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Reframing the Debate on Online Speech: The Search for Ideological Coherence and Sound Ideological Grounds Between Freedom of Expression, 'Economic Speech' and Freedom to Conduct a Business

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"Impelled by the notions that science is oppression and criticism is violence, the central regulation of debate and inquiry is returning to respectability – this time in a humanitarian disguise. In America, in France, in Austria, and Australia and elsewhere, the old principle of the Inquisition is being revived: people who hold wrong and hurtful opinions should be punished for the good of society. If they cannot be put in jail, then they should lose their jobs, be subjected to organised campaigns of vilification, be made to apologise, be pressed to recant. If government cannot do the punishing, then private institutions and pressure groups – thought vigilantes, in effect – should do it'.
Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought*, University of Chicago Press, Chicago, 1993, 6

1. Introduction: an all but one-sided debate and a different perspective

There is already a vast literature on the freedom to express one's thoughts online[1]. Most of this body of work, however, even analyses based on apparently very different ideological premises, seems to be united by the idea that greater restrictions are needed to counteract hate speech, so-called fake news, or the overwhelming power of platforms[2]. In this paper, I propose a different point of view,

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[1] It is beyond the scope of this work to attempt to provide a synthetic, and inevitably incomplete, version of a bibliography that is by now immense and, moreover, continually growing. In addition to monographs and scientific journals (including new entries such as the *Journal of Free Speech Law*, whose first issue contains a particularly noteworthy text: Jack M. Balkin, 'How to Regulate (and Not Regulate) Social Media', 71-96; by the same author, see also, among many others, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', 79(1) *NYU L. Rev.* 1 (2004)), as well as popular publications, research by think tanks and interest groups, studies by institutions, articles in newspapers and magazines, and so on. Of course, I will give an accurate account of the main works I have measured myself against in addressing specific issues, without making any claim to comprehensiveness given the enormous publishing landscape that exists on the subject.

[2] In this landscape, two proposals that are notable for their originality are Marco Giraudo's one, although avowedly in the line of classical liberalism, to adapt 'decentralised regulatory models' developed in areas such as polluting emissions to freedom of expression is notable for its originality: Marco Giraudo, *Riflessioni sul ripristino del dibattito pubblico. Fare i conti con le "esternalità costituzionali"*, *mediaLAWS. Rivista di diritto dei media*, 3/2021, 108-123; and that of Frischmann and Benesch to adopt deliberate slowdowns to the otherwise unstoppable flow of opinions expressed in digital environments: Brett M. Frischmann, Brett and Susan Benesch, 'Friction-In-Design Regulation as 21St Century Time, Place and Manner Restriction' (1 August 2022), available at SSRN: https://ssrn.com/abstract=4178647. Among Frischmann's articles on the topic, it is also worth recalling his older 'Speech, Spillovers, and the First Amendment', vol. 2008(1) *Univ. Chig. Legal Forum*, 301-333 (2008).

arguing the case for reconsidering a classic civil libertarian approach to freedom of expression, despite some serious objections raised within the libertarian perspective itself.

With the foregoing in mind, I will first consider the specificities of online speech, i.e., the increasingly preponderant cases in which thoughts are expressed via the Internet, whether in the comment sections of websites or via the all-pervasive social media (§ 2). Subsequently, I examine the state of the art on protecting online freedom of expression at a comparative level (§ 3), then reconstruct the most widespread opposing views in public and scholarly debates, which, as mentioned above, generally call for the introduction of new curbs on a right that, historically in the West and particularly in the United States, has traditionally enjoyed very strong protection (§ 4). Finally, I will attempt to make a convincing argument for a coherently non-interventionist approach and, in the concluding paragraph (§ 5), draw together the threads of my analysis, with a glance at possible regulatory scenarios for the near future (§ 6).

2. How special is online speech?

As mentioned above, the necessary premise for this analysis is to ask whether there are any reasons, beyond their self-evident ubiquity, for one to consider that online expressions of thought have qualitative peculiarities that in their own right would justify implementing or even considering regulation.

My starting point is that it is always preferable to resist the temptation to invoke new laws to keep up with incessant technological innovations[3]. On the other hand, it has been correctly observed that, in some ways, the opportunities that social media give everyone to express opinions on any topic, theoretically even in their most virulent form, bear striking similarities to the very early history of the press, when the publication of pamphlets and – to use an anachronistic term – *samizdat*[4] was practiced by virtually anyone with access to a '*printing* press'[5], on a scale far more widespread than one would imagine today[6]. As recognised by a famous 1997 US Supreme Court ruling, *Reno v. ACLU*, "*Through the use of chat rooms, any person with a phone line can become a town crier with a voice that*

[3] R. de Caria, 'Old is Sometimes Better: The Case for Using Existing Law to Face the Challenges of the Digital Age', 4(2) *Cambridge L. Rev.* 68. On this topic, see several Chapters of Susan J. Brison and Katharine Gelber (eds.), *Free Speech in the Digital Age* (OUP, Oxford, 2019).

[4] This Russian neologism is very appropriate because literally means self-publication.

[5] I owe this idea to Michele Graziadei; I also expressed it in the final report of the ELI project *Freedom of Expression as a Common Constitutional Tradition in Europe* (2022), 29, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf.

[6] See Marie-Claude Felton, *Maîtres De Leurs Ouvrages: L'édition À Compte D'auteur À Paris Au Xviiie Siècle* (Oxford University Studies in the Enlightenment, Oxford, Voltaire Foundation, 2014). An interesting historical account is the one recently published by Jacob Mchangama, *Free Speech: A History from Socrates to Social Media* (Basic Books, New York, 2022).

resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer"[7].

The disintermediation offered by platforms (as opposed to the traditional media) thus has a significant historical antecedent in the immediate aftermath of the invention of the printing press, which is now being contrasted precisely with new technologies which are causing its rapid obsolescence and, according to many, may soon supersede it[8].

It is also true, however, that online expression entails some fundamental novelties and differences from channels that conveyed opinions almost exclusively until the advent of digital technologies, i.e., the traditional media.

A first fact to consider is certainly the enormous dissemination capacity of messages entrusted to the Internet, which characteristically transcend the national borders of sovereign states. If the press, but also TV and radio, suffered from the physical and logistical limits linked to distribution and the finite number of frequencies, today, according to a well-known mechanism[9], digital content can spread 'virally', i.e. very widely and in a very short time, potentially to any part of the world. As recognised again in *Reno*, in the passage immediately preceding the one quoted above, "*unlike the conditions that prevailed when Congress first authorised regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue*"[10]. This statement is undoubtedly even more true today, when the number of Internet users has expanded 125 times[11] and continues to grow.

From a legal point of view, this raises important questions of private international law, especially determining the competent jurisdiction and applicable law, as has been evident since *LICRA v.*

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[7] *Reno v. ACLU*, 521 U.S. 844, 870.

[8] See the interesting multi-voice reflection promoted by the online newspaper Politico, *Is the Media Doomed?* , 21 January 2022, available at https://www.politico.com/news/magazine/2022/01/21/media-journalism-future-527294.

[9] Among many studies on the subject, a reference point, although already outdated, is Jonah Berger and Katherine L. Milkman, 'What Makes Online Content Viral?', 49(2) *Journal of Marketing Research* (2012) 192-205.

[10] *Reno v. ACLU*, 521 U.S. 844, 870.

[11] According to data from Statista, the global digital population as of April 2022 was 5 billion; of which 93%, or 4.65 billion, were social media users: *Global digital population as of April 2022*, https://www.statista.com/statistics/617136/digital-population-worldwide/. Cf. also the figures cited by Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press, Cambridge, 2022, 157-8): "*More than two billion users are today governed by Facebook's community guidelines, and YouTube decides how to host and distribute billions of hours of video each week*"; Chapter 5, 'Digital Constitutionalism and Freedom of Expression', is a mine of bibliographical information on the subject. Among many other works, we also recommend the recent Edoardo Celeste, Amélie Heldt and Clara Iglesias Keller (eds.), *Constitutionalising Social Media* (Hart/Bloomsbury, New York, 2022).

Yahoo![12], perhaps the first or at any rate the best known case to address the question of the extraterritoriality of applying national rules to the Internet. This is by now a classic issue that has been broadly addressed at the legislative, judicial and doctrinal levels, which have arrived at what appear to be sufficiently consolidated solutions[13].

The most innovative element, which seems to justify specific reflection by scholars on online speech, is the Internet's gradual elimination of the traditional intermediary role of publishers, or rather their replacement by different entities, ranging from Internet service providers to managers of websites and communication apps, across a variety of platforms.

This marks a substantial difference from the past, which is then reflected in the law, as I will discuss below: the publisher of a newspaper, book or other printed product, and in many ways TV and radio broadcasters as well, were technically capable of controlling the content of the messages conveyed through their media, even before they were disseminated. In the case of websites and social media, this type of control no longer occurs in many cases. This is what happens when content is transmitted on a website managed directly by the author of the content. Technically, the intermediation is carried out by Internet access providers, but they typically provide mere technical support, and seldom consider content. When providers do become involved, it is usually over controlling the transmission of works protected by copyright, but much less often to verify content published on websites and social media.

