

Fundamental Human Rights and Eroding Constitutionalism

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Abstract

Through the course of the last few decades, there has been a considerable and unprecedented increase in the development of digital technologies. This development has disruptively affected the equilibrium of contemporary society's constitutional ecosystem. Thus, a set of normative responses have emerged in order to face digital technology's created obstacles and restore relative equilibrium. Due to this, a considerable amount of academic literature can be found regarding the subject matter of digital constitutionalism. Authors such as Celeste debate that the concept is an attractive one when attempting to explain the contemporary constitutional moment¹. The current paper offers an extensive definition of the concept of digital constitutionalism, identifying its aims, and clarifying the notion of the digital world's constitutionalization. Much of the available academic literature seems to suggest that digital constitutionalism has a programmatic value. The concept pushes people to assess the so far changes produced by digital technology and to reflect on the principles that have to be maintained. On the one hand, contemporary humans

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¹ Celeste, Edoardo. 2018. "Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?" *International Review of Law, Computers & Technology* 33 (2): 122–38.

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possess the possibility to exercise various basic rights, i.e. freedom of speech and expression. On the other, this new digital paradigm possesses various threats to these basic rights in the form of surveillance, data monitoring, and predictive policing.

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Introduction

The concept of digital constitutionalism is highly appealing because it can be used to elaborate on the emergence of recent constitutional counteractions against digital technology produced challenges. While there is a considerable amount of literature regarding the subject matter of digital constitutionalism, much of this literature does not offer a uniform understanding of the subject matter or a uniform definition of it. The aims of the current paper were to assess digital constitutionalism, or cyber constitutionalism, as an alternative to the traditional legal system. In order to achieve the aim of the current paper, an extensive synthesis of academic literature was conducted. From this extensive synthesis, it was found that digital constitutionalism, while an appealing concept, lacks a well-defined and universally accepted framework upon which it can be further built or developed. Furthermore - upon assessing various human rights cases, censorship cases, and freedom of speech-related cases - it was found that the rise of the Internet has led to several different entities, from individual to groups to entire governments, manipulating the systems available to them in order to further their objectives. Digital constitutionalism is the representation of contemporary constitutionalism's decline as it does not identify normative responses but rather embodies values and principles to guide and inform them. On the other hand, emerging normative responses can be treated as elements of the digital paradigm being constitutionalized. Nonetheless, frameworks such as Klonick's can be used in analyzing government limitations on social media capabilities as well as a basis for digital constitutionalism itself.

1. Terms of Service of Social Media Platforms

The experiment that Facebook had conducted on including notions on democracy onto its website demonstrates the disassociation between legal realities and social values. Service terms, in law, are contracting documentation that establishes a basic customer transaction: users agree to be bound by the conditions and terms of the

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website in exchange for attaining access to it^{2,3}. The legal connection between users and providers is that of customers and firm, not citizens and sovereign⁴. In legal regards, it is not logical to speak of rights in customer transactions should they not be bargained for explicitly⁵. According to Zuckerberg⁶, the company's terms of service are not simply documentation that protects it's alongside its users' rights; instead the document governs how users, around the globe, uses its services. Due to this significance, it is important for the company to ensure that the values and principles of Facebook users are reflected in the company's terms of service.⁷

The proclamation of Zuckerberg identifies a reality that legal regulations are not able to; contractual service terms have an integral constitutional part in the governance of daily life.

They are constitutional documentations in the manner that they are important to the manner in which shared social environments are governed and constituted. Service term documentations offer their operators a considerable amount of power. These documents, for corporate, large platforms in particular, are written in a manner that aims at safeguarding the platform providers' commercial interests. Research such as that of Braman and Roberts demonstrates the manner in which contracts of Internet service providers prohibit speech that is

² McBride, Pauline. 2017. "The "New Public" Criterion After Svensson: The (Ir)Relevance Of Website Terms And Conditions". *Intellectual Property Quarterly* 3 (1364-906X): 262-285.

³ Vidhayasai, Tya, Keyuravong, Sonthida, and Bunsom, Thanis. 2015. "Investigating The Use Of Google Translate In "Terms And Conditions" In An Airline'S Official Website: Errors And Implications". *PASAA: Journal of Language Teaching and Learning in Thailand* Volume 49: 138-168.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Zuckerberg, Mark. 2009. "An open letter from Facebook founder Mark Zuckerberg. Facebook." *Facebook*, https://web.facebook.com/notes/facebook/an-open-letter-from-facebook-founder-mark-zuckerberg/190423927130/?_rdc=1&_rdr

protected by constitution and reject standards of constitution in favor of enforcing their own regulations⁸. In the context of the United States, constitutional rights language does not have any application in the *private* paradigm; the law of the constitution is applicable mainly to the actions of *public* organizations and state actors where the state itself is involved directly⁹.

