

Updating Our Rights With The Internet: Arguing the Necessity of a Fundamental Right to Internet Access

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ABSTRACT: *Fundamental rights are essential to the functions of our democracy. A right is declared fundamental when the government must pass a strict scrutiny test in order to infringe upon it. This article is in support of a fundamental right to internet access given how essential the internet has become in the last decade, particularly post-pandemic. Under this right, the United States government would need to go to great lengths to remove internet access from a citizen.*

Malleability has been entrenched in American jurisprudence since its founding. With the advent of the digital age, once again American law must adapt to changing circumstances and ratify a fundamental right to steady internet access, or the “right to connect.” Promoting the right to connect to a fundamental right ensures that, should the government desire to remove internet connectivity from a citizen, it would need to pass a strict scrutiny test. This test secures a right from infringement, requiring that the government would need to go to great lengths to revoke a right under strict scrutiny. Strict scrutiny is the groundwork protecting other fundamental rights such as the right to privacy, the right to marriage, or the right to procreation. The current rule of law in the United States relating to the internet is primarily centered around censorship rather than pure access to the internet; there has yet to be a landmark case wherein the government removed one’s internet access in its entirety. While such a case has yet to occur in America, it is imperative that our government consider both the necessities of a fundamental right to connect, and the consequences of an unprotected right to connect in the post-pandemic world.

To determine one’s digital rights, it is essential to establish the relationship between the online and real world as used today. In the modern era, people live entire lives on the internet. Social media allows for communication comparable to face to face conversation, digital file storing services allow people to keep online possessions as they would physical copies, and applications that are used regularly to allow citizens to apply for jobs and work exclusively online. Today, it is difficult to find an aspect of life that cannot be digitized. This is doubly true when considering the pandemic. Given the outbreak of COVID-19 society has been readjusted to function solely on a digital platform; businesses, families, friendships, and even the government itself now function wholly over the internet.⁵¹ For the first time in history, the Supreme Court broadcasted oral arguments online, while all parties were isolated at home during the pandemic.⁵² There are no signs of this trend toward digitalization slowing in the coming years. The threat of

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⁵¹ Koeze, Ella, and Nathaniel Popper. “The Virus Changed the Way We Internet.” *The New York Times*, The New York Times, 7 Apr. 2020, www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html.

⁵² Honig, Elie. “The Sky Didn’t Fall When the Supreme Court Went Live.” *CNN*, Cable News Network, 4 May 2020, www.cnn.com/2020/05/04/opinions/supreme-court-went-live-opinion-honig-cross-exam/index.html.



the coronavirus will persist for the foreseeable future, and thus digital life will continue indefinitely. Following the threat of the pandemic certain aspects of digital life will linger, due to the simple fact that the internet removes the barrier of physical distance. Many companies are now finding more convenient ways to conduct business using the internet, pressured to do so by the pandemic. The modern circumstance renders the internet no longer a convenience, but a necessity; it has evolved to become a separate world in which humanity lives just as it would physically.

With a new digital world should come newly digitized applications of fundamental rights, which are bound to be threatened should the government revoke internet access. Furthermore, there is a plausible mortality connected to lack of internet access. Today those with limited access to the internet are forced to work outside of their homes, possibly exposing themselves to the virus, jeopardizing themselves and those close to them. People who have the privilege of living with internet connectivity work from the safety of self-isolation, with minimal change to their daily pre-pandemic routine other than location and time spent using their computer. Should the government remove connection to the internet, some citizens would be compelled to work in an unsafe environment, possibly threatening one's fundamental right to life. Of course, with time the dangers of the coronavirus will subside, but even after a new normal is established, removing access to the internet still prevents people from speaking their mind, associating with those they wish to associate with, or applying for the jobs they wish to work in. The calculation is simple: life has been digitized. Thus, the rights and protections of American citizens must be updated to the digital medium as well. The only way to properly guarantee this outcome is to ensure that the government must go to great lengths to take away the sole path to the digital world citizens have, which is internet connectivity.

