THE DILEMMA OF PRIVATE CENSORSHIP

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INTRODUCTION

In today's democracies, discussions over freedom of speech[1] and censorship tend to focus more and more on encroachments by private actors rather than infringements by governments. In contrast to the twentieth century, when the issue of limits on governmental interference with one's speech was at the core of legal and public debates, nowadays the reported instances of censorship show that public attention is largely shifting toward private restrictions. One illustrative example of this trend is the recent confrontation between former President Trump and social media platforms in the United States. In August 2018, President Trump accused Google of suppressing the views of conservatives and hiding news and information from the public.[2] The former President equally extended his warnings to Facebook and Twitter.[3] In May 2019, the Trump administration launched a website for collecting information from individuals on instances when their speech had been censored by social media platforms.[4] One year later, Twitter, allegedly in reaction to years of criticism that it had allowed misinformation and falsity, subjected Trump's tweets to fact-checking.[5] The very next day, the former President issued the Executive Order on Preventing Online Censorship, which, after restating the importance of free speech for the U.S. democracy, announced the government's review of "unfair and deceptive acts and practices" of online censorship with a

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1. This article will use the terms "freedom of speech" and "freedom of expression" interchangeably.

2. Emily Birnbaum, *Trump: Google Suppressing Conservative Voices, Hiding 'Good' News and Information*, HILL (Aug. 28, 2018, 07:12 AM), https://thehill.com/homenews/administration/403905-trump-google-suppressing-conservative-voices-hiding-good-news-and.

3. Ryan Browne, *Trump: Facebook, Twitter, Google are 'Treading on Very, Very Troubled Territory and They Have to be Careful'*, CNBC (Aug. 28, 2018, 8:18 PM), https://www.cnbc.com/2018/08/28/trump-accuses-google-of-rigging-search-results-in-favor-of-bad-coverage.html.

4. Liam Stack, *Trump Wants Your Tales of Social Media Censorship. And Your Contact Info.*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/2019/05/15/us/donald-trump-twitter-facebook-youtube.html.

5. Elizabeth Dwoskin, *Twitter Labels Trump's Tweets with a Fact Check for the First Time*, WASH. POST (May 27, 2020, 8:07 AM), https://www.washingtonpost.com/technology/2020/05/26/trump-twitter-label-fact-check/.

view to developing legislation that would prohibit them.[6] All three platforms objected to the order, claiming that such measures would instead cause more censorship, as well as damage the national economy and hinder innovation.[7] The outcome of this conflict became evident after the infamous storming of the U.S. Capitol on January 6, 2021.[8] Following the riot, Facebook, Twitter, and YouTube banned Trump's accounts, invoking the necessity to prevent further violence.[9] This pivotal decision was hailed by some and bitterly criticized by others, including world leaders, sparking debates about free speech and online private censorship with renewed vigor.[10]

Once again, what distinguishes this confrontation from most previous ones is that it revolves around private – not public – censorship. The issue itself has been puzzling not only for policy makers and social media giants, but also for academia.[11] Specifically in the United States, the current discussions generally stop at the mentioning of the state action doctrine, under which private actors in their dealings with others are not bound by the Constitution, including by the requirement to not abridge one's speech.[12] In addition, many scholars do not expect that courts will modify this approach any time soon.[13]

Against this backdrop, this paper will adopt a different route and will inquire into whether the constitutional guarantee of freedom of speech may in fact require the government to intervene in the private realm in order to curb non-government censorship. To answer this question, the article will first recap how the constitutional right of freedom of expression is understood in today's democracies. Second, it will discuss three important examples of extensive private censorship. Third, the paper will proceed by looking into the reasons as to why freedom of speech is protected by constitutions, arguing that there exists a classic justification for this. Fourth, the article will show that this classic justification may in effect

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6. Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,082 (June 2, 2020).

7. Tony Romm & Elizabeth Dwoskin, *Trump Signs Order that Could Punish Social Media Companies for How They Police Content, Drawing Criticism and Doubts of Legality*, WASH. POST (May 28, 2020, 10:53 PM), https://www.washingtonpost.com/technology/2020/05/28/trump-social-media-executive-order/.

8. Larry Buchanan et al., *How a Pro-Trump Mob Stormed the U.S. Capitol*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/06/us/trump-mob-capitol-building.

9. Mark Zuckerberg, FACEBOOK (Jan. 7, 2021), https://www.facebook.com/zuck/posts/10112681480907401; *Permanent Suspension of @realDonaldTrump*, TWITTER: BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html; YouTubeInsider (@YouTubeInsider), TWITTER (Jan. 12, 2021, 11:04 PM), https://twitter.com/YouTubeInsider/status/1349205688694812672.

10. Miriam Berger & Elizabeth Dwoskin, *Trump Ban by Social Media Companies Came After Years of Accommodation for World Leaders who Pushed the Line*, WASH. POST (Jan. 15, 2021, 3:00 PM), https://www.washingtonpost.com/world/2021/01/15/world-leaders-facebook-twitter-trump-ban/.

11. David L. Hudson, Jr., *Free Speech or Censorship? Social Media Litigation is a Hot Legal Battleground*, ABA J. (Apr. 1, 2019, 12:05 AM), https://www.abajournal.com/magazine/article/social-clashes-digital-free-speech.

12. *See infra* text accompanying notes 18-19.

13. *See, e.g.*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1659 (2018); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1368 (2018). *See also* Hudson, Jr., *supra* note 11.

necessitate governmental intervention in the private sphere to protect speech. This last point brings up the dilemma of private censorship. On the one hand, censorship practices of private actors may be so harmful that governmental interference would seem justified. On the other hand, it has historically been the government that played the role of major oppressor of freedom of expression. Hence, one should strongly resist any temptation to entrust the government with more powers in this field. Finally, the paper will suggest that one solution to this dilemma could be to draw upon the experience and research of economic theory, in particular the works of Friedrich Hayek.[14] By applying Hayek's views on regulation of monopolies and competition to the world of freedom of expression, one can infer that governmental intervention should be avoided to the maximum possible degree. It is only when a particular monopoly substantially manipulates the market of opinions and ideas and effectively eliminates competition between them that the government may be required to step in. Certain practices undertaken by Facebook, Twitter, and YouTube, specifically those relating to political speech, can arguably lead to such undermining of competition.

While largely focusing on the case law of the United States, in the subsequent discussion this article will also look into the experience of leading courts in other democracies. In particular, the paper will refer to the jurisprudence of courts in Canada, Germany, South Africa, and to the case law of the European Court of Human Rights ("ECtHR"). This comparative approach will help better demonstrate important similarities that exist in stances toward freedom of expression among democracies, as well as to underscore that private censorship may pose a challenge to free speech regardless of frontiers.

I. A GUARANTEE AGAINST GOVERNMENTAL INTERFERENCE

According to the existing case law of constitutional courts, freedom of speech is, first and foremost, a guarantee against governmental interference. In this vein, the right to freedom of expression is primarily used to stop encroachments of the government. Because freedom of speech is generally about protecting one's speech from public authorities, private infringements, no matter how flagrant, as such fall outside the ambit of this constitutional right. Such a reasoning is particularly characteristic to the United States, as well as to other democracies, although to a slightly lesser degree.

In the case of the United States, even the wording of the First Amendment of the Bill of Rights, which guarantees freedom of expression, speaks for itself: "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"[15] This provision specifically refers to Congress – later on it was construed

14. *See generally* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER (1973) [hereinafter LLL 1]; FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE (1978) [hereinafter LLL 2]; FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 3: THE POLITICAL ORDER OF A FREE PEOPLE (1979) [hereinafter LLL 3]; FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1978); FRIEDRICH A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS (1978).

15. U.S. CONST. amend. I.

to cover other branches of the government as well[16] – prohibiting it from interfering with free speech. Semantically, this wording suggests that the purpose behind the right to freedom of expression is to serve as a guarantee against governmental infringement.[17] In interpreting the First Amendment, the United States Supreme Court has in principle closely followed the constitutional text. Underpinning its stance by the state action doctrine, which generally holds that constitutional rights safeguard against interferences of the government and do not apply to private conduct,[18] the Supreme Court ruled that "it is fundamental that the First Amendment prohibits *governmental* infringement on the right of free speech."[19]

The Supreme Court also made it clear that it is not eager to provide exceptions to the established rule if the occurred interference with the right to freedom of expression cannot be unequivocally attributed to the government. In *CBS, Inc. v. Democratic Nat'l Committee*, for example, two political groups argued that a private broadcaster, licensed by the government, may not deny them access to airtime to comment on public issues.[20] The Court rejected this argument holding that there was no state action in the case for the reason that national legislation did not specifically touch upon this matter and thus left licensed broadcasters a great

16. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 326 (2010). *See also* Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321, 326-330 (2018). The First Amendment directly binds the federal government and, through the Fourteenth Amendment, also state and local authorities. *See* U.S. CONST. amend. XIV; Gitlow v. People of New York, 268 U.S. 652, 666 (1925).

17. For a discussion of the reasons that shaped the U.S. approach to freedom of speech, see Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 694-695 (1980) and Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 42-56 (Michael Ignatieff ed., 2005).

18. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974). The emergence of the doctrine is associated with the *Civil Rights Cases*, 109 U.S. 3 (1883), whose predecessors were United States v. Cruikshank, 92 U.S. 542 (1876), Virginia v. Rives, 100 U.S. 313 (1880), *Ex parte* Virginia, 100 U.S. 339 (1880), and United States v. Harris, 106 U.S. 629 (1883). *See also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. UNIV. L. REV. 503, 508 n.19 (1985); Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 224 (1976).

19. Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982) (emphasis added)*; see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

20. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 94 (1973). *Cf.* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (where state action was found on the ground that the government provided for pervasive regulation of dissemination of radio programs in public transport). *See also* the decision of the German Federal Constitutional Court (also FCC) in the *Freedom of Assembly at Frankfurt Airport* case, in which a group of opponents of deportation was banned by a transport company Fraport AG from spreading leaflets at the airport. Although Fraport AG was formally a private firm, its main shareholders were the State of Hesse and the City of Frankfurt am Main. The FCC ruled that the use of private law corporate structures cannot exempt public authorities from being directly bound by basic rights, in particular when they retain a controlling influence in such organizations. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 699/06, Feb. 22, 2011, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvr069906en.html;jsessionid=EE98B4133EAA42D460B2F33F4E1D1789.2_cid370 (Ger.).

deal of autonomy.[21] In another case, *Rendell-Baker v. Kohn*, a group of teachers claimed that their dismissal for exercising speech rights by a private school, whose income for more than ninety-percent (90%) consisted of public financing and whose activities were largely regulated by the government, was unconstitutional.[22] The Court, however, dismissed the claims and found no state action on the grounds that the decision to discharge the teachers did not follow from any state regulation, while such factors as receipt of government funding and performance of a public function were not decisive *per se*.[23] Finally, the Supreme Court confirmed its rigorous stance on inapplicability of the First Amendment to private behavior when, reversing its previous decision on the matter,[24] it eventually did not validate the right to hold pickets in private shopping centers.[25]

In other democracies, freedom of expression also primarily operates as a shield against governmental infringement, although the approach is less straightforward. In contrast to the United States, freedom of speech is framed here in a broader and more abstract manner. The European Convention on Human Rights,[26] for example, states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[27] In Germany, the Basic Law sets out: "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources."[28] In a similar fashion, the Constitution of South Africa declares: "Everyone has the right to freedom of expression, which includes – (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research."[29] In all

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21. *CBS, Inc.*, 412 U.S. at 114-21.