This means that, where they apply, the rights of constitution – i.e. freedom of association and speech, the right to take part in democratic processes, and due process requirements – are not applicable against private actors and are only applicable against state actors. While certain academics such as Shaw, Fiedler and Meyen have made suggestions that the rules of constitution can be applicable to quasi-public for a platform, legislation has not been developed in such a manner, at least for now^{10;11}. This has led to users possessing a minimum amount of legal redress in regards to complains regarding how the platform, or platforms, is/are governed. Users of online platforms are viewed as being clients who accept private network participation terms voluntarily. The users, after adopting and accepting these terms, have to abide by them, according to law. The legal

⁸ Braman, Sandra, and Stephanie Roberts. 2003. “Advantage ISP: Terms of Service as Media Law.” *New Media & Society* 5 (3): 422–48.
<https://doi.org/10.1177/14614448030053007>.

⁹ Ibid.

¹⁰ Shaw, Adrienne. 2014. “The Internet Is Full of Jerks, Because the World Is Full of Jerks: What Feminist Theory Teaches Us about the Internet.” *Communication and Critical/Cultural Studies* 11 (3): 273–77.
<https://doi.org/10.1080/14791420.2014.926245>.

¹¹ Fiedler, Anke, and Meyen, Michael. 2015. "A Quasi-Public Sphere: Letters To The Editor In The German Democratic Republic". *Javnost - The Public* 22 (2): 181-195.
doi:10.1080/13183222.2015.1048932.

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response that creates worries for users, regarding how platforms are governed, is that “*If you don’t like it, leave*”^{12;13}.

The organizations operating these platforms place a tremendous amount of effort in order to avoid being seen as accountable to third-parties for what users do on the platform. They accomplish this by reducing the extent to which they are viewed as regulating their users. By demonstrating themselves as intermediaries who are entirely neutral; as conversation facilitators and content carriers, these organizations look to avoid the implication of being accountable for the manner in which their systems are deployed and designed and the manner in which their users act ^{14;15}. Simultaneously, social media organizations have powerful incentives to mold the manner in which users interact and behave so as to fulfil the varying and, generally, conflicting demands inside and from varying communities of users, governments, groups of civil society, businesses, and advertisers.

This act is highly delicate as these organizations express their discretion and neutrality, as private property owners and businesses, to control and manage their networks. However, this is far from the truth as these platforms are, in no manner, neutral. The algorithms and architecture they use mold the manner in which their users communicate as well as the information that participants are presented.

¹² Fried, Barbara H. 2002. “If You Don’t like It, Leave It: The Problem of Exit in Social Contractarian Arguments.” *SSRN Electronic Journal*.
<https://doi.org/10.2139/ssrn.296584>.

¹³ Suzor, Nicolas. 2018. "Digital Constitutionalism: Using The Rule Of Law To Evaluate The Legitimacy Of Governance By Platforms". *Social Media + Society* 4 (3): 205630511878781. doi:10.1177/2056305118787812.

¹⁴ Huber, Thomas L., Kude, Thomas and Dibbern, Jens. 2017. "Governance Practices In Platform Ecosystems: Navigating Tensions Between Cocreated Value And Governance Costs". *Information Systems Research* 28 (3): 563-584. doi:10.1287/isre.2017.0701.

¹⁵ De Brasi, Leandro. 2019. "Democratic Governance Of Information Technologies: The Need For Citizen Competence". *IEEE Technology And Society Magazine* 38 (1): 51-57. doi:10.1109/mts.2019.2894471.

While their use terms and policies illustrated in terms that are formally neutral, the powers they offer are selectively enforced and wielded¹⁶. Their continuing processes of governance are molded by the interplay of social norms¹⁷ and complicated sociotechnical¹⁸ socio-economic structures¹⁹.

Platforms intervene as user mediation systems cannot be neutral in any manner^{20;21}. Accordingly, the terms of service contract documents have to perform double duties. The first duty is that users have complete discretion to control the manner in which the platform operates as well as the manner in which it is utilized. The second duty is that of for any questioning the manner in which the platform exercises its behavior controlling powers for other ends – such as governments seeking to censor content or surveil users, users

¹⁶ Ibid.

¹⁷ Oermann, Markus, Martin Lose, Jan-Hinrik Schmidt, and Katharina Johnsen. 2014. “Approaching Social Media Governance.” *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2498552>.