In most cases, control, even if technically feasible, becomes extremely difficult given the exorbitant amount of content produced and transmitted every second. Monitoring and suppressing any content that breaks the law or violates the rights of others can only be effectively carried out after the fact, while preventive control can only be exercised through use of artificial intelligence mechanisms,

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[12] *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France v. Yahoo! Inc. et Société Yahoo! France* (*LICRA v. Yahoo!*), Tribunal de Grande Instance de Paris, 22 May 2000. See also, much more recently, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Court of Justice of the EU, C-18/18, 3 October 2019, on the extraterritoriality of the right to be forgotten, as well as the lawsuit brought by a Canadian billionaire against Twitter in Canada over a series of tweets he deemed defamatory: see Jason Proctor, 'Twitter loses Appeal Court bid to toss wealthy B.C. businessman's defamation suit', in CBC, 10 December 2021, available at https://www.cbc.ca/news/canada/british-columbia/twitter-giustra-defamation-lawsuit-1.6281590.

[13] See, e.g., the very early publication by Jack L. Goldsmith, 'The Internet and the Abiding Significance of Territorial Sovereignty', 5(2) *Indiana Journal of Global Legal Studies* (1998). On this subject, one should note the decision of the Supreme Court of British Columbia, *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, which established an obligation for Google to remove search results (for infringement of intellectual property) in all jurisdictions (not only in Canada, to which Mountain View's removal action was limited); this case was then followed up in the Supreme Court of Canada in the case *Google Inc. v. Equustek Solutions Inc.* (*Equusteck I*), 2017 SCC 34, then again in the U.S. District Court for Northern California, *Google LLC v. Equustek Solutions Inc.* (*Equustek II*), No. 5:17-cv-04207-EJD, and in the Supreme Court of British Columbia, *Equustek Solutions Inc. v. Jack* (*Equustek III*), 2018 BCSC 610. On the issue of whether Google's search results can amount to a '*constitutionally protected activity*' (the expression is contained in an order of the Superior Court of California, County of San Francisco, *S. Louis Martin vs. Google, Inc.* CGC-14-539972), and in particular to a manifestation of thought protected by the First Amendment, we refer to the well-known paper written for Google by Eugene Volokh and Donald M. Falk, 'First Amendment Protection for Search Engine Search Results', 20 April 2012, available at http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf.

which for the moment are far from perfect, as has been demonstrated by several recent cases, including in the news[14]. In other words, for the authors of Internet content, from the most followed influencers to the simplest users, there is no longer an editor to check, filter, and approve or reject their content, which is immediately passed on from the producer to the audience (as is the case for both videos and written texts). In turn, this fundamental innovation has inevitable legal repercussions, to be more fully discussed in the next section.

3. Regulatory approaches in a comparative perspective

Without prejudice to the analysis in the previous paragraph, and focusing on the Western landscape where the Internet is still most free in a comparative perspective, legal systems are faced with the choice of whether to put the new intermediaries on an equal footing with the old publishers in terms of liability for user-generated content, or whether to establish a new regime instead. In parallel, they have also made rather different choices on hate speech and disinformation.

3.1. User-generated content

Up to this point, the US has followed a very clear path against such equivalence. In fact, the very famous Section 230[15] (contained in the same legislation that came under scrutiny in *Reno* but remained intact after that case), establishes a fundamental exemption from civil liability for Internet service providers with regard to *user-generated content*.

Many observers have seen this regulatory choice as one of the primary reasons why the advent of today's dominant user-generated content platforms (from the Meta galaxy to Twitter to YouTube to TripAdvisor) took place in the US[16], where such companies were shielded from potentially lethal court cases[17].

It is no coincidence that this legal protection has been appropriately dubbed 'the First Amendment of the Internet'[18], precisely because of the profound impact it has had on the way the medium has

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[14] See e.g. Karen Hao, 'AI still sucks at moderating hate speech', in *MIT Technology Review*, 4 June 2021, available at https://www.technologyreview.com/2021/06/04/1025742/ai-hate-speech-moderation/; Robert Gorwa, Reuben Binns and Christian Katzenbach, 'Algorithmic content moderation: Technical and political challenges in the automation of platform governance', 7(1) *Big Data & Society* (2020); Yifat Nahmias and Maayan Perel, 'The Oversight of Content Moderation by AI: Impact Assessments and Their Limitations', 58(1) *Harvard Journal on Legislation* 145.

[15] 47 U.S. C. § 230 - Protection for private blocking and screening of offensive material.

[16] See, among many others, Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press, Ithaca, New York, 2019).

[17] Consider e.g. *Bollea v. Gawker*, which led to the bankruptcy of the very popular gossip site: on this topic, see First Amendment Watch at New York University, *Hulk Hogan v. Gawker: Invasion of Privacy & Free Speech in a Digital World*, available at https://firstamendmentwatch.org/deep-dive/hulk-hogan-v-gawker-invasion-of-privacy-free-speech-in-a-digital-world/.

[18] I found this expression in Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, *Reason*, 29 July 2019, available at

evolved. This development has taken place even though, as I discuss in a subsequent section, there has been no lack of sharp criticism coming from opposing ideological premises, but united by the conviction that the current approach must be jettisoned.

The American legal system has thus until now maintained a distinction between traditional operators and Internet operators with regard to the content they carry.

Only recently has the broad operation of this provision been subject to an administrative restriction, as a result of an Executive Order issued by then-President Trump instructing federal agencies not to apply Section 230 in cases where platforms chose to interfere with content published by users[19]. As any of their users could see, such intervention has become more and more frequent over the past few years, both with regard to the dissemination of information on the Covid-19 epidemic and vaccination campaigns aimed at combating it (to which I will return in § 3.2.), and with regard to statements made by certain political figures, above all former President Trump himself. The latter cultivated a personal resentment against Twitter and Facebook, which would eventually lead to his ban from both platforms after the events of 6 January 2021. After repeatedly exhorting Congress (including on Twitter and Facebook themselves!) to repeal Section 230, Trump resorted to the only intervention that fell within his constitutional prerogatives, namely an Executive Order, inevitably limited in its scope of operation for constitutional reasons. In any case, the measure was repealed by newly elected President Biden on his first day in office, so that today the legal position in the US remains as it was since 1996, except for the brief interlude of Trump's Executive Order.

Europe presents a different picture, since neither national nor European Union law has ever known a provision similar to Section 230. Indeed, European legal practice seems to take the opposite approach, as affirmed to some extent in the famous and controversial case *Delfi AS v. Estonia*[20], concerning a sentence imposed by an Estonian court against a newspaper publisher held responsible for a series of defamatory or threatening comments against an entrepreneur, despite having removed the comments immediately after being asked to do so (the entrepreneur also demanded financial compensation).

In a 15-2 decision, the Grand Chamber of the European Court of Human Rights held that the sentence imposed on the publisher did not violate freedom of expression. The ruling had significant consequences, leading many publishers and website operators, especially smaller ones, to eliminate

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https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/; as well as in Katherine Fruge Corry, *Section 230: Should the Interactive Computer Service Provider Shield Be Repealed?*, *Louisiana Law Review*, available at https://lawreview.law.lsu.edu/2021/03/12/section-230-should-the-interactive-computer-service-provider-shield-be-repealed. See also Note *Section 230 as First Amendment Rule*, 131 *Harv. L. Rev.* 2027 (2018). The former in turn quotes Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95(1) *Notre Dame L. Rev.* 33 (2019).

[19] President Donald Trump, *Executive Order* 13925 - *Preventing Online Censorship*, 28 May 2020.

[20] European Court of Human Rights, Grand Chamber, *Delfi AS v. Estonia*, 16 June 2015, 64569/09.

their comments sections or introduce – where they had the resources – preventive moderation mechanisms.

While *Delfi* does not directly apply to platforms and user-generated comment in social media, it is undoubtedly indicative of a different approach, less absolutist in the protection of freedom of expression and more willing to balance it proportionally with other needs[21].

3.2. Hate speech and disinformation

The differences outlined in the previous paragraph also apply to the approach followed in the two legal contexts to hate speech and so-called fake news. In the American legal system, the historical centrality of freedom of expression guaranteed by the First Amendment to the Constitution remains firm to this day. The strength with which free speech is protected in American constitutional jurisprudence is such that it has included in the list of constitutionally protected expressions all expressions attributable to hate speech, as affirmed in some famous cases by the US Supreme Court[22], which have since barred the way to attempts by federal and state legislatures to introduce restrictions in this area.

As far as fake news is concerned, the discourse is similar. As recently as 27 April 2022, the Biden administration announced its intention to establish a Disinformation Governance Board, an advisory body that was supposed to provide federal agencies under the Department of Homeland Security with guidance on the veracity of information relevant to national security. However, this initiative foundered in less than a month, precisely because of the difficulty in reconciling it with the systemic tradition of very strong protection of freedom of speech and of the press[23].

In Europe, the scenario is significantly different. Hate speech traditionally enjoys much less protection at the level of individual national legal systems and the Council of Europe[24]; it was one of the first areas in which the European Commission intervened to regulate the behaviour of platforms, although it has thus far hesitated to do so by binding acts, preferring to enlist cooperation, at least initially, from the main companies in the sector (beginning with Facebook, Microsoft, Twitter and

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[21] On the contours of *hosting providers*' liability, with particular reference to the type of intervention they exercise on *user-generated content*, see the important case *RTI v. Yahoo!*, decided by the Italian Supreme Court in its judgment No. 7708 of 19 March 2019; see also O. Pollicino, M. Bassini and G. De Gregorio, *Fundamentals of Internet Law* (Egea, Milan, 2021), 90-1.

