Government, Big Tech, and Individual Liberty

9 February 2022

By

Romaine R. Miler
&
Johnny B. Davis

Introduction

The thesis is that the first principles of the Founding Fathers express in the Declaration give the proper guidance for dealing with the impact of high tech on individual liberty. The Supreme Court erred in the Prager vs. Google/ The right to Freedom of speech comes from man being made in the image of God and is inherent in the individual and therefore it protects against corporation violations in addition to government. Social media platforms that are open to access by the general public should not be allowed to restrict content based on disagreement with the political or religious content such as Google banning of Prager videos due to their conservative positions.

The principles of the Founders also guide the collection of big data by tech corporations. The data should be treated as the property of the individual user and protected as a private property right as data is a thing of economic value. Tech companies should only be able to collect with the direct consent and market-based compensation of the individual user. Thus, individuals will be empowered to have a say over their data on an individual basis. Likewise tracking should only be done with individual consent and technology companies such as cell phone companies should be required to sell their products to enable the user to block tracking.

The basic fundamental principles of the Declaration are the guidance needed to navigate the novel issues surrounding technology. The current legal establishment in America is out of touch with those principles and renewal is needed to properly deal with those issues both in government and in the culture at large.

Big-Tech and Freedom of Speech

The First Amendment only limits governmental actors—federal, state, and local—but there are good reasons why this should be changed. Certain powerful private entities—particularly social networking sites such as Facebook, Twitter, and others—can limit, control, and censor speech as much or more than governmental entities. A society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities that have ushered in a revolution in terms of communication capabilities.

Big Tech refers to the five major technology companies of influence. This group comprises companies such as Google, Facebook, Amazon, Apple, and Microsoft and are considered the five most valuable listed firms globally.[1] The scope of influence and power of these firms are considered vast and far reach and are intrinsically rooted in every faucet society and our everyday lives, both politically and religiously. Justified in existence by their positive effects and creating a forum for global commerce and communication, Google, Facebook, Amazon, and Apple have had a remarkable impact on humanity by giving us access to a treasure trove of information, encouraging us to connect with others, and allowing us to acquire whatever physical objects or digital objectives we desire with a couple of taps or clicks.[2] However, these positives have limits, and the scope of Big tech has led to arguments about the pervading influence these firms have on free speech and censorship.

The rights of expression and free speech emanate from natural law and provide that all men are made in God's image and are afforded the right to express themselves without being limited in speech or censored by the state. The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from promoting one religious view over others and restricting an individual's religious practices. It guarantees Freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely.[3] This prohibition was expanded beyond the scope of Congress in 1925 when the Supreme Court in *Gitlow v New York*[4] held that the due process clause of the 14th Amendment protected the First Amendment rights of Freedom of speech from infringement by the executive branch of the federal government.[5]

---

[1] Kiran Bhageshpur, "Council Post: Data Is the New Oil -- and That's a Good Thing," Forbes (Forbes Magazine, December 10, 2021), https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=8c5b82173045.

[2] Akshita Gandra, "Big Tech: The Good, the Bad, and the Antitrust Argument," Business Today Online Journal (Business Today Online Journal, December 18, 2019), https://journal.businesstoday.org/bt-online/2019/big-tech-the-good-the-bad-and-the-antitrust-argument.

[3] "First Amendment," Legal Information Institute (Legal Information Institute, 0AD). Accessed February 4,2022. https://www.law.cornell.edu/constitution/first_amendment.

[4] Gitlow v. New York, 268 U.S. 652 (1925)

[5] History.com Editors, "14th Amendment," History.com (A&E Television Networks, November 9, 2009), Accessed February 4, 2022. https://www.history.com/topics/black-history/fourteenth-amendment.

Global commerce and communication have given rise to various mediums by which individuals can communicate and share views with others. Companies such as Google and Facebook have capitalized on the collective needs of individuals to share opinions across states and the world at large and wields vast power over what is said within their respective forums. Control over speech by controlling what is said and what is not has given rise to arguments on whether The First Amendment protects individuals from being censored within online spaces such as Youtube or other notable social media platforms.

