Social Networks as New Public Forums?

Enforcing the Rule of Law in the Digital Environment

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Abstract

The article provides a comparative overview on recent case law developments concerning the so-called deplatforming, calling for a more in-depth consideration of the role of social network service providers. By comparing the US and Italian scenarios, it delves into the question on whether these operators should be equalized to public forums or State actors and then subject to stricter regulation with respect to content moderation.

Keywords

social networks – freedom of expression – deplatforming – public forum doctrine – State action doctrine

1 Introduction

In his recent book Judicial Protection of Fundamental Rights on the Internet Oreste Pollicino delves into the varying framing adopted by courts of different jurisdictions to address a common problem: how to reconcile old-fashioned legal rules with the need to safeguard human rights in the digital age? As part of this research, the book provides among others a critical overview of the case law that over the last two decades focused on the liability regime applicable to Internet service providers, with a view to highlight how courts substantially re-shaped the role of intermediaries and ultimately how these stances influenced the protection of human rights in cyberspace. The book, then, inherently implies a seminal research question, i.e. how the rule of law, of which the...
protection of human rights constitutes a key pillar, can be secured in the shift from the world of atom to the world of bit.

In order to answer this question, I will undertake a different but intertwined research path, which, also in light of the case law delivered by courts in the specific area of Internet service providers liability, looks at the legal status applicable to intermediaries under the applicable legislation and questions whether the latter still fits with the evolving role of such actors.

I will start from a question that may apparently sound as provocative but that in fact, albeit indirectly, implies a key normative claim: can social networks that provide their users a virtual space for sharing thoughts and opinions "censor" the most influential political figure in the world? A decision of such nature may constitute a legitimate enforcement of the terms and conditions entered by two private parties (namely, the Internet service provider and the relevant user). However, one should question if the same act does not trigger other consequences from a purely constitutional law standpoint. Answering this question requires to shed some light on the possible resort to real-word categories to regulate phenomena taking place in the digital realm.

The goal of this article is then to investigate the conflict between power and freedom and the one between public power and private power, which more and more come into play in the context of the Internet and most notably of social networks. Among others, the recent decisions of Twitter and Facebook to suspend Donald Trump’s respective accounts show the importance of these conflicts.¹

I will therefore try to answer some questions considering a comparative overview on the challenges relating to freedom of expression in the digital age.²

I will question if the frequently evoked metaphor that conceptualizes the Internet and social networks as public spaces/forums implies a normative or rather a merely descriptive claim.³

Assuming that this metaphor can have a normative value, I will try to figure out if the inherently private nature of the contractual relationship between

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² I have tried to focus on these challenges in my book: BASSINI, Internet e libertà di espressione. Prospettive costituzionali e sovranazionali, Roma, 2019.
users and social networks can provide a legal justification for the moderation activities carried out by Twitter and Facebook that resulted, among the others, in the ban imposed on Donald Trump’s account.4 In my view, adopting a constitutional law perspective, this argument may not suffice to justify the exercise by social networks of a form of private censorship.5 In fact, this argument may per se provide robust justification for the power of social networks to moderate content, however it seems to disregard the fact that more and more Internet service providers act as private powers vis-à-vis individuals, being able to affect individuals’ fundamental rights and freedoms at large.6 In this capacity, they are in competition with public authorities. And this conflict becomes particularly clear in the case regarding the suspension of the accounts held by Donald Trump. As I will try to figure out, this problem still retains its importance even adopting the view that Twitter and Facebook were right in censoring Trump’s speech, on the assumption that the latter exceeded the limits to the legitimate exercise of freedom of expression.

If these remarks make sense, then the issue of the legitimacy of the removal cannot be addressed from a merely private law standpoint, which captures only a part of the problem. Rather, this question can be answered having regard to the possible existence of horizontal effects attached to the constitutional provisions protecting freedom of expression. Indeed, Internet service providers face more and more a “liability paradox”: on the one hand, they are presumed (and required) to play a merely passive role, having no control over third-party content shared or disseminated through their services; on the other hand, the evolution of these services make it reasonable to expect that providers can handle the removal of content when on notice of its unlawful nature. However, when it comes to pieces of content that it would better be up to a court to declare unlawful (i.e. content whose unlawful nature is not crystal-clear), their intervention is perceived as a (negative) form of censorship. And then the problem of the private nature of the relationship comes into play,7 as it is

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5 See Monti, “Privatizzazione della censura e Internet platforms: la libertà d’espressione e i nuovi censori dell’agorà digitale”, Rivista italiana di informatica e diritto, 2019, p. 35 ff.


questioned whether Internet service providers are entitled to limit users’ freedom of expression even to a broader extent than that allowed by constitutions, e.g. by removing content that does not constitute an unlawful conduct in the relevant legal system.

These questions make even much more sense, in my view, considering the important developments that may occur in the medium term in the European Union legal system. As it is well-known, on 15 December 2020 the Commission presented a long-awaited proposal for a regulation on a Single Market for Digital Services (so called “Digital Services Act”). This act should lead to important amendments to the e-Commerce Directive (Directive 2000/31/EC).

The answers I will try to point out in this article should provide an added value for the proper understanding of the current scenario and the evaluation of the different choices available to regulators (in the EU but also in the US).