Just as previous fundamental rights were established through interpretation of precedent, the same can be done with the right to connect. When concluding the existence of the right to privacy from the landmark case *Griswold v. Connecticut*, Justice Douglas explained that the right was within the "penumbra" of previous rights established within the Bill of Rights. By explaining the right as a penumbra, he highlights that the right to privacy is a product of inference. Douglas explained that this fundamental right can be inferred from the First Amendment, wherein privacy is "protected from governmental intrusion," as well as the Third Amendment, which prevents physical governmental intrusion through the prohibition of quartering of soldiers.⁵³ In his conclusions Justice Douglas clarified for the court the common applications of the law as used by its citizens, and then redefined fundamental rights to fit those common applications. The same must be done today for the internet. The common applications of fundamental rights have been digitized just as applications of the First Amendment changed,

⁵³ *Griswold v. Connecticut*, 484.



resulting in Justice Douglas recognizing these penumbras of established fundamental rights. One can clearly see that the online applications of fundamental rights manifest digital rights. Such online rights are easily identifiable when considering what rights are forcibly infringed upon should the government confiscate one's internet access.

In the event of a state sanctioned internet blackout, First Amendment rights are likely to be the first to be torn from US citizens. Previously, if a person wished to voice his opinion, they would do so through either the press or public speaking. While both practices are used today, the internet has become an astronomically more wide-reaching and efficient resource to spread one's opinion. This links the use of the internet to the fundamental right to freedom of speech. Freedom of association, a right tied to the First Amendment, further binds internet usage to the First Amendment. Social media applications are home to groups of like-minded people, who join these groups for the purpose of discussing certain hobbies or passions. While physical meetings of like-minded people are of unquestionable prevalence, contemporary organizations that do not rely on the internet to function are rare. Additionally, censorship cases have been the focus of internet jurisdiction for the past few decades. The 1997 case, *Reno v. American Civil Liberties Union*, determined that a law censoring indecent content on the internet violated the First Amendment, as the Act was determined to be a content-based restriction of speech, as caused by the complexities of the word "indecent." A similar outcome is to be expected should the state remove internet access. All international examples of government instigated internet blackouts revolved around conflicts between citizens, which cause the government to block communication to prevent violence stemming from the disagreement. Given the international precedent, it can be inferred that should an internet blackout occur in the United States, it would derive from similar issues concerning the content of speech and the consequential disagreement between people and government. The mass censorship that would follow would be a one-sided, unmerited violation of fundamental rights. The only way to circumvent such injustice would be with the strict scrutiny test. If the government wishes to remove first amendment rights via an internet blackout, they must provide a compelling state interest. Simply preventing disagreement between government and people would not pass this test, thus preventing infringement upon American fundamental rights.

Naturally, there is a difference between internet regulation and internet control. A person can conduct nearly all functions of life online. These activities are subject to regulation. For example, in the 2003 case *United States v. American Library Association*, congress wished to pass the Children's Internet Protection Act, which would require public libraries to install internet filters on all public computers within the library. This form of state action was deemed constitutional, as it was the only way of serving a compelling state interest of protecting children, while imposing "a comparatively small burden" on internet users. Here, First Amendment rights



are excused when applying to specific websites that can be harmful to children. However, barring one's *access* to the internet prevents them from not only exercising fundamental rights, but from living online entirely. Freedom to connect does not prohibit government internet regulation, simply government intrusion upon internet access. Should state action create laws such as that of *American Library Association*, they can do so with ease under a fundamental freedom to connect, which would only protect *access* to this digital world on the grounds that digital life demands as many fundamental rights as the real world. In the physical world, the government creates law to regulate activities, but would never restrict the *ability* to exercise fundamental rights in the physical world without due process. There is a natural fundamental right to life. These same rights should be protected digitally as well.

Similarly, potential state action against access to the internet negates the established fundamental right to property. During an internet blackout, private conversations or files will be kept from citizens just as if the government physically sealed the entrance to one's home or removed all private papers or possessions. The physical act of seizing property is an extreme violation of one's rights, bound to cause an immediate and visceral reaction in opposition. There is no reason why the same standards should not be applied online. The modern zeitgeist is trending towards the existence of a digital life; a stable connection in each home is required to flourish in that life. A threat to it would be a threat to contemporary American life in a manner no government can reasonably enforce under the bounds of the constitution of the United States. Protection of this digital life can only be achieved through recognizing the parallels and equalities between digital and physical life, and understanding that these parallels correspond to digital penumbras supported by the constitution, emphasizing the need for the fundamental right to access the world we now live in.