[22] Most notably *R.A.V. v. City of St. Paul*, 505 US 377 (1992); *Virginia v. Black* 538 US 343 (2003); *Snyder v. Phelps*, 562 US 443 (2011).

[23] See *The Washington Post*'s editorial 'The Disinformation Governance Board's collapse shows the problem', 23 May 2022, available at https://www.washingtonpost.com/opinions/2022/05/23/disinformation-governance-boards-collapse-showcases-problem/.

[24] Despite some partially non-concurrent cases, such as *Perinçek v. Switzerland*, European Court of Human Rights, Grand Chamber, 15 October 2015, 27510/08. See on this topic Jacob Mchangama and Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?', 21(4) *Human Rights Law Review* 1008-42 (2021).

YouTube, then adding Instagram, Snapchat, Dailymotion, Jeuxvideo.com, TikTok, LinkedIn, Rakuten Viber and Twitch) to adopt a shared code of conduct[25] under the banner of self-regulation[26]. On the other hand, there have been other so-called co-regulatory initiatives, such as the reform of the Audiovisual Media Services Directive[27] or the adoption of a more interventionist, hard regulation approach with the Digital Services Act[28], which introduces the possibility of forcibly removing certain illegal content from users and national authorities, including that classified as hate speech, by means of an appeal mechanism against content moderation decisions, a system of cooperation with 'trusted flaggers' (again for content control), and prevention obligations for large platforms[29]. This confirms a clear shift towards ever tighter restrictions on online hate speech, also evident in the Online Safety Bill[30], whose final approval by the British Parliament is expected in the coming months.

Even more initiatives have appeared in Europe on both the national and EU level to counter disinformation. It is worth mentioning France's *Loi contre la manipulation de l'information*[31], the UK Online Safety Bill , and the Code of Practice on Disinformation, whose first version was approved

[25] See the factsheet on the Commission website, *The EU Code of conduct on countering illegal hate speech online. The robust response provided by the European Union*, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en. It was followed by the Commission Communication on *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms,* COM(2017) 555 final, 28 September 2017, and the *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, C/2018/1177, OJ L 63, 6.3.2018, p. 50-61.
[26] See Oreste Pollicino, 'La prospettiva costituzionale sulla libertà di espressione nell'era di Internet', *mediaLAWS. Rivista di diritto dei media*, 1/2018, 48-82, 63.
[27] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (cf. Oreste Pollicino, *La prospettiva costituzionale,* cit.).
[28] Proposed by the Commission in December 2020: Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, 2020/0361(COD), 15 December 2020.
[29] Admittedly, the Commission presents the initiative as aimed at promoting a '*co-regulatory framework*', but as such the DSA appears to be the result of traditional *top-down* regulation. The DSA in turn dovetails with the *Digital Markets Act*, also currently in the process of final approval, which is specifically aimed at counteracting the strong position of large platforms, as well as with *Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on countering the dissemination of terrorist content online*, which has recently come into force. In turn, the European initiatives are juxtaposed with national initiatives, such as the German *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (*Netzwerkdurchsetzungsgesetz*, *NetzDG,* in English *Network Enforcement Act*), also known as *Facebook-Gesetz*, in English *Facebook Act*, which entered into force in 2018 and was amended in 2021. With reference to the DSA, the following writings, particularly relevant to the topics covered by the present work, should be noted among many: Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime', *Eur Law J.* (forthcoming 2022); Miriam C. Buiten, 'The Digital Services Act. From Intermediary Liability to Platform Regulation', 12(5) *Jipitec* 361 (2021); Jorge Morais Carvalho, Francisco Arga e Lima and Martim Farinha, 'Introduction to the Digital Services Act, Content Moderation and Consumer Protection', 3(1) *Revista de Direito e Tecnologia* 71-104 (2021); Anna Mazgal, 'Back to the Future? The Digital Services Act and Regulating Online Platforms Built on Community-Led Moderation', in Alexander Baratsits (ed.), *Building a European Digital Public Space: Strategies for taking back control from Big Tech platforms*, iRights media, Berlin, 2021; Andrej Savin, 'The EU Digital Services Act: Towards a More Responsible Internet', *Journal of Internet Law* (2021); Brussels Report, 'The EU's Digital Services Act is undermining free speech', 25 April 2022, available at https://www.brusselsreport.eu/2022/04/25/the-eus-digital-services-act-is-undermining-free-speech/.
[30] 'A Bill to make provision for and in connection with the regulation by OFCOM of certain internet services; for and in connection with communications offences; and for connected purposes'.
[31] Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

by the European Commission in 2018, followed by a second, stronger iteration in June 2022 involving key stakeholders under the banner of replacing self-regulation with co-regulatory mechanisms[32].

4. Current regulatory and case-law perspectives, in light of the mainstream debate

In the previous paragraph, I mentioned several regulatory innovations straddling the line between soft-law and hard regulation. Of these, several (such as the French Disinformation Act) have already come into force, others (such as the Digital Services Act) are in the final stages of legislation, some (such as the Online Safety Bill) are at an advanced stage but still being debated, and a few (such as the US Disinformation Governance Board) have been rejected or at least suspended.

This picture, albeit sketchy and partial, shows how conspicuous and relentless have been efforts by legislators and policymakers in all jurisdictions to rein in the behaviour of online platforms and manifestations of thought. It may appear that these interventions are already quite extensive, but in truth, much more restrictive measures are being called for in many quarters that would profoundly change both the level of protection of freedom of expression and the framework of Internet freedom, as we have long known and understood them. In this respect, one can see a singular convergence of views among progressives and conservatives, in both the American and the European debates, on the need to limit, on the one hand, the overwhelming power of the platforms – described as authentic 'leviathans'[33] or 'sovereigns of cyberspace'[34] or 'cloud empires'[35] or 'gamemakers'[36] or even as 'new rulers'[37] of the (increasingly) digital world – and, on the other hand, to maintain a traditionally strong

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[32] Oreste Pollicino, who acted as an 'honest broker' on behalf of the European Commission in reaching this agreement to update the previous version, explains: the '*members of the EU Commission's high level expert group on disinformation [...] took the view that the issue of fake news needs to be addressed by a self-regulation mechanism only. I was part of that group but I had (and still have) another view [...]. [The] new Code [...] after the entry into force of the Digital Services Act, will introduce a co-regulatory mechanism and not only a self-regulatory one. [The new Code is just a starting point of a new season of co-regulation in the field of disinformation*'. See Oreste Pollicino, 'The Road Towards a Strengthened Code Against Disinformation: About Metaphors in Free Speech and the Need to Handle Them Carefully', *European Law Institute Newsletter*, (3) May-June 2022, 3-4, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Newsletter/2022/Newsletter_May-Jun_2022.pdf.

[33] Christian D'Cunha, '"A State in the disguise of a Merchant": Tech Leviathans and the rule of law', *Eur Law J.* 1-23 (2021).

[34] Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms', 32 *Berkeley Tech. L.J.* 988 (2018).

[35] Vili Lehdonvirta, *Cloud Empires: How Digital Platforms Are Overtaking the State and How We Can Regain Control* (MIT Press, Cambridge, 2022).

[36] Chapter 8 of Maurice E. Stucke and Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (HarperCollins,New York, 2020).

[37] Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131 *Harv. L. Rev.* 1598 (2018).

emphasis on protection of freedom of expression (quite pronounced in the US, less so in Europe[38]) and limited regulation of the Internet.

The latter approach has ensured that the online media were for a long time the place where opinions could be expressed in the freest manner, as well as one of the least regulated areas of the Internet, in contrast to areas related to intellectual property or economic activity.

Thus, for instance, in the US context, the Left and Right apparently agree on the need to repeal Section 230, although so far the political will to act has been lacking[39]. Progressives usually believe that platforms take too little action against hate speech and alleged disinformation, and that mechanisms should therefore be introduced to end their exemption from liability for the user-generated content they host and disseminate. As we have seen, European institutions have moved in this direction with the Digital Services Act, with a view to directly involving platforms in the exercise of censorship powers and pushing them to take an interventionist approach.

It is true that, compared to the past, platforms have greatly increased their interference with hosted content, most likely due to regulatory and government pressure[40]. Indeed, basic considerations of law and economics lead one to believe that, in the absence of restrictions, platforms would have an economic incentive to maximise the space for free expression, 'censoring' as little as possible, and indeed favouring the circulation of particularly strong opinions and content, which would generate more interactions and thus ultimately increase the time spent by users on the platforms, along with advertising revenue[41].

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[38] Cf. the picture resulting from the aforementioned ELI report on *Freedom of Expression as a Common Constitutional Tradition in Europe*.

[39] See among others Dan Sanchez and Liam McCollum, 'Big Tech and Free Speech: How Both the Left and the Right Are Wrong', in *Fee.org*, 5 April 2022, available at https://fee.org/articles/big-tech-and-free-speech-how-both-the-left-and-the-right-are-wrong/.

[40] Cf. the insightful reflections on the subject by Marco Bassini, *Internet e libertà di espressione. Prospettive costituzionali e sovranazionali* (Aracne, Aprilia, 2019), 237.

