

ARTICLES

BIG TECH PLATFORMS, DEMOCRACY AND THE LAW: GLOBAL PROBLEMS, LEGAL PERSPECTIVES AND THE MEXICAN EXPERIENCE

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ABSTRACT: How do Big Tech platforms affect the exercise of fundamental rights? What can the States do, in the context of their sovereignty, to moderate these actors' powers? What has been explored in the context of Mexico? This article discusses how Big Tech platforms, such as Facebook and Google, may impact our collective lives and democracy. It highlights the legal implications of access to information and freedom of expression. This research provides an overall legal framework on this issue, to later place in context the Mexican draft bill introduced in 2021 to regulate platforms' content moderation practices, analyzing its flaws and areas of improvement, and suggesting specific elements for further legal discussion to prevent abuse of power from these companies within the Latin American and Mexican context. A comparative legal methodology is used, resorting to elements of American and European Law, to later discuss the Mexican legal framework.

KEYWORDS: Digital Platforms, Content Moderation, Freedom of Speech, Digital Democracy, Self-regulation, Self-jurisdiction.

RESUMEN: ¿Cómo afectan las plataformas digitales el ejercicio de derechos constitucionales?, ¿qué pueden hacer los Estados, en el marco de su soberanía, para regular el poder de estos actores?, ¿Qué se ha intentado en el caso mexicano

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An early version of this manuscript was presented in Prof. Michael Birnhack's Seminar on Law & Technology at Tel Aviv University. My gratitude goes to him, as well as to the rest of the academic staff at TAU, for making my time there so enriching and unique.

I would like to sincerely thank Prof. Lilian Edwards for her guidance and support through my doctoral studies at Newcastle, for sharing with me her immense knowledge and experience and allowing me to build my own research identity.

I would like to acknowledge the two peer reviewers, particularly Reviewer 2, for their comments towards the improvement of this article. I am also much obliged to John Ackerman, Editor-in-Chief, and Ivan Suarez and Julio Valencia, Managing Editors, for their assistance and suggestions on the final text of this article. Naturally, all remaining mistakes are mine.

al respecto? El presente artículo analiza cómo las plataformas digitales del sector Big Tech, tales como Facebook y Google, pueden afectar la democracia y nuestras vidas colectivas. Este artículo resalta las implicaciones jurídicas de acceso a la información y al ejercicio de la libertad de expresión. Esta investigación presenta un análisis general del marco jurídico aplicable, para luego analizar en mayor contexto el borrador de iniciativa propuesto en 2021, que tenía como objeto regular las prácticas de moderación de contenidos en plataformas digitales. La metodología empleada es derecho comparado, para contrastar en un primer momento elementos de derecho europeo y estadounidense, y posteriormente el marco normativo mexicano.

PALABRAS CLAVE: *Plataformas digitales, moderación de contenidos, libertad de expresión, democracia digital, autorregulación, auto-jurisdicción.*

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I. INTRODUCTION

The digital space is a common ground where people gather vast amounts of information on different topics and express their viewpoints on diverse issues. The relationship between the Internet and democracy spans across other fields and phenomena. It is indeed a widely analyzed topic of research across various fields. This article analyzes the legal implications of Internet use and democracy in the context of politics and freedom of expression.

This article first describes Big Tech platforms and their power and influence in three different aspects from a global perspective, resorting to American and European Law: search engine manipulation, privacy, and content moderation. It then examines the Mexican proposed bill on the regulation of digital platforms, discussing its challenges, possible outcomes, and limitations. Lastly, conclusions and suggestions are presented for further research relevant to the overall discussion of this complex phenomenon.

II. BIG TECH PLATFORMS, THEIR POWER, AND EFFECTS
 ON DEMOCRACY. THREE MAIN ASPECTS

Even though many celebrate the freedom of the Internet and its apparently anarchic and free nature, Birnhack and Elkin-Koren remind us of the origins of the Internet as an innovation conceived of by military strategists that was only later privatized.¹ Indeed, today the cyberspace is home and marketplace to a diverse number of companies. However, it is evident that there are some tech giants or titans that rule the Internet. This is what Amy Webb refers to as *the Big Nine*: Amazon, Google, Facebook (which has now rebranded itself as Meta²), Tencent, Baidu, Alibaba, Microsoft, IBM, and Apple.³ The *Big Nine* can be grouped into two main tribes, the American *G-MAFLA* (Google, Microsoft, Apple, Facebook, IBM, and Amazon) and the Chinese *BAT* (Baidu, Alibaba and Tencent).

If these companies are considered in a wider context, one will realize that only three of the ten biggest firms worldwide are not part of the Big Nine. These exceptions are the Saudi Arabian Oil Company, the electric vehicle and clean energy company Tesla, and, lastly, the conglomerate holding company Berkshire Hathaway.

TABLE 1

	<i>Company</i>	<i>Market capitalization in billions of USA dollars (2021)</i>
1	Apple (United States)	\$2252.3
2	Microsoft (United States)	\$1966.6
3	Saudi Arabian Oil Company Aramco (Saudi Arabia)	\$1897.2
4	Amazon (United States)	\$1711.8
5	Alphabet (United States)	\$1538.9
6	Facebook (United States)	\$870.5
7	Tencent Holdings (China)	\$773.8
8	Tesla (United States)	\$710.1
9	Alibaba Group (China)	\$657.5
10	Berkshire Hathaway (United States)	\$624.4

SOURCE: Own chart, made with information from FORBES, “The 100 largest companies in the world by market capitalization in 2021 (in billion U.S. dollars)” Chart, May 13, 2021, in STATISTA <<https://www.statista.com/statistics/263264/top-companies>> (Accessed on December 03, 2021).