In order to conduct this analysis, I will start considering the role of online platforms and the inherent connection between these private actors and freedom of expression, which emerges from the very beginning looking at the US scenario of the mid 1990s. The article will then illustrate the overlap between the public sphere for the exercise of freedom of expression, based on the relationship between individuals and State authorities, and the private digital sphere, based on the relationship between users and service providers. To do so, the article will examine the role of social networks in light of the public forum doctrine and the State action doctrine, and will try to draw a comparison with the case law of Italian courts focusing on the suspension of two far-right political movements’ Facebook fan pages. This analysis will further confirm the pivotal role played by courts in the age of the Internet, a claim that lies at the heart of Pollicino’s latest book.

The article will eventually conclude that social networks should not be equalized to public forums or State actors, as the latter options are supposed to bring unintended, negative consequences.

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Reforming the Legal Regime Applicable to Internet Service Providers: When Content Regulation Passes Through Services Regulation

Many important cases have recently emerged that bring to light the key role played by online platforms for freedom of expression and, generally speaking, for the protection of individuals’ rights.

Scholars and courts debate if the services in question amount to digital utilities and can therefore be equalized to public services – an option that would pave the way for subjecting them to stricter regulation.

The dispute has recently arisen between the most important social networks and the former president of the United States Donald Trump (whose accounts were permanently blocked after the content he posted on the occasion of the 6 January Capitol Hill siege) has brought to light a long-debated topic in recent years on which the institutions of the European Union, through the Digital Services Act package, have recently advanced an important proposal for reforming a legal framework that was drafted in 2000, when many of the current digital platforms did not even exist.

The status of Internet service providers, in fact, is a legal issue that has often been at the heart of the attention of commentators and has given rise to several courts’ decisions (both at the national level and at the supranational level, in the EU legal system and in the Council of Europe one), without leading lawmakers to ultimately change the rules of the game.

The hesitation showed so far by the European Union institutions, quite reluctant for a while to consider the option of shaping a new legal framework, should not, however, come as a surprise, especially if one bears in mind the legal, economic, and cultural conditions behind the adoption, both in the US and in Europe, of the first rules on this subject-matter.

It is not even a coincidence, perhaps, that before the proposal for a regulation under the Digital Services Act came into play in Europe, in the US attempts...
were made to shed some new light on the subject (albeit in the context of a strongly personalistic opposition between Donald Trump and some social networks, Twitter above all, in the context of the 2020 US general election).

In the US Internet service providers have benefited from a very favorable regime, based on the provision of Section 230 of the Communications Decency Act ("CDA"), the first act regulating the Internet passed by Congress in 1996 with a view to preventing cyberspace from becoming a free zone where conducts prohibited in the real world could nevertheless occur.12

According to the Good Samaritan clause enshrined in Section 230 CDA, Internet service providers enjoy a broad immunity in relation to content moderation activities carried out “in good faith”. The same provision exempts service providers from liability by excluding that the latter can be considered content providers (and then subject to publisher liability). Service providers, in fact, merely provide the forum where third parties can post content or information. Requiring service providers to bear liability for any illegal piece of content or information posted by content providers would have likely discouraged digital platforms to act as new “virtual agoras” (in a purely metaphorical and descriptive sense), generating additional costs and risks. So, this provision was of utmost importance for the rise and expansion of the Internet as we know it today,13 allowing service providers to escape possible negative consequences (i.e. incurring liability) related to any act of content moderation, except for a limited set of derogations. It is not by coincidence that Congress passed this provision with the primary goal of preventing courts from analogizing service providers to publishers and thus apply to them the same legal regime based on direct liability. Indeed, a US court had already made this point in 1991, in the CompuServe case,14 where the court found that Internet service providers were comparable to bookstores, public libraries and newsstands, and as such merely acted as distributors of third-party content. Nonetheless, in 1995 the Supreme Court of the State of New York delivered an opposite decision in Prodigy,15 subjecting a service provider to the standard of liability applicable to publishers. The Court noted that the presence of a team of moderators and of some guidelines intended for users of the platform made it possible to qualify the operator as a publisher and not a mere distributor of third-party content. The intervention of Congress in 1996 aimed to clear the ground from

13 A recent volume by Jeff Kosseff not surprisingly renamed this provision as “The Twenty-Six Words That Created the Internet” (see Kosseff, The Twenty-Six Words That Created the Internet, Ithaca-London, 2019).
this possible misunderstanding, avoiding that any content moderation activity conducted in good faith could be indicative of editorial responsibility.\textsuperscript{16} Of course, this provision dates back to an era when the Internet was not yet populated, as it is today, by the so-called “web giants”; and where therefore the absence of concentrations of power in the hands of a few subjects led to the presumption that the Internet could fulfill the ambition of a free market of ideas, that is the digital declination of that “marketplace” theorized by Justice Holmes in 1919 in his famous dissenting opinion in the \textit{Abrams} landmark judgment.\textsuperscript{17} It is no coincidence that this provision has been at the center of numerous debates among US commentators, some of which have emphasized that the attitude of greater openness cultivated by the legislator at the beginning of the digital age has ended up placing a very important market power in the hands of a few operators. Nor is it a coincidence that for some types of infringements the exemption from liability based on Section 230 CDA has been mitigated through the provision of notice and take down mechanisms, as in the case of copyright infringements, which fall under the umbrella of the Digital Millennium Copyright Act.\textsuperscript{18} According to the notice and take down rule, service providers are not supposed to bear liability for illegal information or content posted by third parties, unless the same acquire knowledge (and then become “on notice”) of the same. In the latter scenario, if they fail to remove the piece of content or information that is deemed unlawful, they will incur indirect liability.

