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TRANSNATIONAL FRAMEWORKS FOR RECONCILING THE TERRITORIAL REACH OF ONLINE SPEECH REGULATION

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I. Introduction

Online speech penetrates every aspect of life in the digital age. As the reach of online speech grows, so too have governmental efforts to regulate it. Given the global nature of online speech and the internet itself, one of the hottest legal questions today is the territorial reach of content and privacy regulation. In other words, who should decide whether the sovereign state's legislative and adjudicatory authority is enforceable beyond its territorial borders and via what process such a decision should be made?

Nations with robust free speech protections, such as the United States, argue that geographically segmented delinking or delisting of offending material is sufficient to alleviate the harm caused by the speech at issue.[1] Moreover, American discourse often frames global takedown mandates as an existential threat to the First Amendment and even the beginning of a dystopian future in which the most repressive regimes dictate the terms of global information access.[2] In other jurisdictions, such as the European Union, freedom of speech is less sacred.[3] Thus, EU courts and legislators are more willing to recognize that countervailing interests sometimes outweigh free speech rights, meaning global takedown orders may be appropriate in some instances.[4] Europeans contend that geographically segmented approaches are not wholly effective and thus removing global takedowns orders from their judicial arsenal could

[1] "Geographically segmented" means that the takedown or delinking of the offending content is limited, in principle, to within the territory of the jurisdiction compelling the content removal. This can be done via a technical tool known as a "geofence" which restricts access to the content if the user is accessing the material from within the restricted territory or by removing the content from URLs specific to the territory (for example, .fr in France). A "takedown" order requires the content to be removed from the internet. "Delinking" requires a search engine to remove the link to the material from their platform, but the content itself still exists on the internet and can be located by typing in the direct URL to the website that hosts the content.

[2] *See* Penney Jonathon, *Chilling Effects and Transatlantic Privacy*, 25 EUROPEAN LAW JOURNAL, 122-139 (2019).

[3] Franz Werro, *The Right to Inform v. The Right to be Forgotten: A Transatlantic Clash*, *in* LIABILITY IN THE THIRD MILLENNIUM 285, 289 (Aurelia Colombi Ciacchi et al., eds. 2009).

[4] S*ee, e.g.*, Rosen, *supra* note 11, at 5; Thomas Nagal, *Concealment and Exposure, in* CONCEALMENT AND EXPOSURE: AND OTHER ESSAYS 3, 3 (2002); Alan F. Westin, Privacy & Freedom (1967); Charles Fried, *Privacy*, 77 Yale L. J. 475, 477 (1968).

frustrate fundamental rights—such as the right to privacy.[5] Has the globalization of online speech created an intractable cross-Atlantic conflict? Or, is there a way forward that respects the values of both societies?

This paper begins by examining the existing American and European approaches to online speech regulation and, more importantly, the territorial reach of such regulations. Next, I propose that there are fundamentally two ways forward. The first is to regulate online speech through the traditional power structures of sovereignty. In section D.1, I explore this option and conclude that any approach that relies on national or regional sovereignty will cause destabilizing international tension, because the speech regime will be wholly crafted by one jurisdiction and will thus lack legitimacy in the eyes of the excluded party. In section D.2, I explore the second option, an internationally cohesive online speech regime. Here, I examine three means of facilitating international discourse and ultimately propose an approach that draws on two of these options to varying extents. While this is functionally the more challenging approach, it is the only option that offers hope of a globally tolerable framework for online speech regulation.

II. American Regulation of Online Speech

Before examining American speech regulations, it is important to understand the ideological fundament of the American *value* of freedom of expression. There are three leading theories that explain the need for a free-speech right. First, freedom of expression elucidates the "truth" by allowing as many ideas as possible to "compete" in the "marketplace of ideas."[6] Second, freedom of expression facilitates democratic self-governance, because citizens are more informed and therefore can push society to evolve.[7] Third, freedom of expression enables self-actualization because allowing people to speak their truths enables them to become more whole as people.[8] These enlightenment era philosophies about individuality and self-governance deeply influenced the establishment and early development of the United States. Thus, freedom of expression goes to the core of the American national identity. It is necessary to appreciate the significance and Americanness of this value in order to fully understand the legal regime that safeguards freedom of expression.