22. *Rendell-Baker*, 457 U.S. at 831-35.

23. *Id*. at 839-43.

24. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968).

25. *See generally* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

26. The practice of the European Court of Human Rights is referred to due to the key role that this Court plays across the member states of the Council of Europe by exercising its judicial review powers. *See*, *e.g.*, Steven Greer & Luzius Wildhaber, *Revisiting the Debate About "Constitutionalising" the European Court of Human Rights*, 12 HUM. RTS. L. REV. 655 (2012).

27. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950213 U.N.T.S. 221. It can be argued that this approach to freedom of expression started to crystalize together with the adoption of the French Declaration of the Rights of Man and the Citizen of 1789. Thus, Article 11 of the Declaration states: "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law." Here, again, the focus is on the rights of an individual speaker, not on the prohibitions on the government. For an examination of the reasons that shaped the approach in question, see Dieter Grimm, *The Protective Function of the State*, *in* EUROPEAN AND US CONSTITUTIONALISM 137, 138-142 (Georg Nolte ed., 2005).

28. GRUNDGESETZ [GG] [BASIC LAW], art. 5(1), translation at http://www.gesetze-im-internet.de /englisch_gg/.

29. S. AFR. CONST., 1996, § 16(1).

these cases, the cited instruments refer to *everyone*, not the *government*; their focus is on endowing *everyone* with the right to freedom of speech, not on introducing restrictions on the *government*. On this basis, it is widely recognized that freedom of speech under this approach, in addition to imposing so-called negative duties on governments, also charges them with some positive obligations.[30] In contrast to negative obligations, which oblige the government to abstain from acting, positive duties require taking additional steps to ensure "the *effective* realization" of constitutional rights.[31] The role of the government under this model is accordingly not limited to refraining from unwarranted interference, but also extends to facilitating enjoyment of rights. In the specific context of freedom of speech, a positive duty "obliges the state and its agents to establish the conditions necessary for the effective exercise of speech rights[,]"[32] which in theory could prompt the government to significantly expand the scope of freedom of expression, including by restraining private actors from violating free speech of others.

When it comes to practice, however, courts outside the United States generally acknowledge that freedom of expression is mainly a safeguard against governmental interference. For example, the European Court of Human Rights, while discussing this matter, pointed out that "the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities."[33] In the German landmark case on freedom of expression *Lüth*, the Federal Constitutional Court held: "There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state."[34] Furthermore, even in South Africa, where there seems to be even more room for extending application of constitutional provisions to private actors, freedom of speech has also primarily played a role of a guarantee against governmental infringement. To be more specific, Article 8 of the South African Constitution states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[35] Despite this provision, in reality the Constitutional Court of South Africa has been reluctant to apply constitutional rights in the private realm, including in the domain of free speech.[36]

Unsurprisingly, the bulk of jurisprudence on freedom of speech in other democracies is also about limits on governmental interference. Cases involving

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30. *See, e.g.*, Dean Spielmann, *The European Court of Human Rights*, *in* HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 427, 427-437 (Dawn Oliver & Jörg Fedtke eds., 2007); DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY: THIRD EDITION, REVISED AND EXPANDED 60 (2012); Pierre De Vos, *Rejecting the Free Marketplace of Ideas: A Value-Based Conception of the Limits of Free Speech*, 33 S. AFR. J. ON HUM. RTS. 359, 377 (2017).

31. KOMMERS & MILLER, *supra* note 30, at 60.

32. *Id*. at 449.

33. Özgür Gündem v. Turkey, 2000-III Eur. Ct. H.R. 1, para. 42.

34. BVerfG, BVerfGE 7, 198, Jan. 15, 1958 (*Lüth*), at 204.

35. S. AFR. CONST., 1996, § 8(2).

36. MARK S. KENDE, COMPARATIVE CONSTITUTIONAL LAW: SOUTH AFRICAN CASES AND MATERIALS IN A GLOBAL CONTEXT 229 (2015).

private censorship are scarce, although there are several noteworthy exceptions to this practice. For example, in the case of *Dink v. Turkey* – decided by the European Court of Human Rights – a journalist of Armenian origin in a series of articles discussed the issue of identity of Armenians living in Turkey.[37] In response, he was convicted by a criminal court for insulting sentiments of Turks and sentenced to six months of imprisonment, with suspension of execution.[38] Following the conviction, the journalist was later murdered by a Turkish extremist.[39] The ECtHR found that Turkey violated the right to freedom of expression, including by failing to comply with its positive obligation

> to create . . . a favorable environment for participation in public debates for all persons concerned, allowing them to express their opinions and ideas without fear, even if they go against the opinions and ideas that are defended by the official authorities or an important part of the public[.][40]

Another example is Germany, where during the Cold War era the Federal Constitutional Court considered the *Blinkfüer* case.[41] In *Blinkfüer*, the publishing houses Axel Springer and Die Welt, two of the most influential players on the media market, decided to tackle a small weekly newspaper *Blinkfüer* that transmitted programs from the Eastern zone.[42] To this end, Axel Springer and Die Welt approached all newspaper and magazine dealers in Hamburg, calling upon them to remove *Blinkfüer* from circulation if they wished to keep business relationships with the publishing companies.[43] The German Federal Constitutional Court ruled that in these specific circumstances Axel Springer and Die Welt by relying on their economic dominance on the market *de facto* deprived private dealers of the opportunity to resist the call since by doing so they would risk losing the supply from the major publishing houses.[44] The FCC reasoned that because such actions were likely to eliminate certain views from the market of opinions and ideas, it was obligatory to uphold "the independence of press . . . against interference by economic power groups by inappropriate means."[45]

However, as noted before, such cases remain an exception and the vast majority of disputes on freedom of expression outside the United States is about its negative aspect: the permissibility of governmental interference with freedom of speech of private actors. In fact, there can be several reasons as to why the concept of positive obligations still has not dramatically changed the role of freedom of expression in other democracies. First, historically – at least in recent centuries – it has been the government who played the role of the major oppressor

37. Dink v. Turkey, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, Sept. 14, 2010, http://hudoc.echr.coe.int/eng?i=001-100383, paras. 8-17.

38. *Id*. at paras. 18-29.

39. *Id*. at paras. 30-34.

40. *Id*. at para. 137.

41. BVerfGE 25, 256, 1 BvR 619/63, Feb. 26, 1969 (*Blinkfüer*).

42. *Id*. at 256-57.

43. *Id*. at 257-59.

44. *Id*. at 264-67.

45. *Id*. at 268.

of freedom of speech.[46] The desire of courts to primarily ensure protection from the acts of the government thus appears entirely justified. Second, one should also note that even proponents of expansion of the scope of freedom of speech admit that it is not yet clear under what criteria courts may establish the existence of positive obligations that could potentially lead in certain cases to curbing private censorship.[47] As Pierre De Vos put it, "[i]t is not an easy task to imagine precisely what types of obligations this would impose on the state and what the limits of courts would be to intervene in the process to enforce such positive obligations[.]"[48] In developing such criteria, the European Court of Human Rights, for example, held that:

> In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[49]

While this statement sheds some light on the subject, it is arguably still far from being specific enough to foresee with a proper degree of certainty whether or not a particular situation would give rise to the existence of positive obligations.

As a result, even though outside the United States constitutional instruments enshrine freedom of speech in a broader fashion, in practice courts construe the right in question essentially as a safeguard against interference of public authorities. Only in exceptional cases has the right to freedom of expression been used in a different role. The approach employed by other democracies is thus substantially close to the one applied in the United States.

II. EXAMPLES OF PRIVATE CENSORSHIP

While typically censorship has been mainly associated with the government, it is becoming increasingly evident that non-government actors can also pose a serious threat to freedom of speech. As will be shown below, thriving private censorship can effectively wipe out the benefits that freedom of expression carries.

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46. The abundance of government censorship practices in history is shown by numerous studies such as CENSORSHIP: A WORLD ENCYCLOPEDIA vol. 1-4 (Derek Jones ed., 2001).

47. De Vos, *supra* note 30, at 378-79. For an overview of cases where courts found positive obligations under the right to freedom of expression, see Robin Clapp, *Challenging the Traditional Conception of Civil Rights: Positive Obligations of the State under Freedom of Expression*, 33 ZAM. L.J. 51 (2001). *See also generally* COUNCIL OF EUR./EUR. CT. OF HUM. RTS., POSITIVE OBLIGATIONS ON MEMBER STATES UNDER ARTICLE 10 TO PROTECT JOURNALISTS AND PREVENT IMPUNITY (PREVENT IMPUNITY 2011).

48. De Vos, *supra* note 30, at 378-79.

49. Özgür Gündem v. Turkey, 2000-III Eur. Ct. H.R. 1, para. 43. *See also* Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 185, para. 40.

When private censorship is widespread, it does not virtually differ from its governmental analogue in terms of negative effects on free speech. Private actors, similar to the government, are capable of imposing content restrictions that are detrimental to discovery of the truth, personal self-fulfillment, and democracy. To illustrate this, the following section will discuss three distinct examples of extensive private censorship.

The first example relates to regulation of speech by such giant social media platforms as Facebook, Twitter, and YouTube. As a matter of fact, today Facebook has more than 1.9399 billion daily active users,[50] Twitter's web increases by 6,000 Tweets per second,[51] while YouTube receives more than 500 hours of new videos every minute,[52] which proves that these platforms have enormous power to influence the opinions of millions.[53] But while it seems fair to concede that all of them play an important role in saving their users from gigabytes of fraudulent and hideous uploads,[54] the platforms' speech policies and their execution raise a number of concerns.

These speech policies have evolved as quickly as the platforms themselves. Facebook's regulation of content has promptly developed from what used to be a one-page simple policy document[55] into the comprehensive multi-section Community Standards.[56] Under Section III "Objectionable Content[,]" the community standards set out what kind of speech can be restricted – for example, hate speech, violent and graphic content, etc., – as well as provide a policy rationale for each of the categories.[57] The number of these categories of speech falling under regulation has been gradually increasing, thus making Facebook's polices bulkier and more restrictive.[58] More importantly, apart from the community standards,

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50. *Number of Daily Active Facebook Users Worldwide as of 3rd Quarter 2021 (in millions)*, STATISTA (Nov 1, 2021), https://www.statista.com/statistics/346167/facebook-global-dau/.

51. *Twitter Usage Statistics*, INTERNET LIVE STATS, https://www.internetlivestats.com/twitter-statistics (last visited Feb. 14, 2022).

52. L. Ceci, *Hours of Video Uploaded to YouTube Every Minute 2007-2020*, STATISTA (Sep. 14, 2021), https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute.

53. *See also* MARK TUSHNET, ADVANCED INTRODUCTION TO FREEDOM OF EXPRESSION 116 (2018).

54. Langvardt, *supra* note 13, at 1358-63; Catherine Buni & Soraya Chemaly, *The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech*, VERGE (Apr. 13, 2006), https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech. For the description of hardship that content moderators have to live through, see SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 134-200 (2019).

55. Klonick, *supra* note 13, at 1631.

56. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Feb. 14, 2022). Note that these standards are regularly updated.