These rules seemed at the time the most suitable ones to give substance to the spirit of US constitutionalism on the First Amendment, portrayed in its digital declination by the landmark \textit{Reno} case delivered by the Supreme Court in 1997.\textsuperscript{19}

In Europe, where the protection of freedom of expression is subject to a more balanced standard, not by coincidence regulators took inspiration from the second model, based on the notice and take down mechanism, introducing it in the e-Commerce Directive in 2000. While this act has somehow prevented Europe from being an “easy land of conquest” for the American tech giants raised in Silicon Valley, it has nevertheless proved inadequate to capture

\textsuperscript{16} 47 U.S.C. § 230(c)(1): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”.

\textsuperscript{17} \textit{Abrams v. United States}, 250 U.S. 616 (1919).

\textsuperscript{18} 17 U.S.C. § 512.

the more and more complex nature of these services and of the relevant business models.

This brief overview on the origins of Internet service providers liability should suffice to explain which reasons prompted the European Union institutions, also by virtue of all but enthusiastic results of the various self-regulation and co-regulation mechanisms undertaken so far, to plan a new regulatory intervention on this matter.20 A guiding factor of the new package of reforms is the awareness of the obsolescence of the rules on the liability of service providers, which no longer mirror the complexity and sophistication of the role of Internet service providers.

Recent events show the sensitive nature of content moderation and thus provide further justifications for the ongoing debate on how to revisit the rules enshrined in the e-Commerce Directive. More and more digital platforms act as “private powers”; more and more, they can influence individuals’ rights and freedoms, most notably freedom of expression and privacy. The actual degree of protection of freedom of speech and other individual rights may in fact depend on the policy implemented, for instance, for conducting content moderation. Indeed, the involvement of these players in such role is not new.

In the landmark Google Spain case,21 the Court of Justice of the European Union vested in Internet search engine service providers the power to strike an important balance between data protection and freedom of information. In fact, the Court said that it is up to search engine providers to evaluate whether the requests by individuals to obtain the removal of certain information (the mere URLs, not the original source hosted by an autonomous webpage) for protecting their right to be forgotten can be accepted. In other terms, search engine providers were asked to determine which fundamental right had to prevail in this conflict. Although decisions (whether to remove or to not remove data and information) of such nature can be challenged before courts or supervisory authorities, it cannot be disputed that the enforcement of the right to data protection (and, of course, also of other competing rights) is, at least prima facie, subject to a process of privatization, being conducted by non-public actors that may be driven by business considerations and implications. Similar issues have come up with respect to freedom of speech.

As it is well known, in 2020, Facebook established an oversight board composed of independent experts to introduce a review mechanism for the most disputed decisions resulting from content moderation activities.

21 Case C-131/12, Google Spain, 2014.
The “battle” between former President Donald Trump and the most important social networks sheds light on the importance of the role of social networks at the intersection between power and democracy. On the one hand, social networks still qualify as private platforms run by operators that pursue their business, seeking maximization of the revenues they collect. One may thus shape the relationship between these service providers and the relevant users as a purely private one governed by the contractual terms and conditions both parties agree to abide by. On the other hand, however, the same relationship could be framed according to a different understanding, to the extent social networks constitute the main (and sometimes the only) avenue for individuals to express ideas and opinions, so that the deprivation of their use (for instance, because of the suspension or block of users’ accounts) may be deemed to interfere with individuals’ freedom of expression. This problem has come into play most notably with respect to the role of content moderation, which may lead to remove from digital platforms pieces of content that do not necessarily amount to illegal conduct as they do not comply with the service terms and conditions. If such removal can be justified based on the terms and conditions entered by the parties, and therefore in a purely private framing of the relationship in question, a different conclusion may be reached assuming that digital platforms operate as public fora and constitute quasi-public services. In the latter scenario, in fact, service providers would be subject to the same obligations applicable to State actors (i.e. public authorities) for protecting freedom of expression. Content moderation, thus, would not be possible for pieces of content that public authorities have no right to censor or prohibit. Especially when cases like that opposing Trump and social networks such as Facebook and Twitter come up, the removal of a post, the deletion of a comment or the blocking of an account, even if legitimized on the basis of the terms and conditions of use of the relevant service, probably no longer represent only choices made in the context of private autonomy by a private subject but become determinations having significant legal implications because of their effects on the digital public sphere.

In strictly legal terms, the key question concerns the possible equalization between the Internet (and social networks) and what in the US jurisprudence is usually defined as public forum, a “place” naturally designated for the

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exchange of ideas and opinions between individuals and therefore subject to very limited restrictions only. Accepting this equation would lead to a very significant reduction of the room for "private" content moderation, thus aligning the statute of freedom of expression on digital platforms with that in force outside that environment. This option would pave the way for the application of freedom of expression with horizontal effects, as users could enforce their right to free speech vis-à-vis the relevant service providers.

Taken from this angle, the reform that the institutions of the European Union aim to implement in the field of digital services (but also markets) unveils the complexity of the various profiles behind it. It is no coincidence that even in the US, with a much-discussed Executive Order, Donald Trump tried to shift away the role of intermediaries from that enshrined in the legal paradigm of Section 230 CDA.