¹⁸ Williams, Logan D. A., and Thomas S. Woodson. 2019. “Enhancing Socio-Technical Governance: Targeting Inequality in Innovation through Inclusivity Mainstreaming.” *Minerva* 57 (4): 453–77. <https://doi.org/10.1007/s11024-019-09375-4>.

¹⁹ Hsu, Meng-Hsiang, Shih-Wei Tien, Hsien-Cheng Lin, and Chun-Ming Chang. 2015. “Understanding the Roles of Cultural Differences and Socio-Economic Status in Social Media Continuance Intention.” *Information Technology & People* 28 (1): 224–41. <https://doi.org/10.1108/itp-01-2014-0007>.

²⁰ Suzor, Nicolas. 2016. “Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms.” *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2909889>.

²¹ Suzor, Nicolas, Tess Van Geelen, and Sarah Myers West. 2018. “Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda.” *International Communication Gazette* 80 (4): 385–400. <https://doi.org/10.1177/1748048518757142>.

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themselves, and third-parties and owners of copyright with grievances; the terms are arranged in such a manner to disclaim responsibility or liability for the manner in which autonomous users behave.

This duality is only maintained to the extent that these organizations are entirely within the private sphere. The duality depends on the proclamation of a basic distinction: While social media platforms possess the legal right and technical ability to regulate the manner in which the systems are utilized, they are not burdened with the legal or moral accountability for the manner in which their users behave or act. This distinction operates on the notion that social media users are rational and entirely autonomous actors within a liberal market. These individuals provide their consent to social media organizations as being their entry price, but keep their personal responsibilities. This proclamation allows these platforms to be entirely private businesses and has come under considerable focus as contemporary humans learn of the part that these platforms play in the governance of daily activities²².

The manner in which individual rights are safeguarded within the confines of the online world has become an increasing international concern^{23;24}. According to an article published by the Guardian, Berners-Lee called for “*Magna Carta for the Web*” in order to safeguard individual rights; with the campaign being taken up by the “*Web We Want*” initiative. This initiative uses those that came before and builds on them, namely the principles of the Global Network’s

²² Fisk, Nathan W. 2016. *Framing Internet Safety: The Governance of Youth Online*. Cambridge, Massachusetts: Mit Press.

²³ Suzor, Nicolas. 2016. “Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms.” *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2909889>.

²⁴ Suzor, Nicolas, Tess Van Geelen, and Sarah Myers West. 2018. “Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda.” *International Communication Gazette* 80 (4): 385–400. <https://doi.org/10.1177/1748048518757142>.

Initiative²⁵ and the Charter of Internet Principles & Rights Coalition²⁶. Most other campaigns and declarations from supranational entities, groups of civil society, and nation states reflect these calls that are inherently grouped amongst liberal, classic priorities: rights of privacy, decentralized powers, freedom of expression and formal equality (i.e. net neutrality)^{27;28}.

Generally, these initiatives are aimed against state actor interference; i.e. the demands of several governments to disclose and gather information regarding the activities of users, block or remove access to information that is prohibited, and engineer technologies and networks in a manner to facilitate law enforcement and surveillance. In contrast, pressure for improved governance is generally least visible and mostly dispersed on intermediaries' practices of internal self-governance. This leads intermediaries to become more secretive regarding their practice of content regulation and how their service terms are enforced²⁹. Only a handful of major institutions and rights declarations have been made in order to hold Internet service provider's

²⁵ Global Network Initiative. 2012. <https://globalnetworkinitiative.org/wp-content/uploads/2016/10/GNI-Annual-Report-2012.pdf>.

²⁶ Bodle, Robert. 2011. "IRPC Charter." Internet Rights and Principles Coalition. September 1, 2011. <http://internetrighsandprinciples.org/site/charter/>.

²⁷ Bourreau, Marc, Kourandi, Frago and Valletti, Tommaso. 2015. "Net Neutrality With Competing Internet Platforms". *The Journal Of Industrial Economics* 63 (1): 30-73. doi:10.1111/joie.12068.

²⁸ Graber, Christoph B. 2016. "Bottom-Up Constitutionalism: The Case Of Net Neutrality". *Transnational Legal Theory* 7 (4): 524-552. doi:10.1080/20414005.2017.1300678.

²⁹ Santaniello, Mauro, Palladino, Nicola, Catone, Maria Carmela and Paolo, Diana. 2018. "The Language Of Digital Constitutionalism And The Role Of National Parliaments". *International Communication Gazette* 80 (4): 320-336. doi:10.1177/1748048518757138.

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focus on their internal procedures and policies' procedural legitimacy³⁰.