57. *Id*. Today the community standards also enumerate circumstances under which the outlawed categories of speech may nonetheless be published on the social platform as an exception. For example, in relation to hate speech, it is provided that criticism of immigration policies is allowable. *See id*.

58. David Talbot & Nikki Bourassa, *How Facebook Tries to Regulate Postings Made by Two Billion People*, MEDIUM (Oct. 19, 2017), https://medium.com/berkman-klein-center/how-facebook-tries-to-regulate-postings-made-by-two-billion-people-bca9408b6b4b.

which is a document available to the public, Facebook also crafted "internal rules" on how the content on the platform should be regulated.[59] In practice, these are the internal rules – a document spanning more than eighty pages, only for private use – that serve as an actual basis under which recruited reviewers moderate speech online.[60] As a result, Facebook's policies suffer from a lack of transparency since the information on the specifics of content moderation is not disclosed to the public.[61] However, when Facebook's "Abuse Standards" were leaked in 2012, new concerns emerged as the rules in question turned out to not always be clear. For example, according to the leaked document, "[h]umor and cartoon humor is an exception for hate speech unless slur words are being used or humor is not evident[.]"[62] Under this rule, the same piece of content arguably can be simultaneously interpreted as both necessitating censorship and worth being kept, largely depending on a person vested with the ultimate decision-making power.

In a dramatic way, Twitter has transformed from being the "free speech wing of the free speech party" to a platform that is deeply embroiled in content moderation.[63] While in 2009 Twitter pledged to not limit users' freedom of expression, except in some very restricted cases, such as direct threats, spam, or pornography,[64] these exceptions have constantly grown to encompass more and more speech.[65] One of the latest additions to the regulated content is, for example, "false or misleading information about COVID-19" and "false or misleading information about civic processes."[66] On top of that, Twitter decided to make one step further and embarked on an ambitious task to conduct – whenever the platform feels it is justified in doing so – fact-checking of Tweets so that users could be better informed.[67] Likewise, policies on permissible content underwent rapid developments at YouTube, where regulation of speech equally started with a one-page document in 2006.[68] Today it takes the form of multi-page Community Guidelines that cover various categories of speech, starting from sexual materials

59. Klonick, *supra* note 13, at 1634-35.

60. *Id*. at 1634.

61. Buni & Chemaly, *supra* note 54; *see also* Sarah T. Roberts, *Social Media's Silent Filter*, ATLANTIC (Mar. 8, 2017), https://www.theatlantic.com/technology/archive/2017/03/commercial-content-moderation/518796/.

62. Buni & Chemaly, *supra* note 54.

63. Sarah Jeong, *The History of Twitter's Rules*, VICE: MOTHERBOARD (Jan. 14, 2016), https://www.vice.com/en/article/z43xw3/the-history-of-twitters-rules.

64. Crystal, *The Twitter Rules*, INTERNET ARCHIVE, https://web.archive.org/web/20090118211301/http://twitter.zendesk.com/forums/26257/entries/18311 (last visited Feb. 14, 2022).

65. *See Rules and Policies*, TWITTER: HELP CTR., https://help.twitter.com/en/rules-and-policies#twitter-rules (last visited Feb. 14, 2022) that currently regulate more speech under such new policies as "COVID-19 misleading information policy," "Civic integrity policy," "Synthetic and manipulated media policy," and others.

66. *Id*.

67. Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER: BLOG (Mar. 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html.

68. Buni & Chemaly, *supra* note 54.

and harmful content and ending with misleading data and impersonalization.[69] It is reported that YouTube's speech policies change three dozen times a year,[70] and continue to expand, having recently been extended to cover "implied threats" and "malicious insults."[71]

Aside from expanding the scope of regulated speech, Facebook, Twitter, and YouTube have also significantly amplified their enforcement efforts. While at the beginning content moderation at Facebook was conducted by a group of college students in California,[72] at present there are between 7,500[73] and 30,000[74] specially trained reviewers, most of whom are based abroad, with one of the biggest hubs located in the Philippines.[75] Considering that Facebook has around 2 billion users, most of whom use the platform on a daily basis,[76] such numbers may point to a significant pressure that is put on moderators. Even though concrete figures remain largely unknown, in 2017, for example, it was reported that Facebook reviewers had to check 100 million items of content monthly, with only ten seconds being allocated for making a decision on its appropriateness.[77] Along the same lines, Twitter moderators are allegedly required to review around 1,000 pieces of content per day.[78] Presumably because Twitter is a smaller platform, the number of its content reviewers is estimated to be 1,500.[79] While in 2006 YouTube had only around 60 employees reviewing the uploaded videos,[80] in 2019 there were already up to 10,000 moderators, who similarly worked in different parts of the world.[81] Interestingly enough, despite the recruitment of thousands of new reviewers, in moderating speech the platforms continue to predominantly rely on flagging of

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69. *Community Guidelines*, YOUTUBE, https://www.youtube.com/about/policies/#community-guidelines (last visited Feb. 14, 2022).

70. Elizabeth Dwoskin, *YouTube's Arbitrary Standards: Stars Keep Making Money Even After Breaking the Rules*, WASH. POST (Aug. 9, 2019, 9:21 AM), https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/.

71. Matt Halprin, *An Update to Our Harassment Policy,* YOUTUBE: BLOG (Dec. 11, 2019), https://youtube.googleblog.com/2019/12/an-update-to-our-harassment-policy.html.

72. Klonick, *supra* note 13, at 1634.

73. Elizabeth Dwoskin & Tracy Jan, *Facebook Finally Explains Why It Bans Some Content, in 27 Pages*, WASH. POST (Apr. 24, 2018, 2:16 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/04/24/facebook-finally-explains-why-it-bans-some-content-in-27-pages/. *See also* Talbot & Bourassa, *supra* note 58.

74. Dwoskin, *supra* note 70.

75. Elizabeth Dwoskin et al., *Content Moderators at YouTube, Facebook and Twitter See the Worst of the Web — and Suffer Silently*, WASH. POST (July 25, 2019, 1:00 AM), https://www.washingtonpost.com/technology/2019/07/25/social-media-companies-are-outsourcing-their-dirty-work-philippines-generation-workers-is-paying-price/.

76. Talbot & Bourassa, *supra* note 58.

77. Olivia Solon, *To Censor or Sanction Extreme Content? Either Way, Facebook Can't Win*, GUARDIAN (May 23, 2017), https://www.theguardian.com/news/2017/may/22/facebook-moderator-guidelines-extreme-content-analysis.

78. Dwoskin et al., *supra* note 75.

79. Jason Koebler & Joseph Cox, *How Twitter Sees Itself*, MOTHERBOARD (Oct 7., 2019), https://www.vice.com/en/article/a35nbj/twitter-content-moderation.

80. Buni & Chemaly, *supra* note 54.

81. Dwoskin, *supra* note 70.

inappropriate content by users.[82] In effect, this may result in having an impermissible material uncensored for a long time until someone eventually reports it.

However, it seems not to be the platforms' internal arrangements, but rather the substance of their regulation of speech that has given rise to a number of public controversies. This is because from the perspective of freedom of expression many censored posts and videos were entirely innocent. For example, Facebook recently banned a series of works of art, including paintings of Rubens and some contemporary artists, on the ground that they contained manifestations of nudity.[83] The same basis was used by the social media giant to remove Phan Thi Kim Phuc's Pulitzer-prize winning photograph "The Terror War" that depicts a group of children running away from a napalm attack during the war in Vietnam.[84] The decision was reversed only after news outlets worldwide subjected the restriction to severe criticism.[85] In another controversy, the platform banned a post citing the Declaration of Independence for spreading hate speech, although after some time Facebook apologized and lifted the ban.[86] A few months later, Facebook censored pro-life advertisements showing babies who survived premature births stating that they were too "sensational" or "graphic" to be posted on the platform.[87]

Twitter's content moderation has also often been criticized, particularly for being indiscriminate and selective. This, for example, manifested in suspending the accounts of the Al Jazeera Arabic channel, allegedly because of a sudden receipt of a large number of complaints;[88] actress and #MeToo activist Rose McGowan, either out of privacy concerns or impermissible behavior;[89] and users being critical of the Chinese government, ostensibly in an attempt to prevent "platform manipulation."[90] After Twitter introduced fact-checking and applied it

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82. Buni & Chemaly, *supra* note 54.

83. Kerry Allen, *Facebook Bans Flemish Paintings Because of Nudity*, BBC NEWS (July 23, 2018), https://www.bbc.com/news/blogs-news-from-elsewhere-44925656; *Facebook Blocks Nude Painting by Acclaimed Artist*, BBC NEWS (Mar. 1, 2017), https://www.bbc.com/news/world-australia-39099726.

84. Zoe Kleinman, *Fury Over Facebook 'Napalm Girl' Censorship*, BBC NEWS (Sept. 9, 2016), https://www.bbc.com/news/technology-37318031.

85. Sam Levin et al., *Facebook Backs down from 'Girl' Censorship and Reinstates Photo*, GUARDIAN (Sept. 9, 2016, 1:44 PM), https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo.

86. Sam Wolfson, *Facebook Labels Declaration of Independence as 'Hate Speech'*, GUARDIAN (July 5, 2018, 1:10 PM), https://www.theguardian.com/world/2018/jul/05/facebook-declaration-of-independence-hate-speech.

87. Emily Jones, *Facebook Removes Pro-Life Ads of Babies who Survived Premature Birth*, CBN NEWS (Oct. 26, 2018), https://www1.cbn.com/cbnnews/us/2018/october/facebook-removes-pro-life-ads-of-babies-who-survived-premature-birth.

88. Alfons López Tena, *Twitter Has Gone From Bastion of Free Speech to Global Censor*, BUS. INSIDER (June 27, 2017, 8:19 PM), https://www.businessinsider.com/twitter-has-gone-from-bastion-of-free-speech-to-global-censor-2017-6.

89. Anna Livsey, *Rose McGowan Suspended From Twitter After Ben Affleck Tweets*, GUARDIAN (Oct. 12, 2017, 1:09 PM), https://www.theguardian.com/technology/2017/oct/12/rose-mcgowan-twitter-suspended-ben-affleck-harvey-weinstein.

90. *Twitter Apologizes for Blocked China Accounts Ahead of Tiananmen Anniversary*, REUTERS (June 2, 2019, 6:23 AM), https://www.reuters.com/article/us-china-twitter/twitter-apologizes-for-bl

to Trump's account,[91] Facebook CEO Mark Zuckerberg objected, pointing out that private entities should not act as an "arbiter of truth."[92] Others wondered whether Twitter would also be as eager to use this tool in relation to other politicians[93] – the comment which is arguably worthy of note, given that one of Twitter's top executives confessed that the platform is "not being able to enforce highly specific rules at the scale it operates."[94] In October 2020, Twitter's moderation was again under scrutiny, namely after the platform suspended the New York Post's account following its report on Hunter Biden's affairs – weeks before the presidential election – allegedly conducted in violation of some privacy rules.[95]

YouTube's enforcement of its own rules has equally been called into question on the ground of selectiveness. In this vein, the platform faced criticism in 2016, when it allowed disseminating violent videos on war in Syria and Iraq, while at the same time banned videos on drug wars in Mexico.[96] In 2019, moderators working for YouTube confessed that the decisions on whether a material should be kept or removed are often driven by market considerations.[97] As long as a channel generates significant revenue from advertisement, it is less likely that it would be subjected to penalties in case of a violation of the platform's policies.[98] For example, after Logan Paul, who has more than 20 million subscribers, published videos showing him alongside a hanged man and tasering dead rats, YouTube merely suspended ads on his channel for two weeks while ordinarily this might have resulted in a permanent ban.[99]

In light of this, one may wonder whether the regulation of speech on Facebook, Twitter, and YouTube is legitimate, given that their policies are not available to the public and, as it appears, overbroad, while the enforcement, being dependent on quick reactions of reviewers, is often inconsistent, if not arbitrary. Again, what makes this issue particularly important is the fact that these platforms exercise a great influence over dissemination of content on the Internet. As noted by Jeffrey Rosen, "Google and Facebook now have far more power over the privacy and free speech of most citizens than any King, president, or Supreme

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ocked-china-accounts-ahead-of-tiananmen-anniversary-idUSKCN1T30C7. Twitter later apologized and promised to correct the mistakes. *See* @Policy, TWITTER (June 1, 2019, 10:16 AM), https://twitter.com/Policy/status/1134825965501276160.

