their platform in the future.¹⁰⁴ However, the details of this meeting, or whether it ever actually took place, were never disclosed to the public.¹⁰⁵

D. *Takeaways*

The three instances described above are a mere drop in the bucket when it comes to the racial abuse that professional athletes suffer on social media.¹⁰⁶ However, these fact patterns exemplify exactly why the racial abuse of athletes on social media platforms, such as Twitter, Facebook, and Instagram, is such a major problem within the sports industry and society as a whole.¹⁰⁷ Throughout history, racism has been a stubborn evil that has simply refused to go

¹⁰³ See *Football Racism*, *supra* note 100 (outlining Twitter's response to criticism directed towards them in the aftermath of the racist abuse that Marcus Rashford and Paul Pogba suffered on their site).

¹⁰⁴ See *id.* (noting that in addition to releasing a statement condemning the racist abuse of Paul Pogba and Marcus Rashford, Twitter also agreed to sit down with Manchester United, Pogba, and Rashford to discuss how to tackle racism on social media in the future).

¹⁰⁵ See *id.* (noting that in addition to releasing a statement condemning the racist abuse of Paul Pogba and Marcus Rashford, Twitter also agreed to sit down with Manchester United, Pogba, and Rashford to discuss how to tackle racism on social media in the future).

¹⁰⁶ See Musa Okwonga, *Foul play: how racism towards black footballers is moving online*, THE GUARDIAN (Dec. 15, 2019), *archived at* <https://perma.cc/R3TM-JLUL> (stating that the racial abuse of soccer players and teams on Twitter, Facebook, and Instagram increased 600-900% between November 2018 and 2019). See also *Reporting Statistics*, KICK IT OUT (Feb. 22, 2020), *archived at* <https://perma.cc/ET7P-GETT> (reporting that Kick It Out received "159 discrimination reports of soccer players from social media" in 2018/19, of which 62% dealt with racial abuse).

¹⁰⁷ See Bembry, *supra* note 10 (describing that by opening their lives to the outside world through social media, athletes also expose themselves to internet trolls). However, this does not mean that we should merely accept the racial abuse of athletes online as the new norm, it is a problem that must be addressed. *Id.*

away thanks in part to its uncanny ability to adapt to the changes within society.¹⁰⁸ Although overt racism within the sports industry appears to be on the decline, a more covert form of racism, made possible through the use of social media and the internet, has seemingly taken its place.¹⁰⁹ In the words of Malcolm X, “Racism is like a Cadillac. The 1960s Cadillac doesn’t look like the 1921 Cadillac, but it’s still a Cadillac; it has simply changed form.”¹¹⁰ With this in mind, while today’s athletes may experience racism in a different form than their predecessors, this should not mean that this new form of racial abuse should be allowed to continue at its current rate.¹¹¹

IV. Analysis

A. *Reconstructing the Legal Framework in the United States to Require Greater Censorship of Hate Speech by Social Media Platforms Is Not the Answer*

The racial abuse of professional athletes on social media presents serious issues for society and the sports industry alike, but it also presents specialized issues for social media platforms

¹⁰⁸ See Daniel Kilvington, *Stamping out racism in sport means social media too*, THE CONVERSATION (Oct. 22, 2014), archived at <https://perma.cc/7DPH-3CMS> (articulating that racism is “a tenacious, stubborn and powerful parasite that adapts to survive.”).

¹⁰⁹ See *id.* (detailing how the number of arrests made for “racial or indecent” chanting at English soccer matches over the 2012-2013 Barclays Premier League season does not necessarily mean that racism as a whole is actually on the decline within the sports industry). See also FARRINGTON, *supra* note 13 (highlighting “[t]hat there has been an air of complacency about racism in sport,” even though social media has provided a new avenue for the spread of racist views).

¹¹⁰ See Kilvington, *supra* note 108 (quoting a metaphor that Malcolm X used to describe how racism has the ability to adapt to changes in society in order to survive).