The baseline test for the permissibility of governmental limitations on speech, including online speech, is the First Amendment.[9] Generally speaking, the court

[5] Peguera, Miquel, *The Right to Be Forgotten in the European Union*, *in* THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., 2019).
[6] Mill, J.S., *On Liberty*, (Hackett Publishing 1978) (1859); T. Nettleton, *The Philosophy of Justice Holmes on Freedom of Speech*, 3 THE SOUTHWESTERN POL. SCI. Q., 287, 287-305 (1924).
[7] Alexander Meiklejohn, *What Does the First Amendment Mean*, 20 UNIVERSITY OF CHICAGO LAW REVIEW 461(1953).
[8] Mill, *supra* note 6.
[9] U.S. Const. amend. I.

applies strict scrutiny to content-based speech restrictions for all protected speech, meaning the government's limitation on expression is only valid if there is a compelling governmental interest in restricting the speech and the restriction is narrowly tailored to this interest.[10] While in theory, this test leaves room for balancing freedom of speech against countervailing interests, in reality, the application of strict scrutiny to a speech regulation is typically the death knell for the challenged regulation.[11] Thus, in many instances, it is nearly impossible for the government to limit even the most reprehensible speech.

The free speech *value* is so robust that, even when the First Amendment is not directly implicated, courts will sometimes find that the policy considerations justify decisions that protect expression. For example, an American court granted Google an injunction that prohibited US enforcement of a Canadian court order to globally remove content that violated intellectual property laws.[12] The court held that, under American law, Google would not have been forced to remove the content, so compelling Google to do so in the US unjustly deprived Google of the benefits of US federal law.[13] As the Canadian court later pointed out, this reasoning is weak because "absent the injunction, Google would be free to choose whether to list those websites [or not]."[14] Thus, forcing Google to take the sites down did not require Google to break any law.[15] Given the weakness of the US court's reasoning, it is clear that something else is driving the court's decision. The dicta in *Google* suggests that this something else is policy concerns about chilling freedom of expression. The court warned, "Free speech on the internet would be severely restricted if websites were to face tort liability for hosting user-generated content."[16]

This case is an informative example of the American approach to online speech regulation for two reasons. First, it demonstrates that US courts are extremely resistant to compelling content removal within their own borders under US law. It was never suggested that Google was the speaker here, meaning that forcing it to remove content is, by definition, not a restriction on its speech. Furthermore, stolen intellectual property is not protected speech under the First Amendment.[17] However, the free speech *value* was nonetheless protected by the court's decision. Second, *Google* reveals the US judiciary's resistance to enforcing the takedown orders of foreign courts. Thus, even though American companies may honor global takedown requests

[10] *See Texas v. Johnson*, 491 U.S. 397, 406 (1989).
[11] Laurence H. Tribe, *American Constitutional Law*, West Publishing 45 (3rd ed. 1999).
[12] *Google LLC v. Equustek Sol. Inc*., No. 5:17-CV-04207-EJD, 2017 WL 5000834, at *3 (N.D. Cal. Nov. 2, 2017).
[13] *Id.* at *3.
[14] *Equustek Sol. Inc. v. Jack*, 2018 BCSC 610, para. 20 (Can.).
[15] *Id.*
[16] *Id.* at para 15.
[17] U.S. Const. amend. I

in order to continue to do business in the ordering jurisdiction, it is unclear that they would be forced to do so by American courts.

III. European Regulation of Online Speech

Europe has long been more proactive than the United States in regulating internet speech.[18] As such policies continue to multiply, European courts are being asked to clarify the geographic scope of their applicability. Two recent cases from the European Court of Justice (ECJ) define the geographic scope of judicial takedown orders issued pursuant to the Right To Be Forgotten And National Defamation Laws.

We will begin by examining the original internet jurisdiction case, which, though groundbreaking in 2001, has been rendered largely obsolete by rapid technological development.[19] The *Yahoo* case was deemed a victory for the European view of international order, holding in favor of geographically segmented approaches.[20]

Thus, at the time, Europeans were apparently supportive of limiting delisting to within their territorial borders. However, in 2020, Europeans largely regard this approach as too limited to protect their fundamental privacy rights and instead argue in favor of the extraterritorial application of delisting orders.[21] This transformation shows that we have reached a new level in globalization in which rights held within a territory cannot be vindicated without compelling behavior extraterritorially.