91. Dwoskin, *supra* note 5.

92. Brett Molina, *Facebook's Mark Zuckerberg on Twitter Fact-Checking Trump: Companies Shouldn't Serve as 'Arbiter' of Truth'*, USA TODAY (May 28, 2020, 7:35 AM), https://www.usatoday.com/story/tech/2020/05/28/twitter-fact-checks-trump-facebooks-mark-zuckberberg-disputes-move/5272584002/.

93. *Twitter Plays Into Trump's Hands*, WALL STREET J. (May 27, 2020, 7:22 PM), https://www.wsj.com/articles/twitter-plays-into-trumps-hands-11590621733.

94. Koebler & Cox, *supra* note 79.

95. *Twitter's 'Living' Censorship*, WALL STREET J. (Nov. 1, 2020, 3:40 PM), https://www.wsj.com/articles/twitters-living-censorship-11604263210.

96. Roberts, *supra* note 61.

97. Dwoskin, *supra* note 70.

98. *Id.*

99. *Id.*

Court justice."[100] By placing recently indefinite bans on Trump's accounts, who was still in office at the time,[101] the platforms attested to this observation once more, even though there can be little dispute that some of his last tweets looked disturbing.

Another example of non-government censorship relates to restricting freedom of expression at private colleges and universities.[102] The desire to control speech on campus has persisted in the United States for a number of years and manifested itself in various forms. One such manifestation involved the attempt to regulate freedom of expression through the adoption and enforcement of speech codes and policies in the late 1980s and the beginning of the 1990s.[103] Colleges and universities argued that the enactment of these instruments was necessary to respond to a proliferation of verbal attacks on disadvantaged members of the community.[104] Through speech codes and policies, educational institutions thus sought to minimize instances of hate speech and create a peaceful learning environment based on mutual respect and tolerance.[105] It is estimated that more than 350 colleges and universities across the country followed this path during the named period.[106]

The rules enshrined in the adopted regulations however were often controversial. For example, the University of Connecticut included in the scope of harassment "the use of derogatory names," "inconsiderate jokes," "misdirected laughter," and "conspicuous exclusion from conversation."[107] In other cases, it was permissible to restrict one's speech on condition that the speaker had an intention to create a hostile educational environment.[108] Gradually, speech codes began to be used to institute proceedings against expressions that clearly fell within the category of protected speech from the First Amendment perspective, even though some people might find them unpleasant or offensive. At the University of

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100. Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, BROOKINGS INST. (May 2, 2011), https://www.brookings.edu/research/the-deciders-facebook-google-and-the-future-of-privacy-and-free-speech/.

101. *See supra* text accompanying notes 9-10.

102. While the focus of this section is certainly on private colleges and universities, a significant part of its content is also relevant to public institutions. This is because both private and public colleges and universities share the same goal – educate and create knowledge – as well as because in some cases freedom of speech on campuses is abridged not by administrations but by private actors such as riot groups, which makes the division between private and public institutions less essential. *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xxi, 20 (2017).

103. Catherine L. Langford, *Consumer Student or Citizen Student? The Clash of Campus Speech Codes and Free Speech Zones*, 43 FREE SPEECH Y.B. 93, 95 (2006).

104. Dennis Chong, *Free Speech and Multiculturalism In and Out of the Academy*, 27 POL. PSYCHOL. 29, 32 (2006); Langford, *supra* note 103, at 95. *See also* UWM Post v. Bd. of Regents of Univ. of Wis., 774 F. Supp. 1163, 1164 (E.D. Wis. 1991).

105. *UWM Post*, 774 F. Supp. at 1164.

106. Erwin Chemerinsky, *The Challenge of Free Speech on Campus*, 61 HOWARD L.J. 585, 590 (2018).

107. DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 9 (1991).

108. *UWM Post*, 774 F. Supp. at 1165; Iota Xi Chapter of Sigma Chi v. George Mason Univ., 773 F. Supp. 792, 794 (E.D. Va. 1991).

Michigan, for example, at least three students faced charges for sharing their views during classroom discussions.[109] At the University of California, Riverside, a fraternity was suspended after its members for one of their *fiestas* made t-shirts showing a man in a sombrero with a beer.[110] According to another example, the California State University in Northridge temporarily suspended a student editor for publishing a caricature ridiculing affirmative action.[111] On other occasions, students were punished on the discretionary basis of university administrations, with no reference being made to speech codes or policies overall.[112]

As the number of such cases continued to grow, many sounded the alarm about the deteriorating situation with freedom of speech on campuses.[113] Eventually, a number of university speech codes and policies were challenged in courts as violating the First Amendment.[114] This turned out to be a successful enterprise as in every single case the courts upheld freedom of speech.[115] Noticing this development, other colleges and universities across the country abandoned their speech codes and policies.[116] Despite the demise of these regulations, however, restrictions of freedom of expression on campuses did not disappear.

In recent years, colleges and universities, both private and public, witnessed an attempt to fine-tune free speech through the spread of such new instruments as trigger warnings, microaggressions, and safe spaces.[117] Typically promoted with the intention of guaranteeing emotional well-being on campuses, these instruments also clashed with the ideals of a free and robust discussion.[118] As far as trigger warnings[119] are concerned, in this case students themselves suggested their

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109. Doe v. Univ. of Mich., 721 F. Supp. 852, 861, 865-66 (E.D. Mich. 1989).

110. Michael J. Laird, *The Constitutionality of Political Correctness*, 16 COMM. & LAW. 43, 50 (1994).

111. Dirk Johnson, *Censoring Campus News*, N.Y. TIMES (Nov. 6, 1988), https://www.nytimes.com/1988/11/06/education/censoring-campus-news.html.

112. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 388-89 (4th Cir. 1993). *See also* S. Douglas Murray, *The Demise of Campus Speech Codes*, 24 W. ST. U. L. REV. 247 (1997).

113. *See*, *e.g.*, Laird, *supra* note 110, at 51-52; James Leonard, *Killing with Kindness: Speech Codes in the. Am. Univ.*, 19 OHIO N.U. L. REV. 759, 759-60 (1993); Evan G. S. Siegel, *Closing the Campus Gates So Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L. J. 1351, 1398-400 (1990); D'SOUZA, *supra* note 107, at 9.

114. *See*, *e.g.*, Univ. of Mich., 721 F. Supp. at 861; UWM Post v. Bd. of Regents of Univ. of Wis., 774 F. Supp. 1163, 1168 (E.D. Wis. 1991); Iota Xi Chapter of Sigma Chi v. George Mason Univ., 773 F. Supp. 792, 793-94 (E.D. Va. 1991); Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 388 (4th Cir. 1993); Corry v. Leland Stanford Junior Univ., No. 740309 (Ca. Super. Ct. Feb. 27, 1995). *See also* Chemerinsky, *supra* note 106, at 590-94; Laird, *supra* note 110, at 45-48; Murray, *supra* note 112, at 265-70.

115. *Id*.

116. Chemerinsky, *supra* note 106, at 594.

117. Joseph Russomanno, *Speech on Campus: How America's Crisis in Confidence Is Eroding Free Speech Values*, 45 HASTINGS CONST. L.Q. 273, 290 (2018); Robert Shibley, *Current Threats to Free Speech on Campus*, 14 FIRST AMEND. L. REV. 239, 255-64 (2016).

118. Russomanno, *supra* note 117, at 290.

119. *Trigger Warning*, LEXICO, https://www.lexico.com/en/definition/trigger_warning (last visited Feb. 15, 2022) (Trigger warnings generally denote "[a] statement at the start of a piece of

expansion. It was argued that trigger warnings should apply to a broader array of works, including to William Shakespeare's "The Merchant of Venice" (anti-Semitism), Virginia Woolf's "Mrs. Dalloway" (suicide),[120] F. Scott Fitzgerald's "The Great Gatsby" ("'suicide,' 'domestic abuse,' and 'graphic violence'")[121] and many others.[122] The willingness to ensure the comfort of students and staff by combatting microaggressions[123] was no less contentious. Thus, a widely discussed controversy over this topic occurred after the University of California released its Principles of Community "Diversity in the Classroom" in 2014.[124] To foster an inclusive environment on campus, the principles gave a list of examples constituting microaggressions that were better to avoid.[125] The list included such expressions as "I believe the most qualified person should get the job," "Gender plays no part in who we hire," "America is the land of opportunity" and so on.[126] Even though following public criticism the examples in question were omitted from the section on microaggressions, one can still have reasonable doubts as to what extent it is now safe to express these and similar ideas on campus.[127]

On top of this, colleges and universities in the United Stated recently encountered a series of particularly upsetting incidents of suppression of speech fraught with violent behavior. One such incident occurred at the University of California, Berkeley, which in 2017 was going to host an event with a far-right British activist Milo Yiannopoulos.[128] Despite extra steps taken by the university to ensure safety on campus on the day of the event, including enlarging the

writing, video, etc., alerting the reader or viewer to the fact that it contains potentially distressing material[.]").

120. Jennifer Medina, *Warning: The Literary Canon Could Make Students Squirm*, N.Y. TIMES (May 17, 2014), https://www.nytimes.com/2014/05/18/us/warning-the-literary-canon-could-make-students-squirm.html?_r=0.

121. Alison Flood, *US Students Request 'Trigger Warnings' on Literature*, GUARDIAN (May 19, 2014, 11:03 AM), https://www.theguardian.com/books/2014/may/19/us-students-request-trigger-warnings-in-literature.

122. *Id*.

123. *Microaggression*, LEXICO, https://www.lexico.com/en/definition/microaggression (last visited Feb. 15, 2022) (Microaggressions can be defined as "[a] statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority[.]").

124. Eugene Volokh, *UC Teaching Faculty Members Not to Criticize Race-Based Affirmative Action, Call America 'Melting Pot,' and More*, WASH. POST (June 16, 2015, 7:48 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/16/uc-teaching-faculty-members-not-to-criticize-race-based-affirmative-action-call-america-melting-pot-and-more/; Shibley, *supra* note 117, at 262-64.

125. Volokh, *supra* note 124.

126. *Id*.

127. *Diversity in the Classroom,* UCLA 10 (2016), https://equity.ucla.edu/wp-content/uploads/2016/06/DiversityintheClassroom2014Web.pdf. In this vein, one may in addition recall the increased pressure exercised upon academics in recent years for expressing openly their views. *See*, *e.g.*, Michael Powell, *How a Famous Harvard Professor Became a Target over His Tweets*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/us/steven-pinker-harvard.html.