¹¹¹ See *id.* (noting how cyber racism is a pressing issue that needs to be dealt with, and if it is not, athletes and fans alike will continue to be confronted with racial abuse on social media platforms).

themselves.¹¹² Even under the current legal framework, where social media sites have been given broad discretionary powers through Section 230 of the CDA to determine whether or not to remove certain types of content, social media sites have voluntarily chosen to employ intricate content-moderation systems tasked with removing racially abusive posts, along with other offensive content, that is directed towards athletes on their platforms.¹¹³ This section will argue that the question of how to moderate racist speech and content that is directed toward athletes on social media sites should be left to the social media platforms themselves due to the incentives that already exist for social media platforms to employ content-moderation systems absent government regulation, along with the issues that would inevitably arise with further government regulation in this area.¹¹⁴

¹¹² See Shaw, *supra* note 22, at 281–82 (describing how hate speech on social media presents serious human rights issues, including how hate speech plays a major role in exacerbating violence). See also WHARTON, *supra* note 60 (discussing how one of Facebook’s biggest fears is that the existence of hate speech on its platform will lead users to view Facebook as a fearful place that they will not want to visit).

¹¹³ See Klonick, *supra* note 15, at 1625 (addressing why social media platforms bother with creating content-moderation systems at all given that social media platforms “have broad freedom to shape online expression and a demonstrated interest in free speech values.”). See also Citron & Norton, *supra* note 20, at 1453–54 (discussing how internet intermediaries, such as social media platforms, have enormous freedom in deciding how, and even if, they will combat hate speech on their platforms).

¹¹⁴ See Klonick, *supra* note 15, at 1625 (stating that social media platforms “create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users’ speech and community norms.”). See also Citron & Norton, *supra* note 20, at 1454 (explaining that internet intermediaries view combatting the use of hate speech on their platforms as imperative to the long term economic success of social media).

1. The Corporate and Social Values of Social Media Platforms Incentivizes Voluntary Good Faith Censorship of Racially Abusive Content Directed Towards Athletes

Social media platforms want to be known as safe environments where users can go to share their views on a variety of issues.¹¹⁵ The issue that arises with this approach is that users may find the views of other users on the platform as obscene, hateful, threatening, or abusive.¹¹⁶ This has placed social media platforms in between multiple rocks and hard places, and has left them asking how they can balance their time honored commitment to the American value of free speech, while also creating a platform where everyone can feel safe.¹¹⁷ To conduct this difficult balancing act, social media platforms have embraced values the company wishes to promote outside of their commitment to freedom of speech.¹¹⁸ By

¹¹⁵ See WHARTON, *supra* note 60 (outlining how “media companies are caught among multiple rocks and hard places . . . [t]hey want to create a pleasant environment for users (‘safe,’ in industry parlance), and yet they would like to be seen as upholding the American value of free speech.”).

¹¹⁶ See Shaw, *supra* note 22, at 286–88 (illustrating how cultural differences can have a major impact on how certain messages are interpreted or received).

The importance of local variation in animating hate speech becomes especially problematic in the Internet context — someone in the United States may post something potentially derogatory about Jews or Gypsies that would be only mildly offensive in their home state, but dangerous in the context of the social and historical circumstances of an Italian reader.

Id. at 287–88.

¹¹⁷ See Citron, *supra* note 15, at 1037 (describing how while tech companies, such as Twitter and Facebook, have always had a strong commitment to free expression, they have also always had some exceptions to this policy). For example, “threats, cyber stalking, nonconsensual pornography, and hate speech were prohibited after extended discussions with advocacy groups” in order to strike an appropriate balance between community norms and the platforms’ commitment to free expression. *Id.*

¹¹⁸ See Klonick, *supra* note 15, at 1625–26 (discussing how YouTube looked to other values that the platform wanted to promote in addition to freedom of speech in order to create their content-moderation system). See also Citron & Norton, *supra* note 15, at 1455 n. 119 (“Such decisions may be justified as a matter of

adopting this approach, social media platforms, such as Twitter, Facebook, and Blogger, have implemented a number of policies and tools into their platforms that have made it easier for users to view the content they wish to see, while also filtering out the types of content which users may find offensive.¹¹⁹ For example, when Facebook was struggling with whether or not to censor certain types of obscene or hateful speech, they looked not only to the value they placed in promoting free speech, but also to competing principles and concerns, such as user safety and public relations concerns, among others.¹²⁰ While Facebook found that free speech values often won out over the other competing principles, in certain situations, Facebook deemed it necessary to remove content in order to promote their mission of making “the world more open and connected.”¹²¹

Similarly, recent trends concerning racial abuse of athletes on their platforms have alerted social media companies that a problem

corporate law under the social entity theory of the corporation, which permits corporate decision-makers to consider and serve the interests of all the various constituencies affected by the corporation’s operation.”) (citing Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors’ Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 412 (2002).