¹ Michael D Birnhack & Niva Elkin-Koren, *The invisible handshake: The reemergence of the state in the digital environment*, 8 VA. JL & TECH., 9 (2003).

² In the interest of clarity, throughout this article the term “Facebook” will be used to refer to the platform’s environment, whereas “Facebook/Meta” will be used to imply the company.

³ AMY WEBB, *THE BIG NINE: HOW THE TECH TITANS AND THEIR THINKING MACHINES COULD WARP HUMANITY*, 12-18 (Hachette UK. 2019).

The Big Nine play a crucial role in providing social media sites and search engines. For instance, Facebook, Instagram, and WhatsApp are owned by Facebook/Meta; Gmail, YouTube and the most-used search engine belong to Google; Tencent owns WeChat, the overreaching app that has revolutionized how millions of Chinese communicate.⁴

It must be noted that —while most social media and search engines belong to one of the Big Nine— there are some exceptions, such as *Twitter*, *TikTok* or *SnapChat*. Therefore, these companies may not be part of the *Big Nine*, but they are not small at all and play mostly by the same logic.

In this part, the article broadly explains three different ways in which people use digital platforms and their possible harms to democracy, presenting a specific legal analysis of each one. Given the impact of their products and their presence, several references will be made to Google and Facebook/Meta, resorting mostly to elements of American and European law where applicable.

1. *We See*

Media provides citizens with information to make voting decisions and stimulates interest in elections. In fact, there is vast literature that explains how and to what extent voters learn from a variety of media sources including newspapers, TV, Radio, internet and so forth. In that regard, the media reinforces political interest and voting intentions.

It cannot be reasonably challenged that citizens do use and engage with the media to learn about issues and topics relevant to the political arena, such as candidates' traits, proposals, or careers.⁵

On this matter, the evolution of technology and the development of different digital tools have gradually allowed citizens to obtain information and make up their minds before an election.

It is well known that the internet plays a significant role in people engaging with news and information around the globe. For example, in the United States, it is estimated that 37% of American adults get their news from the internet, followed by Radio (27%) and print newspapers (20%). The internet is only second to TV (57%).⁶

While TV is still a major source of information, Internet and digital platforms are thriving. In Germany, for example, it is reported that TV was the

⁴ Interesting to note, however, that vast majority of Internet Law scholarship is still rooted in a Western perspective, disregarding Chinese tech companies in terms of privacy dynamics and freedom of speech.

⁵ Caroline J. Tolbert & Ramona S. McNeal, *Unraveling the effects of the Internet on political participation*, 56 POLITICAL RESEARCH QUARTERLY, 176 (2003).

⁶ Valentino Larcinese & Luke Miner, *The Political Impact of the Internet on US Presidential Elections*, 63 ECONOMIC ORGANISATION AND PUBLIC POLICY DISCUSSION PAPERS SERIES, 2 (2017).

main source of news in 2013 with 82%; by 2018 it was still the major force of information, but it dropped down to 74%.⁷ Additionally, Internet has taken a paramount place as an information provider. Both social media and search engines are the relevant venues in which users consume digital news. It is important to highlight that despite the rise of social media platforms such as Twitter or Facebook, search engines remain a strong channel through which people gain access to online information.⁸ Internet users seem to trust search engines — mainly Google — almost blindly to the point that they would first question “their own ability to search properly before doubting the effectiveness of Google’s algorithm.” This applies mainly to young users, whose first experience with the internet came with Google itself.⁹

It shall not be ignored that Google, as a US-based company, is the main player in the field, with approximately 90% of the market share worldwide, leaving the remaining percentage as follows:

TABLE 2

<i>Europe</i>		<i>South America</i>		<i>North America</i>	
Google	91.32%	Google	96.66%	Google	88.66%
Bing	3.84%	Bing	1.66%	Bing	6.77%
Yahoo	1.32%	Yahoo	1.57%	Yahoo	3.62%
Yandex	2.44%	DuckDuckGo	0.05%	DuckDuckGo	0.58%

SOURCE: Own chart, made with information from Statcounter <<http://gs.statcounter.com/search-engine-market-share>> (Accessed on June 2, 2018).

As shown, online search —which Google has taken over— is crucial for citizens when obtaining information regarding politics, elections, and other public issues. At the same time, search engines offer a full spectrum of digital marketing tools and techniques and so-called “ad products”, designed for political campaigns, which this paper will discuss in the next section.

The quality and content of digital information may vary across political issues and regions. This allows different kinds of media bias to take place, as well as the manipulation of public opinion.

One may observe these biases in barefaced totalitarian or undemocratic regimes. However, even in the absence of evident manipulation, market play-

⁷ REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM, DIGITAL NEWS REPORT 2018, pp. 80-81. Accessed on December 03, 2021. <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/digital-news-report-2018.pdf/>.

⁸ Filippo Trevisan, et al., *The Google voter: Search engines and elections in the new media ecology*, 21 INFORMATION, COMMUNICATION & SOCIETY, 118 (2018).

⁹ *Id.*

ers can still exercise a tendentious influence on public opinion strengthening voters' predispositions by "pervasive selection and filtering".¹⁰

In this context, scholars point stress a fundamental difference when it comes to users analyzing search results¹¹:

- The visible area; and
- The scrolling area.

The "visible area" is what users see immediately in the search results page, whereas all information below, which is not directly visible, is the "scrolling area." That is, the first few results (the visible area) are the elements relevant for the user, the ones that they may engage and interact with, while the rest (the ones remaining in the "scrolling area") would rarely be of interest to the user.

The visible area may be formed of both organic results and sponsored results. The first ones come from the search engine's algorithm, while sponsored results are links coming from advertising, which is being paid for and appear in the results page.