The Right To Be Forgotten is a right arising under EU law that enables Europeans to compel search engines to delist their personal information if it is old, no longer relevant or not in the public interest.[22] In 2015, the top data protection regulator in France argued that Google's geographically targeted application of the rule was inadequate because people outside Europe could still find the offending information, and people within Europe could still access it using VPNs and other workarounds.[23] The ECJ ultimately ruled that the geographic reach of the "right to be forgotten" was

[18] Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe* (2015).
[19] *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), rev'd, 379 F.3d 1120 (9th Cir. 2004), on reh'g en banc, 433 F.3d 1199 (9th Cir. 2006), and rev'd and remanded, 433 F.3d 1199 (9th Cir. 2006).
[20] *See Id.*
[21] *See* Pressland Editors, *The Right to Be Forgotten*, Medium (2019) https://medium.com/news-to-table/the-right-to-be-forgotten-8ea53b3a8be6.
[22] *See* Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1; *see also Google Spain SL v. Agencia Española de Protección de Datos*, No. C-131/12 (May 13, 2014).
[23] *See* Le Conseil d'Etat [CE. Sect.] [highest administrative court] July 19, 2017, No. 399922 (Fr.), https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/ce-19-juillet-2017-google-inc.

limited to within the EU.[24] Thus, a successful right to be forgotten request will result in European URLs being delinked from search engines and a geofence that prevents users with IP addresses or HTTP headers indicating they are within the EU from accessing the offending content through a search engine.

The ECJ reasoned that the EU should not impose the right to be forgotten on countries that do not recognize the law. The court wrote,

> [I]t should be emphasized that numerous third States do not recognize the right to de-referencing or have a different approach to that right[. . . .][T]he right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality[….] Furthermore, the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.[25]

This language is responsive to the American concern that mandating global delinking pursuant to the right to be forgotten would allow the most restrictive member states to dictate the international rules of Internet Speech.

Just a few weeks later, the ECJ seemingly reversed course. In *Facebook*, the ECJ held that EU member states can order online platforms to remove content *globally* if it violates their defamation laws or is otherwise illegal.[26] However, ECJ's dicta, they cautioned national courts to resort to global takedowns sparingly, reasoning that,

> [T]he protection of private life and of personality rights need not necessarily be ensured in absolute terms but must be weighed against the protection of other fundamental rights. It is thus necessary to avoid excessive measures that would disregard the need to strike a fair balance between the different fundamental rights.[27]

The ruling stemmed from an Austrian case brought by the leader of the Green party, Eva Glawischnig-Piesczek, who sued Facebook in an effort to remove online comments calling her a "lousy traitor," "corrupt oaf," and member of a "fascist party."[28] While the Austrian national court found the statements defamatory, in many countries, including Facebook's home the US, such comments do not meet the

[24] Adam Satariano, *'Right to be Forgotten' Privacy Rule is Limited by Europe's Top Court*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html.
[25] Case C-507/17, *Google v. Commission nationale de l'informatique et des libertés* (CNIL) (Sept. 24 2019).
[26] *See* Case C-18/18, *Glawischnig-Piesczek v Facebook Ir. Ltd.* (2019) (Op. Advoc. Gen. Szpunar).
[27] *Id.*
[28] *Id.*

requisite elements of defamation.[29] Facebook responded that the decision "undermines the longstanding principle that one country does not have the right to impose its laws on speech in another country" and added that the decision raised questions about freedom of expression.[30]

In spite of the divergent outcomes, the court is ostensibly engaging in the same balancing tests in both cases simultaneously weighing privacy rights against speech rights and the sovereignty of member states against the sovereignty of third states.

IV. Analysis of the Two Main Approaches to Regulating the Territorial Scope of Online Speech Regulation

Given the global nature of online speech, a legal regime must be developed to establish the territorial scope of online speech regulations. On a macro level, there are two approaches to such regulation. First, sovereign powers can independently attempt to dictate the framework for speech regulation globally. Second, the international community can collectively develop a global online speech regime. An analysis of both approaches reveals that only the latter option can produce a regime that is viewed as legitimate in the eyes of all impacted parties.

a. Looking to Traditional Conceptions of Sovereignty to Resolve the Territorial Issue

The theory that authority emanates exclusively from the sovereign state corresponds to a well-established tradition both in legal doctrine and in political philosophy, most recently championed by the neo-realist school of thought.[31] For democratic states, the democratic constituency and democratic process are the only sources of legitimacy.[32] Thus, any international agreement is considered suspicious if it constrains the democratic process.[33] Under this conception of power, the only legitimate way to regulate online speech is through the democratic processes of individual sovereign jurisdictions.[34]

An online speech regime generated via traditional sovereign power structures could produce any kind of regulatory framework. One potential outcome is that the ECJ continues to issue rulings like *Google* and *Facebook*, meaning the EU continues to dictate the international rules of online speech. Consequently, the most restrictive

[29] *See What is a Defamatory Statement*, DIGITAL MEDIA LAW PROJECT, https://www.dmlp.org/legal-guide/what-defamatory-statement (last visited Aug. 8, 2020).
[30] *See* Adam Satariano, *supra* note 24.
[31] *See* J.L. GOLDSMITH & E.A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); *See* also JeaN BoDiN, six Books of the coMMoNwealTh bk. I, ch. VIII (M.J. Tooley trans., 1955).
[32] *See Id.* at 4 and 212
[33] *See Id.*
[34] *See Id.*

European member states will establish the outer bounds of what speech is permissible online.