Of course, this is not to say that every citizen is required to maintain a stable connection to the internet; that would be an unreasonable request. There are many people who choose not to exercise some of their constitutional rights. The Second Amendment, which secures the right to bear arms, for example, is controversial. Many exercise it, while just as many people do not. However, it is the citizens' prerogative to choose which path to take. Similarly, there is a large population who choose not to live a digital life. However, this dispute is one of rights, and government restraint in removing those rights. It should be the right of the American citizen to choose how they live digitally, and if they desire, they should be able to exercise their fundamental rights digitally, free of the fear that the government will remove connection to the online world, and in doing so, disregard their fundamental rights.

Despite the obvious fact that the internet has changed with modern society, many will contest that it is unnecessary that we establish the fundamental right to connect. This is a natural conclusion, as there has not yet been a case where the government has forcibly removed internet



access in the United States, thus there is no pressing need for an update in the law. However, while such a case has yet to occur in America, governments have forced internet blackouts several times beyond the US border. These international examples highlight the ramifications and violations of basic rights a government shutdown of internet access enables, while also exemplifying the need for and the uses of a fundamental right to connect to prevent such an outcome. For example, nations such as Egypt, Iran, or India have shut down their internet during times of war or political turmoil simply because anti-government or anti-war protests were organized online via social media. Egyptian and Tunisian governments forced internet blackouts during the mayhem of the Arab Spring in 2011, and, most recently, in Iran during the 2019 fuel protests. The Iranian internet blackout obstructed families living outside the state from communicating with those still in Iran while preventing protests from organizing over social media⁵⁴. In this act both physical and digital versions of freedom of speech were seized from Iranian citizens. There were economic and personal consequences as the entire nation was plunged into an archaic state of detachment from the world. Reporting about the protests was limited, thus information about violence during those protests was kept from the world and was isolated to the locations wherein such violence was committed. The internet blackout in Iran and the chaos that followed emphasized how great of an influence the internet is today, and how an internet blackout bluntly removed many fundamental rights a citizen has. In the Kashmir region of India, the government imposed an internet blackout following a series of violent protests. These restrictions were applied “to prevent the propagation of terror activities and the circulation of inflammatory material”⁵⁵. In the months that the blackout took place, the expected chaos ensued as citizens were stripped of their livelihoods, and connections to their families and friends. As a result, however, India remedied their policies by establishing the right to connect as a fundamental right within the Indian Constitution (Dutta)⁵⁶. They saw what a government enabled internet blackout could do to the modern population, and promptly amended their constitution to adapt to modern circumstance, accepting the fact that rights can be revoked both physically and digitally, with equal consequence. It is essential that America reach the same result. A more conservative court, such as the one we have now, will argue that it is not the place of the court to litigate, but to simply apply the rights of the constitution verbatim to whatever

⁵⁴ Hjelmgard, Kim. “Tool of Repression!: Iran and Regimes from Ethiopia to Venezuela Limit Internet, Go Dark Online.” *USA Today*, Gannett Satellite Information Network, 23 Nov. 2019, www.usatoday.com/story/news/world/2019/11/23/irans-internet-blackout/4268948002/.

⁵⁵ Schultz, Kai, and Sameer Yasir. “India Restores Some Internet Access in Kashmir After Long Shutdown.” *The New York Times*, The New York Times, 26 Jan. 2020, www.nytimes.com/2020/01/26/world/asia/kashmir-internet-shutdown-india.html.