In 2020 the Ninth Circuit of the U.S. Court of Appeals in Prager v Google[6] held that Youtube is a private forum not subject to judicial scrutiny under the First Amendment.[7]The decision implies that companies operating in cyberspace can remove or censor content that falls outside their political or religious views and raises serious concerns about the foundation principles of liberty and the interpretation of the First and Fourteenth Amendments. The Constitution was drafted to protect the inherent rights and freedoms of the individual regardless of where or in what forum that right is exercised. In concluding, in Packingham v North Carolina, Justice Kennedy posited that "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen again."[8] Undoubtedly, the significance of Kennedy's obiter must have been grounded in the rationale that the First Amendment encompasses a wide range of forums in which an individual or entity could share views without censorship.

The decision that Youtube was not a public forum was an implicit subversion of first principles, substantive law, and natural justice. This begs the question: what forums can be public forums for free speech? Eric George, Prager's lead attorney, noted that "a public forum could be a virtual location, like a website, that must allow individuals and organizations to exercise their free speech rights."[9] In fact, in *Amalgamated Food Employees v Logan Valley*, it was held that private forums could become public if they were open to the public and had a duty to permit free speech regardless of whether or not it had state power.[10] As of January 2022, Youtube describes itself as a public forum in its terms of service.[11] Irrespective of the Ninth Circuit's decision in Prager, it appears that previous courts had opted to protect First Amendment rights regardless

---

[6] Prager University v. Google LLC, No. 18-15712 (9th Cir. 2020)

[7] Ibid.

[8] Packingham v. North Carolina - 137 S. Ct. 1730 (2017)

[9] Eric George , (February 4, 2022), https://assets.ctfassets.net/qnesrjodfi80/1eB3nT6EVvDO4CFkhbHmQN/4383b7c420211b96fd01618664bddd92/George-PragerU_v_YouTube-Transcript.pdf, 1-2.

[10] Paul Gowder, “Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,” Amalgamated Food Employees (Union Local 590 v. Logan Valley Plaza, 2009), https://www.mtsu.edu/first-amendment/article/463/amalgamated-food-employees-union-local-590-v-logan-valley-plaza.

[11] “Terms of Service ,” YouTube (YouTube, January 5, 2022), https://www.youtube.com/static?template=terms.

of the space or forum in which speech was made. Modern courts have drifted from first principles, the natural law, and an interpretation of the Constitution.

As seen above, it appears that previous courts viewed the natural law's supremacy over positive law and expressed fundamental rights that Government and the Constitution must protect. Did the 9th Circuit err in its interpretation of the 1st Amendment? This question undeniably rests on the rules of statutory interpretation and a presumptive lapse in Judicial foresight. A principled application of first principles, legal textualism, and purposivism[12] would have logically addressed what has now been titled an absurdity.[13] As noted above in recent case law (*Packingham*), the objective of the First Amendment was to ensure the protection and justified expansion of free speech and individual self-fulfillment in the age of online public forums.[14]

Individual self-fulfillment is notably associated with the concept of liberty; it provides that individuals have an intrinsic need to share their views and ideas to become functional. (cite) Companies such as youtube have been sanctioned by the courts to continue censoring political and religious opinions under the doctrine of state action.[15] Traditionally, the courts have upheld the doctrine on the rationale that private property ownership and the protection for excessive government interference are constitutionally protected.(cite) However, it has long been argued that big tech companies have amassed significant influence in the marketplace of ideas.(Cite) Arguably the influence of tech companies rises to the level of a state actor and was subtly defined in *Packinghan v. North Carolina*: "While in the past there may have been difficulty in identifying the most important places in a spatial sense for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the internet in general, and social media in particular."[16] Expanding on the significant influence, Justice Kennedy elaborated that the expansion of social media has contributed to a "revolution of historic, proportions."[17] i.e., Social media platforms are now the modern-day equivalent of public forums like public parks and public streets.[18] Early Supreme Court precedent also shared the view that

---

[12] Richard H Fallon, "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both," *Cornell Law Review* 99, no. 4 (May 4, 2014): pp. 704-710, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4628&context=clr.