It is also no coincidence that before the more recent proposal, the institutions of the European Union had tried to revisit this legal framework using a sectoral approach: first, with the reform of the framework on audiovisual media services (the so-called AVMS Directive 2010/13/EU), then with the more recent and much debated Copyright Directive (Directive (EU) 790/2019). Both moves had in common the attempt to shape a specific categorization of the platforms going beyond the legal paradigm enshrined in the e-Commerce Directive and carving out special rules related to the peculiarity of the respective sectors (copyright and audiovisual media services). Questioning the legal status of online platforms can therefore be useful to better understand the ongoing reforms.

3 Social Networks and the Public Forum Doctrine

One of the options recently considered by courts lies with the application to social networks of the public forum doctrine, equalizing them to the free spaces that are traditionally meant to facilitate individuals to meet other persons and exchange views, thoughts, and opinions. Given this inherent setting,
these spaces are compatible only with content-neutral restrictions on freedom of expression. Accordingly, viewpoint discrimination, i.e. applying limitations based solely on the merits of the content of the ideas and opinions, is prohibited.\textsuperscript{27}

The notion of public forum, however, is widely referred to without implying a normative claim, to describe the nature of online platforms and of social networks in particular. The descriptive use of this terminology aims to stress the benefits and the added value offered by online platforms; in a nutshell, it highlights the importance and key role attached to social networks for the exercise of freedom of expression. However, a normative use differs from such a purely descriptive metaphor, as the latter does not consider the consequences that a qualification of said platforms as public forums would imply.

It is not by coincidence that such conflict seems to be at the heart – albeit in some parts only – of the landmark \textit{Packingham} judgment delivered by the US Supreme Court,\textsuperscript{28} where Justice Alito, in his concurring opinion, strongly dissented from the use in the opinion by Justice Kennedy of what he called “loose rhetoric”. The judgment is very well-known: the Supreme Court found contrary to the First Amendment a law of the State of North Carolina that made it a felony for registered sex offenders to access a commercial social networking website where they know that the site permits minor children to become members or to create or maintain personal webpages.\textsuperscript{29} The restriction was found disproportionate by the Court, as it potentially also covered websites that could have facilitated the social reintegration of individuals formerly convicted of such offenses. The language of the opinion by Justice Kennedy seems to imply, even if not in a crystal-clear way, a comparison between the Internet,

\begin{footnotesize}
\textsuperscript{27} The US Supreme Court had the chance to develop this theory in the landmark \textit{Hague v. Committee for Industrial Organization} case, 307 U.S. 496 (1939), following \textit{Davis v. Massachusetts}, 167 U.S. 43 (1897). In \textit{Hague} the Court theorized that the State is required to avoid any discrimination and recognized the broadest exercise of freedom of speech in those spaces that have “immemorially been held in trust for the use of the public [...] for purposes of assembly, communicating thought between citizens, and discussing public questions”. See also \textit{Schneider v. State}, 308 U.S. 147 (1939).
\end{footnotesize}
defined as the modern public square, and the category of public forums, to which the First Amendment jurisprudence attaches a very specific significance.30 In particular, Justice Alito criticized this comparison drawn through a series of “undisciplined dicta” suggesting a qualification with very specific consequences in legal terms. According to Justice Alito: “if the entirety of the internet or even just ‘social media’ sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders”. In Alito’s opinion one can notice the concern that the Supreme Court could, albeit in an involuntary manner, equalize social networks to public forums. Actually, there is no trace of such outcome in the Court’s judgment, which indeed merely focused on the disproportionate effects of the ban. However, the decision stressed very much the fact that the Internet could make the free marketplace of ideas real (as the Supreme Court had already highlighted in Reno v. ACLU),31 a metaphor mentioned for the first time in 1919 in the famous dissenting opinion by Justice Holmes in the Abrams v. United States case.32 In such very sensitive context to the libertarian attitude of the Internet, social networks play a pivotal role, and the relevant regulation is of key importance for the safeguard of freedom of expression.

Indeed, in the case law of US courts, the concerns raised by Justice Alito in his concurring opinion do not seem to have triggered specific consequences. Courts that had the chance to deliver judgments on the qualification of social networks as public forums, in fact, have carefully limited the scope of application of this metaphor with normative effects.


31 Reno v. American Civil Liberties Union, cit. supra note 19, p. 885: “The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship”.

32 The Supreme Court found unconstitutional provisions that definitely pursued a legitimate goal, i.e. minors’ protection, because they were drafted in a manner that disproportionately interfered with freedom of expression, most notably by failing to adequately circumscribe the notions of indecent content and patently offensive content. This way, the law ultimately limited access to content that adults had a constitutional right to enjoy.
Most notably, courts addressed complaints made by users who had suffered restrictions imposed by State-owned social network accounts on their ability to interact, including by accessing or replying to posts or by sharing them.

The leading case in this respect is by far that concerning former President Donald Trump’s account @realDonaldTrump (different from the official account of the President of the United States @POTUS, which has now been transferred to the new President Biden). Some users whose ability to interact with his account had been limited brought an action against Trump, claiming that such restriction amounted to viewpoint discrimination prohibited by the First Amendment. The decisions in this saga, indeed, merely focused on whether an account such as that belonging to Trump, at the time serving as President of the United States, qualified as public forum.

The Court of Appeals for the Second Circuit, which upheld the decision of the first instance court, made it clear that:

“We do not consider or decide whether an elected official violates the Constitution by excluding persons from a wholly private social media account. Nor do we consider or decide whether private social media companies are bound by the First Amendment when policing their platforms. We do conclude, however, that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.”