¹¹⁹ See Klonick, *supra* note 15, at 1626–27 (summarizing how social media platforms Twitter and Facebook looked to their mission statements in order to determine whether or not they should censor certain types of speech). Twitter discovered that promoting freedom of expression “means little as our underlying philosophy if we continue to allow voices to be silenced because they are afraid to speak up.” *Id.* See also Citron & Norton, *supra* note 20, at 1456 (outlining a statement released by Facebook which reads in part, “Unfortunately ignorant people exist and we absolutely feel a social responsibility to silence them on Facebook if their statements turn to direct hate... That’s why we have policies that prohibit hateful content and we have built a robust reporting infrastructure and an expansive team to review reports and remove content quickly.”). Blogger is a Google platform which users can utilize to “‘express opinions, even very controversial ones,’ but they cannot ‘cross the line by publishing hate speech.’” *Id.* at 1455.

¹²⁰ See Klonick, *supra* note 15, at 1626 (describing how Facebook looked to its corporate mission statement to determine whether or not they should take down certain posts and content on their platform).

¹²¹ See *id.* at 1626 (explaining that in order to make the world more open and connected, Facebook felt as if it was necessary to take certain content down so that users would feel encouraged to “connect and interact on the platform.”).

exists and must be remedied.¹²² Comparing Twitter's strong public condemnation of the racially abusive tweets which were directed towards Marcus Rashford and Paul Pogba in the Fall of 2019 to Twitter's complete lack of a response to the similar abuse that P.K. Subban and Sachia Vickery suffered in 2014 and 2018 respectively, it appears that, at the very least, change is on the horizon.¹²³ Holding Twitter to its statement in the aftermath of the inhumane abuse that Marcus Rashford and Paul Pogba suffered, it is evident that Twitter has placed value in rectifying this situation, and has already begun the process of improving its content-moderation system to ensure that athletes will not have to suffer similar abuse on their platform in the future.¹²⁴

¹²² See *Football racism*, *supra* note 100 (outlining Twitter's response to criticism directed towards them in the aftermath of the racist abuse that Marcus Rashford and Paul Pogba suffered on their site).

We're fully aware of, and share, the concerns surrounding online racist abuse towards certain footballers in the UK over recent days. We strongly condemn this unacceptable behavior. . . We maintain a dialogue with both the PFA (Professional Footballers Association) and Kick it Out and are committed to working together to address abusive online and racist behavior across the industry.

Id.

¹²³ See *id.* (quoting Twitter's response to the racial abuse that Marcus Rashford and Paul Pogba suffered, which read, "We're fully aware of, and share, the concerns surrounding online racist abuse towards certain footballers in the UK over recent days. We strongly condemn this unacceptable behavior. . . We maintain a dialogue with both the PFA (Professional Footballers Association) and Kick it Out and are committed to working together to address abusive online and racist behavior across the industry."). See also Chiari, *supra* note 10 (highlighting the responses of the Bruins organization, Bruins players, and the Canadiens' organization after P.K. Subban was racially abused on Twitter, but does not mention any response to the situation by Twitter); Bemby, *supra* note 10 (articulating that Sachia Vickery was forced to resort to self-help tactics in response to racial abuse that was directed toward her on social media, and that no social media company offered her any sort of relief or even issued a statement condemning the abuse that she suffered).

¹²⁴ See *Football racism*, *supra* note 100 (stating that Twitter released a statement in which they promised to work with the relevant parties in order to remove racially abusive tweets that were directed towards athletes on their site).

2. The Economic Interests of Social Media Platforms Incentivizes Voluntary Good Faith Censorship of Racially Abusive Content Directed Towards Athletes

Though corporate responsibility is an admirable incentive, the primary reason social media platforms voluntarily remove racially abusive content that is directed towards athletes is because it threatens the potential profitability of the platform itself.¹²⁵ Within the short existence of social media companies, it has already been shown that market forces have the ability to shape the individual speech policies of social media platforms.¹²⁶ Social media platforms are constantly attempting to balance how much content, and what types of content, they should remove, and how much, and what types of content, they should keep up so as to meet user expectations.¹²⁷ It is imperative that social media platforms get this balancing act correct because if user expectations with regard to speech policies are met, users will spend more time on the platform, translating into an increase in the platform's revenue.¹²⁸