[41] Such interactions tend to take place with others of similar opinions, mutually reinforcing their convictions, and progressively isolating them from contact with others with different opinions: cf. Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi, Walter Quattrociocchi and Michele Starnini, 'The echo chamber effect on social media', 118 *PNAS*, No. 9 (2021). The consideration of platforms' incentive to maximise, for advertising purposes, time spent on-line by users is made with reference to political disinformation and its possible effects on the democratic process by Kate Jones, 'Online Disinformation and Political Discourse. Applying a Human Rights Framework', Research Paper, Chatham House, November 2019, available at https://www.chathamhouse.org/sites/default/files/2019-11-05-Online-Disinformation-Human-Rights.pdf. While there have been widespread warnings from the progressive side about how online disinformation has facilitated conservative successes, most notably Trump's victory in 2016, there are also more recent investigations showing exactly the opposite: see Mollie Hemingway, *Rigged: How the Media, Big Tech, and the Democrats Seized Our Elections*, Regnery Publishing, Washington, D.C., 2021 (cf. also Mark Zuckerberg's very recent allegations of FBI meddling in Facebook's handling of the Hunter Biden laptop controversy: Bruce Golding, 'Zuckerberg says Facebook censored The Post's Hunter Biden stories because FBI warned of Russian misinfo "dump"', *New York Post*, 26 August 2022, available at https://nypost.com/2022/08/26/zuckerberg-blames-fbi-for-censoring-the-posts-hunter-biden-scoop/). On this topic, see also, among others, two of the latest books by Cass R. Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (OUP, Oxford, 2021); *#republic: Divided Democracy in the Age of Social Media* (Princeton University Press, Princeton and Oxford, 2017); as well as two articles by Jonathan Haidt published in *The Atlantic*: 'Why the Past 10 Years of American Life Have Been Uniquely Stupid' and 'Yes, Social Media Really Is Undermining Democracy', respectively 11 April 2022 and 28 July 2022, both available at https://www.theatlantic.com/.

If platforms are not behaving this way, or doing so less and less, it is difficult to explain solely as a matter choice or compliance with ESG principles. Presumably, the companies are responding to deeper 'nudging' from the authorities, even if it is not immediately perceptible. An example of this approach can be found in the area of hate speech, where the European authorities have expressed a preference for over-enforcement over under-enforcement[42].

Yet, even this chilling effect is not considered sufficient from liberal[43] perspectives, which have shifted from being historically strenuous protectors of freedom of expression and the press as a bulwark against possible authoritarian drift to being champions of restrictions on freedom of speech, under the banner of woke thinking and the ideology of political correctness that is dominant today[44]. Even so, this approach does not lack contradictions and, as I have called them elsewhere, 'logical short-circuits'[45]. To me, an Italian case that pitted Facebook, now Meta, against a number of openly neo-fascist groups that had been banned from that platform[46] seems extremely significant in this regard. In the proceedings brought by the latter to regain access, the Italian judges (especially in the complaint) started from a typically liberal affirmation of principle, namely, the superiority of freedom of expression and association over economic freedom (of Facebook), obtaining, however, the paradoxical consequence of ordering Facebook to readmit the neo-fascist groups, giving them back political space and agility. In other words, Facebook's restriction of freedom of expression and entrepreneurial freedom (or 'freedom of economic speech', as I now propose to define cases where the two intersect) advantages groups which progressives would certainly not want to favour.

A similar paradox can be derived from reading the landmark *Packingham* case[47], in which the US Supreme Court declared illegitimate a North Carolina state law prohibiting *tout court* access to social media for people convicted of sexual offences. In this case, the paradox consists in deriving an advantage for the perpetrators of such heinous crimes from a typically progressive premise, affirmed in the majority opinion of Justice Kennedy's swing vote and signed by all four of the then liberal-minded justices on the court (with the concurrence of three conservative justices[48] Alito, Chief Justice Roberts and Thomas, whose signed opinion shared similar overtones on the point).

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[42] Martin Husovec, 'Why Is There No Due Process Online?', in *Balkinization*, 7 June 2019, available at https://balkin.blogspot.com/2019/06/why-there-is-no-due-process-online.html.

[43] Here and in the following pages, the word liberal is used with the meaning it has in the American political debate, i.e. as a synonym of progressive.

[44] For a very critical perspective of this evolution, see Stephen R. Soukup, *The Dictatorship of Woke Capital: How Political Correctness Captured Big Business* (Encounter Books, New York, 2021).

[45] R. de Caria, *Offers They Can't Refuse*, cit., 28.

[46] Court of Rome, Specialised Section on Enterprise, Order of 12 December 2019; Court of Rome, Order of 29 April 2020.

[47] *Packingham v. North Carolina*, 582 U.S. ___ (2017).

[48] Justice Gorsuch did not participate in the decision.

In light of such rulings, the question arises as to what leeway remains for platforms to freely determine their own policies on admitting certain users. Would an identical rule, not imposed by the State of North Carolina but freely adopted by Facebook/Meta, still be legitimate? Considered abstractly, the answer is yes, because it expresses Facebook's freedom of economic and contractual initiative.

However, the general tendency seems to be to affirm (in the US as well) a general principle of applying fundamental rights horizontally, i.e. in relations between private individuals[49]. The ultra-conservative Justice Thomas himself surprisingly hinted at this view in a later opinion in *Biden v. Knight First Amendment Institute*[50], in which he drew an analogy between today's platforms and traditional carriers, and thus seemed to open at least the theoretical possibility of imposing (moreover, by way of interpretation) on platforms the pervasive anti-discrimination obligations applied to transport and public accommodation operators[51]. This is one of the possible avenues formulated by American jurists to overcome the strong constraint of the state action doctrine, whereby rights contained in the Bill of Rights (including the First Amendment, highlighted here) offer protection only against actions carried out by public authorities (specifically, state actors) and not private individuals[52]. An attempt to apply the First Amendment to formally private subjects, for example by

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[49] On the application of fundamental rights to inter-private relations, under the so-called *Drittwirkung* theory, I have dealt at greater length in *Offers They Can't Refuse*, cit.

[50] 593 U.S. ___ (2021) Thomas, J., *concurring*.

[51] "*In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at the bottom of communications networks, and they 'carry' information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organisations that focus on distributing the speech of the broader public. [...] The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size*", *ibid.*, 6-7 of the slip opinion.

[52] I limit myself here to citing Stephan Jaggi's encyclopaedic entry, 'State Action Doctrine', in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (last updated October 2017), available at https://oxcon.ouplaw.com/view/10.1093/lawmpeccol/law-mpeccol-e473?rskey=XgQGSk&result=1&prd=MPECCOL, as well as Mark Tushnet's classic study, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law', 1(1) *International Journal of Constitutional Law*, 79-98 (2003). With regard to the many works that have reflected on the operability of this doctrine in the digital world, I would like to point out, in particular, Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action', *op. cit.*, already quite old; Paul S. Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation', 71 *U. Colo. L. Rev.* 1263 (2000). More recently, see Daniel Rudofsky, 'Modern State Action Doctrine in the Age of Big Data', 71 *NYU Annual Survey of Amer. L.* 741 (2017); Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of Platforms: Protecting Fundamental Rights Online in the Algorithmic Society', 11(2) *Eur. J. Leg. Stud.* 65 (2019); Michael Patty, 'Social Media and Censorship: Rethinking State Action Once Again', 40(1) *Mitchell Hamline Law Journal of Public Policy and Practice* 99 (2019); M. Zalnieriute, 'From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN', 21 *Yale J.L. & Tech.* 278 (2019); Oreste Pollicino, 'Digital Private Powers Exercising Public Functions: The Constitutional Paradox in the Digital Age and its Possible Solutions' (2021), available at https://echr.coe.int/Documents/Intervention_20210415_Pollicino_Rule_of_Law_ENG.pdf. See also, in the Italian scholarship, Pasquale Stanzione, *I "poteri privati" delle piattaforme e le nuove frontiere della privacy* (Giappichelli, Torino, 2022); Giulio Enea Vigevani, Oreste Pollicino, Carlo Melzi d'Eril, Marco Cuniberti and Marco Bassini, *Diritto dell'informazione e dei media* (Giappichelli, Torino, 2022); Silvia Sassi, *Disinformazione contro Costituzionalismo* (editoriale scientifica, Napoli, 2021); Ignazio Spadaro, *Il contrasto allo* Hate Speech *nell'ordinamento costituzionale globalizzato* (Giappichelli, Torino, 2020); Oreste Pollicino and Graziella Romeo (eds.), *The Internet and Constitutional Law: The protection of fundamental rights and constitutional adjudication in Europe* (Routledge, London-New York,

considering them either as "company towns"[53], as "broadcasters or cable providers"[54], or as "editors"[55], has also been put forward[56].

Moving to the opposite side of the mainstream ideological spectrum, one finds in the conservative camp similar paradoxes and slippage with respect to historically held or even reasonably expected positions. Besides what has just been said regarding Justice Thomas's positions, the basic contradiction, mirroring the progressive one into which many opinion leaders seem to fall, moves from the opposite premise: namely, that platforms, far from exercising too little control, are instead engaging in one-sided censorship.

This position revives the American Right's classic polemic against the so-called liberal media and considers Silicon Valley start-ups to be carriers of a similar anti-conservative bias. Hence Trump's strenuous opposition to Section 230, which culminated in his Executive Order discussed above, and multiple legal initiatives by opinion leaders and conservative groups contesting exclusions or penalisations by platforms such as Facebook/Meta and YouTube[57] (similar to parallel initiatives

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2016). I will only point out that, in times long past, Posner had advanced some considerations of law and economics against the necessity of obliging the managers of public facilities to make them available, as a "public forum", to all those wishing to make use of them to express their thoughts: Richard A. Posner, 'Free Speech in an Economic Perspective', 20 *Suffolk University Law Review* 1, 52 (1986). Although from different perspectives, the "public forum" doctrine was also criticized, among others, by Daniel A. Farber, 'Free Speech without Romance: Public Choice and the First Amendment', 105(2) *Harv. L. Rev.* 554 (1991), and Jack M. Balkin, 'Some Realism About Pluralism: Legal Realist Approaches to the First Amendment', vol. 1990(3) *Duke L. J.* 375 (1990).