128. Chemerinsky, *supra* note 106, at 585. *See also* Russomanno, *supra* note 117, at 273-74.

presence of police, the situation got out of control.[129] This is how it was described by Erwin Chemerinsky, dean of the Berkeley School of Law:

> But then Berkeley faced something that other campuses had not previously experienced: 150 black-clad rioters associated with the anarchist group "Black Bloc" - many of whom were wearing masks, helmets, body armor, and who were armed with poles, sticks, and commercial grade fire-works. They ignited fires, hurled Molotov cocktails, destroyed barricades, smashed windows, and attacked individuals. An ordinary student protest had become an unmanageable riot, which continued into the city of Berkeley, overwhelming campus efforts and forcing cancellation of the event.[130]

The University of California, Berkeley did not become the only victim of violence inflicted due to open disagreement with invited speakers. On the contrary, the practice of turning from word to sword appeared to be contagious. Since then, violent attacks have taken place at the University of Washington, Middlebury College, and University of Virginia, among others, resulting in death, injuries, and millions of dollars in damage.[131]

Given the rise of violence at campus rallies, it should not come as a surprise that under such circumstances the state of freedom of speech on campus and the commitment of students to the ideals of the First Amendment is waning. According to the research initiated by the Association of American Colleges and Universities, only 35.6% of students strongly agree that it is safe to hold unpopular opinions on campus.[132] A study commissioned by McLaughlin & Associates revealed that 51% of students favor having speech codes.[133] A Knight Foundation survey showed that 32% of students find that it is always acceptable to engage in protests against speakers, while 60% think that it is sometimes acceptable; only 8% of students indicated that it would never be acceptable.[134]

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129. Chemerinsky, *supra* note 106, at 588.

130. *Id*. at 585-86 (citation omitted).

131. *See generally Man Shot at University of Washington Protests*, USA TODAY (Jan. 21, 2017, 12:21 AM), https://www.usatoday.com/story/news/nation-now/2017/01/21/man-shot-university-washington-protests/96873786/; Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html; Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies,* ABC NEWS (Aug. 8, 2018, 4:44 PM), https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500; Fenit Nirappil, *White-supremacist Rally Cost D.C. at Least $2.6 Million, Preliminary Estimate Shows*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/local/dc-politics/white-supremacist-rally-cost-dc-26-million--preliminary-estimate-shows/2018/08/14/3edebcce-9ffa-11e8-83d2-70203b8d7b44_story.html.

132. ERIC L. DEY ET AL., ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? 7 (2010).

133. MCLAUGHLIN & ASSOCS., *National Undergraduate Study* 8 (2015), https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0.

134. Knight Foundation, *Free Expression on College Campuses*, COLLEGE PULSE 4 (2019), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/351/original/Knight-CP-Report-FINAL.pdf.

Pervasive private censorship, however, is not a new phenomenon. For example, a closer look at censorship of obscenity, which reached its peak in the West[135] at the turn of the nineteenth century, shows that it was largely conducted by private actors.[136] Specifically, it can be argued that this censorship was established by private moralist associations; in the case of the United States this was by the New York Society for the Suppression of Vice ("NYSSV"), led for many years by Anthony Comstock.[137]

The moralist associations believed that what was immoral to them should also become illegal. In this regard, it should be noted that prior to the middle of the nineteenth century, the regulation of obscenity could be generally described as unsystematic and scattered. Even though *R. v. Curl* decided in 1727 held that publishing an immoral libel was a criminal offence under common law,[138] this cause led to only a small number of prosecutions until the second half of the nineteenth century.[139] In the United States, as in other countries,[140] there was no legislation specifically targeted at suppressing indecent materials, and the regulation of this matter was limited to several isolated references in statutes dealing with import of goods and the like.[141]

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135. While this section will focus on the United States, similar processes took place in other western countries, often earlier, particularly in the United Kingdom, Switzerland, and France. *See generally* Franck Hochleitner, *La censure à l'Opéra de Paris aux Débuts de la IIIe République (1875-1914)*, LA CENSURE EN FRANCE A L'ERE DEMOCRATIQUE 233 (Pascal Ory ed. 1997); PAUL KEARNS, FREEDOM OF ARTISTIC EXPRESSION: ESSAYS ON CULTURE & LEGAL CENSURE 7-42 (2013); Jean-Yves Le Naour, *Un Mouvement Antipornographique: La Ligue Pour le Relèvement de la Moralité Publique (1883-1946)*, 22 HISTOIRE, ECONOMIE ET SOCIETE 385 (2003); Colin Manchester, *Obscenity Law Enforcement in the Nineteenth Century*, 2 J. OF LEGAL HIST. 45 (1981) [hereinafter Manchester A]; Colin Manchester, *Lord Campbell's Act: England's First Obscenity Statute*, 9 J. OF LEGAL HIST. 223 (1988) [hereinafter Manchester B]; Stefan Petrow, *The Legal Enforcement of Morality in Late-Victorian and Edwardian England*, 11 U. TAS. L. REV. 59 (1992); M.J.D. Roberts, *Morals, Art, and the Law: The Passing of the Obscene Publications Act, 1857*, 28 VICTORIAN STUDIES 609 (1985); ANNIE STORA-LAMARRE, L'ENFER DE LA IIIE RÉPUBLIQUE (1990).

136. Interestingly, while discussing this example of censorship, legal scholarship has often tended to place a major emphasis on actions of the government at the risk of underestimating the actual role of private actors in establishing this form of censorship. *See generally* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE U.S. 529-47 (1941); Henry H. Foster Jr., *The "Comstock Load"–Obscenity and the Law,* 48 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 245 (1957); Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of Am. Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U.L. REV. 215 (2007); JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, & THE VISUAL ARTS 678-697 (2007).

137. Across the Atlantic, similar organizations were the Society for the Suppression of Vice and the Encouragement of Religion and Virtue (also known as Vice Society) and the National Vigilance Association in the United Kingdom; the Swiss Association against Immoral Literature (*L'Association suisse contre la littérature immorale*) in Switzerland; and the League for the Recovery of Public Morality (*La Ligue pour le relèvement de la moralité publique*) and the Society of Protest against Licensing of the Streets (*La Société de protestation contre la licence des rues*) in France.

138. Manchester B, *supra* note 135, at 223-24.

139. *See, e.g.*, Foster Jr., *supra* note 136, at 246-47.

140. *See* Manchester B, *supra* note 135, at 223 (for the United Kingdom)*; see also* STORA-LAMARRE, *supra* note 135, at 138 (for France).

141. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society–From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 746-47 (1992).

Against this background, the NYSSV turned to lobbying for the adoption of the new comprehensive legislation that would criminalize obscenity in its various forms. In February 1873, Anthony Comstock personally left for Washington, D.C. to beseech Congress to enact a stricter law against obscenity.[142] Congress quickly acquiesced to Comstock's pressure and in less than a month approved An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, which since then has been widely known as the Federal Anti-Obscenity Act or simply the "Comstock Law."[143] According to the new statute, selling, lending, giving away, exhibiting, publishing, producing and mailing any indecent object, as well as possessing such material for one of the named purposes was illegal.[144] The statute provided severe penalties for engaging in circulation of indecent publications; for example, the punishment for mailing obscene materials could be as harsh as ten years imprisonment with hard labor.[145] Finally, to facilitate the fight against indecency, the Comstock Law authorized judges to order the police to search, seize and forfeit obscene materials.[146]

What makes this example of censorship particularly relevant for today's regulation of speech by private actors is that members of the NYSSV eventually took the lead in enforcing the legislation that they lobbied for. Soon after tightening of the legal framework on obscenity, it became clear that public authorities were not so eager to persecute authors and distributors of indecent materials. While the ideas of moral and social purity indeed enjoyed a vast public support,[147] at the same time many people did not find anything criminal in obscenity, including in the government.[148] Judges regularly disapproved actions of the NYSSV, which prompted Comstock to level criticism against them.[149]

Under these circumstances, members of the NYSSV were convinced that the overall success of the purification of morals would eventually depend on their own actions. As a consequence, the association soon turned out to be the major

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142. CHARLES GALLAUDET TRUMBULL, ANTHONY COMSTOCK, FIGHTER: SOME IMPRESSIONS OF A LIFETIME ADVENTURE IN CONFLICT WITH THE POWERS OF EVIL 86 (1913).

143. Craig L. LaMay, *America's Censor: Anthony Comstock and Free Speech*, 19 COMM. & L. 1, 16-17 (1997).

144. An Act for the Suppression of Trade In, and Circulation of, Obscene Literature & Articles of Immoral Use, ch. 258, §§ 1-2, 17 Stat. 598, 598-99 (1873) (repealed 1909).

145. *Id.* It should be noted that moralist associations also lobbied the adoption of anti-obscenity measures at the international level. In 1908, they held the International Congress against Pornography in Paris, at which the participating associations urged, *inter alia*, to arrange an international official conference with a view to enacting a cross-border regulation to suppress obscenity. Responding to this call, such a diplomatic conference took place two years later, again in Paris, where fourteen states, including the United States, signed the Agreement for the Repression of Obscene Publications, which remains in force today. *See, e.g.*, Uladzislau Belavusau, *Art, Pornography and Foucauldian Reconstruction of Comparative Law*, 17 MAASTRICHT J. EUR. & COMP. L. 252 (2010)*;* Annie Stora-Lamarre, *Le Livre en Question. La Censure au Congrès International contre la Pornographie (Paris, 1908)*, 7 MIL NEUF CENT. LES CONGRÈS LIEUX DE L'ÉCHANGE INTELLECTUEL 1850-1914, at 87 (1989).

146. An Act for the Suppression of Trade In, and Circulation of, Obscene Literature & Articles of Immoral Use, ch. 258, § 5, 17 Stat. 598, 599-600 (1873) (repealed 1909).

147. LaMay, *supra* note 143, at 37, 49.

148. *Id.* at 23.

149. *See*, *e.g.*, THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE, THE TWENTY-FIRST ANNUAL REPORT 20 (1895). *See also* LaMay, *supra* note 143, at 28.

enforcement agent of the newly adopted anti-obscenity legislation and resorted to a massive institution of legal proceedings against authors and distributors of allegedly indecent works. Since Comstock could secure a position as special postal agent, one of his typical tactics was to first write an anonymous request for a supposedly obscene material and then, once the object had been obtained by mail, to begin a prosecution with evidence at hand.[150] Although the proceedings initiated by the NYSSV were not always successful, the amount of punished works grew rapidly and extended to renowned works of art and literature. For example, at the turn of the nineteenth century Comstock and his followers proscribed works of Theodore Dreiser,[151] Nathaniel Hawthorne,[152] George Bernard Shaw,[153] Leo Tolstoy,[154] Walt Whitman,[155] William Shakespeare,[156] and many others. In summarizing the NYSSV achievements on the occasion of its thirty-nine years of operation, Comstock reported that during this time so many people were convicted that they would require a train with sixty-one coaches to be transported, and that more than 160 tons of indecent publications had been destroyed.[157]

Not surprisingly, such a zealous enforcement coincided in time with the establishment of strict regimes of censorship and self-censorship in the field of art and beyond. As the line between decent works and outright pornography was not always easy to discern, writers, artists, publishers, and distributors had to become particularly cautious, realizing that making one imprudent step might easily lead them to a criminal sentence or bankruptcy.[158] To avoid potential sanctions, some preferred to either entirely delete or thoroughly mask uncomfortable topics in their works,[159] while others opted to impose measures of self-regulation.[160] For example, in 1895, the National Editorial Association adopted the "pure press code," which was supposed to govern the business of newspapers and publishers.[161] In this context, it was clear that holding a discussion on many matters of general interest could become a serious problem as long as there were even distant references to intimacy. One can reasonably expect that because of such pressure certain opinions and ideas were either entirely erased from public discourse, or their presence was considerably suppressed.