In 2014, individual users of social media platforms, advocacy groups, and prominent individuals came together to force social media platforms to overhaul their speech policies with regard to the

¹²⁵ See WHARTON, *supra* note 60 (explaining that if social media platforms fail to address hate speech on their sites, or it comes out that their advertising algorithms discriminate based on race or promote hate speech, then the platforms could face serious economic repercussions). See also Klonick, *supra* note 15, at 1627 (pointing to the fact that while corporate responsibility is an admirable incentive to remove hateful or violent content from social media, the true driving force behind voluntary censorship is the threat to the platforms' bottom-line).

¹²⁶ See Citron, *supra* note 15, at 1047–48 (describing how advocacy groups and prominent individuals were able to rally support to press social media companies to change their rules regarding nonconsensual pornography beginning in 2011).

¹²⁷ See Klonick, *supra* note 15, at 1627 (reasoning that if a social media platforms take down too much content, then users will not be able to interact with one another and they will lose trust in the platform). On the other hand, if a platform does not take down enough content, then users may feel uncomfortable due to the inappropriate speech they will encounter, which will lead to decreasing page views and revenue. *Id.*

¹²⁸ See *id.* (explaining how meeting user expectations can translate into making the social media platform more profitable).

posting of nonconsensual pornography on their platforms.¹²⁹ Though these advocates' only power was their ability to garner public support, this seemingly modest power's true strength was felt in full force when users and advertisers arranged a boycott of social media platforms that allowed nonconsensual pornography to be posted on their sites.¹³⁰ As a result of this boycott, the platforms suffered economic losses, which eventually forced the platforms to succumb to the public's demands and ban the posting of nonconsensual pornography from their sites.¹³¹

The success that these advocates enjoyed in forcing social media platforms to reevaluate their speech policies in 2014 provides a potential roadmap for proponents in favor of greater censorship of racially abusive posts directed toward athletes on social media to follow.¹³² Similar to the situation in 2014, there is support among a number of groups, including current and former athletes, media pundits, media outlets, advocacy groups, and fans, for social media platforms to more strictly police the racial abuse of athletes on their platforms.¹³³ If these groups work together and form a coherent plan,

¹²⁹ See *id.* at 1655 (illustrating how public support in opposition of the posting of nonconsensual pornography placed substantial market pressure on social media platforms, which eventually resulted in the overhaul of the platforms' speech policies in 2014).

¹³⁰ See *id.* (illustrating how public support in opposition of the posting of nonconsensual pornography placed substantial market pressure on social media platforms, which eventually resulted in the overhaul of the platforms' speech policies in 2014).

¹³¹ See *id.* at 1628–29 (illustrating how public support in opposition of the posting of nonconsensual pornography placed substantial market pressure on social media platforms, which eventually resulted in the overhaul of the platforms' speech policies in 2014).

¹³² See Jackson, *supra* note 10 (listing the number of different groups, including players, coaches, and advocacy groups, that called upon social media companies to take the racial abuse of black soccer players more seriously). See also Klonick, *supra* note 15, at 1629 (noting that individual users, advocacy groups, and celebrities came together to confront social media platforms about the posting of nonconsensual pornography beginning in 2014).

¹³³ See *Football racism*, *supra* note 100 (describing how Phil Neville, a former player for Manchester United and current manager of the England Women's National Team, Harry Maguire, a current player on Manchester United, and Kick It Out, a nonprofit whose aim is to tackle racism, all called on Twitter to take the racial abuse of Paul Pogba and Marcus Rashford more seriously).

similar to how the groups did in 2014, exerting market pressures on social media platforms could be an effective tool to utilize in forcing social media platforms to take the racial abuse of professional athletes on social media more seriously.¹³⁴

3. More Strict Government Regulations Requiring Social Media Platforms to Censor the Racial Abuse of Athletes Could Lead to Over-Censorship

Undoubtedly, government regulation requiring social media companies to more strictly police racial abuse on their platforms would have benefits.¹³⁵ However, there is likely more harm than good that would result from this greater regulation of social media platforms' speech policies.¹³⁶ Taking aside the constitutional issues surrounding further government regulation in the United States, a major concern among legal scholars is that although any government regulation requiring a change to existing speech policies would be drafted with the intent to only censor types of speech that people tend