Primarily, these have focused on privacy rights and freedom of expression^{31;32}. The users who care about the manner in which their content is regulated, dissimilar to powerful local governments and lobby groups, do not possess influence on the platforms they use as well as the platform's policies. This issue is then intensified by basic uncertainties and conflicts inside of civil society, where a consensus has not been reached regarding the extent to which users require protection from the governing decisions of the platforms they use. This deficit in rights language and articulated platform responsibility concepts make it even more challenging to express the concerns that platforms as well as users may have³³.

There is an increasing need for a language of user rights. If contemporary shared social environments are governed by platforms of digital and online media, then there is a continuing challenge to articulate the rights that users should have as well as the manner in which said rights are to be safeguarded. In certain ways, social media environments can be regarded as quasi-public environments, where liberal differentiation between private and public is not sufficient in order to appropriately comprehend user experiences and

³⁰ Yilma, Micheal. 2017. "Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts." *International Journal of Law and Information Technology* 25 (2): 115–38. <https://doi.org/10.1093/ijlit/eax001>.

³¹ Suzor, Nicolas. 2018. "Digital Constitutionalism: Using The Rule Of Law To Evaluate The Legitimacy Of Governance By Platforms". *Social Media + Society* 4 (3): 205630511878781. doi:10.1177/2056305118787812.

³² Suzor, Nicolas, Van Geelen, Tess and Myers West, Sarah. 2018. "Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda." *International Communication Gazette* 80 (4): 385–400. <https://doi.org/10.1177/1748048518757142>.

³³ Yilma, Micheal 2017. "Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts." *International Journal of Law and Information Technology* 25 (2): 115–38. <https://doi.org/10.1093/ijlit/eax001>.

relationships³⁴. Service terms do not possess an efficient market and the organizations that create these terms have such a disproportionate amount of power, relative to their users, that the user agency to negotiate said terms is highly restricted³⁵.

Had a rulesets market been developed, to the extent that governing private bodies dealt with subjects of basic human rights, these values are too significant to be left as contract negotiations. As users look for ways to renegotiate the social contracts that act as the foundation for their relations with the platforms they use, the concerns regarding private governance are continuing to increase in ways that are organized in a loose and diverse manner. These concerns tend to manifest themselves as controversies regarding the manner in which power is exercised over matters such as bias content curating and selecting algorithms, responses to harassment and abuse perpetrated via the platform, and censorship questions³⁶. In some situations, sustained and organized actions by user groups have demonstrated their effectiveness at pressuring social media organization into changing their service terms³⁷. However, without an agreement amongst users as to whether their interests can be referred to as rights and thus override service terms, these efforts generally take place in isolated and only proceed in a slow manner.

³⁴ Santaniello, Mauro, Palladino, Nicola, Catone, Maria Carmela and Paolo, Diana. 2018. "The Language Of Digital Constitutionalism And The Role Of National Parliaments". *International Communication Gazette* 80 (4): 320-336. doi:10.1177/1748048518757138.

³⁵ Yilma, Micheal 2017. "Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts." *International Journal of Law and Information Technology* 25 (2): 115–38. <https://doi.org/10.1093/ijlit/eax001>.

³⁶ Ibid.

³⁷ Santaniello, Mauro, Palladino, Nicola, Catone, Maria Carmela and Paolo, Diana. 2018. "The Language Of Digital Constitutionalism And The Role Of National Parliaments". *International Communication Gazette* 80 (4): 320-336. doi:10.1177/1748048518757138.

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This is the project of digital constitutionalism: rethinking the manner in which power exercising, within the context of the digital world, can be made legitimate^{38;39}. The rule of law's primary notion is that rules limit the exercise of powers. Moreover, constitutionalism seeks to define these limitations. Thus, constitutionalism being applied to the digital world is then the creation of articulated limitations regarding the exercise of powers within the confines of a networking society⁴⁰. This type of constitutionalism faces an important challenge, which is to identify the manner in which appropriate governance values can be safeguarded within the online world. It is an increasing issue to develop and identify legal, social, and technical approaches that can help in improving online governance legitimacy⁴¹. Protecting telecommunications users' constitutional rights has been a problem for a considerable amount period of time and has now become even more important as many begin to realize the significant part that digital media platforms play as communication intermediaries⁴².

In constitutional theory and law, there is a division between private and public, which becomes problematic when one realizes that

³⁸ Padovani, Claudia, and Santaniello, Mauro. 2018. "Digital Constitutionalism: Fundamental Rights And Power Limitation In The Internet Eco-System". *International Communication Gazette* 80 (4): 295-301. doi:10.1177/1748048518757114.

³⁹ Celeste, Edoardo. 2018. "Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?" *International Review of Law, Computers & Technology* 33 (2): 122–38. <https://doi.org/10.1080/13600869.2018.1475898>.