[13] "Statutory Interpretation: Theories, Tools, and Trends," EveryCRSReport.com (Congressional Research Service, April 5, 2018), https://www.everycrsreport.com/reports/R45153.html#_Toc510711643.

[14] David L Hudson, "In the Age of Social Media, Expand the Reach of the First Amendment," Americanbar.org, (n.d.). accessed February 4, 2022, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

[15] "State Action Doctrine," uk.practicallaw.thomsonreuters.com (Practical Law), (n.d.). accessed February 4, 2022, https://pt.scribd.com/document/477419693/private-txt.

[16] "Packingham v. North Carolina (582 US __)," Packingham v North Carolina (2017), accessed February 4, 2022, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/Packingham%20v%20North%20Carolina%20%282017%29.html.

[17] Ibid.

corporations in their commission of quasi-public functions could be interpreted as a badge of servitude, most notably, *Plessy v Ferguson.*[19] In short, private actors could implicitly rise to the level of a state actor where its functions had adversely limited individual self-fulfillment, inclusive of the First and Second Amendments.

Modern consensus on the doctrine of state action is seemingly centered around the rationale that private actors such as big tech have vast control over online communication and forums and should be considered state actors in one way or the other. This has led to calls for more regulation and First Amendment protection for users.[20]

A revisionist approach considering modern times implies the need for doctrinal expansion to protect sacred rights and freedoms under the Constitution. Freedom of speech is defended both instrumentally—it helps people make better decisions—and intrinsically—individuals benefit from being able to express their views. The consensus is that the activity of expression is vital and must be protected. Any infringement of Freedom of speech, be it by public or private entities, sacrifices these values. In other words, the consensus is not just that the government should not punish expression; instead, it is that speech is valuable and, therefore, any unjustified violation is impermissible. If employers can fire employees and landlords can evict tenants because of their speech, then speech will be chilled and expression lost. Instrumentally, the "marketplace of ideas" is constricted while, intrinsically, individuals are denied the ability to express themselves. Therefore, courts should uphold the social consensus by stopping all impermissible infringements of speech, not just those resulting from state action.[21]

The duty of protecting free speech ultimately rests within the courts. Robust interpretation of the framers' true intent must be of core value when deciding cases that may infringe upon an individual's right to share, listen, and respond to opposing or supporting views. After all, the framers did not draft the Constitution solely to protect the then but considered its purposive roots in protecting the now. "The rise of Big-Tech and the censoring of political and religious views."

The Constitutionality of Collecting, Processing, and Tracking Personal Data

The Constitution implies inherent rights on how companies should collect and process data regarding property rights and the associate economic value of personal data in the digital age.

---

[18] David L Hudson, “In the Age of Social Media, Expand the Reach of the First Amendment,” Americanbar.org, (n.d.). accessed February 4, 2022, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

[19] Plessy v. Ferguson, 163 U.S. 537 (1896)

[20] (Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. Rev. 121, 134 (2014).)

[21] Erwin Chemerinsky, Rethinking State Action, 80 N.W. U. L. Rev. 503, 533–34 (1985).)

Consent should be a key player in the processes associated with data collection. This puts the individual in control of how and when such data is used. Likewise, for tracking, individuals should be able to conduct affairs without the prying eyes of Big-Tech. Though not expressly outlined in the Constitution, the right to privacy is a penumbra right. Compensation to individuals based on market value for consumption and use is also implicitly protected under the Consitution.

Mass collection and processing of personal data have created a relatively new economic model for commerce called data mining. It is now considered a disruptive technology and has created a forum of utility and capitalization of individual personal information with significant economic gains for data processors or big tech.