[53] The case on which this analogy is based is *Marsh v. Alabama*, 326 U.S. 501 (1946), which held that a city, even if privately owned by a corporation, was still a public place where the First Amendment right to distribute political propaganda leaflets applied.

[54] In this case, the references are in particular to *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), in which a "*fairness doctrine*" requiring networks to grant airtime to candidates in political elections was held to be compatible with the First Amendment on the basis of a primacy of users' rights over those of *broadcasters*; and *Turner Broadcasting Systems v. FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting v. Federal Communications Commission (II)*, 520 U.S. 180 (1997), a case concerning the obligation of cable TV operators to reserve certain channels for local TV stations, which was ultimately considered legitimate, despite the premise that there is not the physical scarcity of resources that characterises traditional TV. In addition to these cases, the case of *Manhattan Community Access Corp. v. Halleck,* 587 U.S. ___ (2019), in which the Supreme Court ruled out the nature of a state actor in the case of an operator of a private public access television network, which therefore had the right to exclude whomever it wanted from its schedule (despite high expectations, however, the Court in *Halleck* did not address the possible implications of the principle it affirmed there in relation to social media).

[55] Here, indeed, the Supreme Court ruled to the contrary in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 24 (1974), declaring unconstitutional a Florida law that established equal treatment obligations for political candidates, based on an instance when a politician had asked a newspaper for permission to respond to an editorial about him, only to receive a refusal. The principle was also extended to public broadcasters in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) and to an electricity company that published a monthly newsletter (*Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986)). However, other subsequent cases have narrowed its scope, ruling out the application of the *Tornillo* precedent, e.g. with reference to a shopping centre (*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) or a *law school* association that wanted to be able to deny without consequence (in this case, loss of federal funds) (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR*)), 547 U.S. 47 (2006), access to army recruiters (but the Supreme Court held that there was an obligation to allow such recruiting in order not to lose state funds).

[56] Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, CRS Report R45650 (2019), available at https://crsreports.congress.gov/product/pdf/R/R45650.

[57] Notable among them are the initiatives of Prager University against YouTube and Freedom Watch against Google.

against traditional media[58]), along with regulatory initiatives aimed at prohibiting companies from discriminating against conservative views (alleged anti-conservative bias) and ensuring a level playing field[59].

I now turn to the latter issue[60], which has been the subject of some very important court cases still in full swing and involved the Supreme Court in a very recent decision on so-called de-platforming laws passed by Republican-majorities in Texas and Florida. These laws are aimed at prohibiting large platforms from discriminating against content published on their sites and apps by users on the basis of their opinions, thus significantly restricting the platforms' freedom of enterprise, as well as their freedom of expression. Herein lies the conservative paradox, which is often forgotten. Today conservatives have embraced the cause of freedom of expression, making it a workhorse of their own programme and promoting an absolutist reading of it, manifested in rulings such as *Citizens United* on campaign finance[61], just as they normally defend economic freedom. When these two freedoms collide in platform ownership, however, conservatives seem inclined to justify restrictions on their 'economic speech', risking the sacrifice of certain cardinal principles on the altar of Realpolitik and short-term advantage in political and ideological battles.

Both the Florida and Texas laws, which have also been justified on the basis of an equivalence that Justice Thomas made *obiter* between platforms and traditional common carriers[62], have been challenged in court, with varying outcomes. In Florida, *NetChoice v. Moody* saw the trial court suspend the law's effectiveness on 30 June 2021[63], finding that its provisions limiting the editorial freedom of platforms were probably unconstitutional due to conflict with well-established

[58] *Comcast v. National Association of African-American-Owned Media*, 589 U.S. ___ (2020).

[59] In my opinion, the initiative of the Republican Attorneys General of Missouri and Louisiana to sue senior officials of the Biden administration for allegedly conspiring with Facebook and Twitter to steer their content restriction policies in a number of important matters, including information on the Covid-19 pandemic, is to be evaluated differently: in this case, in fact, the targets of the legal action are public officials, and the objective appears to be to ascertain the degree of interference and pressure exerted by them on the platforms. See Eric Schmitt, *Missouri and Louisiana Attorneys General Ask Court to Compel Department of Justice to Produce Communications Between Top Officials and Social Media Companies*, 1 September 2022, available at https://ago.mo.gov/home/news/2022/09/01/missouri-and-louisiana-attorneys-general-ask-court-to-compel-department-of-justice-to-produce-communications-between-top-officials-and-social-media-companies.

[60] I limit the analysis to regulatory measures that have passed, but the *Ending Support for Internet Censorship Act,* introduced unsuccessfully by Republican Senator Josh Hawley in 2019, should also be mentioned: for a critique, see Lily A. Coad, 'Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation', 106 *Cornell L. Rev.* 457 (2021). By way of information, I would like to point out that a similar initiative has also been taken by the right-wing majority in Poland, although it has not yet been effectively turned into law: see Notes from Poland, 'Law to protect Poles from social media 'censorship' added to government agenda', 5 October 2021, available at https://notesfrompoland.com/2021/10/05/law-to-protect-poles-from-social-media-censorship-added-to-government-agenda/.

[61] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[62] Jon Brodkin, 'Texas looks to a Clarence Thomas opinion to defend its social media law', *ArsTechnica*, 19 May 2022, available at https://arstechnica.com/tech-policy/2022/05/texas-looks-to-a-clarence-thomas-opinion-to-defend-its-social-media-law/. On this topic, see among many, Christopher S. Yoo, 'The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy', 1 *J. Free Speech L.* 463, 480-2 (2021).

[63] United States District Court for the Northern District of Florida, Case 4:21-cv-00220-RH-MAF.

jurisprudence on the broad discretion of traditional media[64]. Subsequently, on 23 May 2022, the Eleventh Circuit Court upheld this conclusion (while saving other provisions requiring platforms to grant users access to data on the number of views of their content)[65].

In Texas, the analogous *NetChoice v. Paxton* case saw the federal trial court find (on 1 December 2021) that the local de-platforming law was probably unconstitutional and decide that its application should be suspended[66]. But in this case, the Fifth Circuit Court of Appeals, on 11 May 2022, overturned the preliminary injunction (thus allowing the Texas law to come into force), albeit without stating reasons[67], but undoubtedly hinting at a belief in the equivalence of platforms' obligations with those of common carriers[68]. A few weeks later, however, on 31 May 2022, the Federal Supreme Court reversed that ruling, annulling the Fifth Circuit's order and reinstating the preliminary injunction that had suspended the law.

In blatant confirmation of the 'logical short-circuits' and ideological paradoxes mentioned above, the Supreme Court decision was made (without express reasons) by a majority of five judges not aligned with the traditional ideological divisions: in fact, they included liberal-minded judges Breyer and Sotomayor, along with conservatives Barrett, Kavanaugh and Roberts. Likewise, the minority comprised the liberal Kagan along with conservative justices Alito, Gorsuch and Thomas[69]. Gorsuch and Thomas joined Alito's dissenting opinion, in which some rather significant statements were made.

Alito starts from the premise of the issue's novelty, which leads him to doubt whether it is possible to have particularly strong certainty about the dispute's future outcome. Even the Supreme Court's own precedents, which Alito observes were issued before the advent of the Internet, appear not to lead to definitive conclusions[70]. Some of these precedents "recognised the right of organisations to

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[64] Above all *Tornillo*, quoted above in footnote 55 and discussed later in the text.

[65] United States Court of Appeals For the Eleventh Circuit, Case: 21-12355.

[66] United States District Court for the Western District of Texas, Austin Division, Case 1:21-cv-00840-RP.

[67] United States Court of Appeals for the Fifth Circuit, Case: 21-51178.

[68] Valerie C. Brannon, 'Free Speech Challenges to Florida and Texas Social Media Laws', CRS Report LSB10748 (2022), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10748, 5.

[69] If Thomas's position is not surprising, considering some of his opinions referred to above, in particular the one in *Knight First Amendment Institute*, not surprisingly quoted by Alito, more difficult to decipher is the vote of Gorsuch (who had signed the majority opinion in *Comcast*, quoted just above in footnote 58): it seems likely that his position could be in line with the one expressed in the recent important case of *Bostock v. Clayton County*, 590 U.S. ___ (2020), where he signed the majority opinion together with Chief Justice Roberts and liberal-minded Justices Ginsburg, Breyer, Sotomayor and Kagan, in which the Court surprisingly recognised that the prohibition against sexual discrimination in employment relationships should be interpreted as including also the prohibition against discrimination on the basis of sexual orientation. The deep reason for the decision by Gorsuch seems to me to lie in a profound judicial deference to what it considered to be a very precise choice of the legislature.

[70] For a more in-depth analysis, Alito cites the seminal Eugene Volokh, 'Treating Social Media Platforms Like Common Carriers?', 1 *J. Free Speech Law* 377 (2021). On the novelty of the issues addressed, see the observation above, at § 2, as well as the following passage from *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011): "*whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears*".

refuse to host the speech of others": namely, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[71], in which the right of a private group organising the St. Patrick's Day Parade (with the authorisation and indirectly on behalf of the City of Boston, which authorised the use of the logo and also provided funding) to exclude a homosexual group from the event was unanimously upheld. The other cited case, *Tornillo*, is even more relevant, because, as we have seen, it ruled (again unanimously) that a newspaper can refuse a political candidate's request to publish a rebuttal to a critical editorial, thus guaranteeing broad protection for editorial discretion[72].