However, previous studies suggest that Internet users rarely engage with sponsored results and prefer to open organic links instead. For example, one study shows that in more than 80% of the searches, participants would go first to the results identified as organic, suggesting that users tend to ignore sponsored results.¹² At the same time, usual practice points out that web users prefer to adjust their search terms instead of moving to the next results page.

Having said that, this article now goes on to explore what does the law say with regards to this issue, and what are the legal implications of the results that come out of a search query. It has been demonstrated that altering the organic results in the visible area may affect the users' impressions, perspectives, and thoughts regarding different aspects of life, including politics and democracy. The impact of such manipulation in the light of the existing literature may be grouped up into six explanatory points.

1) As it was previously explained, higher-ranked links attract more clicks and, consequently, users tend to spend more time on websites associated with those higher-ranked search results. This is so because people trust search engines to assign higher ranks to the results best suited to their needs.¹³

¹⁰ Oliver Falck, et al, *E-lections: Voting Behavior and the Internet*, 104 AMERICAN ECONOMIC REVIEW, 7 (2014).

¹¹ Nadine Höchstötter & Dirk Lewandowski, *What users see – Structures in Search Engine Results Pages*, 179 JOURNAL OF INFORMATION SCIENCES, 1797 (2009).

¹² *Id.* at 1801.

¹³ Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcomes of Elections*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 4512 (2015).

On this note, Robert Epstein introduced the term *Search Engine Manipulation Effect* (SEME) to refer to the alteration of the ranking in the search results and its impact in elections outcomes. Epstein carried out five different experiments in two countries (three in the United States and two in India), uncovering the power SEME, and reporting the following results:

- SEME can shift the voting preferences of undecided voters by 20%,
- Such a shift can be much higher in some demographic groups, and
- The rankings can be disguised so users show no awareness of the manipulation.

2) Changing voting preferences and shifting elections is the ultimate outcome of SEME. People's thoughts and actions can change —according to Epstein— by simply modifying the order in which the results appear on results page. Basically, the first page of results and the order in which it is structured influence the voters' minds.

In addition to the above, Epstein's work maintains that most users show no awareness that they are viewing biased search results. Given that biased search rankings can sway the voting preferences of undecided voters without their awareness and without fair competition from opposing candidates, SEME appears to be a powerful tool for manipulating elections in this century.¹⁴ This hypothetical scenario implies that a search engine may deliberately favor one candidate, one political party or doctrine, and diminish others. While this may seem for some unfeasible or unrealistic, it is certainly possible and overall —and until now— mostly legal.

3) In the context of competition law, it must be highlighted that there are several critiques towards Google, to the extent that it may be favoring its own products, manipulating its rank to benefit itself.¹⁵ But in the context of democracy and politics, Google can technically and legally support a candidate, a campaign, or an ideology.

4) For example, if a political candidate from Tijuana, Baja California considers that Google is manipulating its search results since the first three links that appear in the screen's visible area are news discrediting him, they would

¹⁴ *Id.* at 4518.

¹⁵ Tansy Woan, *Searching for an Answer: Can Google Legally Manipulate Search Engine Results*, 16 U. OF PA. J. BUSINESS L 297-298 (2013): "For example, as of October 28, 2013, a Google search for 'maps' produces Google Maps as its first search result. Critics argue that Google unfairly prioritizes its own products and services, such as Google Maps, over the products and services of its competitors, such as MapQuest and Bing Maps, by listing its own services first. The critics argue that this practice deceives the public into believing that Google's products and services are objectively more relevant and therefore superior, driving Google's competitors out of business. On the other hand, Google counters that search manipulation allows Google to deliver more relevant results, and it denies unfairly prioritizing its own products over others'. Google is not alone in this regard. Most search engines are guilty of search engine manipulation, since it is through this manipulation that search engines are able to produce relevant results".

find little success in challenging that. First, because the said candidate would likely face several complications in terms of jurisdiction and international private law,¹⁶ since Google is an American company incorporated and based in California, United States. Even if it has presence worldwide, it claims to be mostly governed by American law and its courts. Secondly, even if the plaintiff manages to bring a case before a court of law, whether in Mexico, the United States or elsewhere, he would not be able to find out why the search algorithm is ranking those results in that specific order. This is because the algorithm protected under trade secret, and Google, being a private for-profit company, is under no obligation to publish or share its industrial property. Thirdly, the candidate would then realize that Google —as any other search engine— is perfectly entitled to support one political figure or another, as it enjoys freedom of speech. The American constitutional framework protects the so-called “Google Speech,” which can favor one political candidate or another. These two last elements will be discussed in more detail in the following paragraph.

5) Regarding patent protection, scholars point out that well-known search engines have always refused to fully disclose the methods and techniques by which they score and rank their search results. Naturally, Google’s search algorithms are perhaps the most famous of these secrets. Critics of search bias claim that these unknown formulas lead to a “black box effect”: users do not know neither the method through which search results are computed prior to any assigned ‘bias’ nor the adjustments search engines make purposely.¹⁷

While it is true that Google patented its first PageRank algorithm back in the late 1990’s —and as in any patent procedure, the entity seeking for patent protection needs to disclose information and after a certain period of time, that protection expires—, it is also true that, as technology has evolved, Google has made several updates and changes to the algorithm. It also makes use of other complementary algorithms to improve its search results. For instance, PageRank was the original algorithm used for Google queries, but later on the company introduced new elements to optimize their results, such as Panda, Penguin, Hummingbird and so forth. In other words, trade secret law protects all subsequent adjustments Google makes to the original algorithm.¹⁸

As Oren Bracha and Frank Pasquale point out, the proper balance between secrecy and transparency is indeed a major normative challenge in the search engine context, because on the one hand certain degree of secrecy is of legitimate interest, but at the same time —both authors stress— society

¹⁶ The complications of jurisdiction and forum shopping will be addressed in the following sections of this article.

