

Congress (and Zuckerberg) shall make no law...

Anitha Quintin
CSLD Undergraduate Essay Competition (First Place Award)
March 4, 2019

The town square has been replaced by online forums, and the stump speech by 280 characters. Public forums have evolved to reach more people than ever before. Facebook alone counts over 800 million accounts as the world's most widely used social networking site (Bakshy, 2012). With such a large user base, control over information access lies almost solely in the hands of the CEOs of these social media empires. The recent banning of far-right actor Alex Jones (Fukuyama, 2018) has highlighted an important question being asked since the birth of these platforms: should social media platforms be allowed to censor content otherwise protected by the First Amendment to the U.S Constitution?

At first glance, the First Amendment seems to regulate only the government's ability to restrict speech. However, First Amendment scrutiny is applicable to this case, if one subscribes to the notion that social media posts are modern day public speeches. And one should subscribe to such a notion. In *Reno v. ACLU*, the Court stated that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox,” and “[t]hrough the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”(Jackson, 2014).

The state actor doctrine with respect to company-towns has long been debated by the Supreme Court—with no definitive position being taken. Though Facebook is no Gulf Shipbuilding Corporation¹, the factors that arose in such cases can be aggregated to the modern digital world. In *Marsh v. Alabama*, the court made it clear that an individual's first amendment rights are to be valued over a company's property rights. Even in cases where courts ruled in favor of private companies, the Supreme Court “has authorized states to provide greater protections for expressive activities than the Constitution provides”² (Washington Law Review, 1989). This sets additional precedence for the creation of new legislation to protect free speech.

Social media giants are creating digital town squares whose ‘real-world’ counterparts would be regulated by state governments. If the government cannot restrict speech in a town square, it would follow that social media companies cannot restrict speech in their forums. These private companies serve a very important public function by “providing a space that has the *primary* purpose of serving as a forum for public communication and expression, that is *designated* for that purpose, and that is *completely open* to the public at large” (Jackson, 2014). If a private company provides such a public space that it can be equated to the public spaces protected under the First Amendment, then the company is acting as the government exclusively

¹ This is in direct reference to *Marsh v. Alabama*, where it was decided that citizens' individual rights to free speech trumped the rights of property owners (Oyez).

² The Supreme Court of California concluded that the California Constitution protects speech and petitioning in privately owned shopping centers. In 2001 *Golden Gateway Center v. Gateway Tenants Ass'n*, a plurality of the California Supreme Court suggested that private property in California may be subject to the speech provisions of the California Constitution if it is the “function equivalent of a traditional public forum”. (Jackson, 2014).

does; the private company should be subject to the same regulation as the congress mentioned in the Constitution.

Perhaps social media companies' strongest defense for their censorship is their own identity—these forums are private property; no censorship on their part is a violation of free speech. And if anyone has a problem with it, they can just take their message elsewhere.

Unfortunately, it's not that easy.

Social media is so vital to modern communication that it is imperative to adapt arguments in favor of protecting free speech—even in the case when the offender is a non-state actor. Due to the quasi-monopolistic nature of such sites³, being shut out of even a single site can be a permanent muzzle for any user—this effect is constantly amplified due to countless mergers and purchases of other sites carried out by the social media giants. Social media outlets are open and public spaces, which calls into question their claim to being 'private property'.

As of 2011, Facebook was the second most visited site in both the United States and the World (de Zúñiga, 2011). Though it may seem trivial to restate the amount of traffic Facebook receives, it is absolutely essential to the argument to note the magnitude of Facebook's power with respect to information access. And with mission statements that include a dedication to "the open exchange of information" and "[giving] people the power to share and make the world more open and connected" (Jackson, 2014), one would assume censorship of content is off the table.

Under Section 230 of the Communications Decency Act⁴, social media platforms cannot be held responsible for any of the content published by users of their platform. Therefore the only inherent regulation of users is the policing of their speech not protected under the first amendment—and a CEO's decision as to what constitutes acceptable speech. With immunity from legal repercussions, there is no reason for which any company would want to involve themselves in the sticky world of determining others' rights. Just as in physical speech, it is best to let individuals decide for themselves what they wish to listen to.

³These platforms can only truly be successful if they maintain a natural monopoly of online communication (Jackson, 2014).

⁴"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 U.S.C. § 230)

Bibliography:

1. Bakshy, Eytan, et al. "The Role of Social Networks in Information Diffusion." *ACM Digital Library*, Apr. 2012, dl.acm.org/citation.cfm?id=2187907.
2. Fukuyama, Francis. "Social Media and Censorship." *The American Interest*, 9 Aug. 2018, www.the-american-interest.com/2018/08/08/social-media-and-censorship/.
3. Jackson, Benjamin F. "Censorship and Freedom of Expression in the Age of Facebook," *New Mexico Law Review* vol. 44, no. 1 (Spring 2014): p. 121-168. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/nmlr44&i=131>.
4. "Marsh v. Alabama." *Oyez*, 10 Feb. 2019, www.oyez.org/cases/1940-1955/326us501.
5. "Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?" *Washington Law Review*, 1989.
6. Homero Gil de Zúñiga, Nakwon Jung, Sebastián Valenzuela; Social Media Use for News and Individuals' Social Capital, Civic Engagement and Political Participation, *Journal of Computer-Mediated Communication*, Volume 17, Issue 3, 1 April 2012, Pages 319–336, <https://doi.org/10.1111/j.1083-6101.2012.01574.x>