Accordingly, even if an account run by a State official is hosted by a private platform, it still constitutes a public forum where viewpoint discrimination is forbidden. The decisions do not provide specific guidelines on the legal status of Internet service providers, and most notably of social networks. However, the appellate court judgment sheds some light on the key value of

33 Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018). The first instance court had noted that, with respect to the requirement of government control, necessary to qualify a space as public forum: “the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and [...] uses the account to take actions that can be taken only by the President as President” (ibid., p. 567).

34 Knight First Amendment Inst. at Columbia Univ. v. Trump, cit. supra note 22, p. 4. The appellate court confirmed that there were no doubts about the “substantial and pervasive government involvement with, and control over, the Account”, as the same was used by Trump “as a channel for communicating and interacting with the public about his administration” (ibid., p. 18)
the distinction between private and public forums. It is not by coincidence that the defenses raised by Trump were centered on the alleged status as private forum of the relevant account: even if the account in question “facilitates robust public debate”, according to Trump “it is simply the means through which he participates in a forum and not a public forum in and of itself”. None of these defenses proved to be successful, as the appellate court held that: “the President is a governmental actor with respect to his use of the Account”, hence the prohibition to carry out viewpoint discrimination. And blocking users’ accounts, in fact, does amount to such kind of content-based restriction of freedom of speech, to the extent it prevents users to which posts are made available (in their capacity as “constituents”) from having access to them and interacting with them and their author: users’ reactions (including the acts of liking or retweeting posts), in other terms, amount themselves to speech that enjoys constitutional protection.

Therefore, the Internet is comparable to other media: the constitutional safeguards applicable to freedom of expression “in the offline world” still retain their validity in the relationship between State actors and citizens in the digital environment. The fact that speech is hosted by private platforms does not affect the extent of the obligations to protect this freedom by State actors. There are no further obligations applicable to online platforms as such. Accordingly, the same subjects that qualify as State actors in the real world should be given the same treatment in the digital context.

In a nutshell, in the *Knight First Amendment Institute v. Trump* case, both judgments seem to endorse the idea that when it comes to social networks there is no general application of the public forum doctrine per se, which shall nevertheless apply when accounts are run by State officials.

The same outcome is confirmed in the *Davison v. Randall* case, where the Court of Appeals for the Fourth Circuit upheld the first instance decision rendered by the District Court for the Eastern District of Virginia.

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35 *Knight First Amendment Inst. at Columbia Univ. v. Trump*, *cit. supra* note 22, p. 16.


37 See the important reference to the Supreme Court decision in *Manhattan Community Access Corp. et al. v. Halleck et al.*, 587 U.S. (2019): “When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint”.

38 See also *Morris and Sarapin, “You Can’t Block Me: When Social Media Spaces Are Public Forums”*, First Amendment Studies, 2020, p. 52 ff.

39 Something that appears compatible with the content of Section 230 CDA.


The appellate court found that the Facebook page run by Phyllis Randall, Chair of the Loudoun County Board of Supervisors, amounted to a public forum. Accordingly, the court held that the restrictions imposed through the removal of comments posted by users and the blocking of certain accounts constituted viewpoint discrimination. It is worth noting that the appellate court interestingly focused on the private nature of the hosting platform (namely Facebook), noting that, even in the absence of a crystal-clear understanding of Facebook as private or public space, the fact that a private property, other than a government-owned one, is at stake, does not per se exclude the application of the public forum doctrine. Indeed, the case law of US courts has extended the application of such theory to private spaces subject to a public use. In the case in question, Chair Randall had specifically created the Facebook page, which constituted therefore a designated public forum under the control of a public official. The appellate court has not specifically addressed this problem in connection with online platforms and social networks in general terms, but of course has made some interesting remarks where highlighting that the private nature of a forum does not exclude its public relevance. What is still disputed, however, is the set of circumstances under which a private space amounts to a public forum. The key question, then, seems to be: are social networks public forums only when hosting public figures and State officials that are bound to respect the First Amendment? Are there elements that support such understanding of social networks even in the context of a purely private relationship that does not concern State actors?

In fact, in the two sagas mentioned above, the relevant Facebook and Twitter accounts represent and identify State actors, public powers subject to the First Amendment that are obliged to protect individuals’ freedom of expression. The fact that platforms such as Facebook and Twitter came into play should not lead to underestimate the truly key point, i.e. whether private platforms can perform content moderation activities in the enforcement of their terms and conditions that may not be permitted to State actors subject to the obligation to respect the First Amendment. In other terms, one should question if freedom of expression can have horizontal effects, also covering the relationship between users and social networks.

43 See also Morgan et al v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018); Campbell v. Reisch, No. 19–2994 (8th Cir. 2021); Robinson v. Hunt County, 2019 WL 159439 (5th Cir. 2019).
The State Action Doctrine and the *PragerU* Case

The approach adopted by US courts in the assessment on the existence of the circumstances that make a social network account a public forum seems to be quite formalistic. Indeed, courts delved into the presence of a power of control by a public official on the activities occurring on private platforms. One may wonder if such approach is correct, given that private platforms were created with commercial purposes and are driven by business goals but ultimately meet the same needs for which State authorities established or designated public forums: to allow the free flow and exchange of ideas, opinions, and thoughts. Although analogizing social networks to public forums is not per se a desirable option (and would likely result in critical consequences), it seems that the rationale behind the latter’s framing as spaces where viewpoint discrimination is prohibited is connected to the special and unparalleled degree of openness they feature. Public forums are thus by default and inherently “spaces of freedom” and this prevents State authorities from applying viewpoint discrimination.