⁴⁰ Padovani, Claudia, and Santaniello, Mauro. 2018. "Digital Constitutionalism: Fundamental Rights And Power Limitation In The Internet Eco-System". *International Communication Gazette* 80 (4): 295-301. doi:10.1177/1748048518757114.

⁴¹ Mann, Monique, Daly, Angela, Wilson, Michael and Suzor, Nicolas. 2017. "The Limits of (Digital) Constitutionalism: Exploring the Privacy-Security (Im)Balance in Australia." *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3021580>.

⁴² Greenstein, Shane, Peitz, Martin and Valletti, Tommaso. 2016. "Net Neutrality: A Fast Lane to Understanding the Trade-Offs." *Journal of Economic Perspectives* 30 (2): 127–50. <https://doi.org/10.1257/jep.30.2.127>.

regulation is not only the duty of the state⁴³. The regulations of online environments as well as the manner in which these regulations are enforced have a considerable impact on their user's human rights⁴⁴. Recognizing this fact has led to several outcries for newer ways of thinking about digital platform governance and a better comprehension of the manner in which online governance and constitutional rights converge^{45;46;47}. Thus, there is a need to better understand how, once governance has been decentralized, rights and values of constitution can be safeguarded⁴⁸.

2. Existing Legal Barriers to Private Lawsuits Against Social Media Providers

Under contemporary federal legislation, users of social media platforms face two barriers when attempting to file a lawsuit against the platform provider for its decision to limit or host access to the content created by a user. The first of which is that these lawsuits are only applicable on the platform's decision to delete content rather than allow it as then the social media platforms would go against the United

⁴³ Boatright, John. 2017. *Review of Ethics and Corporate Governance: Justifying the Role of Shareholder*. In *The Blackwell Guide to Business Ethics*, edited by Norman Bowie, 38–60. Blackwell Publishing Ltd.

⁴⁴ Boatright, John. 2017. *Review of Ethics and Corporate Governance: Justifying the Role of Shareholder*. In *The Blackwell Guide to Business Ethics*, edited by Norman Bowie, 38–60. Blackwell Publishing Ltd.

⁴⁵ Joerges, Christian, Sand, Inger-Johanne and Teubner, Gunther. 2004. *Transnational Governance and Constitutionalism*. Oxford ; Portland, Or.: Hart Pub.

⁴⁶ Williams, Logan, and Woodson, Thomas. n.d. *Enhancing Socio-Technical Governance: Targeting Inequality in Innovation through Inclusivity Mainstreaming*.

⁴⁷ De Brasi, Leandro. 2019. "Democratic Governance of Information Technologies: The Need for Citizen Competence." *IEEE Technology and Society Magazine* 38 (1): 51–57. <https://doi.org/10.1109/mts.2019.2894471>.

⁴⁸ Suzor, Nicolas. 2018. "Digital Constitutionalism: Using The Rule Of Law To Evaluate The Legitimacy Of Governance By Platforms". *Social Media + Society* 4 (3): 205630511878781. doi:10.1177/2056305118787812.

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States First Amendment⁴⁹. However, doctrines of state action offer that the freedom of speech, and the safeguards in place to protect it, is not applicable when an individual is harmed by a private entity, but rather when an individual is harmed by a government entity⁵⁰. The second legislative barrier is that the Section 230 of the Communications Decency Act provides *interactive computer service* providers with broad immunity^{51;52;53}.

Communications Decency Act Section 230 subsection c part 1 offers these service providers with immunity from lawsuits looking toward holding the provider responsible for the publication of information that was made by a *provider of information content*; thereby protecting websites in the field of social media from being accountable for hosting content^{54;55}. In contrast, the second part of this

⁴⁹ Gillette, Felix “Section 230 Was Supposed to Make the Internet a Better Place. It Failed.” Bloomberg L.P., 7 August 2019, <https://www.bloomberg.com/news/features/2019-08-07/section-230-was-supposed-to-make-the-internet-a-better-place-it-failed>

⁵⁰ Suzor, Nicolas. 2018. "Digital Constitutionalism: Using The Rule Of Law To Evaluate The Legitimacy Of Governance By Platforms". *Social Media + Society* 4 (3): 205630511878781. doi:10.1177/2056305118787812.

