

CONTENT MODERATION AND OVERSIGHT

THE NEW FRONTIERS

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Political freedom depends on public debate. More than just the setting of regular elections, Democracy is a system under which the populace should at all times feel that they have unfettered access to the channels in which to freely express themselves. But access to platforms is one thing, and the content of that speech is another.

In the words of Justice Oliver Wendell Holmes: 'The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.' What is less well-known is that Justice Holmes wrote those words in a unanimous Supreme Court decision ruling that it was a violation of the Espionage Act of 1917 for Defendant to distribute flyers opposing the draft during World War I. Today, the debate continues as to just what state controls over social media forums are acceptable. Or should there be any such oversight at all in a Democracy?

Clear and Present Danger

In *Schenck v. United States*, 249 U.S. 47 (1919), the Supreme Court case where Justice Holmes carved out his famous exception to the Constitutionally-protected right to free speech, he based his ruling on the notion that Schenck's anti-war flyers posed a 'clear and present danger' to America's wartime recruitment effort. Interestingly, some legal historians claim that Holmes regretted his holding in Schenck because of its intrusion upon free speech and that this led him to join the minority and dissent in a similar Espionage Act case later that same year.

'Imminent Incitement to Lawless Action'

Fifty years later Schenck was significantly scaled back in the landmark ruling in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), where the First Amendment was interpreted to mean that government cannot punish inflammatory speech unless it is used to 'incite imminent lawless action'. *Brandenburg*, an Ohio KKK leader, had held a rally wherein he used derogatory language towards Blacks and Jews and advocated the forced expulsion of African Americans to Africa and Jewish Americans to Israel. *Brandenburg* held that the

state was not permitted to forbid or proscribe the advocacy of the use of force or violation of law except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.

Free Speech and Technocracy

A technocracy has been defined as the 'control of society (or an industry) by an elite of technical experts.' This raises the issue as to whether America has now become a technocracy given the very powerful role that the high-tech industrial and commercial sector plays in our society---most prominently in the fields of information, communications, and social media.

Whereas at one time the public made its opinions known to readers of the local newspaper by way of the now-archaic 'Letters to the Editor' which--unless deemed obscene or otherwise not fit for a family newspaper-- were quite likely to be published. Today, anyone from anywhere in the world can put their two cents' worth of opinion, ideology, or rhetoric---polite and restrained, or inflammatory-- before hundreds of millions of readers, subject of course to the ubiquitous 'Terms of Service' (TOS) parameters.

Executive Summary

> The Issue

How to democratically deal with content moderation and oversight of the burgeoning social media industry?

> The Gravamen

Balancing Constitutional free speech rights with the need to have some regulation over content remains a challenge of much debate.

> The Path Forward

Oversight should be the product of sound Judicial precedent heretofore affecting traditional media, coupled with Congressional and industry input.

Therein lies the fundamental freedom of speech, expression, and flow of information debate.

Social Media Gatekeeping

Numerous issues come to the fore when digital regulation is discussed, including such concerns as: ‘who will be the gatekeeper?’, ‘what laws or judicial precedent will govern such oversight?’, ‘are there societal sensitivities and moral conventions that should be weighed?’ and ‘will proscription of a Tweet or posting amount to an undue policing of social media content and a chilling of First Amendment rights?’ The tech behemoths operating today’s exchange-of-ideas platforms have thus far granted unto themselves the unrestricted authority to decide what content will be published and what will not.

And, it is both the granting and the banning of content, devoid of any calculus by Justice Holmes, that worries many observers from across the political spectrum who regard the most liberal interpretation of ‘Freedom of Speech’ to be the hallmark of a Democracy. Or, as phrased by Evelyn Beatrice Hall (pseudonym, S.G. Tallentyre): “I disapprove of what you say, but I will defend to the death your right to say it.”

The Role of the Lawyer

Regardless of whether social media comes to be moderated by government fiat or self-regulation by the industry itself, those

engaging in the regulation of speech will need the advice of lawyers well-versed in Constitutional Law, Privacy Law, and other legal disciplines lest well-intended controls morph into the realm of authoritarian censorship. Who, for example, will define what incitement is? What standards will be in place to protect free speech and a vulnerable public from AI bots masquerading as humans? The extent of social media platform abuse by unleashing such bots may even impact the highly publicized multi-billion-dollar sale of Twitter, thus bringing Contract lawyers and high-profile litigation firms into the social media fray.

The digital platforms themselves were granted unprecedented protection from liability—a safeguard enjoyed by no other media in U.S. history—with the passage of Section 230 of the Communications Decency Act granting them immunity from liabilities related to third-party hosted content. But will such insulation from liability continue unchallenged?

Infringement and Take-Down Orders

Aside from the issue of content regulation, there is the issue of liability that falls outside of the Communications Decency Act protections where alleged trademark, copyright, and other IP infringements occur. Although the platform itself might not be held liable for third-party posted

Action

1 Who
Any lawyer counseling government or industry oversight analysts should start by raising the issue of who can best serve as a gatekeeper of social media regulation. A Congressional oversight board? An industry watchdog akin to what FINRA does for securities regulation?

2 What
What norms will be relied upon for regulation? The possibilities run the gamut from virtually no regulation, i.e., ‘defending to the death the right to publish’, to censors such as Hollywood saw by way of the Hayes Office during the early years of film production.

3 Necessary Skills
Lawyers looking to work in the field of social media can apply their Constitutional Law, Privacy Law, Contract Law, and intersections of several legal disciplines to address the opportunities ahead.

4 Techno Law
From the technical side, lawyers will be called upon who are skilled in Communications Law, AI, and IP prosecution and infringement practice.



content, social media users can be. That point was illustrated when a well-known New York drug store chain innocently posted a picture of an American actress and model walking with their shopping bags, which resulted in a \$6 million Tweet-suit. Perhaps such content should have been vetted by social media savvy lawyers beforehand. Even without formal litigation,

lawyers are also engaged to file takedown requests over posted content that infringes on an owner's IP.

In sum, how the moderation and oversight of social media is impacted legally will have a long-term--if not everlasting-effect on the vaunted Fourth Estate of Democracy.

**“WHOEVER
WOULD
OVERTHROW
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OF A NATION
MUST BEGIN
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OF SPEECH.”**

- BENJAMIN FRANKLIN



Further Reading

1. <https://www.cccba.org/article/regulating-social-media-content-a-primer/>
2. <https://statusbrew.com/insights/social-media-law/>
3. <https://theconversation.com/social-media-regulation-why-we-must-ensure-it-is-democratic-and-inclusive-179819>
4. <https://www.infolawgroup.com/insights/2011/06/articles/social-networking/the-legal-implications-of-social-networking-the-basics-part-one>
5. <https://www.getproofusa.com/social-media-laws-and-regulations/>





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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years of experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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