The key question to address, in other terms, is whether the fact that social networks are private platforms suffices to deprive individuals of the protections they enjoy, regardless of the means of communication employed, in their relationship with State actors. Can we expect that the same set of safeguards is subject to enforcement with horizontal effects vis-à-vis social networks, for the simple fact that more and more the latter act as private powers? Once again, to answer this question it is necessary to understand if the reference to private powers implies a merely descriptive or a normative claim, to the extent it describes the ability of actors having significant market power to influence more and more individuals’ rights and freedoms.44

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Some interesting points have come up in another case, which did not involve any account run by a State official. In *Prager University v. Google LLC* ("PragerU v. Google")⁴⁵ the Court of Appeals for the Ninth Circuit had the chance to rule on a separate but connected issue, i.e. whether social networks and platforms such as YouTube amount to State actors. This is an alternative option to conceptualize the normative claim behind the role of social networks. Here, the problem is not based on the framing of these platforms as public forums, but rather is rooted on the performance of functions traditionally exclusively reserved to the State.

As it is well known, the State action doctrine was theorized with a view to preserving the freedom of private actors from constraints applicable *prima facie* to State authorities. However, scholars have largely debated the possible enforcement with horizontal effects of constitutional rights⁴⁶ and the case law of US courts has exceptionally extended to private entities, where vested with functions reserved to public authorities, the category of State actors.⁴⁷ This was one of the points made in *PragerU v. Google*, despite the very clear message delivered by the Supreme Court a few months before in the *Manhattan Community Access Corp. v. Halleck* case, which however did not directly concern online platforms.⁴⁸ The Supreme Court said that: "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints".⁴⁹

It therefore does not come as a surprise that in *PragerU v. Google* the attempt made by the plaintiff to argue that YouTube amounted to a State actor proved unsuccessful. The appellate court strongly criticized this argument, noting that in the landmark *Marsh v. Alabama* the Supreme Court did not hold that "any private property owner ‘who operates its property as a public forum for speech’ automatically becomes a state actor who must comply with the First Amendment".⁵⁰ In *Marsh v. Alabama*,⁵¹ in fact, the private actor who ran the company town was the owner of the entire facilities and was therefore performing the traditional functions of a public entity. In addition to that, the

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⁴⁹ Ibid., p. 10.
⁵⁰ *PragerU v. Google*, cit. supra note 45, p. 18.
Court pointed out that the same Supreme Court case law adopted a restrictive approach in order to avoid a disproportionate extension of the coverage provided by the notion of State actor.52 Interestingly, the appellate courts also mentioned the Packingham decision, saying that:

“Although Packingham spoke of ‘cyberspace’ and ‘social media in particular’ as ‘the most important places […] for the exchange of views’ in modern society, […] Packingham did not, and had no occasion to, address whether private social media corporations like YouTube are state actors that must regulate the content of their websites according to the strictures of the First Amendment”.

This was of course an important step to avoid any attempt to equalize social networks to State actors53 based on the Supreme Court precedent in Packingham. In the view of the appellate court, there are no similarities between Internet service providers and State actors. There is no participation in the exercise of functions traditionally exclusively reserved to the State. On the contrary, online platforms are run by private actors that take decisions on the publication of third-party content on their respective websites.54

Against this background, the decisions taken by Twitter and Facebook to ban Donald Trump have provided further food for thought in respect of the debate on the role of social networks for the protection of freedom of expression. It is worth noting that there is a remarkable difference between the relevant scenarios. In the two sagas mentioned above, US courts found that Trump’s account amounted to a public forum, and as such could not carry out viewpoint discrimination. The problem, in the case regarding the ban imposed on Trump’s accounts, is different: no matter whether it belongs to a public official, the key question is if social networks can restrict public figures’ freedom of expression by suspending the relevant accounts. To answer this question,


53 See also the judgment of the District Court for Southern District of Texas in Nyabwa v. Facebook, 2018 WL 585,467 (S.D. Tex. Jan. 26, 2018): “the Court did not declare a cause of action against a private entity such as Facebook for a violation of the free speech rights protected by the First Amendment”.

one could wonder if individuals enjoy a right to use social networks to exercise freedom of expression. Apparently, there is no room for claiming the existence of such right, since a solid decision on this point by the Supreme Court is still lacking.55

It is true that in the specific case Donald Trump made statements that are likely to fall within the notion of fighting words and constitute therefore hate speech.56 Also, one may note that the “freedom of moderation”, including by suspending an account, in a way reflects the content of Section 230 CDA and the absence of liability for any act of moderation taken in good faith. Eventually, one may also argue that other avenues remain available to Trump to disseminate his views, thoughts, and opinions. However, looking at the problem from the perspective of the conflict between power and democracy, it becomes clear that a “big elephant” is in the room, and it is probably time to deal with it.