Resultantly becoming a major driving force of modern-day commerce, data collection and processing provide invaluable insight to Big Tech and Society as a whole. For example, companies such as Facebook and Instagram collect the most data averaging almost 150 percent of global consumption and processing of personal data.[22]And have resulted in significant financial profits for Big Technology Companies.[23]

Although, current legal analyses are unclear whether proprietary rights should be extended to data subjects.[24] Proposed legislation, The Own Your Own Data Act in 2019, introduced by Senator John Kennedy to regulate the collection of data or information generated on the internet and to give individual exclusive property rights to individuals, would have prospectively answered questions on data ownership and property rights. However, it was not voted on.[25] What is uncertain is whether Congress hopes to address this issue.

Property within its legal context is defined as any interest in an object, whether tangible or intangible, that is enforceable against the world. (30-cite) The enforceability of property rights has been an unalienable right since the Declaration of Independence—(We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness) (31-Cite) and guaranteed equal rights to every individual. However, what seems to be amiss is the Founders' understanding of natural rights to property and modern-day knowledge of one's pursuit of happiness. Arguably, it could be said that, upon drafting the Declaration, Thomas Jefferson had taken a prospective approach that would protect an individual's rights in the pursuit of happiness.[26] This is by no means limited to Life and Liberty but extends to the ownership of property, which in this piece is personal data.

---

[22] Andriy Slynchuk, “Clario.co,” *Clario.co* (blog), July 22, 2021, https://clario.co/blog/which-company-uses-most-data/.

[23] Ibid.

[24] Dorothy J Glancy (2005).

[25] (2019), https://www.kennedy.senate.gov/public/_cache/files/9/f/9ff92982-1a58-4cf5-9bda-8530e5078224/2D6F1D231B87F5B281A01893CEAA75DF.sil19328-own-your-own-data-.pdf.
[26] Carol V. Hamilton, “Why Did Jefferson Change ‘Property’ to the ‘Pursuit of Happiness’?,” History News Network, January 27, 2008, https://historynewsnetwork.org/article/46460.

Information that uniquely identifies a person is an entitlement that belongs to him and thus can be identified as private property or an inalienable right to ownership. The concept of inalienable rights allows the individual to use his data in whatever manner he sees fit. (33 cite) This implies that individuals must solely decide how their data is collected and used. Furthermore, the principles of natural law teach that the rights allotted to the individual are sacrosanct and should not be trampled upon by big Corporations or Governments. (34 cite) This is rather obvious when dealing with matters concerning private property. Companies that collect and process personal information should do so with regard to these enshrined principles. Similar principles should apply to Big Tech companies and tracking. Individuals should conduct their day-to-day affairs without being tracked by Corporations and likewise Governments.

Data Privacy and the Constitution

It is now standard practice for Big Tech companies to collect names, addresses, email, demographics, social security numbers, I.P. addresses, and individual financial information. Regardless, the scope of enforcing the right to privacy is narrowly applied and limited to the Federal Government. This narrow application has resulted in fundamental breaches of the individual's privacy rights. Of importance is the current practice of self-regulation among major industry players. (35 cite) However, in keeping with the principles of the Constitution, the First, Third, Fourth, and Fifth Amendments guide how an individual's privacy should be protected in cyberspace.(36 cite) In keeping with the founders' collective view that natural rights must be protected. The right to privacy must extend to Big Tech companies considering changing times. Louis Brandeis, in his piece "The Right to Privacy," argued that economic changes entail the recognition of new rights to meet the new demand of society.[27] The notion that private enterprise is not subject to provide Constitutional protections is a gross miscarriage of justice.

Bibliography

Bhageshpur, Kiran. "Council Post: Data Is the New Oil -- and That's a Good Thing." Forbes. Forbes Magazine, December 10, 2021. https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=8c5b82173045.

---

[27] Louis D. Brandeis and Samuel D. Warren, “The Right to Privacy ,” *Harvard Law Review* IV (December 15, 1890): pp. 1-3, http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.

Gandra, Akshita. "Big Tech: The Good, the Bad, and the Antitrust Argument." Business Today Online Journal. Business Today Online Journal, December 18, 2019. https://journal.businesstoday.org/bt-online/2019/big-tech-the-good-the-bad-and-the-antitrust-argument.

"First Amendment." Legal Information Institute. Legal Information Institute. Accessed February 4, 2022. https://www.law.cornell.edu/constitution/first_amendment. The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees Freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely.