This process undoubtedly has legitimacy within the EU. EU member states have consented to the authority of the ECJ, so binding themselves to an online speech regime it developed does not upset principles of democratic representation. Said another way, whether or not the individual member states or individual Europeans agree with the resulting policy, the speech regulation regime itself has "input legitimacy" because it was produced by the appropriate democratic process.[35]

On the other side of the Atlantic, the ECJ's policy also impacts which speech is available online. However, for Americans the proper processes for controlling speech within the US are those established by the American courts and legislative systems. Thus, from the American perspective, the ECJ's application of European speech regulations to speech within the US lacks input legitimacy. Subjecting Americans to a legal regime that lacks input legitimacy will undoubtedly lead to cross-Atlantic tension, especially given the centrality of freedom of speech in the American value system.

Alternatively, the US could exercise its sovereign power and impose speech regulations on Europeans. Proponents of the robust American conception of free speech argue that European regulation of online speech should not extend beyond European borders.[36] In practice, this translates to a policy in which technical limitations restrict access within Europe, but the content is not taken down or globally delisted. European policymakers argue that these technical tools are not wholly effective because readily accessible technical tools are often enough to circumvent such restrictions.[37] Moreover, in the globalized world people can easily communicate across borders.[38] Thus, countervailing interests, such as the privacy right, cannot be wholly protected by a geographically segmented approach.

As is demonstrated by the Canadian case,[39] American courts may refuse to enforce foreign takedown orders. Thus, companies would be free to decide whether to remove content within the US. For companies operating exclusively within the US, an American judicial approach that does not honor foreign takedown orders enables them to leave the offending speech online over the objection of the European court. However, most of the companies at issue operate on both sides of the Atlantic. As the world currently exists, these companies will likely remove the content for economic

[35] *See* Andrew Potter, *Two Concepts of Legitimacy*, MACLEAN'S (Dec. 3, 2008), https://www.macleans.ca/general/two-concepts-of-legitimacy/.
[36] *See* Robert C. Post, *Participatory Democracy as a Theory of Free Speech*, 97 VA. L. REV. 477 (2011).
[37] Case C-18/18, *Glawischnig-Piesczek v Facebook Ir. Ltd.* (2019) (Op. Advoc. Gen. Szpunar).
[38] *See Id.*
[39] *See* Google LLC v. Equustek Sols. Inc., 5:17-CV-04207-EJD, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017).

reasons, even if the American court does not mandate removal.[40] However, it is not hard to imagine a world in which online service providers are more geographically segmented. In this case, American companies would be largely beyond the reach of European courts. To help visualize this situation, consider the relationship between Chinese and American platforms. In China the major search engine is Baidu, whereas in the US it is Google. By staying out of China, Google is able to engage in activities that would be illegal for Baidu. However, even though Google has no business presence in China, it is still accessible in China via technical tools that circumvent the "Great Firewall of China" and functionally available through cross border communication.[41] Therefore, American speech regulation, or lack thereof, still impacts the effectiveness of Chinese speech policy.

In this situation, Americans dictate which speech is available within Europe. Thus, the European speech regime was not implemented through the proper democratic institutions, meaning it lacks input legitimacy from the European perspective. This regime will lead to the same international tension that was described above.

b. Develop a Body of Transnational Law About Online Speech Regulation

Given the insurmountable legitimacy concerns raised by an approach to online speech regulation that relies on sovereign power structures alone, an alternative must be found. The remainder of this paper examines three big-picture approaches to an international online speech regulation regime that is both practically effective and legitimate from the American and European perspectives. Ultimately, the aforementioned cases represent the shortcomings of a solution based on cosmopolitan pluralism; however, lessons learned from both judicial dialogue and structured international bodies theories offer insight into how conceptions of sovereignty can be reframed in a way that makes room for a system that is acceptable on both sides of the Atlantic.