However, notes Alito, one must also consider the already mentioned *PruneYard Shopping Center*[73], in which the Court held, again unanimously, that the California Constitution could legitimately equate a privately owned shopping centre with a public place, and consequently subject its operators to the obligation to allow those who reasonably wish to distribute political material and invite customers to sign a petition. Another precedent cited by Alito in support of the legitimacy of de-platforming laws is *Turner Broadcasting I* which, together with *Turner Broadcasting II,* saw the Court, this time by a 5-4 majority across ideological lines, affirms the constitutionality of certain obligations imposed by the Federal Communications Commission on cable TV operators to reserve channels for local TV stations, thus holding that the public interest in pluralism should prevail over the editorial discretion of the companies involved.

As I write, a decision on the merits is expected shortly from the lower courts (as Alito himself notes), so the case is far from closed and will have to be monitored very closely.

5. Freedom of expression online: the case for a coherent and ideologically sound approach (and a response to possible objections)

The analysis conducted so far has highlighted some glaring contradictions in both perspectives currently dominant in the public debate. This inevitably generates a certain dissatisfaction with the debate's quality and encourages a search for a different approach that is more internally consistent and less exposed to the aporias and contradictions just mentioned.

Put simply, this alternative takes a favourable view of the US's traditionally strong constitutional protection of freedom of expression and considers upholding these safeguards of paramount importance, even to the detriment of short-term political advantage, no matter how desirable. Arguments in support of a strenuous defence of freedom of speech still appear to be fully valid and irrefutable, both on the ideological level dear to conservatives (freedom of expression must be

[71] 515 U.S. 557 (1995).

[72] Note the contradiction with the aforementioned *Red Lion*.

[73] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

protected however it is used and no matter how odious its abuses may be[74]), as well as from the utilitarian point of view more typical of liberals (in a functioning marketplace of ideas, *à la* Oliver Wendell Holmes, such as that of a 'tolerant society'[75], bad ideas will be progressively eliminated, preferably in a spontaneous and not coercive fashion, which would only unintentionally reinforce them).

Moreover, the case for the freedom of expression and economic freedom of platforms should not be underestimated. After all, they are, until proven otherwise, private entities entitled to the widest editorial discretion, as is recognised with the traditional media. From this point of view, the progressive privatisation of 'censorship' operated by the platforms[76], made manifest by Facebook/Meta's establishment of an Oversight Board tasked with acting as a private and independent appellate body to evaluate the social network's decisions on content removal and profile blocking, do not appear in any way scandalous.

If these arguments hold true, there seems no valid reason to sacrifice these fundamental principles for the admittedly laudable goal of fighting hatred or various forms of ideological and cultural discrimination, which undoubtedly harm their victims. Certainly, attempts to regulate such activities are not entirely the result of spontaneous evolution of the 'marketplace of ideas'.

From this point of view, the only real possible counterargument appears to be what I would call 'the oligarch objection', put to me by Carlo Lottieri in a seminar presenting my previous paper on the subject[77]. Lottieri argued that platform operators would have received, if not actively sought, favours from the state (such regulatory barriers to the entry of competitors) that would have increased their dominant market positions over weaker competitors or recent entrants, not unlike what happens in certain authoritarian systems where favoured entrepreneurs 'organically' accumulate money and power (Lottieri compared this mechanism to that of certain criminal groups that acquire enormous wealth thanks to tenders and other non-transparent procedures, which involve favouritism even when they are not blatantly illegal).

[74] Cf. Walter E. Bloch, *Defending the Undefendable* (Ludwig von Mises Institute, Auburn, 2018 [1976]), Chapter III, 'Free Speech', 39-72.

[75] As in the title of the celebrated work by Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, Cambridge, 1986). By this same author, we note the very recent release of a new volume written with Geoffrey R. Stone, *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford University Press USA, New York, 2022). Recently, some arguments have been taken up by Jonathan Zimmerman, *Free Speech: And Why You Should Give a Damn* (City of Light Publishing, Buffalo, 2021); see also Id., 'Why we must allow hate speech', *Pittsburgh Post-Gazette*, 17 August 2022, available at https://www.post-gazette.com/opinion/Op-Ed/2022/08/17/rushdie-matar-fatwa-censorship-speech-codes/stories/202208170022.

[76] See the reflections on the subject by Chinmayi Arun, 'Making Choices: Social Media Platforms and Freedom of Expression Norms', in Lee C. Bollinger, Agnès Callamard (eds.), *Regardless of Frontiers. Global Freedom of Expression in a Troubled World* (Columbia University Press, New York, 2021), chapter 12.

[77] 'Offers they can't refuse', *op. cit.*, presented at an IREF seminar in Bendern, Liechtenstein, on 15 October 2021.

From a libertarian perspective, Lottieri's objection undoubtedly appears serious and deserving of consideration. It can be traced back to the question of whether the private property of crony capitalists, rent-seekers or even criminals deserves the same degree of protection offered to anyone who has acquired it without violating the principle of non-aggression and the other cornerstones of a free society[78].

The first consideration is whether the large platforms can be classified as oligarchs, as Lottieri argued in one of his recent publications on the legal repercussions of the Covid-19 pandemic – an event that has seen an extremely marked increase in the platforms' control over content, with fact-checking and restriction of content being truly pervasive.

This is Lottieri's thesis: "*one must wonder what is left of 'private' in contemporary society, characterised by an increasing invasion of politics into the economy and cultural life. [...] Large corporations like Facebook, Amazon or Google are private companies, but they can gain enormous advantages from political power. Therefore, they are inclined to act opportunistically towards politics and invest a lot of money in lobbying initiatives. What is more, they are companies that can be wiped out or penalised in various ways: by regulations concerning taxation, competition, labour contracts, privacy and so on. In this light,* it is impossible to consider the behaviour of Zuckerberg, Bezos or Dorsey as legitimate when they shut the mouths of those who hold positions they do not like. *Above all, one must ask oneself whether their companies – operating within this highly politicised framework – are still genuinely private, given that they operate in total harmony with those who hold sovereignty, or whether they are not the last tentacles of a political power that is far more complex and impenetrable than it was in past decades*"[79].

While there is indeed evidence of rent-seeking by platforms, it seems to me that three elements should be considered. First, the way in which these platforms acquired a position of dominance in their respective markets appears irreducibly different from the way in which oligarchs acquire their wealth. If in the latter case there is an obvious original flaw, the platforms seem to be at most victims of their own success, which they achieved largely in line with the fundamental requirements outlined by

[78] The topic is linked to one that is particularly topical today, namely the need to reconcile the requirements of protecting the *rule of law* with the pursuit of foreign policy objectives, with reference to the sanctions imposed on Russian oligarchs in the aftermath of the Russian invasion of Ukraine: see on this subject Len Shackleton, *Yes, let's be 'tough on Russia' - but not by overriding the rule of law*, *IEA*, 10 March 2022, available at https://iea.org.uk/yes-lets-be-tough-on-russia-but-not-by-overriding-the-rule-of-law/.

[79] Carlo Lottieri, 'Introduzione: Gli oligarchi, i renitenti e gli altri', in Id. (ed), *Leviatano sanitario e crisi del diritto. Cultura, società e istituzioni al tempo del Covid-19* (Giometti&Antonello, Macerata, 2022), 25-6, emphasis added (the translation from the Italian original is mine). In some ways, this perspective was paradoxically corroborated by Mark Zuckerberg himself, in a statement he made quite widely on the net, namely 'In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we're really setting policies' (it is reported, among others, by Franklin Foer, 'Facebook's war on free will', *The Guardian*, 19 September 2017).

Mises: an entrepreneur "*does not reign over conquered territory, independent of the market, independent of his customers. [...] This 'king' must stay in the good graces of his subjects, the consumers; he loses his 'kingdom' as soon as he is no longer in a position to give his customers better service and provide it at lower cost than others with whom he must compete*"[80].

Secondly, the ever-increasing pervasiveness of the control over platforms's operations by public authorities is such as to raise doubts as to their *de facto* assimilation into the enormous corpus of state bureaucracy. On the one hand, there are numerous legislative initiatives aimed at stirring the conduct of the largest social media[81], or even imposing on them the censorship of certain content (an obligation against which they have reacted in court)[82].

On the other hand, the scrutiny is particularly strong in the area of antitrust: in fact, there are multiple well known initiatives in the most diverse legal systems against platforms for alleged oligopolies, if not monopolist practices in their respective market segments[83], all the more insidious when the platforms are treated like traditional publishers, with similar responsibilities.

It appears very difficult to contextualise these initiatives within a scenario of close intermingling between platforms and public authorities, unless one postulates the existence of a precise agreement between the former and the latter, according to which everything takes place according to a logic, and even heavy antitrust sanctions are happily tolerated by these companies because they are part of a broader scheme in which the benefits outweigh the disadvantages. This thesis is suggestive but requires demonstration[84].

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[80] Ludwig von Mises, *Economic Policy: Thoughts for Today and Tomorrow*, Ludwig von Mises Institute, Auburn, 2006, 3rd ed. [1979], 1.