¹⁷ Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What’s the Question?*, 14 LEWIS & CLARK LAW SCHOOL LEGAL RESEARCH PAPER SERIES 10-11 (2011).

¹⁸ *Id.* at 90.

has a strong interest in transparency and accountability. In various contexts people are becoming aware of the troubling aspects of a “black box society,” in which private firms are basically uncontested when locking away information despite a strong public interest in disclosure. However, the idea of a regulatory regime for Search Engines does not seem to have attracted the mainstream of legal scholars.¹⁹

6) The judicial experience has not changed this view. There are three cases relevant for this analysis: 1) *Search King v. Google*, 2) *Langdon v. Google et al.*, and 3) *KinderStart.com v. Google*.

In *Search King v. Google*, the complaint was about intentional and malicious de-ranking of specific websites in Google’s search results. The court upheld Google’s argument to the extent that its PageRank system represents speech protected by the First Amendment, and “any act aimed at knowingly and intentionally modifying the ranking of websites is a legitimate expression of the freedom of speech.”²⁰

Consequently, for the Court, PageRank consists merely of “opinions on the relevance of certain websites.” As such, there is no way to prove that the ranking for a given website is *false* —all of it is subjective— and this is how the Court concluded that Google was entitled to “full constitutional protection.”²¹

Then, in *Langdon v. Google et al.*, the situation was slightly different. In this case, the plaintiff Christopher Langdon was running two websites, one exposing the alleged fraud perpetrated by North Carolina Officials, and another highlighting atrocities executed by the Chinese Government. He sought online advertisements for his websites in different search engines, such as Google and Yahoo. They all refused to run them. Langdon argued that such refusal translated into a violation of his First Amendment right. The Court ruled in favor of Google and the other search engines since they were entitled to editorial discretion in “deciding whether to publish, withdraw, postpone, or alter content” as they see fit. Even more, the Court clarified the legal nature of Google and other search engines: a private, for-profit company that “uses the internet as a medium to conduct business.”²²

Finally, in *KinderStart.com v. Google*, the ranking for KinderStart dropped to zero. It brought similar claims as the ones previously discussed, which failed to prove Google’s responsibility. KinderStart claimed that Google’s search engine was a public forum because everyone online could access Google’s website (or any number of thousands of other websites having a “Google

¹⁹ Oren Bracha & Frank Pasquale, *Federal Search Commission-Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV., 1201-1202 (2007).

²⁰ Stavroula Karapapa & Maurizio Borghi, *Search engine liability for autocomplete suggestions: personality, privacy, and the power of the algorithm*, 23 INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY, 267 (2015).

²¹ Woan, *supra* note 15, at 316-317.

²² *Id.* at 318.

Search Box” as provided by Google) and everybody use its engine without any payment or charge. According to KinderStart, Google had willfully and continuously dedicated the engine for public use and public benefit. As previously mentioned, the Court did not uphold this claim, basing its reasoning on the lack of precedents to support such contentions. Even more, the question of when a search engine may eventually become a public forum has remained unsolved.²³

As can be seen, there is an increasing need to regulate this complex phenomenon. But acknowledging the need of rules and principles is not the end of the story. Where should that regulation come from? From the market, statutory law, or government regulatory authorities? The idea of market discipline sounds attractive for scholars supporting the *laissez faire, laissez passer* economic model. It can be summarized as follows:

Fortunately, market forces limit the scope of search engine bias. Searchers have high expectations for search engines: they expect search engines to read their minds and infer their intent based solely on a small number of search keywords. Search engines that disappoint (either by failing to deliver relevant results, or by burying relevant results under too many unhelpful results) are held accountable by fickle searchers. There are multiple search engines available to searchers, and few barriers to switching between them. As a result, searchers will shop around if they do not get the results they want, and this competitive pressure constrains search engine bias. If a search engine bias degrades the relevancy of search results, searchers will explore alternatives even if searchers do not realize that the results are biased.²⁴

This idea would be undisputed if the market had diverse competitors providing search engines. Unfortunately —as it was shown in the first part of this article— the data proved that one specific search engine holds the vast majority of the market share. As Bracha & Pasquale highlight:

The market discipline argument is based on two key premises: robust competition in the search market and users’ responsiveness to abuse. Unfortunately, both premises are highly problematic [...] It is unclear whether search engines fall under the strict definition of a natural monopoly, but they exhibit very similar characteristics. [Additionally] In many, if not most cases, consumers lack both the incentive and even the ability to detect such manipulation or determine its reasons. Given the lack of transparency of the search algorithms, search consumers simply cannot reverse engineer the hundreds of factors that go into a ranking, and they have little incentive to compare dozens of search results to assess the relative efficacy of different search engines.²⁵

²³ *Id.* at 321-323.

²⁴ Eric Goldman, *Search engine bias and the demise of search engine utopianism*, in WEB SEARCH 128-129 (Amanda Spink & Michael Zimmer eds., 2008) Springer, Berlin, 2008, pp. 128-129.

²⁵ Bracha & Pasquale, *supra* note 19, at 1180-1183.

This leads us to the concluding remark that market forces alone cannot deal with the risk of search engine manipulation and prevent major harms to democracy. Nevertheless, this issue cannot be addressed alone but rather as part of a wider context in which digital platforms can affect our thinking, our political views and civic engagement. The next two aspects are even more complex and require a deep analysis and reflection.