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150. *See* Blanchard, *supra* note 141, at 749.

151. KATHERINE MULLIN, JAMES JOYCE, SEXUALITY & SOC. PURITY 10 (2003).

152. Blanchard, *supra* note 141, at 746.

153. MULLIN, *supra* note 151, at 10.

154. PAUL S. BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE 15 (2002).

155. Blanchard, *supra* note 141, at 746.

156. LaMay, *supra* note 143, at 37.

157. THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE, THE THIRTY-NINTH ANNUAL REPORT 9 (1913); Ralph K. Andrist, *Paladin of Purity*, AMERICAN HERITAGE (Oct. 1973), https://www.americanheritage.com/content/paladin-purity.

158. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970 130 (2nd ed. 1998).

159. Blanchard, *supra* note 141, at 757-58; KRISTOFER ALLERFELDT, CRIME AND THE RISE OF MODERN AMERICA: A HISTORY FROM 1865–1941, at 145 (2011).

160. ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 118 (1999).

161. *Id.*

Private censorship therefore can travel through time and pursue a variety of objectives. These objectives may include the desire to clean the online space, to create a more comfortable educational environment, to purify the morals of a society, and so on. Regardless of concrete goals and measures taken to achieve them, when private actors enjoy substantial power to impose their will on many others, this can lead to the establishment of censorship that in terms of its impact in essence does not differ from the extensive restrictions imposed by government.

III. A CLASSIC JUSTIFICATION OF FREEDOM OF EXPRESSION

To understand whether the right to freedom of expression can be of any use against private censorship, it is important to look into *why* the United States and other democracies protect free speech at the constitutional level. As will be shown, a number of theories have been developed to respond to this question. Among this variety, however, there are three theories that together can be viewed as a classic justification of freedom of expression. These theories hold that freedom of speech is valued because of its importance for discovery of the truth, personal self-fulfillment, and democracy.[162]

According to the first theory, freedom of expression is necessary for discovering the truth. When censorship reigns, many facts and opinions cannot be made public and discussed, which prevents society from establishing the truth and distinguishing it from the falsehood. The foundations of this approach were laid down by John Milton[163] and later on developed by John Stuart Mill.[164] Mill built his theory on the premise that no one can be absolutely sure whether a particular opinion is true or false; this can only be presumed.[165] The very condition to ascertain whether an opinion should be regarded as the truth or falsehood is to subject it to contradictory judgments and facts.[166] When people simply suppress an opinion, they thereby distance themselves from the truth.[167] As Mill explained it: "If the [silenced] opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision

162. Each of these theories has several versions, which reveal some open questions within them. One such question is whether these justifications should be regarded as consequentialist or constitutive theories. For example, the justification from personal self-fulfillment has been constructed on both grounds. It has been argued that freedom of speech leads to a more enlightened personality, as well as that freedom of expression is itself an inherent element of individual self-development, regardless of its outcomes. *See* ERIC BARENDT, FREEDOM OF SPEECH 13 (2d ed. 2005). From a more general stance, however, both these interpretations seem plausible as they reflect important aspects of freedom of expression. In fact, they are also closely interrelated and complete each other. For these reasons, while acknowledging these differences in interpretation, this section will approach the justifications from discovery of the truth, personal self-fulfillment and democracy from both perspectives or, as U.S. Supreme Court Justice Brandeis put it, "both as an end and as a means." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

163. *See generally* JOHN MILTON, AREOPAGITICA (1973).

164. *See generally* JOHN STUART MILL, ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS (2015).

165. *Id*. at 19.

166. *Id*. at 21-22.

167. *Id*. at 19.

with error."[168] Freedom of expression is a basic requirement for advancement in the quest for the truth. In the beginning of the twentieth century, the U.S. Supreme Court Justice Oliver Holmes proposed a slightly different version of this justification. In his famous dissent in *Abrams v. United States*, Justice Holmes introduced the concept of the "marketplace of ideas," according to which "the best test of truth" for a thought is to bring it to the market where other opinions and ideas are traded freely.[169] Then, similar to the market of goods and services, the free market of opinions and ideas will allow a comparison to be made between them so that the true ones can emerge. Such a market would be impossible without free speech since it provides the possibility for each opinion and idea to be expressed, discussed, and weighed against others.

The second justification posits that freedom of speech must be protected due to its importance for personal self-fulfillment. According to this theory, free speech is crucial because it allows the individual to access and consider various types of information and opinions, which is instrumental for making an autonomous choice. One of the advocates of this theory, Thomas Scanlon, argued that being autonomous means having the capacity to independently consider opinions and judgments of others and to make one's own choice regarding what to believe and how to act.[170] The right to freedom of expression is essential because it safeguards individual autonomy, and, in particular, precludes suppression of speech on the assumption that some expressions may form false beliefs or convince an individual to commit harmful acts.[171] Another version of this theory was developed by Martin Redish, according to whom there is only one true ultimate value that underlies freedom of speech: "individual self-realization."[172] All other values, such as the quest for the truth or collective self-rule, derive from, and in the end contribute to, personal self-realization.[173] The utmost importance of freedom of speech stems from the fact that it affects all decisions relevant to personal self-realization, including the development of one's capacities and exercising control over one's own life by fulfilling the chosen goals.[174] Finally, in addition to the fundamental impact on personal autonomy, it is argued that uninhibited communicative activity *per se* constitutes an important aspect of personal development. Freedom of expression is one of the core attributes that makes humans human.[175]

The third theory justifies freedom of expression as essential for democracy. One of the first theorists who developed this approach was Alexander Meiklejohn, whose works built a connection between freedom of speech and self-

168. *Id.*

169. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

170. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215-16 (1972).

171. *Id.* at 213-22.

172. Martin H. Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1981).

173. *Id.* at 594-95.

174. *Id.* at 593-94.

175. *See also* BARENDT, *supra* note 162, at 13.

governance.[176] In interpreting the U.S. Constitution, Meiklejohn drew the conclusion that one of its core principles lies in that it entrusts all constitutional powers to the people, thereby fixing the choice for self-rule in the law.[177] The First Amendment serves to fulfil this principle, which means that the purpose of the right to free speech is to protect those activities that are necessary for the people to exercise self-governance.[178] In particular, such activities include comprehending political issues, expressing judgements on public decisions that relate to such issues, and taking part in developing ideas on how these decisions can be improved.[179] Without these activities, guaranteed in all their different forms, self-governance cannot exist.[180] A more recent version of this justification was proposed by Cass Sunstein, who argues that freedom of speech is inextricably linked with the concept of deliberative democracy.[181] Sunstein equally builds up his argument around the U.S. Constitution, and, while conceding that freedom of speech does protect some private rights, asserts that its "large point" is about public discussion.[182] According to Sunstein, the intent of the framers was to ensure that the public could openly discuss general issues.[183] Such deliberations, premised on freedom of speech, are the key to generating better political decisions and ensuring collective self-rule.[184]

As noted, these three theories can collectively be understood as constituting a classic justification of freedom of expression. On this account, two important matters should be explained in more detail. First, none of these theories on its own may be regarded as the sole justification of the right to free speech. The issue with these justifications, as perhaps with most other theories, is that they shed light only on one particular side of freedom of expression. In their purest forms, these justifications would exclude from the scope of free speech all the ideas and information that are not relevant to the goals they seek to promote. For example, the justification from discovery of the truth would probably eliminate erotica, the personal self-fulfillment theory would likely exclude offensive expressions and the argument from democracy–commercial speech. Yet, the U.S. Supreme Court, as well as constitutional courts in other democracies, do protect such expressions, which means that freedom of speech is a more complicated subject that requires a more nuanced approach. As Ronald Dworkin noted, "it is hardly surprising that so complex and fundamental a constitutional right as the right of free speech should

176. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment is an Absolute*, SUP. CT. REV. 245 (1961).

177. Meiklejohn, *supra* note 176, at 253-54.

178. *Id*. at 254-55.

179. *Id*. at 255-56

180. *Id*.

181. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241-252 (1993); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991).

182. SUNSTEIN, *supra* note 181, at 241.

183. *Id*. at 242.

184. *Id*. at 242-43.

reflect a variety of overlapping justifications."[185] Even more importantly, constitutional courts themselves refer to more than just one theory in their jurisprudence to substantiate the need to protect freedom of expression.[186] Thus, while none of these theories can fully embrace freedom of speech on its own, together they are more likely to fulfil this task and cover a multitude of its facets.

Second, just because the discussed three-pronged justification of freedom of expression can be regarded as classic does not, however, necessarily mean that it is the most accurate. As noted earlier, political theorists and legal scholars have developed many other theories suggesting competing views on why freedom of expression is valuable. For example, it has been argued that free speech is important because it maximizes the amount of liberty,[187] checks the abuse of public powers,[188] promotes culture,[189] fosters good character,[190] cultivates tolerance,[191] and so on. It was equally maintained that freedom of speech must be protected because it is an essential element of "a just political society," in which the government approaches all individuals as "responsible moral agents."[192] Needless to say, all these justifications contribute to the construction of a proper understanding of freedom of expression. Yet, in contrast to all other theories, justifications that relate to discovery of the truth, personal self-fulfillment, and democracy are the only ones that have been consistently invoked by the U.S. Supreme Court and other constitutional courts to protect free speech. Hence, this is also the fact of their extensive endorsement by the courts that makes them, jointly, a classic justification.

In the United States, the Supreme Court has repeatedly stressed the link between freedom of expression and discovery of the truth.[193] In *Red Lion Broadcasting Co. v. FCC*, for example, it was held that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market[.]"[194] In a similar vein, the Supreme Court has underscored the importance of the right to freedom of speech for personal self-fulfillment.[195] According to the

185. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 201 (1996).

186. *See infra* text accompanying notes 193-207.

187. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 6 (1982).

188. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

189. *See* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221 (1987).

190. *See generally* Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567 (1998).

191. WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 31-36 (2014).

192. DWORKIN, *supra* note 185, at 200.

193. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Leathers v. Medlock, 499 U.S. 438-39, 448-89 (1991); Virginia v. Hicks, 539 U.S. 113, 119 (2003); McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014). *See also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

194. *Red Lion Broad. Co.*, 395 U.S. at 390.

195. *See, e.g.*, Stanley v. Georgia., 394 U.S. 557, 565 (1969); Cohen v. California, 403 U.S. 15, 24 (1971); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972); Bd. of Educ. of Westside

Court, "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."[196] In *Cohen v. California*, it was reasoned that the purpose of the right to freedom of speech is to entrust

> the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[197]

The Court's case law also includes a number of cases confirming that freedom of expression is crucial for a thriving democracy.[198] Thus, the Supreme Court laid down that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[199] It was maintained that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"[200] and that "the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate."[201]

The same reasons for protecting freedom of expression have also been invoked by constitutional courts outside the United States. For example, the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)* held:

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They . . . can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's

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Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 263 (1990) (Marshall, J., concurring). *See also* Procunier v. Martinez, 416 U.S. 396, 427-28 (1974) (Marshall, J., concurring).