5 A Comparison Between the US Courts Approach and the Italian Recent Case Law

If US courts have proved reluctant to applying the State action doctrine and the public forum doctrine in the context of social networks, in Europe – where the doctrine of Drittwirkung57 was first established58 – there are no signs of a different attitude in case law. At the supranational level, the Court of Justice of the European Union recently tried to enforce with horizontal effects the right to privacy and data protection in the well-known Google Spain case. This case definitely impacts freedom of expression, as the removal of search results should be granted only when it does not interfere with freedom of information, protected by Article 11 of the EU Charter of Fundamental Rights. The mechanism in question requires search engine service providers to strike such

55 Moreover, it is worth noting that the Supreme Court accepted the petition for a writ of certiorari in Knight Institute v. Trump, now Joseph Biden, Jr., President of the United States, et al., v. Knight First Amendment Institute at Columbia University, et al., no. 20–197, 5 April 2021; with respect to this decision, see the concurring opinion written by Justice Thomas, arguing a comparison between common carriers and digital platforms.
58 See Bundesverfassungsgericht (Germany), Lüth, Judgment of 15 January 1958, BverfGE 7, 198 (1958).
balance *prima facie*, leading to a privatization of fundamental rights enforcement and to a quasi-constitutional role for private actors.\(^{59}\)

Italian courts have recently released some rulings that address the point of the private rather than public nature of the service provided by social networks such as Facebook. Three orders adopted by the *Tribunale di Roma*\(^{60}\) between the end of 2019 and the beginning of 2020 provide interesting insights on the attitude of European courts on the public value of the services operated by social networks. These decisions, although apparently focused on the same issue, lead to different conclusions.\(^{61}\)

The three orders were adopted in the context of proceedings brought as a matter of urgency, after Facebook decided to suspend the fan pages of two far-right political movements, namely Forza Nuova and CasaPound, and the accounts of the relevant administrators. The key question, once again, lies with the dilemma on the nature of content moderation. Does content moderation solely amount to the enforcement of the terms of use entered by social networks and the relevant users?

Indeed, the three orders (which are the most well-known and important but are not the only decisions adopted by Italian courts on this problem) fail to accurately conceptualize the essence of the problem. They do not offer a crystal-clear understanding of the legal status of social networks (and of the relevant terms of use) from a constitutional law perspective.

The most striking aspect is that these orders resulted in different outcomes:\(^{62}\) in one case, the Court ruled that the ban on the fan page was unlawful; in another case, the Court held that the ban was not only legitimate but also necessary for Facebook to escape liability under the Italian legislation implementing the e-Commerce Directive. This is a very telling circumstance,

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62 For a focus on the case law of Italian courts on Internet service providers liability see Bassini, *cit. supra* note 11.
suggesting the lack of a clear framing on the role of online platforms in the digital sphere.

In the first order, released in December 2019, the Tribunale di Roma said that Facebook, having a community of over 2.8 billion users, plays a role of pivotal importance, from which a special status derives for this platform. Indeed, the relationship between Facebook and its users cannot be compared to that existing between two private actors, as it implies that in such relationship the social network is bound to respect the constitutional principles (including the protection of freedom of expression), unless a violation of the terms of use by users occurs. The respect of the constitutional principles and the principles inherent to the legal system identifies, in the view of the Tribunale di Roma, the very constraint applicable to social networks such as Facebook in their relationship with users. This way, the Tribunale di Roma has de facto qualified Facebook as a public service, albeit only implicitly. The Court drew such conclusion from a very empirical observation: the fact that the exclusion from the Facebook community prevents individuals from taking part in the political debate. Such result, in the specific case regarding political movements, would conflict with the principle of political pluralism that is enshrined in Article 49 of the Italian Constitution. So, the Court has extended the effects of constitutional norms (namely, of Article 21, protecting freedom of expression) to the private relationship between Facebook and its users.

However, these remarks did not establish a solid precedent in the Italian case law, as the appeal brought against this decision led the Tribunale di Roma to adopt a very different reasoning, although the decision was ultimately upheld. Indeed, in the order adopted in April 2020 the Court confirmed the outcome of the previous decision but came to this conclusion following a different path and getting rid of the risky metaphor analogizing the service operated by Facebook to a public service. In the view of the Court, the relationship between Facebook and its users is subject to ordinary private law norms. The latter circumstance, however, does not exclude that constitutional principles such as the protection of public order and public morals apply even to private relationships such as the one in question. This observation allowed the Court to draw an important consequence: the relationship between social networks and users is identical to any other relationship between a subject that exercises its freedom to conduct business (protected by Article 41 of the Italian Constitution) and its counterpart, i.e. a user that can claim and exercise his/

her freedom of expression protected by Article 21 (or freedom of assembly protected by Article 18). Therefore, the private law relationship in force between the parties cannot be terminated because of users’ expressions that are covered by Article 21 or 18 of the Constitution.64 A private subject, then, cannot exercise, by virtue of the agreement entered with another party, powers that are substantially affecting freedom of expression and freedom of assembly.65 Accordingly, the terms of use cannot be exempted from any control; they cannot even escape compliance with the law. These rules must be interpreted in accordance with the legal norms in force, as it is up to the State to establish the limits to freedom of expression. In the view of the Court, then, the Italian law does not permit to qualify CasaPound as an unlawful movement. Therefore, Facebook was not entitled to disable access to the relevant fan page. The order “kills two birds with one stone”: on the one hand, its sticks to the genuinely private nature of the relationship between social networks and users; on the other hand, it acknowledges that private governance can be subject to restrictions deriving from the constitutional principles.