2. *We Think*

Digital platforms know what users do, and who they are. They also manipulate their consumer habits: what to buy, where to go, what to watch, and so forth. Lilian Edwards states that in the last two decades we have seen a major change in online marketing, since it moved from broadcasted ads, where millions of people would see the same content delivered by email spam or banner ads on websites, to the more complex targeted ads based on users' behavior (Online Behavioral Advertising, or OBA).²⁶ As Edwards summarizes: the theory goes that since these ads are “tailored to individual desires,” recipients are more likely to read them, to click through to actual websites and engage with that content.²⁷

For some it may not be completely clear how the “targeting” and “tailoring” take place. Where do Big Tech companies gather information about users, to then analyze it and then capture their attention? In this regard, it is appropriate to bring to this discussion Shoshanna Zuboff's explanation on the matter:

Nothing is too trivial or ephemeral for this harvesting: Facebook ‘likes,’ Google searches, emails, texts, photos, songs, and videos, location, communication patterns, networks, purchases, movements, every click, misspelled word, page view, and more. Such data are acquired, datified, abstracted, aggregated, analyzed, packaged, sold, further analyzed, and sold again. These data flows have been labeled by technologists as “data exhaust.” Presumably, once the data are redefined as waste material, their extraction and eventual monetization are less likely to be contested.

Subjectivities are converted into objects that repurpose the subjective for commodification [...] Populations are the sources from which data extraction proceeds and the ultimate targets of the utilities such data produce.²⁸

This new economic logic, that Zuboff has dubbed as “Surveillance Capitalism”, brings with it a new tool for political advertising: micro-targeting,

²⁶ Lilian Edwards, *Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling*, in *LAW, POLICY AND THE INTERNET* 120 (Lilian Edwards ed., 2018).

²⁷ *Id.*

²⁸ Shoshana Zuboff, *Big other: Surveillance Capitalism and the prospects of an Information Civilization*, 30 *JOURNAL OF INFORMATION TECHNOLOGY*, 79 (2015).

which usually involves, as explained above, monitoring people's online behavior, and using the collected data, to catch the user's attention and display political advertisements tailored to their views.

Additionally, Jacob Silverman sheds light on the power of digital platforms and their political effects. He claims that social media increases the voting turnout. While increasing political participation seems plausible, it may also trigger serious concerns on how this knowledge might be repurposed if, for instance, Facebook/Meta would encourage people in some districts to vote while "saying nothing to others."²⁹ This one company possesses vast power to sort the information people see and is capable to nudge them towards certain behavior. As Silverman enquires "could it influence the fate of elections, not to mention specific policies?" or even worse "would we ever know if it did?"³⁰

One piece of literature is of particular interest for this analysis. In 2015, one year before the US Presidential Election that would trigger the infamous Cambridge Analytica scandal, Zeynep Tufekci recounted the following:

In 2010, a massive experiment (performed without being noticed by any of the sixty-one million subjects, none of whom were asked for permission), Facebook demonstrated that it could alter the U.S. electoral turnout by hundreds of thousands of votes, merely by nudging people to vote through slightly different, experimentally manipulated, get-out-the-vote messages. In this experiment, some messages geared toward Facebook users appeared stand-alone while other, more potent ones, were socially embedded, showing a "your friend voted" extra nudge.

[...]

Facebook has stated explicitly that they had tried to keep their 2010 experiment from skewing the election. However, had Facebook not published the results, and had they intended to shape the electorate to favor one candidate over another, the algorithmic gatekeeping enabled through computational agency would have been virtually unnoticeable, since such algorithmic manipulation is neither public, nor visible, nor easily discernible.³¹

Again, this problem reiterates the power that digital platforms hold and how they can affect not only what users see, but also trigger their behavior and therefore our collective political decisions.

There are some legal instruments across specific jurisdictions, particularly in Europe, to fight this possible abuse, such as the General European Data Protection Regulation (GDPR).³² It should be noted that the Mexican legal

²⁹ Jacob Silverman, *Privacy under Surveillance Capitalism*, 84 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY, 158 (2017).

³⁰ *Id.*

³¹ Zeynep Tufekci, *Algorithmic harms beyond Facebook and Google: Emergent challenges of computational agency*, 13 COLORADO TECHNOLOGY LAW JOURNAL 215-216 (2015).

³² For a comprehensive analysis, see Lilian Edwards, *Data Protection: Enter the General Data Protection Regulation in LAW, POLICY AND THE INTERNET*; *supra* note 26.

system has certainly similarities with the GDPR with one notorious difference: the legitimate interest exception. That is, the use of personal data of an individual without their express consent. The Mexican legislation on data protection requires express consent from the subject to process that data.

However, this is not precisely promising, since the ways in which “consent” is expressed in the digital age are evidently vague, abusive, and almost unnoticed. This is characterized by “pre-formulated declarations of consent,” or “clickwrap” contracts, that hide extensive privacy policies, well-known for “taking a disproportionate amount of time to go through and require reading comprehension abilities at university level,”³³ and this translates into millions of users clicking “I accept” or “Yes” on declarations of consent that they do not actually understand or make sense of, and thus feeding the economic logic of data extraction, commodification and personalized advertisements and publications that restrain their way of thinking.

3. *We Say*

Freedom of speech has changed with the advent of Internet, but more particularly with social media platforms, such as Facebook or Twitter. This has even led to the Supreme Court of Justice of the United States to say that “the vast democratic forums of the Internet in general, and social media in particular” are “the most important places [...] for the exchange of views,” but as some scholars have pointed out, the digital age has also imposed users of social media an unprecedented regime of private censorship.³⁴

But how did we get here? It is necessary to bring Lilian Edwards’ explanation to understand this issue:

Content often carries with it legal liability, which may be civil or criminal [...] how far should online intermediaries be responsible for this content, or contrarily, how far should responsibility stay with the original content author or provider?

The EC Electronic Commerce Directive 2000 (or E-Commerce Directive or ECD) alongside the Digital Millennium Copyright Act (DMCA) in the USA effectively established the ideas of limited liability and “notice and take down” (NTD) as the template for intermediary responsibility, a solution which had remarkable reach for over a decade and remains the pattern of many Organization for Economic Co-operation and Development (OECD) laws [...]