196. *Police Dep't of Chi.*, 408 U.S. at 95-96.

197. *Cohen*, 403 U.S. at 24.

198. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931); Bridges v. California, 314 U.S. 252, 270 (1941); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988); Walker v. Tx. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015).

199. *Stromberg*, 283 U.S. at 369.

200. *Hustler Mag., Inc.*, 485 U.S. at 50.

201. *Walker*, 135 S. Ct. at 2246.

> action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles.[202]

In a similar fashion, the Constitutional Court of South Africa referred to the same three justifications, ruling that "[freedom of speech] is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally."[203] Finally, the European Court of Human Rights has equally underscored the importance of freedom of expression for the search for truth[204] and development of every individual.[205] It declared freedom of expression "one of the preconditions for a functioning democracy"[206] and pointed out that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."[207]

There is arguably no other theory of freedom of expression that has received as much support by constitutional courts as those that concern discovery of the truth, self-fulfillment, and democracy. As shown above, they have also received their endorsement in scholarship. This is what makes them together a classic justification of freedom of speech, both in the United States and other democracies.

IV. HOW TO KEEP THE GENIE IN THE BOTTLE?

It follows that because freedom of speech is primarily protected due to its relationship with discovery of the truth, personal self-fulfillment, and democracy, then whenever censorship has started to infringe on these three goals, freedom of speech must be protected. In this regard, it does not matter whether censorship comes from the government or a private power.[208] In fact, none of the discussed theories links the necessity to safeguard freedom of expression with the government or "require[s] governmental presence."[209] When a private actor infringes on free speech extensively, the latter can soon lose its ability to serve the purpose which justifies its constitutional protection. As shown earlier, private

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202. Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 976 (footnotes omitted) (Can.); *see also* Ford v. Quebec, [1988] 2 S.C.R. 712, 765-67 (Can.).

203. South African Nat'l Defence Union v. Minister of Defence 1999 (4) SA 469 (CC) para. 7 (S. Afr.) (footnotes omitted).

204. *See*, *e.g.*, Chauvy and Others v. France, 2004-VI Eur. Ct. H.R. 205, ¶ 69 (2004); Giniewski v. France, 2006-I Eur. Ct. H.R. 277, ¶ 51 (2006); Fatullayev v. Azerbaijan, No. 40984/07, ¶ 87, (Apr. 22, 2010), http://hudoc.echr.coe.int/eng?i=001-98401.

205. *See* Handyside v. the United Kingdom, 24 Eur. Ct. H.R. (ser. A), ¶ 49, (1976); Steel and Morris v. the United Kingdom, 2005-II Eur. Ct. H.R. 1, ¶ 87 (2005).

206. Appleby and Others v. the United Kingdom, 2003-VI Eur. Ct. H.R. 185, ¶ 39 (2003); *see also* Handyside v. the United Kingdom, 24 Eur. Ct. H.R. (ser. A), ¶ 49, (1976).

207. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A), ¶ 42 (1986).

208. *But see infra* text accompanying notes 227-228.

209. David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 ABA Hum. Rts. Mag., no. 4 (2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

censorship may indeed manifest itself on a large scale, and its negative impact could be comparable to governmental control over speech. The New York Society for the Suppression of Vice widely punished people for distributing allegedly obscene works, but in many cases these works were nothing but genuine examples of classic art and literature.[210] Through speech codes, numerous private universities subjected students to new penalties that applied even when expression of certain ideas occurred during academic discussions.[211] Today, on the basis of opaque and often controversial internal rules on content moderation, platforms such as Facebook, Twitter, and YouTube continue to restrict speech online with instances of excessive fervor and selectivity regularly being reported.[212] In all these cases, limitations on freedom of expression have caused a chilling effect on sharing certain opinions and ideas thereby erasing them from public discourse. Such an outcome has nothing to do with discovery of the truth, personal self-fulfillment, or democracy.

Therefore, while it is true that it has historically been the government that posed a major threat to free speech, today it is clear that freedom of expression can equally suffer from private censorship. This means that to allow freedom of speech to exercise its core function, in some exceptional cases, protections may need to be put in place against non-governmental infringement. Otherwise, if they are not properly implemented when necessary, the commitment to freedom of speech as a constitutional right risks becoming tainted or even meaningless. Under extensive private censorship, the same as under government oppression, one is likely to forget about the discovery of the truth, personal self-fulfillment, and democracy. Importantly, such a conclusion stems directly from the *value* of freedom of expression and, as a result, applies to both countries with "strongly negative"[213] constitutions and those whose constitutions recognize positive obligations.

In fact, the idea that the government may be required to protect freedom of expression at the private level is far from being new and has already been expressed in courts and academia alike, even though it has largely been overlooked that the necessity to curb private censorship follows directly from the very justification of freedom of expression. In the United States, for example, the Supreme Court ruled:

> Th[e First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from

210. *See supra* text accompanying notes 151-157.
211. *See supra* text accompanying notes 107-112.
212. *See supra* text accompanying notes 83-99.
213. Schauer, *supra* note 17, at 46.

> governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[214]

Furthermore, in *Red Lion Broadcasting Co. v. FCC*, the Court reasoned: "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[215] Across the ocean, as mentioned before, the European Court of Human Rights held that governments are under obligation "to create . . . a favorable environment for participation in public debates for all persons concerned, allowing them to express their opinions and ideas without fear, even if they go against the opinions and ideas that are defended by the official authorities or *an important part of the public*[.]"[216] In Germany, the Federal Constitutional Court ruled that the government bears a positive obligation to prevent the rise of "monopolies of opinion."[217]

In scholarship, first concerns about non-government censorship were raised years ago. For example, in the nineteenth century John Stuart Mill warned about "the tyranny of the majority" whose acts may or may not overlap with those of public authorities.[218] More recently, Erwin Chemerinsky, while mounting an argument against the state action doctrine, pointed out that "all impermissible infringements of speech" should be prevented, both governmental and private ones.[219] Cass Sunstein maintained that the state may be required to undertake some positive measures to remedy the problems originating from uncontrolled private use of means of communication.[220] In a similar vein, Owen Fiss argued that in the context of free speech the government may not be approached solely as "the natural enemy of freedom"; quite the contrary, the government can also perform a role of freedom's friend, protecting the right to free speech from private powers.[221] Eric Barendt acknowledged that acts of private censorship may equally pose a threat to freedom of speech, even though there are few venues to challenge them.[222]

Moreover, governments have occasionally taken measures to limit private censorship. One illustrative example of such measures is the passage of the Leonard Law in California.[223] Following the rise of speech codes in colleges and universities, state senator Bill Leonard drafted a bill aiming to protect speech on private campuses which was almost unanimously supported by the California State

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214. Associated Press v. United States, 326 U.S. 1, 20 (1945) (footnotes omitted).

215. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387 (1969). *See generally* Laura Stein, *Understanding Speech Rights: Defensive and Empowering Approaches to the First Amendment*, 26 MEDIA, CULTURE & SOC'Y 103 (2004).

216. Dink v. Turkey, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, ¶ 137 (Sept. 14, 2010) (emphasis added), http://hudoc.echr.coe.int/eng?i=001-100383.

217. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 5, 1966, 2020, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 162,176.

218. MILL, *supra* note 164, at 7-12.

219. Chemerinsky, *supra* note 18, at 534.

220. SUNSTEIN, *supra* note 181, at 17.

221. OWEN M. FISS, THE IRONY OF FREE SPEECH 2-4 (Harv. Univ. Press 1996).

222. BARENDT, *supra* note 162, at 151-53.

223. CAL. EDUC. CODE § 48950 (1992); CAL. EDUC. CODE § 94367 (1992).

Legislature.[224] According to the law, speech of students in private non-religious secondary schools and private non-religious postsecondary institutions was granted the same protection that it would enjoy off campus pursuant to the First Amendment to the U.S. Constitution and Section 2 of Article I of the California Constitution.[225] In practice, soon after its passage, the Leonard Law was used to invalidate the Stanford Speech Code for being overbroad and imposing content-based restrictions.[226]

However, that the importance of freedom of expression for discovery of the truth, personal self-fulfillment, and democracy – its classic justification – may require the government to interfere with the private sphere to curb private censorship can hardly be accepted without a sense of unease. Historically, it has been the government that predominantly played the role of tyrant vis-à-vis freedom of speech, with fascist and communist dictatorships being just a few of the many examples.[227] The same equally applies to the present times, where, at the global level, freedom of expression continues to be arbitrarily suppressed by governments in most countries. For example, as reported by international observers, only in thirty-one percent of countries can people enjoy free press.[228] Against such a background, it is no coincidence that in both the United States and other democracies freedom of expression has primarily been construed as a protection against the government.

The inherent risks with involving government in regulating the speech of private actors, even for the altruistic purpose of preventing those actors from suppressing speech themselves, give rise to the dilemma of private censorship. On the one hand, like governmental control over speech, private censorship can seriously harm the free flow of ideas and information in a society by stifling discussions on matters of general interest and keeping individual and public decisions unquestioned. On the other hand, the solution to the issue of private censorship – governmental interference – is worrisome because, as noted above, the history and current experience of authoritarian societies clearly show the high risk of entrusting the government with extra authority in the realm of free speech. In other words, by tackling private censorship one can too easily let the genie of the oppressive government out of the bottle.

It seems likely that in the near future many different proposals will develop in scholarship to address this dilemma, especially if instances of private censorship continue to grow. What this paper suggests is to take a closer look at other areas of human activity, in which similar problems emerged in the past. One such area is economic development, where determining the proper degree of governmental

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224. Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1590-92 (1998).

225. CAL. EDUC. CODE § 48950 (1992); CAL. EDUC. CODE § 94367 (1992).

226. Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995), at 42. *See also* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J. L. & EDUC. 145, 154-156 (2010). For criticism of the Leonard Law, see Eule and Varat, *supra* note 224, at 1590-1600.

227. *See generally* JONES, *supra* note 46.

228. Jennifer Dunham, *Freedom of the Press 2016: The Battle for the Dominant Message*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-press/2016/battle-dominant-message (last visited Feb. 15, 2022).

intervention in the operation of markets has been one of the biggest challenges for liberal economic thought.[229] Considering that for freedom of speech governmental interference represents a particular threat, ideas of Friedrich Hayek on regulation of markets deserve special attention.[230]

In his writings, Hayek developed an argument about the preponderance of "spontaneous order" over dictated "organization."[231] Spontaneous or self-grown order has no human creator behind it; it is abstract and has no distinguishable purpose; and no human mind can master its complexity.[232] In contrast, arranged or made order is deliberately established; it is concrete and pursues a specific purpose; and such an order is relatively simple, which allows its creator to cope with it.[233] Hayek named human language, the market (pointing to Adam Smith's "invisible hand"), and law in the sense of common rules of conduct as examples of spontaneous order.[234] Examples of arranged organization include planned economy and law in the positivist tradition as "commands of a legislator."[235]

Hayek argued that highly complex systems can operate and evolve successfully only as spontaneous orders.[236] This conclusion follows from "the fragmentation of knowledge" or "the fact that each member of society can have only a small fraction of the knowledge possessed by all, and that each is therefore ignorant of most of the facts on which the working of society rests."[237] To grasp myriads of facts – far more than any individual mind is capable of doing – and to adapt to unforeseeable circumstances, complex orders have to rely on "self-organizing" forces as no human brain or authority can fulfill this task.[238] This also means that, as a rule, governmental interference with a spontaneous order is not desirable as it may undermine the operation of the self-organizing mechanism under which each agent acts on the basis of his/her own knowledge.[239] What in fact leads to "the optimum utilization" of skill and knowledge under a spontaneous

229. *See, e.g.*, Robert M. Solow, *Hayek, Friedman, and the Illusions of Conservative Economics*, NEW REPUBLIC (Nov. 16, 2012), https://newrepublic.com/article/110196/hayek-friedman-and-the-illusions-conservative-economics.