⁵¹ Legal Information Institute., 2019. U.S. Code § 230. Protection for private blocking and screening of offensive material. Cornell Law School, <https://www.law.cornell.edu/uscode/text/47/230>

⁵² Robertson, Adi “Why the Internet’s Most Important Law Exists and how People are still Getting it Wrong” The Verge. 21 June 2019, <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview>

⁵³ Felix Gillette, “Section 230 Was Supposed to Make the Internet a Better Place. It Failed. Bloomberg L.P.”, 7 August 2019, <https://www.bloomberg.com/news/features/2019-08-07/section-230-was-supposed-to-make-the-internet-a-better-place-it-failed>

⁵⁴ Legal Information Institute, “Code § 230. Protection for private blocking and screening of offensive material”, 2019, Cornell Law School. <https://www.law.cornell.edu/uscode/text/47/230>

⁵⁵ Robertson, Adi “Why the Internet’s Most Important Law Exists and how People are still Getting it Wrong” The Verge. 21 June 2019,

subsection offers websites immunity if they have been taking good faith actions to limit accessibility to content that users or the provider has deemed “objectionable, obscene, harassing, lewd, excessively violent, filthy, or lascivious”⁵⁶. Therefore, United States federal legislation currently does not offer users, who wish to challenge to decisions of a social media platform to restrict or ban content or to host content any necessary resources. Moreover, it may limit or eliminate the liability and responsibilities of these platforms in certain situations.

3. First Amendment: State Action Requirement

The United States’ First Amendment’s Clause regarding Free Speech states “*Congress shall make no law... abridging the freedom of speech*”⁵⁷ and through the Fourteenth Amendment, it applies to every state⁵⁸. Therefore, similar to other guarantees of constitution, the First Amendment is applicable only in situations where the lawsuit is filed against the actions of government⁵⁹. According to the Supreme Court, as cited by Konvitz⁶⁰, while common or statutory law does in certain circumstances provide redress and extend its protections against individuals or private organizations seeking to abridge others’ free expression, the Constitution itself does not provide such redress or protection. On the other hand, in certain situations, the Supreme Court,

<https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview>

⁵⁶ Legal Information Institute., “Code § 230. Protection for private blocking and screening of offensive material”, 2019, Cornell Law School, <https://www.law.cornell.edu/uscode/text/47/230>

⁵⁷ National Archives., 2019. The Bill of Rights 1791. Archives. Gov <https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf>

⁵⁸ Peltason, Jack Walter ed., *About America: The Constitution of the United States of America with Explanatory Notes* (US Department of State, 2004).

⁵⁹ Konvitz, Milton. 2017. *FUNDAMENTAL RIGHTS: History of a Constitutional Doctrine*.

⁶⁰ Ibid.

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has permitted claims of the First Amendment to proceed against protected speech abridging private entities.

Aside from factual situations where companies exercise powers that are exclusively and traditionally held by the government, the Supreme Court has applied this Amendment to private entities if the entity has a relationship that is sufficiently close to the government⁶¹. Situations can exist when a private entity is subject to extensive regulations of the state; however, governmental regulations themselves are insufficient in establishing the requirement of state action⁶². Therefore, the question in cases involving private parties is that of whether the relationship between the private actor and the state is close enough to treat the former's actions as being those of the state themselves.

Unfortunately, courts lower than the Supreme Court have universally concluded that the First Amendment does not prohibit providers of social media services from limiting the ability of their users to post content on their platforms. Conversely, the Supreme Court itself has not offered its thoughts on this subject matter, and this will be elaborated upon in detail in the following paragraphs. It should be noted that several legal commentators have debated that courts should view platforms of social media as being equal to state actors, at least when they act in similar ways (Konvitz 2017)⁶³.

4. First Amendment Limits on Government Regulation of Social Media Content

In attempting to address wide concerns of public policy regarding the manner in which social media organizations regulate the content that users create, legislators and commentators have proposed

⁶¹ L. Fisk, Catherine. 2018. *A Progressive Labor Vision of the First Amendment: Past as Prologue*. (Columbia Law Review, 2018), 118(7), pp.2057-2094.

⁶² Ibid.

⁶³ Fisk, L. Catherine, 2018. *A Progressive Labor Vision of the First Amendment: Past as Prologue*. (Columbia Law Review, 2018), 118(7), pp.2057-2094.

legislation to safeguard the ability of social media platform users to freely speak⁶⁴; and to have these platforms clarify, remove, or deemphasize certain types of content^{65;66}. As elaborated upon previously, the First Amendment is inapplicable to conflicts that arise between private entities⁶⁷, thus federal regulation that regulates decisions regarding content accessible on the Internet may qualify as sufficient state action in order to implicate this Amendment⁶⁸. The Amendment, after all, states that “*Congress shall make no law... abridging the freedom of speech*”⁶⁹. When it has been established the actions being committed are those of the state, the consideration that follows is that of the extent to which the Amendment safeguards platforms of social media’s decisions to moderate their content.