Underneath it all, perhaps, lies the feeling, among both users and traditional state governments, that the giant “GAFAM” platforms (Google Amazon

³³ Midas Nouwens, et al., *Dark patterns after the GDPR: Scraping consent pop-ups and demonstrating their influence*, in PROCEEDINGS OF THE 2020 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, 2 (2020).

³⁴ Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L. J. 5, 1353-1388 (2018).

Facebook Apple Microsoft) now exert power greater than any prior private companies and possibly than some elected governments [...]

Since 2000, automated content curation has become steadily more sophisticated and prevalent, especially in relation to copyright “take downs”, and with the rise of machine learning (ML), automated blocking has begun to look more feasible, even in heavily contextual and cultural areas, such as “fake news” and indecency, albeit with more successful application to images than text [...] the public has arguably begun to comprehend that algorithms used by platforms to distribute, moderate and filter content can and do incorporate value-judgements and inherent bias, and can be used to apparently modify public emotions and opinions. The dawning horror at this covert manipulation of everything from buying choices to democratic decision making may have finally killed off once and for all the notion of platforms as innocent intermediaries.³⁵

In that regard, scholars Frederik Stjernfelt and Anne Mette Lauritzen provide an interesting perspective on this issue. They argue that today’s freedom of speech is under pressure. This is because Big Tech companies have amassed political power and they can lay down the rules of public conversation and access to information, leaving private individuals and even governments with little or no rights of defense against their decisions”.³⁶

In 2018, a group of human rights organizations and academics launched a set of core principles to limit and frame the increasing powers of Tech giants on moderation of user-generated content: the Santa Clara Principles.³⁷

Later that year, one of these Tech giants, Facebook/Meta, in a desperate attempt to cope with the increasing demands for greater accountability and transparency to users about how it controls the flow of speech in the web, decided to launch an external independent appellate body: The Oversight Board.

The idea behind the board is to give users a way to challenge content removal decisions on Facebook or Instagram. More specifically, “if you have already requested that Facebook or Instagram reviews one of its content decisions and you disagree with the final decision, you can appeal to the board”.³⁸

Nevertheless, there are some issues that trigger concern about the Oversight Board’s functioning: I) independence, and II) self-regulation. As to the first, the Oversight Board is run by a Facebook/Meta-funded trust that exercises administrative powers, such as “the ability to enter into Board member contracts and service agreements, remove and appoint members and staff

³⁵ Lilian Edwards, ‘With Great Power Comes Great Responsibility?: The Rise of Platform Liability’, in *LAW, POLICY AND THE INTERNET* 253-259 (Lilian Edwards ed., 2018).

³⁶ FREDERIK STJERNFELT & ANNE METTE LAURITZEN, *YOUR POST HAS BEEN REMOVED: TECH GIANTS AND FREEDOM OF SPEECH* 178 (Springer Nature, 2020).

³⁷ Santa Clara Principles (Jan. 9, 2022) <https://santaclaraprinciples.org/>

³⁸ *Id.*

issue payment and compensation, and [...] research expenses”³⁹, therefore, Members of the Board —the ones who deliberate which content remains online— are factually being paid by Zuckerberg’s company. While some may argue that funds *come* from Facebook/Meta but it is the Board, a legally and technically independent body, the one who *manages* the payroll, the truth is that there is also a lack of *intellectual* independence, since the only method of external input for selecting Board members “is a public portal through which members of the public, Facebook, and Board members can submit candidate recommendations,”⁴⁰ leaving no room for external candidates proposed directly by human rights organizations, activists, or academics. In relation to the second point, the Board is Facebook/Meta’s own creation to self-control its own decisions, that is, it is trying to solve by itself the extensive critiques regarding abuse on content moderation practices and criteria, establishing its own sort of judicial branch. In a certain way, Facebook/Meta is just transferring the power of decision from its corporate executives to the Members of the Board, all within the atmosphere of its own corporate governance.⁴¹

In a very interesting critique, Aldo Iannotti della Valle explains that the Oversight Board arose as a *para-jurisdictional* body in the context of the “erosion” characterized by the State —as a political entity— losing jurisdictional power over the cyberspace, allowing these Big Tech companies to evolve from self-regulation to self-jurisdiction schemes.⁴²

Regardless of the launch of Oversight Board, the truth is that Big Tech corporations exercise power that affect the way we express ourselves in the digital age and it is still unclear how to build an appropriate framework that allows these companies to function but at the same time limits their abuse of power.

This resonates with Giovanni De Gregorio’s extensive research on Digital Constitutionalism, since he states that online platforms, while establishing the standard of free speech and shaping democratic culture on a global scale, disclose little information about their practices and procedures on content moderation, making it all “opaque or lawless.” While there are other interesting proposals —whose analysis exceeds the research limits of this article—, such as the Manila principles or the Internet Governance Forum Dynamic Coalition on Platform Responsibility, users still must deal with “discretion-

³⁹ Kate Klonick, *The Facebook Oversight Board: Creating an independent institution to adjudicate online free expression*, 129 YALE L. J., 2482 (2020).

⁴⁰ *Id.* at 2484.

⁴¹ Mårten Schultz, *Six Problems with Facebook’s Oversight Board. Not enough contract law, too much human rights*, in PERSPECTIVES ON PLATFORM REGULATION 160-161 (Ronald Broemel, et al. eds., 2021).