230. For discussion of Hayek's ideas in legal scholarship, *see generally* Scott A. Boykin, *Hayek on Spontaneous Order and Constitutional Design*, 15 THE INDEP. REV 19 (2010); A. I. Ogus, *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, 16 J.L. & SOC'Y 393 (1989); Ellen Frankel Paul, *Hayek on Monopoly and Antitrust in the Crucible of United States v. Microsoft*, 1 N.Y.U. J.L. & LIBERTY 167 (2005); Richard A. Posner, *Hayek, Law, and Cognition*, 1 N.Y.U. J. L. & LIBERTY 147 (2005).

231. HAYEK, LLL 1, *supra* note 14, at 35.

232. *Id*. at 38.

233. *Id*.

234. *Id*. at 37, 72.

235. *See, e.g.*, HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 231-33. HAYEK, LLL 1, *supra* note 14, at 72-74, 88.

236. HAYEK, LLL 1, *supra* note 14, at 38.

237. *Id*. at 14.

238. *Id*. at 54.

239. *Id*. at 51.

order is competition, which works as a "discovery procedure" that informs agents about the unknown and tells them what to do.[240]

Yet, Hayek equally made a stand against the principle of *laissez faire* as a reliable criterion to determine when governmental intervention should be allowed.[241] While in a free system a great deal of government attempts to interfere in the private domain can be indeed ruled inexpedient, such decisions cannot be made on the basis of a generic rule.[242] Rather, the validity of each such attempt should be determined through conducting a careful examination, such as a cost-benefit analysis,[243] and verifying its compliance with the rule of law.[244] In this vein, government engagement beyond the minimal state model can in certain cases be justified,[245] for example in arranging a monetary system, furnishing statistics, registering land, supporting education,[246] providing some collective goods,[247] ensuring construction quality, certifying professionals, setting hygiene standards, and so on.[248]

What is particularly relevant to the subject of free market and speech rights, is that public intervention may also be required to combat negative effects of monopolies.[249] On this account, Hayek warned that the fact that a certain enterprise became too large or happened to be a sole producer of a particular good or service does not *per se* necessitate governmental interference.[250] In fact, such an enterprise could have reached dominance on the market by simply "serving [its] customers better than anyone else" and it would be inappropriate to punish it for the successful use of its possessions and human resources.[251] The situation nonetheless drastically changes when this enterprise decides to preserve its superiority not through maintaining a cause that has led it to gaining the monopolistic status but through preventing others from serving better than it does.[252] Specifically, through targeted discrimination of prices a monopolist can effectively influence the behavior of market participants, which includes deterring possible competitors.[253]

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240. HAYEK, LLL 3, *supra* note 14, at 68-69; *see also* FRIEDRICH A. HAYEK, *Competition as a Discovery Procedure*, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 179 (1978).

241. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 231; *see also* HAYEK, THE ROAD TO SERFDOM, *supra* note 14, at 17.

242. HAYEK, THE ROAD TO SERFDOM, *supra* note 14, at 17.

243. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 225.

244. *Id*. at 231-232.

245. Speaking of law, Hayek argued that the legislator may need to intervene in the judicial development of law to break a deadlock or rectify an error. *See* HAYEK, LLL 1, *supra* note 14, at 88-89.

246. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 223.

247. HAYEK, LLL 3, *supra* note 14, at 43-46.

248. *Id*. at 62.

249. *Id*. at 80-88.

250. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 265; HAYEK, LLL 3, *supra* note 14, at 77-80. In addition, Hayek added that some government policies – for example, tax laws – may favor specifically big companies, in which case it is justifiable to remedy such framework. HAYEK, LLL 3, *supra* note 14, at 78.

251. HAYEK, LLL 3, *supra* note 14, at 73.

252. *Id*. at 84.

253. *Id*.

And once competition – the key element to direct humans in a free society – is restricted, the necessity for the government to intervene becomes justified.[254] When competition is absent, the market cannot run effectively.

What do Hayek's views on regulation of monopolies mean for private censorship? As in the market of goods and services, private monopolies may from time to time arise in the market of opinions and ideas. Like in the case of goods and services, an actor's large scale or monopolistic status on the market of opinions and ideas should not pose a serious concern as such, although the public may still be interested in watching actors of this kind more closely. Once again, such characteristics may equally point to nothing more but an actor's unique insight and creativity.[255] One, however, should sound the alarm when such a monopoly starts to undermine competition – the very precondition for advancement of a free system.[256] As in production, in the domain of free speech competition allows for comparing different opinions and ideas and selecting the ones that are more suitable.[257] Without this mechanism, the opportunities for making the right choice become restricted. While in business harmful monopolies can block the entry into the market for alternative goods and services by fixing prices,[258] in the area of speech monopolies can fix what may or may not be expressed to get rid of competitive opinions or ideas. If in the former case the change in the market behavior of others is achieved through price discrimination,[259] in the latter a certain market conduct is enforced by aimed content discrimination.

By extrapolating Hayek's teachings to the market of opinions and ideas, one can discern a criterion for determining when the government may in fact be required to act in order to curb private censorship. It is thus only when a certain private actor reaches the status of monopoly and engages in restricting access to the market for particular opinions and ideas – and thereby prevents competition between them and the permitted ones – that the government can be allowed to intervene. But this analysis shall by no means be construed as mandating interference with the private realm in any other case. Moreover, the nature of the market of opinions and ideas further limits the instances when government action may be permitted. This is because to have a possibility to impair competition on such a market, a private actor should indeed be able to exercise extensive control over it. This, fortunately, seems to occur significantly less frequently in the domain of speech than in production of goods and services. It follows that the option of governmental interference should be reserved solely for cases when private censorship reaches exceptional magnitude and puts the market as such in jeopardy.

This distinctive approach therefore shows how one can restrain particularly harmful manifestations of private censorship and at the same time keep the genie of omnipresent government inside the bottle. What might then be the practical application of its principles to recent cases of private censorship? Speaking of

254. *Id*. at 73, 83.
255. *See also* HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 14, at 265.
256. *See* HAYEK, *supra* note 240.
257. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
258. HAYEK, LLL 3, *supra* note 14, at 84.
259. *Id*.

Facebook, Twitter, and YouTube, there are good reasons to consider each of these platforms a monopoly on the market of opinions and ideas, specifically as far as political expressions are concerned. This stems from the fact that if, for example, a Facebook user is banned on the ground of his/her political views, then there is no alternative, comparable place for him/her to go to put them forward. Facebook is a unique and established marketplace where matters of general interest can be discussed with almost two billion people.[260] The same is equally relevant to Twitter and YouTube. Being banned from any of them is equal to losing the ability to communicate with the public at large, whether in the form of short notifications or different types of videos. For the user this means that if he/she wishes to keep access to the same extensive reach in terms of audience that only Facebook, Twitter, and YouTube can provide, he/she must conform his/her views to the political agenda of these platforms, no matter the course. The truthfulness of opinions and ideas are thus determined not by the market mechanism, but by such monopolies as Facebook, Twitter, and YouTube. For the rest of the public, this kind of censorship translates into the fact that political expressions on some of the biggest sources of information have already been pre-filtered for them. As opinions and ideas are not traded freely, competition on the market becomes weakened, with all the negative implications for a free system. In this unique case, therefore, it would be justified for the government to take action in order to prevent private monopolies from distorting the market mechanism.

This particular example of regulating political speech by social media giants, inspired by recent events in the United States,[261] should nonetheless be distinguished from other cases when Facebook, Twitter, and YouTube chose to block some categories of expression, such as pornography or cruelty. The difference between the two is that in the former the platforms engage in discrimination of some political speech. Only certain political opinions and ideas are proscribed, while others are allowed. As for pornography and cruelty, Facebook, Twitter, and YouTube seem instead to impose a blanket prohibition on them. It means that the social media platforms do not even attempt to partake in or expand the market of such speech. Thus, as long as Facebook, Twitter, and YouTube approach these categories of speech with a blanket ban and do not discriminate between different types of pornography and cruelty, the government should refrain from any interference. This however shall by no means deter the public from continuing to question the definitions of pornography and cruelty that Facebook, Twitter, and YouTube have developed, as they have led to controversies at least on several occasions in the past.[262]

The unique value of freedom of speech, embodied in its classic justification, may therefore warrant protecting it not only from encroachments of the government, but also from private infringements. However, as human history and current practices suggest, instances of governmental intervention in the private

260. *Number of Daily Active Facebook Users Worldwide as of 4th Quarter 2020 (in Millions)*, STATISTA, https://www.statista.com/statistics/346167/facebook-global-dau/ (last visited Feb. 15, 2022).

261. *See supra* text accompanying notes 2-10.

262. *See supra* text accompanying notes 83-99.

realm should be avoided to the extent possible. Drawing upon Hayek's works, one can conclude that governmental interference may be justified only when a private actor begin, as a monopoly, to substantially manipulate the market of opinions and ideas, enforcing there a particular conduct and eliminating competition. While such cases seem to occur rarely, they can be too perilous to ignore.

CONCLUSION

Private censorship is not a new phenomenon, and restrictive practices applied by Facebook, Twitter, and YouTube is just one example. As discussed above, non-government censorship transcends the time and has no regard for national borders. Similar to government oppression, extensive private censorship goes against the value of freedom of expression and the core goals it seeks to advance: discovery of the truth, personal self-fulfillment, and democracy. In principle, this begs the conclusion that governmental intervention is justified whenever freedom of speech is amply suppressed by private powers. Notwithstanding, the U.S. Supreme Court, as well as constitutional courts in other democracies, focus on government censorship for a reason. As a rule, freedom of speech requires *less* governmental interference, not *more* governmental presence.

Yet, the intricacy of this dilemma should not prevent legal scholarship from exploring potential ways for tackling extensive private censorship. As it was recognized long ago that the right to freedom of speech – in contradiction to the text of the U.S. Constitution – is not absolute, there can also be some "well-defined and narrowly limited classes" of cases when the government may be required to act to uphold freedom of expression in the private domain.[263] What this paper suggested is to explore how Hayek's views on regulation of monopolies and competition could apply in the area of freedom of speech. While acknowledging the undesirable nature of any governmental intervention, the key contribution of this approach lies in determining the circumstances under which such intervention may be necessary. In particular, this occurs when a powerful private actor acting as a monopoly substantially distorts the market of opinions and ideas, thereby eliminating any natural competition between them. Under this approach, preventing Facebook, Twitter, and YouTube from censoring political speech would be justified. One cannot have both free speech and censorship at the same time.

263. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-383 (1992).