In another manner, the relevant question is that of when providers of social media services are able to ascertain that regulations of the government infringe on their speech. For example, if the creator of the website hosts content on their platform that they have created then the creator is able to raise their First Amendment objections to regulation of speech⁷⁰. Providers of social media services can argue that they

⁶⁴ Shaw, Adrienne, 2014. "The Internet Is Full Of Jerks, Because The World Is Full Of Jerks: What Feminist Theory Teaches Us About The Internet". *Communication And Critical/Cultural Studies* 11 (3): 273-277. doi:10.1080/14791420.2014.926245.

⁶⁵ Beckerlegge, Gwilym, Computer-mediated religion: Religion on the Internet at the turn of the twenty-first century. In *From sacred text to Internet* (Routledge, 2017), pp. 219-264.

⁶⁶ Abbasi, Sara, “Internet as a Public Space for Freedom of Expression: Myth or Reality?” (February 27, 2017). <http://dx.doi.org/10.2139/ssrn.3064175>

⁶⁷ National Archives, 2019. The Bill of Rights 1791. Archives.Gov. <https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf>

⁶⁸ Suzor, Nicolas. 2018. "Digital Constitutionalism: Using The Rule Of Law To Evaluate The Legitimacy Of Governance By Platforms". *Social Media + Society* 4 (3): 205630511878781. doi:10.1177/2056305118787812.

⁶⁹ Ibid.

⁷⁰ Campbell, Richard, Martin, Christopher R., Fabos, Bettina and Harmsen, Shawn. 2019. *Media Essentials: a Brief Introduction*. Boston: Bedford/St. Martin's.

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exercise the right to freedom of speech when they select if user created content can be published on their website and when they make decisions regarding how said content can be presented⁷¹. Moreover, the fact that a law can affect First Amendment protected freedom of speech does not make the law itself unconstitutional. The First Amendment, as elaborated upon in the following, does not restrict conduct regulations and offers certain speech regulations.

5. Background Principles: First Amendment Protections Online

On one hand, the First Amendment safeguards individual freedom of speech. On the other, its safeguards are not applicable to all cases in the same way. In a similar manner, not all regulations of government that affect social media website posted content can be assessed as the same as there are a range of factors that affect the analysis of a given court. Primarily, a court may question the nature of the actions being regulated, which includes where the actions can be appropriately characterized as conduct or speech⁷². Legislation that targets conduct and speech burdened by incident are permissible⁷³. However, it is not an easy task to identify *speech*. Lower courts have held that, as long as they offer information that humans can understand, computer programs and codes can be entitled to protections of the First Amendment⁷⁴.

In certain situations, courts have found that the names of domains can be regarded as protected speech⁷⁵. The Supreme Court, in

⁷¹ Guiora, Amos, and Park, Elizabeth A. 2017. "Hate Speech on Social Media." *Philosophia* 45 (3): 957–71. <https://doi.org/10.1007/s11406-017-9858-4>.

⁷² Tufts, Shannon Howle, Jacobson, Willow S. and Stevens, Mattie Sue. 2014. "Status Update." *Review of Public Personnel Administration* 35 (2): 193–207. <https://doi.org/10.1177/0734371x14558066>.

⁷³ Ibid.

⁷⁴ Guiora, Amos, and Park, Elizabeth A.. 2017. "Hate Speech on Social Media." *Philosophia* 45 (3): 957–71. <https://doi.org/10.1007/s11406-017-9858-4>.

⁷⁵ Campbell, Richard, Martin, Christopher R., Fabos, Bettina and Harmsen, Shawn. *Media Essentials: a Brief Introduction*. Boston: Bedford/St. Martin's, 2018.

a general manner, stated that conduct that is *inherently expressive* can be provided with protections of the First Amendment⁷⁶. Should legislation aim at regulating speech, courts can make the decision as to the speech type being regulated so as to determine the manner in which said regulation can be scrutinized. An example of this would be the court questioning whether said speech was commercial; if speech is used for commercial purposes or is commercial in nature then it becomes less deserving of First Amendment protections. Commercials and advertisements hosted on or displayed on social media platforms may be regarded as being commercial speech⁷⁷.

However, the speech may receive higher protection if it is not commercial and is, perhaps, advocating certain political notions, rights, etc.⁷⁸. It is also possible for certain speech categories to attain fewer protections than that of commercial speech⁷⁹. An example of these lesser protected forms of speech would be speech advocating for violent actions; advocacy that directly produces or incites unlawful actions⁸⁰. Therefore, violent speech or threats posted on social media are less entitled to the protections offered by the First Amendment.