[81] Cf. Christine Mai-DucFollow and Meghan Bobrowsky, 'Social-Media Firms Would Have to Consider Children's Health Under Bill Passed by California Legislature', in *The Wall Street Journal*, 30 August 2022, available at https://www.wsj.com/articles/social-media-firms-would-have-to-consider-childrens-health-under-bill-passed-by-california-legislature-11661901669?st=cgh2d865qbr4ldi.

[82] Cf. Rina Chandran, 'Twitter battles India for control of social media content', Thomson Reuters Foundation News, 6 July 2022, available at https://news.trust.org/item/20220706152542-4jkzy.

[83] Among many, see on this topic Nicolas Petit, *Big Tech and the Digital Economy. The Moligopoly Scenario* (OUP, Oxford, 2020).

[84] Lottieri, *Introduzione*, *op. cit*., 26 (again in my translation; emphasis in the original): "*Those who speak of the deep state intend to evoke precisely the corrupt relationship that links the political elites, the new and old protagonists of industry and finance, senior bureaucrats, the major media and the hegemonic intellectual currents. We do not therefore have the classic 'regulatory capture' that takes place when an interest group steers political decisions in its favour, but instead a* mutual appropriation*, so that it is not easy to understand, also by virtue of the clear ideological-cultural convergence, who is playing in the position of the dominant and who is playing in the position of the dominated*". Admittedly, a striking example of this "mutual appropriation" appears to be what occurred in the control of Covid-19-related information, as is emerging in the above-mentioned lawsuit by Missouri's and Louisiana's AGs (see footnote 59); yet, if the conduct of the public officials was indeed an unlawful pressure, this would be by definition the law; but to the extent that the platforms consented to this strong government push, the argument made here still appears valid, since it would be – in this case – their freely adopted policy. Cf. also Steven Nelson, 'White House 'flagging' posts for Facebook to censor over COVID 'misinformation', in *The New York Post*, 15 July 2021, available at https://nypost.com/2021/07/15/white-house-flagging-posts-for-facebook-to-censor-due-to-covid-19-misinformation/. Similar observations can be made with regard to what emerges from the periodical transparency reports by Twitter on their *Removal Requests*: cf. https://transparency.twitter.com/en/reports/removal-requests.html.

Lastly, it appears quite difficult to keep within a coherent framework if one takes literally the thesis that private 'censorship' or fact checking by platforms is illegitimate. Indeed, to justify resorting to the courts to assert such illegitimacy, it is necessary to classify the platforms as essential infrastructure[85] or a public service. Only by equating digital platforms with traditional physical networks such as power grids or railways can one sustain their legal obligation to allow access to anyone, just as network service managers and public service concessionaires cannot freely deny access to third parties wishing to use their services.

Doing so, however, would disproportionately extend the scope of antitrust obligations: considering platforms as essential infrastructure (despite the absence of physical restrictions and quotas that characterise the digital world by definition) would inevitably make them subject to a whole series of obligations typical of all non-duplicable infrastructures, which, however, are ill-suited to entities that are not protected by any physical limits to competition[86].

On the other hand, even leaving aside the subjection of companies in a dominant position to impose rules, such an approach would certainly lead to the extension of non-discrimination obligations (valid well beyond only dominant companies) to the detriment of contractual freedom. To assert before a judge the illegitimacy of Facebook/Meta's 'censorship', one would inevitably have to deny that

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It is still worth pointing out that this "mutual appropriation" is certainly not a new phenomenon, but one can already find traces of it in analyses predating the advent of the Internet. For instance, it is interesting to note how censorship, in order not to admit its existence, prefers to hide behind "*institutions with completely different functions, such as publishing houses", or to take on the guise of an "editor (of a book, a newspaper or an anthology), a reporter, a reader of the publisher, etc*". This short essay contains acute considerations on the risks of invisible self-censorship caused by too much governmental censorship. Its reflections are echoed with reference to online speech by Edward Snowden, 'The Most Dangerous Censorship', 22 June 2021, available at https://edwardsnowden.substack.com/p/on-censorship-pt-1, according to which "*For fear of losing a job, or losing admission to school, or losing the right to live in the country of one's birth, or simply social ostracism, many of today's best minds in the so-called free and democratic states have stopped trying to say what they think and feel and have remained silent. Or they adopt the party line of whatever party they would like to be invited to, whatever party their livelihood depends on. This is the cascading effect of the institutional exploitation of the Internet, of the corporate algorithms that thrive on controversy and division: the degradation of the soul as a source of profit – and power*".

[85] See, with regard to Europe, Inge Graef, 'Rethinking the essential facilities doctrine for the EU digital economy', 53(1) *Revue juridique Thémis de l'Université de Montréal* 40 (2019).

[86] With regard in particular to the relationship between competition law and freedom of expression, an important 'economic speech' case worth mentioning is *Associated Press v. United States*, 326 U.S. 1 (1945), cited by Alito in his dissent in *Netchoice, LLC v. Paxton*, discussed above. Here, the Supreme Court had ruled that the provision in Associated Press statute prohibiting its members from delivering news (whether from the group or not) to publishers who were not members of the group was unlawful. The Court here clarified the boundaries of freedom of the press in the sense that "*[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests*" (326 U.S. 20). See also one of the main arguments in support of the law at issue in the *Tornillo* case (an argument, however, rejected by the Supreme Court), namely (in the Court's own reconstruction, 418 U.S. 251): "*The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market*". Also Gregory Day, 'Monopolising Free Speech', 88 *Fordham L. Rev.* 1315 (2020) argues against the enforcement of antitrust law with regard to commercial speech (although he is broadly in favour of a broad use of antitrust law to protect noncommercial speech, "e.g., expressive, political, and social speech").

Facebook/Meta has complete freedom to choose with whom it wishes to enter a contractual relationship[87].

In short, it seems to me that one inevitably ends up on an inclined plane typical of interventionism[88], with a greatly extended range of social rights, which Lottieri himself has remarked elsewhere entails a corresponding compression of individual freedoms, which he does not favour[89].

But even if we were to adopt Lottieri's premise, for the sake of argument, we would still have to deal with the legal consequences of ascribing a crony and oligarchic nature to the platforms. This question has been debated by some of the leading exponents of libertarian and anarcho-capitalist thought, with non-overlapping outcomes[90]. Thus, Mises, in a paragraph entitled *Violence and contract* in the chapter on property in his study of socialist systems, had already reflected on the primal violent nature of property.

In general, he wrote, "*All ownership derives from occupation and violence. When we consider the natural components of goods, [...] and when we follow the legal title back, we must necessarily arrive at a point where this title originated in the appropriation of goods accessible to all. Before that we may encounter a forcible expropriation from a predecessor whose ownership we can in its turn trace to earlier appropriation or robbery. That all rights derive from violence, all ownership from appropriation or robbery, we may freely admit to those who oppose ownership on considerations of natural law*"[91]. Mises concluded that even this form of upstream violence would not be sufficient to

[87] It is worth noting that this consideration remains valid even if one supports the thesis – put forward for instance by Shaira Thobani, 'L'esclusione da Facebook tra lesione della libertà di espressione e d'accesso al mercato', *Persona e Mercato* 2021/2, 426-439 – according to which at least the main platforms could find a *private-contractual* (and not only or not necessarily *public-constitutional*) limitation in their 'editorial' choices, deriving from the fact of having, at least initially, presented themselves as open to all, without sufficient prior indications in the Terms and Conditions regarding their policies of restriction of any content. The thesis appears suggestive and shareable but remains valid in a precisely private context and does not affect the publicist argument of the alleged limits to contractual freedom deriving from immanent and pre-eminent anti-discriminatory principles, which would apply even in the presence of the more detailed and precise Terms and Conditions, potentially even overriding them.

[88] This is the well-known argument at the heart of Friedrich A. von Hayek, *The Road to Serfdom*, Routledge Press, Abingdon, 1944.

[89] Carlo Lottieri, *Every New Right is a Freedom Lost: A Classical Liberal Defense Against the Triumph of False Rights* (Monolateral, Dallas, 2016).

[90] The following analysis is based on Emil Lindqvist, *Libertarianism and Georgism on Private Property* (2015), available at https://www.diva-portal.org/smash/get/diva2:900066/FULLTEXT01.pdf.

[91] Ludwig von Mises, *Socialism. An Economic and Sociological Analysis* (tr. J. Kahane) (Yale University Press, New Haven, 1962 [1951]), 42-3. On this point similar accents can be found in John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy*, Longmans, Green, and Company, London, 1909 [1870], II.I.3 '*The social arrangements of modern Europe commenced from a distribution of property which was the result, not of just partition, or acquisition by industry, but of conquest and violence: and notwithstanding what industry has been doing for many centuries to modify the work of force, the system still retains many and large traces of its origin*'. Similarly, R. Epstein wrote that "*[m]uch of the current stores of wealth were acquired by improper means, and these imperfections necessarily infect the system as it now stands*" (R.A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985, 346). These two passages are recalled by David G. Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review* (2005) 18(1) *Can JL & Jur* 23, 38, n 128.

legitimise an abridgement of current property rights: "*But this offers not the slightest proof that the abolition of ownership is necessary, advisable. or morally justified*"[92].

This conclusion does not detract, however, from the fact that '*The significance of the legal concept of property lies just in this - that it differentiates between the physical has and the legal should have. The Law recognises owners and possessors who lack this natural having, owners who do not have, but ought to have*"[93]: this implies that the possessor who has acquired property contrary to law is not protected by it, but the reasoning remains tied to inter-subjective relations and the more difficult hypothesis of property that does not derive directly from theft, but only indirectly from governmental bestowal, is not considered.