⁴² Aldo Iannotti Della Valle, *La giurisdizione privata nel mondo digitale al tempo della crisi della sovranità: il ‘modello’ dell’Oversight Board di Facebook*, 26 FEDERALISMI.IT: REVISTA DI DIRITTO PUBBLICO ITALIANO, COMPARATO E EUROPEO, 153 (2021).

ary and voluntary mechanisms,” since there is no binding force on online platforms.⁴³

III. THE MEXICAN APPROACH FOR REGULATION: LIMITS, CHALLENGES, AND IMPLICATIONS

In february 2021, after several weeks of press coverage and media speculation on the intention to legislate on social media platforms and their content removal procedures in Mexico, the whip of the majority party in the Mexican Senate released a draft bill that intended to reform the Telecommunications and Broadcasting National Act (*Ley Federal de Telecomunicaciones y Radiodifusión*).⁴⁴

The normative provisions in question attempted to give the Federal Communications Institute (*Instituto Federal de Telecomunicaciones, IFT*) new duties and powers regarding social media platforms. In sum, the draft bill proposed: I) an obligation for social media platforms to register and secure approval of their Terms of Service (ToS) before the IFT in order to operate within the Mexican territory; II) a procedure for users to contest the removal of content, suspension or deletion of accounts done by a social media platform in alignment with their terms of service, and III) the power of the IFT to order the reestablishment of the content removed or the account — with the possibility to fine the social media platform in the event of non-compliance or negligence with the procedure or the resolution.⁴⁵

It has been studied that, at least since 2005, tech companies have expended hundreds of millions of USD dollars in lobbying, in order to tackle and fight any policies and laws that may threaten their business models.⁴⁶ This evident lobbying power along with the multiple flaws in the draft made it impossible to advance and turn it into a feasible bill to be voted in the Senate and the Chamber of Deputies accordingly.

The draft bill was received mostly with negative critiques, from NGOs, consultants, academics and —naturally— social media companies.

The public discussion did not necessarily address the core issue of the draft bill, i.e., giving users the right to challenge a social media platform before the State over decisions related to content removal or accounts’ suspension

⁴³ GIOVANNI DE GREGORIO, *DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY*, 186-189 (Cambridge University Press. 2022).

⁴⁴ Borrador de Iniciativa con proyecto de Decreto por el que se REFORMAN y ADICIONAN diversas disposiciones de la Ley Federal de Telecomunicaciones y Radiodifusión (Jan 3, 2022) <https://ricardomonrealavila.com/wp-content/uploads/2021/02/REDES-SOCIALES-Propuesta-Iniciativa-29.01.21.pdf>

⁴⁵ *Id.*

⁴⁶ Pawel Popiel, *The Tech Lobby: Tracing the Contours of New Media Elite Lobbying Power*, 11 COMMUNICATION CULTURE & CRITIQUE 4, (566-585) 2018.

or deletion. The public debate rather followed the groundless narrative that somehow the proposed bill wanted to give the State —through the IFT— the power to censor digital content and thus shape users’ web speech, and —on more justifiable concern— that such reform could carry implications and possible breaches of obligations under the United States-Mexico-Canada Agreement (USMCA), the successor of the North America Free Trade Agreement (NAFTA).

The fact remains that the draft had several areas for improvement, to say the least. For instance,

- It distinguished social media platforms in two categories: *ordinary* and *relevant*. In the language of the draft, if a platform reaches more than one million users, it is considered *relevant*. This categorization has two effects. Firstly, it imposes an obligation on the platform to request registration before the IFT. Secondly, it makes it subject to its procedure for analyzing and revoking decisions on content removal and account suspensions or deletions.

But this category is unsound: Does it refer to 1 million users worldwide or in Mexico? Does it imply active users or total users? Why would it matter to make this differentiation in the law when in practice most complains would come from users from Google, Facebook/Meta and Twitter? According to this definition a considerable number of platforms could arguably fall within this category, such as Reddit, Telegram or even Flickr or Soundcloud, to the extent that the definition of social media platforms is not narrowed enough in the draft bill to focus on digital speech platforms.

This distinction is unnecessary, and it does not provide clarity but rather confusion on who is affected and what is the legal target of the proposed bill. The draft attempted to impose an obligation on platforms to register before the IFT to operate within Mexico. This specific part of the proposal triggered concern since for some critics this could become a violation under Chapter 19 to the USMCA, which specifies regulation for digital trade, and establishes “Non-Discriminatory Treatment of Digital Products.”⁴⁷ Critics suggested that the proposed obligation does not find equivalent under the United States and Canada law, and since they are not requiring the same authorization, this may be considered a discriminatory treatment.

It is relevant to point out, however, that this registration would not be discriminating a company because of its nationality (e.g., imposing an obligation for Twitter to register before the IFT because it is an *American* company). And if a Mexican platform emerges and then reaches the category of *relevant* social media platform, it would then be bound to comply with the obligation before the IFT. But in any event, this registration is troubling because it does

⁴⁷ USMCA Article 19.4: Non-Discriminatory Treatment of Digital Products. *1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.*

not place the user at the center of the proposal, but rather imposes an obligation on certain platforms to operate and—as it was mentioned in the previous section—it is not clear which platform is considered *relevant*, collaterally affecting the operation of different platforms and services to the extent that they also would have to register and secure authorization of their terms of service.

Again, if the intention of this bill was to give users the right to contest digital platforms before the State, this registration, as well as the distinction above mentioned, are not necessarily relevant.

- In accordance with the draft, social media platforms must secure authorization of their ToS before the IFT (the proposed bill did not take into account how unpractical it would be, for example, for a company to modify its ToS on the IFT's request once it has attained more than one million users). To grant this authorization, the proposed bill mandates that the IFT must take into consideration if the terms prevent fake news and hate speech, and protect minors, among other elements. This is a careless measure, because ToS encompass not only the content that is shared in the platform and how it may be removed, but also other topics such as privacy, jurisdiction, expected usage or payment details.