Editors, History.com. "14th Amendment." History.com. A&E Television Networks, November 9, 2009. https://www.history.com/topics/black-history/fourteenth-amendment. Supreme Court's held that the 14th Amendment protected the First Amendment rights of Freedom of speech from infringement by the state as well as the federal government

"Gitlow v. New York, 268 U.S. 652 (1925)." Justia Law. Accessed February 9, 2022. https://supreme.justia.com/cases/federal/us/268/652/#:~:text=New%20York%2C%20268%20U.S.%20652%20(1925)&text=The%20First%20Amendment%20does%20not,directly%20advocates%20its%20violent%20overthrow. Freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States or Federal Government.

"Prager University v. Google LLC, No. 18-15712 (9th Cir. 2020)." Justia Law. Justia US Law . Accessed February 4, 2022. https://law.justia.com/cases/federal/appellate-courts/ca9/18-15712/18-15712-2020-02-26.html#:~:text=Prager%20University%20v.-,Google%20LLC%2C%20No.,2020). YouTube is a private forum, not a public forum subject to judicial scrutiny under the First Amendment.

George , Eric. "PragerU V. Youtube." Assets.ctfassets.net. Speech, February 4, 2022. https://assets.ctfassets.net/qnesrjodfi80/1eB3nT6EVvDO4CFkhbHmQN/4383b7c420211b96fd01618664bddd92/George-PragerU_v_YouTube-Transcript.pdf.

Gowder, Paul. "Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza." Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 9AD. https://www.mtsu.edu/first-amendment/article/463/amalgamated-food-employees-union-local-590-v-logan-valley-plaza.

Fallon, Richard H. "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both." Cornell Law Review 99, no. 4 (May 4, 2014): 704–10. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4628&context=clr.

"Statutory Interpretation: Theories, Tools, and Trends." EveryCRSReport.com. Congressional Research Service, April 5, 2018. https://www.everycrsreport.com/reports/R45153.html#_Toc510711643. Legislative interpretation provides that the plain meaning of the statutory text must be used except when a textual plain meaning may result in an absurdity.

Hudson, David L. "In the Age of Social Media, Expand the Reach of the First Amendment." Americanbar.org. Accessed February 4, 2022. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

"State Action Doctrine." uk.practicallaw.thomsonreuters.com. Practical Law. Accessed February 4, 2022. https://pt.scribd.com/document/477419693/private-txt. Actions taken by private actors, state agencies, or local governments may also be immune under the state action doctrine. Currently, immunities extend to the First Amendment.

"Packingham v. North Carolina (582 US __)." Packingham v North Carolina (2017). Accessed February 4, 2022. http://law2.umkc.edu/faculty/projects/ftrials/conlaw/Packingham%20v%20North%20Carolina%20%282017%29.html.

Jackson F. Benjamin. Censorship and Freedom of Expression in the Age of Facebook, 44 N.M. L. Rev. 121 (2014).

Chemerinsky Erwin, Rethinking State Action, 80 N.W. U. L. Rev. 503, 533–34 (1985).)

Slynchuk, Andriy. "Big Brother Brands Report: Which Companies Might Access Our Personal Data the Most?" Web log. Clario.co (blog), July 22, 2021. https://clario.co/blog/which-company-uses-most-data/.

Glancy, Dorothy J. "Personal Information as Intellectual Property," 2005.

Own Your Data Act . Bill, https://www.kennedy.senate.gov/ § (2019). https://www.kennedy.senate.gov/public/_cache/files/9/f/9ff92982-1a58-4cf5-9bda-8530e5078224/2D6F1D231B87F5B281A01893CEAA75DF.sil19328-own-your-own-data-.pdf.

Hamilton, Carol V. "Why Did Jefferson Change' Property' to the 'Pursuit of Happiness'?" History News Network, January 27, 2008. https://historynewsnetwork.org/article/46460.

Brandeis, Louis D., and Samuel D. Warren. "The Right to Privacy ." *Harvard Law Review* IV (December 15, 1890): 1–3. http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.