For his part, Nozick's much more interventionist perspective justified a kind of one-off redistribution by the government to redress past injustices: "*an important question for each society will be the following: given its particular history, what operable rule of thumb best approximates the results of a detailed application in that society of the principle of rectification? [...]. Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them*"[94].

Finally, Rothbard is perhaps the one who most precisely considered the legitimacy of property titles arising from acts that are formally legal, i.e. consistent with the established order, but contrary to the principle of non-aggression. He gave the example of the imaginary kingdom of Ruritania, in which the king had violently acquired all of his subjects' property. The latter reacted by preparing to remove him from power, but a moment before abdicating, the king distributed the property of the entire kingdom between himself and eleven of his relatives: what, Rothbard wonders, happened to those titles of property awarded by the king[95]? Adopting a substantialist and anti-utilitarian perspective, he concluded they were illegitimate, based on a fundamental distinction between *just* and *unjust* property: "*It should be clear that for the libertarians to refute this stratagem they must take their stand on a theory of* just *versus* unjust *property [...]. They would then say to the king: "We are sorry, but we only recognise private property claims that are* just – *that emanate from an individual's fundamental natural right to own himself and the property which he has either transformed by his energy or which has been voluntarily given or bequeathed to him by such transformers. We do not, in short, recognise anyone's right to any given piece of property purely on his or anyone else's arbitrary say-so that it is his own. There can be no natural moral right derivable from a man's*

[92] von Mises, *Socialism*, 43.
[93] von Mises, *Socialism*, 37.
[94] Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, Oxford-Cambridge, 1999 [1974]), 231.
[95] Murray N. Rothbard, *The Ethics of Liberty* (New York University Press, New York and London, 1998 [1982]), 54-5.

arbitrary claim that any property is his'"[96]. In this hypothetical response of libertarian society to a despotic king, he even went so far as to conclude: "*"Therefore,* we claim the right to expropriate the 'private' property of you and your relations, and to return that property to the individual owners *against whom you aggressed by imposing your illegitimate claim'"*[97].

Ultimately, even in an author such as Rothbard whose coherence and adherence to libertarian principles is extreme, there emerges a possible space for a revocation of property titles considered unfair from a substantive point of view, even if they are formally correct. Therefore – to return to the point from which we started – it would seem possible to justify, even from a libertarian perspective, interfering with the freedom of platforms to determine in a discretionary manner their own policies of content control and fact-checking. To do so, however, it is clearly necessary to accept the premise of the illegitimacy of the platforms' proprietary titles (if not original, then at least derivative) as a result of that "mutual appropriation" of which Lottieri speaks. This fact, however, lends itself in turn to significant and in my opinion insurmountable objections, connected to the way in which platforms acquired their position of strength, to the strong limits imposed by competition law, and to the risks inherent in extending the scope of the notion of 'essential facility'.

6. Conclusion: between freedom of expression, 'economic speech' and freedom of contract and enterprise

The analysis above has made it possible to reach some precise conclusions. Firstly, the tendency, both in Europe and in the US, towards progressively restricting protection of contractual freedom is evident and very marked: it is a more general trend[98] that is also clearly manifest with regard to the Internet and in particular the role of platforms.

This trend is the result of a 'parallel convergence' of different ideological perspectives: for divergent and in some ways opposing reasons, both progressives and conservatives find themselves advocating for more political interference in the work of platforms. This movement also seems to be supported by proponents of originalism such as Justices Gorsuch and Thomas, who – even if they do not support this trend – seem unwilling to stop it as due to a very deliberate political choice, which causes them to overlook indications of its possible illegitimacy in the Founders' Constitution.

But an openness to limiting contractual freedom seems apparent even from libertarians, who are certainly very much in the minority in the public debate, but who have a certain following in the US and Europe on matters of freedom of expression and civil liberties in general. As we have seen, some libertarians have argued that platforms are no longer authentically private subjects, thus paving the

[96] *Ibid*., 55.
[97] *Ibid*, emphasis added.
[98] As I argued in 'Offers They Can't Refuse', *op. cit.*

way to expand the list of hybrid subjects considered to be state actors whose contractual freedom is limited by the need to guarantee the neutrality of the public sphere.

Starting from the premise that platforms are no longer genuinely private, this conclusion appears as inevitable as it is paradoxical, if one thinks of the scepticism with which libertarian thought has always greeted restrictions on the contractual freedom of private individuals, even if aimed at the pursuit of indisputably common objectives such as overcoming racial prejudice or hatred towards historically disadvantaged groups[99]. But such is the importance of economic freedom, as an irreducible dimension of individual freedom, that its sacrifice on the altar of other objectives, however noble, cannot be rationalised or justified.

At the same time, rather convincing doubts have been raised about how effective anti-discrimination obligations imposed on companies are at eliminating bias. Indeed, convincing arguments have been made that such obligations may paradoxically end up benefiting economic actors prone to unjustified discrimination. The (free) choice of companies not to enter into relations with certain suppliers, workers or customers from prejudice or bias would penalise such businesses. Potential business partners discriminated against by such businesses for reasons having nothing to do with the quality of their performance would end up working for or purchasing services from unbiased competitors. Prohibitions on discrimination prevent this self-correcting free market mechanism from operating[100].

So-called 'economic speech' concerns entrepreneurial choices that are classifiable as 'speech', in that they are made based on the entrepreneur's specific ideological (or religious) beliefs, or in any case reflect and manifest these preferences externally, constituting a form of expression in the context of a business activity. From the legal standpoint, economic speech is an area in turmoil and a highly relevant testbed for the resilience of contractual freedom.

The current trend seems clear. If some arguments against classifying platforms as state actors are disappearing even from libertarian circles, the impression is that this will lead to an immediate reinforcement of anti-discrimination obligations. The possibility that such obligations will be reduced (even for companies that are indisputably private in nature) seems small given the lengthening list of entities these standards are being applied to. As a result, the pervasiveness of restrictions on free speech appears destined to grow as anti-discrimination laws continue to expand their outreach.

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[99] Of particular note are the writings of Walter E. Bloch: 'Discrimination: An interdisciplinary analysis', 11(4) *Journal of Business Ethics* (1992); 'Compromising the Uncompromisable: Discrimination', 57(2) *The American Journal of Economics and Sociology* 223 (1998); with Javier Portillo, 'Anti-Discrimination Laws: Undermining Our Rights', 109(2) *Journal of Business Ethics* 209 (2012). To the contrary, William Kline, 'A Libertarian Defense of Title II of the 1964 Civil Rights Act', *Journal of Business Ethics* (2022).

[100] On this subject, see Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, Cambridge, 1992).

However, at least in the American context, the Supreme Court has shown, even in recent years, that it is willing and able to act as a bulwark of freedom of contract and freedom of expression[101]. Therefore, it cannot be ruled out that 'economic speech' may also be defensible in cases where these two elements are combined and inextricably linked. A starting point could be current proceedings on de-platforming laws, whose evolution should be closely followed for the light they shed on what Internet operators and platforms *must*, *may*, *must not* or *may not* do (or again, *de jure condendo*, *should*, *should be able to*, *should not be able to*, or *should be able not to* do) when it comes to placing limits and restrictions on the free expression of thought.

To date, legislative[102] and judicial[103] approaches to this issue have constantly evolved and become intricately intertwined, making it difficult to reconstruct platforms' powers and duties in terms of positive law. Clarification in this area would be more valuable than ever. This paper advances the argument that any doubt as to the entirely private nature of platforms should be dispelled, thus rendering inviolable entrepreneurial decisions as the expressions of personal ideological or religious belief. This principle would apply to the extent that such choices fall within the twofold, intangible sphere of free entrepreneurial decisions and free manifestations of thought.

[101] This has been particularly prominent with regard to restrictions on electoral discipline, particularly in the campaign finance area: in addition to the aforementioned *Citizens United*, v. *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014); *American Tradition Partnership, Inc. v. Bullock,* 567, U.S. 516 (2012); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). Alongside these, several cases have also strengthened safeguards of religious freedom, which is also protected by the First Amendment. For a critique of this alleged '*Supreme Court's expansion of the First Amendment for the benefit of commercial actors*', in the context of the Internet, see John Gregory Francis, Leslie Francis, *Freedom of Thought in the United States: The First Amendment, Marketplaces of Ideas, and the Internet*, 8(2-3) *European Journal of Comparative Law and Governance* 192-225 (2021); also critically, see David French, *Free Speech for Me but Not for Thee. The American right has lost the plot on free speech,* in *The Atlantic*, April 2022, available at https://www.theatlantic.com/ideas/archive/2022/04/republican-dont-say-gay-bill-florida/629516/; Jedediah Britton-Purdy, *The Bosses' Constitution: How and why the First Amendment became a weapon for the right*, in *The Nation*, 12 September 2018, available at https://www.thenation.com/article/archive/the-bosses-constitution/.

[102] The constant evolution of the legislative formant is in contrast to the need invoked here at the outset to limit as far as possible the use of new laws to deal with these, albeit new, phenomena.

[103] Cf. recently Evangelia Psychogiopoulou and Susana de la Sierra (eds.), *Digital Media Governance and Supranational Courts. Selected Issues and Insights from the European Judiciary* (Elgar, Cheltenham, 2022).