It seems that under such a scenario the IFT would be first validating the narrative and language of the ToS, to later use them as the main lens to solve eventual disputes. But instead, it should actually be employing a constitutional framework of fundamental rights protecting the users' digital speech. It is evident that this proposed new role of the IFT as a ToS validator is inconvenient and unclear, not to mention the implications of reviewing several parts of the terms that are not related to content removal.

- Lastly, the role of the IFT as a digital speech umpire was also found puzzling. This is because the IFT is a constitutional independent body tasked with very specific duties on telecommunications and broadcasting services, and while it does deal with Internet Service Providers (ISP), it is not concerned directly with social media platforms, and its nature is that of a regulatory body, not of adjudication.

At the same time, it is necessary to remember the infamous *forum selection clause* that certain media platforms use in their terms of service. They usually nominate the State of California as the exclusive forum for dispute resolution, with the intention to prevent users to sue in their home countries. For example, Facebook/Meta has a *forum selection clause* that establishes Ireland⁴⁸

⁴⁸ FACEBOOK/META COMMERCIAL TERMS (Feb 2, 2022) https://www.facebook.com/legal/commercial_terms Any Commercial Claim between you and Meta Platforms, Inc. must be resolved exclusively in the US District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim and that the laws of the State of California will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

as the exclusive jurisdiction for users in the European Union, and California⁴⁹ for the rest of the world. With the interesting exception of Tumblr (that opted for New York State), California takes the crown when it comes to digital platforms' forum shopping. These clauses have traditionally blocked the access to justice for several users around the globe since they make it impractical and unbearable to bring a claim against these companies before a court of law. However, in recent years judicial decisions have tended to favor users and allow them to bring a claim in their home country. This was the case in Canada, where the majority of the Supreme Court of that country considered that given that Facebook —regardless of the existence of a *forum selection clause* in the terms of use— could have breached rights protected under Canadian Law and local statutes applicable to British Columbia residents, the local courts were “better placed to adjudicate these sorts of claims” instead of those in California.⁵⁰

Having clarified that, the draft at hand preferred to grant the IFT new powers and changed its nature instead of drawing feasible ways of action for users to bring these companies before a court.

Notwithstanding the above, the draft had in its roots something positive. It had the clear intention to make Big Tech platforms subject to State authority and challenge the increasing amount of power they have accumulated in the last two decades. These corporations have evolved in what Michael Kwet denominates “private overlords of critical information infrastructure” —in their majority American companies— that have the “power to regulate the press, speech and association in foreign territories, as they see fit” in the context of a not-so-new but evolving phenomenon: *digital colonialism*.⁵¹

IV. CONCLUSIONS

Big Tech companies and their platforms have gained control of different aspects of our daily life. They not only affect our individual sphere, but also, they diminish our collective future. What is the role of the State and the law on this issue? This article argued that it must counter the abuse and accumulation of power these companies have amassed. The State must build or take

⁴⁹ *Id.* Any Commercial Claim between you and Meta Platforms Ireland Limited must be resolved exclusively in the courts of the Republic of Ireland, that you submit to the personal jurisdiction of the Republic of Ireland for the purpose of litigating any such claim, and the laws of the Republic of Ireland will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

⁵⁰ Tanya Monestier, *Forum Selection Clauses and Consumer Contracts in Canada*, 36 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 2, 194, (2018).

⁵¹ Michael Kwet, *Digital Colonialism: US Empire and the New Imperialism in the Global South*, 60 RACE & CLASS 4, 12 (2019).

part in normative frameworks that reclaim State sovereignty and grant rights and effective remedies to users.

The draft bill introduced and discussed in Mexico in 2021 must be understood in the wider context of the unchallenged authority that Big Tech corporations have built, behind the fortress of surveillance capitalism and digital colonialism. These companies shall not be considered untouchable or immune to any legal regime outside the USA or Europe —not to mention that, in some cases, they do not even comply with regulations from those regions of the world.

It is in this challenging context that governments and courts must analyze and reflect on how to effectively protect their citizens and provide them with the appropriate means to contest the decisions of digital platforms.

The draft bill here analyzed, however, was technically insufficient and its preparation did not follow a comprehensive legal reflection that would take into consideration appropriate alternatives to be translated into empowerment of users before the decisions of Big Tech platforms. This ended up in a poor public discussion that not only diminished the draft's attempt to pass any possible State legislation on the matter, but also argued in favor of self-regulation.

Even some well-known scholars who have once supported the idea of self-regulation are now acknowledging its multiples flaws. They stress that “as it might have been worth trying, self-regulation did not work [...] self-regulation needs to be replaced by the law.”⁵² And such law must come not only from the US and Europe, while the rest of the world and its citizens wait for something not that far from a messianic solution. For example, as of 2021, China, India, Indonesia and Brazil —all countries in the Global South— are 4 of the 5 countries with the most Internet users in the world.⁵³ Therefore, other regions, including Mexico, need to be part of the discussion and open the debate to introduce appropriate legal instruments to challenge this abuse of authority and reclaim State sovereignty.

The question for further research, particularly in the Latin American context, should not be *whether* the State can regulate social media platforms and ensure users' rights, but rather *how* can the State frame that regulation and enforce it. Hopefully the academic discussion will follow this direction.

⁵² Luciano Floridi, *The End of an Era: from Self-Regulation to Hard Law for the Digital Industry*, 34 *PHILOSOPHY & TECHNOLOGY* 4, 619-622 (2021).

⁵³ *Internet World Stats*, March 7, 2021, *Countries with the highest number of internet users as of Q1 2021* (in millions), in *Statista*, Retrieved January 27, 2022, from <https://www.statista.com/statistics/262966/number-of-internet-users-in-selected-countries/>.