¹³⁴ See *id.* (outlining how Phil Neville, who is the current coach of the England Women's National Soccer Team, proposed that all current users of social media platforms boycott social media for a period of six months in order to send "a powerful message" to social media companies). See also Jackson, *supra* note 10 (detailing how Harry Maguire, a current player on Manchester United, proposed that every account that is opened on social media "should be verified by a passport/driving license" so that social media users could no longer make multiple accounts to racially abuse people). Current Chelsea manager Frank Lampard and Kick It Out also stated that social media companies need to do more to combat racist abuse. *Id.*

¹³⁵ See Citron, *supra* note 15, at 1049 (explaining that the removal of hateful and violent content from social media platforms through greater government regulation could be beneficial in that it could help keep disenfranchised individuals from turning to Al-Qaeda for support, it could remove all beheading videos from social media before they spread across the internet, and it could reduce the amount of terrorist propaganda that is spread across the internet).

¹³⁶ See WHARTON, *supra* note 60 (opining that government regulation of speech would be a grave mistake because it is too difficult to define through government regulation which types of speech should be censored, and which types of speech should not be censored). "Some say Black Lives Matter is demeaning to others. Some say All Lives Matter is racist because it is insensitive to those whose lives are in jeopardy. These are all subjective matters, so the only solution is not suppressing free speech." *Id.*

to find racially offensive, in reality, these regulations would end up censoring types of speech the drafters never even considered.¹³⁷ Any governmental regulation would likely run into the issue of over-censorship because of the definitional ambiguity surrounding the types of racial speech that individuals find to be offensive.¹³⁸ As a result of this ambiguity, greater government regulation would lead to not only the censorship of racially offensive content, but also to the censorship of content that was intended to celebrate and defend racial and cultural differences within society.¹³⁹

¹³⁷ See Citron, *supra* note 15, at 1051 (maintaining that definitional ambiguity as to what exactly “hate speech” is would likely lead to any government regulation to censor speech that went “beyond their original goals.”). Paul Bernal stated, “when you build a censorship system for one purpose, you can be pretty certain that it will be used for other purposes.” *Id.* See also Brannon, *supra* note 18, at Summary (discussing the constitutional issues that would arise if the U.S. Government decided to further regulate the speech policies of social media companies).

Government action regulating internet content would constitute state action that may implicate the First Amendment. In particular, social media providers may argue that government regulations impermissibly infringe on the providers’ own constitutional free speech rights. Legal commentators have argued that when social media platforms decide whether and how to post users’ content, these publication decisions are themselves protected under the First Amendment.

Id.

¹³⁸ See Citron, *supra* note 15, at 1052 (explaining that “[w]ithout clear guidelines and specific examples, vague terms are vulnerable to revision and expansion.”)

Consider the code’s definition of “illegal hate speech”: speech inciting violence or hatred against a group or member of such a group based on race, religion, national, or ethnic origin. Inciting hatred against a group is an ambiguous concept. It could be interpreted to cover speech widely understood as hateful...But it could also be understood as covering speech that many would characterize as newsworthy. Given the term’s ambiguity, incitement of hatred could extend to criticism of Catholics for covering up priests’ sexual exploitation of children.

Id.

¹³⁹ See *id.* at 1054–55 (stating that the algorithms social media sites employ to police their speech policies have already have difficulty distinguishing between offensive material and innocent material). As Lee Rowland, a Senior Staff

V. Conclusion

Except in the rarest of circumstances, American jurisprudence strongly opposes the regulation of private speech by government actors. Through the U.S. Constitution, case law, and statutory law, it is clear that private actors should be free to express their views without fear of government interference. With this in mind, while most everyone can agree that the racial abuse of professional athletes on social media is a problem that must be dealt with, the answer to solving it does not lie with government regulation. Due to the great value that Americans place in freedom of speech, the threat of over-censorship, and the incentives that already exist for social media platforms to create and curate speech policies that ban hate speech, social media platforms should be left to their own devices to determine how best to protect athletes from racial abuse on their sites. Based on recent trends in the tech industry, it appears that social media platforms not only have the expertise required to address this issue, but a strong desire to do so as well.

Attorney at the ACLU said, “Algorithms are not good at determining context and tone like support or opposition, sarcasm or parody.” *Id.*