i. Cosmopolitan Pluralism

The theory of cosmopolitan pluralism begins with the assumption that the permanent overlapping relationships between different normative communities cannot be eliminated by imposing a unitary set of values.[42] Instead, these differences must be managed by adopting a framework for a system of order in which "outside norms affect the system but do not dominate it fully."[43] This framework manages

[40] *We Are Committed to Complying with Applicable Data Protection Laws*, GOOGLE, https://privacy.google.com/businesses/compliance/ (last visited Aug. 8, 2020).
[41] Paul Mozur, Paul, *Baidu and CloudFlare Boost Users Over China's Great Firewall*, The New York Times (2015).
[42] Berman, P., *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* 25 (2012).
[43] *Id.*

unavoidable normative conflict through interactions that lead to mutual consideration of conflicting values.[44] Domestic consideration of broader interests enables independent benefits to accrue due to the overall improvement in the international legal order.[45] In fact, the systemic value of comity should be seen as a necessary part of how communities pursue their interests in the world, not as a restraint on pursuing such interests.[46] Under this framework, communities are not required to fully embrace values that create a domestic constitutional crisis, but such a rejection on public policy grounds should be an unusual occasion.[47] Thus, when faced with enforcement decisions regarding foreign judgments, decision makers should weigh local policies against the "overall systemic interest in creating an interlocking system of adjudication."[48]

Cosmopolitan pluralism represents an approach to international law that is not normatively organized, but rather relies on an international state of mind that prioritizes the value of comity. Both of the aforementioned ECJ cases incorporate cosmopolitan pluralism. In *Google*, the court explicitly states that it is limiting the territorial scope of European law in order to respect the differences between European and third-party privacy laws.[49] Even on *Facebook*, the court explicitly cautions domestic courts to use regulations with global reach sparingly in the interest of comity.[50]

However, cosmopolitan pluralism does not address the legitimate concerns raised in the preceding section. The fact that the court considered the interests of third parties is completely unresponsive to the process legitimacy issue, because the process is still entirely driven by the European judicial machine without any direct or indirect role for American legal structures. Since the theory of cosmopolitan pluralism does not suggest an alternative source of legitimacy, the only conception of legitimacy available is the traditional structure in which legitimacy is derived solely from sovereignty. Thus, this process ultimately still represents the imposition of European law, albeit potentially a more considerate law, on American speech in American territory without the input of any American source of legitimacy.

[44] *Id.*
[45] *Id.* at 148.
[46] *Id.* at 154.
[47] *Id.*
[48] *Id.* at 294.
[49] *See* Case C-507/17. Google v. CNIL (Sept. 24, 2019), http://curia.europa.eu/juris/document/document.jsf?text=&docid=218105&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1760294.
[50] Case C-18/18, Glawischnig-Piesczek v. Facebook Ir. Ltd. (June 4, 2019), http://curia.europa.eu/juris/document/document.jsf?text=&docid=214686&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7750446.

ii. Judicial Dialog

A related but distinct approach is developing a formal or informal dialog between courts. In the relational mode of judicial engagement, courts feel a relationship to other legal systems motivates or obligates them to consider transnational sources, whereas in the deliberative mode courts utilize foreign materials to inform their own thought process.[51] Both modes of judicial engagement serve expressive and affiliative functions because referring to other courts' jurisprudence may "enhance their own internal legitimacy, or be used to avoid adverse reputations in international or transnational communities."[52]

This approach can only overcome the shortcomings of cosmopolitan pluralism if it can either harness the sources of sovereign power to legitimize extraterritorial applications of online speech regulation or reconceptualize sovereignty so that the inputs traditionally required for legitimization are no longer necessary. A jurisprudential basis for engagement between courts that conceives the constitution as mediating between the domestic and the global utilizes the later approach. Said another way, such an approach may shift, or expand, the kind of processes that are capable of producing legitimate policies by changing the very conception of sovereignty.

According to the "constitution as a mediation between the domestic and the global" basis for engagement, a constitution is "a form of law that by its existence commits its polity to some form of engagement with others, in order to sustain the quality of being a nation in a world of nations . . . ." In this view, although constitutions are "constituted" by their particular polities, the act of constituting a constitution takes place within a framework of international expectations, incentives, and relationships as well as domestic exigencies."[53] This approach adds the international community to the legitimation process for an online speech policy. Here, constitutions are not only formed through domestic acceptance, but also by the constraints of acceptability imposed by other nations.[54] Thus, the continued acceptance, not to be confused with approval of foreign jurisdictions is a necessary element in the continued legitimacy of the constitution.[55] By reconceptualizing legitimacy to include the acceptance of the international community, decisions produced through judicial dialogue have more legitimacy than those that are produced in a domestic vacuum.