Conclusion

Social media websites offer users with platforms to generate original content. In this context, these platforms can make the decision of the manner in which they wish to present the content, whether they wish to host the content, and whether they wish to make alterations to

⁷⁶ Ibid.

⁷⁷ Adler, Jonathan. 2016. "Compelled Commercial Speech and the Consumer 'Right to Know.'" *Faculty Publications*, January.
https://scholarlycommons.law.case.edu/faculty_publications/1654.

⁷⁸ Ibid.

⁷⁹ O'Connor, Kimberly W., Schmidt, Gordon B. and Drouin, Michelle. 2016. "Suspended because of Social Media? Students' Knowledge and Opinions of University Social Media Policies and Practices." *Computers in Human Behavior* 65 (December): 619–26. <https://doi.org/10.1016/j.chb.2016.06.001>.

⁸⁰ Ibid.

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the content during the process of it being presented on their website⁸¹. However, whether these editorial actions can be regarded as First Amendment protected speech is a challenging question. An appellate court, cited by Swartzwelder⁸², states that entities that act as mediums for other's produced speech can be provided with protection under the First Amendment if they take part in editorial discretion when choosing the speech, they wish to broadcast.

Conversely, the court stated that if the entity neutrally and indiscriminately broadcasts the speech of every user then this entity cannot be a "*First Amendment speaker*"⁸³. Some have debated that the First Amendment protects the publication decisions of social media platforms⁸⁴. Academic debate, until recently, was primarily focused on if the algorithms that online Internet search engines utilize in order to attain and demonstrate search results could be appropriately characterized as the search engine's speech^{85;86}. Bracha had debated that the publication activities of search engines met, at least, one First Amendment qualification criteria as search engines publish substantive receivable and sendable messages⁸⁷. However, ElSherief, Kulkarni, Nguyen, Wang and Belding argue that indexing the results of a search

⁸¹ ElSherief, Mai & Kulkarni, Vivek & Nguyen, Dana & Wang, William & Belding, Elizabeth. (2018). *Hate Lingo: A Target-based Linguistic Analysis of Hate Speech in Social Media*.

⁸² Swartzwelder, Sara, *Taking Orders from Tweets: Redefining the First Amendment Boundaries of Executive Speech in the Age of Social Media*. (First Amend. L. Rev., 2017), 16, p.538.

⁸³ Ibid.

⁸⁴ Oermann, Markus, Lose, Martin, Schmidt, Jan-Hinrik and Johnsen, Katharina. 2014. "Approaching Social Media Governance." *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2498552>.

⁸⁵ Mustafaraj, E. Eni, and Metaxas, Takis, *From obscurity to prominence in minutes: Political speech and real-time search*, 2010.

⁸⁶ Bracha, Oren. 2014. "The Folklore of Informationalism: The Case of Search Engine Speech." *Fordham Law Review* 82 (4): 1629. <https://ir.lawnet.fordham.edu/flr/vol82/iss4/2..>

⁸⁷ Ibid.

is not equal to communicating ideas that are protected by arguing to be entitled to the protections of the First Amendment, the content needs to be chosen and adopted by the entity communicating it as if it were their own⁸⁸.

Nonetheless, because there is deficit in cases that assess this subject, researchers generally analyze the subject of whether the publication decisions of a social media website can be protected under the First Amendment through First Amendment case analogies. Klonick⁸⁹ (2017) argued that there are three potential frameworks for courts to analyze government limitations on social media's capabilities to moderate the content created by their users. The first would be to view these websites as being equal to small organizations⁹⁰. In this light, these websites would be viewed as state actors bound by the First Amendment when regulating protected speech. The second is that of viewing these websites as being similar to special industries such as broadcast media and carriers; for which, courts have allowed higher regulation of speech in light of the need to safeguard public access to their service⁹¹.

The last is to view these websites as new editors, who receive the entirety of the First Amendment's protections during editorial decisions⁹². It is quite likely that a standalone framework or analogy may not be able to account for the various different platforms of social media as well as the different activities conducted by and on these platforms. For example, one platform may exercise editorial control

⁸⁸ ElSherief, Mai & Kulkarni, Vivek & Nguyen, Dana & Wang, William & Belding, Elizabeth. (2018). Hate Lingo: A Target-based Linguistic Analysis of Hate Speech in Social Media.

⁸⁹ Klonick, Kate. 2019. "The New Governors: The People, Rules, and Processes Governing Online Speech." *Harvardlawreview.org*. 2019. <https://harvardlawreview.org/2018/04/the-new-governors-the-people-rules-and-processes-governing-online-speech/>.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

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over content generated by users while others may take part in merely hosting the content. Therefore, determining how a case abides by a certain framework depends entirely on the case at hand as well as the activities regarding it.

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