In the meantime, the Tribunale di Roma had already adopted another order in the case regarding Forza Nuova. According to the judge, not only was Facebook entitled to disable access to the fan page in question, but it was also subject to an obligation to do so in accordance with the domestic provisions implementing the e-Commerce Directive (namely, Legislative Decree No. 70/2003). According to these provisions, Internet service providers become liable for unlawful content or information posted by a third party in case they fail to promptly remove the latter once on notice (“having actual knowledge”) of its unlawful nature. In other terms, the Court would have found Facebook liable for the failure to disable the fan page at issue, given that the pieces of content posted on the page were found to be unlawful.

64 See CasaPound v. Facebook, cit. supra note 60, p. 10, where the Court said that, on the one hand, service providers act in the pursuit of their freedom to conduct business protected by Art. 41 of the Italian Constitution, whereas users resort to such services for the exercise of both their freedom of expression and freedom of association. The latter, in the view of the Court, have a prevailing rank in the constitutional hierarchy; accordingly, restrictions on the right protected by Arts. 18 and 21 cannot be justified by resorting to the private nature of the contractual agreements in force between the parties; such contractual terms, in other words, shall neither provide that the exercise of freedom of expression constitutes a legitimate ground for the termination of the agreement, nor exclude certain forms of association protected by Art. 18.

65 Ibid., p. 25. In the view of the Court, a private party such a social network acting on the basis of contractual terms cannot be expected to exercise powers limiting individuals’ freedom of expression to a larger extent than that established by legal norms.
Here, the focus of the order is once again different: it is centered on the allegedly unlawful nature of the fan page. On the contrary, it does not specifically delve into the status of the service operated by Facebook, even if the latter is described as a private subject carrying out an activity of significant social relevance. The relevant relationship is governed by the contractual terms and by the law: this way, the Court found that Facebook was right when deciding to disable access to the fan page, having correctly enforced both legal provisions and contractual terms.

This brief overview of the relevant Italian case law shows some reluctance to delve into the legal status of social networks. Instead, courts seem to have stuck to a very pragmatic and empirical approach, relying on a case-by-case analysis. It is probably a consequence of the fact that the applicable legal framework is still constituted by the law approved in 2003 and is about to change as a result of the important stances of EU institutions.

6 Concluding Remarks

This article started by pointing out the key role of online platforms for the enforcement of the rule of law in the digital age. It cannot be questioned that the protection and the enforcement of certain fundamental rights such as freedom of expression largely depend on the way they carry out content moderation. And the way they can perform content moderation is significantly affected by the applicable legal framework.

Since there is great debate on the ongoing reforms in the European Union with respect to this piece of legislation, this article has tried to highlight the guidelines emerging from the recent case law on the framing of the role of online platforms and most notably of social networks. In particular, I have questioned if the usual framing of online platforms as private powers may imply a normative claim, leading to qualify these actors in a different fashion compared to the current status.

The comparative overview drawn up in the previous paragraphs shows how both in the US and in Europe the answer is predominantly a negative one. Only in some cases US courts enforced the public forum doctrine, which has very

66 See Forza Nuova v. Facebook, cit. supra note 60, p. 14, where the Court stresses the particular status of Facebook as a party bound by both the law and the relevant contractual terms.

67 See also Tribunale di Siena (Sez. unica civile), CasaPound v. Facebook, 19 January 2020, No. R.G. 2968/2019 (Order).
specific consequences from a legal standpoint, but only to the limited extent the relevant social network accounts were run by State officials.

Which consequences may derive, then?

One option, as said above, is to determine that the services provided by online platforms amount to public services, in order to subject them to stricter regulation. This option, as noted, would likely lead to reduce or even annul the latitude that social networks enjoy when it comes to content moderation; in other terms, they would be bound to stick to the same obligations applicable to State actors.

It is worth noting that, despite the importance and the unprecedented growth of social networks, they still do not constitute the exclusive avenue available to individuals for the exercise of freedom of expression. They are of course the modern public square (in non-normative terms), but they are not essential facilities.

Also, it is important to outline that such qualification would likely shift online platforms away from the usual and well-established paradigm of service providers. Neither the Digital Services Act nor the most active provider-sympathetic case law seem to credit the option of equalizing Internet service providers and publishers. Even if the current scenario may suggest that the differences between these actors have significantly reduced, there seems to be no justification for treating social networks as they were publishers. The existence of a separate and autonomous legal paradigm still makes sense. The current legal framework definitely needs to be amended; however, the pieces of legislation in force in European Union Member States and in the US made it possible for social networks to become an engine of freedom of expression. Their flourishing was also a flourishing of a new free speech arena.

Ultimately, equalizing social networking services and public services would likely remove the margin of appreciation enjoyed by online platforms in respect of content moderation when it comes, e.g., to disinformation or other pieces of content that do not necessarily amount to unlawful conducts. So, one must consider the possible trade-off between a more democratic (but less safe) Internet and a safer (but less democratic) Internet.

In light of these remarks, it seems that courts were right when refusing to apply certain metaphors and categories to social networks. The conflict between economic (private) power and democracy is still there and cannot probably be resolved just by a shift of the legal paradigm. More transparency is, instead, needed, most notably with respect to the implementation on a larger and larger scale of algorithms and Artificial Intelligence systems that may prove beneficial but also strengthen the power of private actors and increase the threats for individual rights and freedoms. This is, perhaps, the way to not dismantle the benefits and the added value of the platform economy.