To apply this idea to the question of the territorial reach of online speech regulation, transplant the *Facebook* decision into a world in which this conception of legitimacy

[51] Vicki Jackson, Constitutional Engagement in a Transnational Era 72 (2010).
[52] *Id.* at 77.
[53] *Id.* at 81.
[54] *Id.*
[55] *Id.*

was widely accepted and the ECJ had engaged in a more robust dialogue with the American courts. In this situation, the American democratic process still would not have directly participated in the decision. However, there would be a global understanding that the EU Constitution was constituted in part due to American acceptance, and the dialog between courts in the decision would have highlighted this transnational consideration. By adopting this theory of legitimization, the indirect American input could be sufficient to legitimize the policy from the US perspective. Of course, this requires a fundamental shift not just in policy but also in how people understand legitimacy itself. However, at least logically, it is a coherent explanation for how a decision made by one sovereign could still have input legitimacy from the perspective of another impacted party.

iii. Structured International Bodies

The final approach to regulate international online speech in a manner that is considered legitimate across the Atlantic is to create a structured international body that sets the rules for online speech regulation. I am limiting my discussion of such groups to international organizations that are established via treaty, and therefore have the formal authority to bind their members.[56] An example of such an organization is the UN Security Council, which may adopt binding measures to prevent threats to or breaches of peace and security. Even though the link between the people and their representation in the international forum is somewhat attenuated, such groups are still formulated via legitimate governance channels from the participating jurisdictions. For example, in the US Constitution, the president has the power, with advice and consent of the Senate, to make treaties.[57] Thus, there is a clear link between the structured international body and the means of legitimization.

In spite of the clear means of legitimization, there are some issues with such groups. First, the principle of separation of powers does not apply, which is pivotal to some nations' conceptions of legitimate governance.[58] Second, the organs of such groups may be dominated by the stronger power, thereby leaving the weaker party with doubts about the group's legitimacy.[59] Third, there is an argument that these institutions lack legitimacy, because they are too far removed from the consent of the people.[60] While these concerns are legitimate, the first two can be resolved by including structural safeguards for the weaker party and some checks-and-balances in the structure of the international organization. As for the third concern, the same issue is raised with regard to the administrative state in the US. In spite of these concerns,

[56] See Treaties: A Historical Overview, SENATE.GOV, https://www.senate.gov/artandhistory/history/common/briefing/Treaties.html.
[57] U.S. Const. art II, § 2.
[58] Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law 47 (2009).
[59] *Id.* at 47.
[60] *See* Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, Rev. Int'l. Org., 581, 591 (2019).

outside of conservative legal circles administrative bodies, such as the Food and Drug Administration, are largely considered legitimate forms of governance in the US.[61]

Formulating a structured international body, like the Security Council, for internet speech regulation is the most straight-forward approach in terms of conceptualizing the source of its legitimacy. It does not require a major change in the way that legitimacy is conceptualized, because democratically elected branches of government consent on behalf of their people to bind themselves to the decisions reached by the group. Thus, the organization itself derives its legitimacy from the legitimacy of the sovereign powers of which it is comprised.

The ultimate issue with this approach is its functional difficulty, which in some instances could be bordering on functional impossibility. Creating a structured international body first requires groups to cede some of their sovereign authority to the international community. Then, once the group is formed, the parties must make compromises that, in this case, would curtail the ability of their people to exercise what they consider fundamental rights within their own territory. Thus, while this approach is optimal from a legitimacy standpoint, the difficulty of reaching this level of agreement means it cannot be wholly relied on to resolve pressing issues such as online speech regulation.

V. Conclusion

Does the functional difficulty of the structured international bodies approach and the conceptual difficulty of the judicial dialogues approach mean that we are doomed to live in a world without adequately legitimate online speech regulation? No. Rather, it means that the path forward will be difficult and will require the world to embrace both approaches. An issue as pervasive and complex as online speech regulation requires a shift in the way we think about legitimacy and international compromise on substantive matters. The path forward will not be easy, but it is possible to formulate a solution that is legitimate from the perspective of all impacted parties if the issue is attacked from multiple angles.

[61] Gillian E. Metzger., *Administrative Constitutionalism's Lessons*, Reg. Rev. U. Pa. (Dec. 16, 2019). https://www.theregreview.org/2019/12/16/metzger-administrative-constitutionalisms-lessons/.