⁵⁶ Dutta, Prabhaskar K. “Internet Access a Fundamental Right, Supreme Court Makes It Official: Article 19 Explained.” *India Today*, 10 Jan. 2020, www.indiatoday.in/news-analysis/story/internet-access-fundamental-right-supreme-court-makes-official-article-19-explained-1635662-2020-01-10.

issue arises in the court. This is a perfectly valid argument, as there has yet to be a case of first impression concerning the right to connect. Conservative judges may not recognize digital penumbras as Justice Douglas would. However, this paper is an argument for change, albeit through the judicial or legislative branch. Should the court determine that it is not their place to ratify the freedom to connect as a fundamental right without a case, legislation can allow for such an amendment to occur. In these circumstances, the method is less important than the result. So long as the freedom to connect is protected under strict scrutiny, America may confidently move forward into its future.

The American policy towards an internet blackout is, as of now, unknown. However, regulations exist specifying how government control of internet connectivity functions in the United States. The Communications Act of 1934 allows the president to shut down “any facility or station for wire communication” as per 47 US Code, Section 606, which clarifies war powers of the president. However, war is a chaotic time, and policies forged in the pursuit of winning a war are not always the just policy (consider, for example, the Espionage Act). This is why it is essential that freedom to connect be established *before* troubling times develop in the United States. It is the only way to ensure the prevention of injustice. As previously established, the one common aspect of all government internet blackouts was disagreement between state and public. Either through protest or war, there was an aspect of public behavior that the government deemed dangerous, and to avoid the supposed “danger” of disagreement, they established restrictions that violated fundamental rights. America has been in such a position before, concerning the now unused bad tendency test of the First Amendment. The “bad tendency” test allowed censorship towards inflammatory material, or parts of speech that contained a “bad tendency.” This method of identifying which form of speech to prohibit in the United States is identical to India’s reasoning behind their internet blackout, in both situations “inflammatory material” was cited. The bad tendency test was removed through a series of cases which redefined how the First Amendment is used, beginning with *Schenck v. United States*, and ending with *Abrams v. United States*.

In *Schenck v. United States*, the Supreme Court ruled that the pamphlets Charles Schenck and Elizabeth Baer distributed contained a bad tendency for opposing the first World War and violated the Espionage Act. This case, decided by Oliver Wendell Holmes, established the unjust bad tendency test as the precedent until Holmes reversed his opinion following changes in societal norms. When a similar set of circumstances reappeared in 1918, after the war, Justice Holmes reprimanded the bad tendency test in his historic *Abrams* dissent, where he reevaluated the state of the nation, and determined that the law must change. He recognized that “[e]very year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect



knowledge...that experiment is part of our system”⁵⁷. The story of the bad tendency test, the fundamental right to privacy, and other changes in fundamental rights follow a similar path. Holmes recognized the injustice perpetuated by the bad tendency test as well as the changing attitudes towards the First Amendment; he extrapolated from these notions that a change in the law was required. Today, similar injustices concerning First Amendment rights, as well as all other digital rights, will be committed unless the government acts preemptively by safeguarding digital rights before they can be trampled upon. Just as the bad tendency test changed over time, and the fundamental right to freedom of speech was redefined, the time has come to reach a similar conclusion concerning the internet. There is an existing precedent of considering the internet as a tool to be used at one’s own leisure. However, given the pandemic and the evolution of digital activities, the internet is no longer the device it once was. It has grown to touch all aspects of modern life and must be treated as such by the law. A change to our nation’s fundamental rights is required, just as Holmes recognized with the bad tendency test.

This debate leads to a clear conclusion. Modern citizens carry two lives: one physically and one digitally. To remove the gateway to one’s digital life—a stable connection to the internet-- is to violate the fundamental rights that coincide with the use of the internet. Such rights include the right to freedom of speech, the right to property, and the right to freedom of association as established by the First Amendment of the Constitution. While there has yet to be a case concerning the American government revoking such digital rights, it is imperative that we preventively follow trends established by nations who have recognized this danger, such as India. The circumstances under which a government forces an internet blackout have been consistently controversial. Legislating a fundamental right to freedom to connect is the only true way to ensure that the long-standing fundamental rights our nation has protected for centuries can be adapted into the modern setting justly and easily. Continuing to ignore this need until a case of first impression arises will subject our nation to the near certainty of injustice, as caused by the very nature of such cases. The internet has delivered a new world to modern times, and our nation must prepare to protect its citizen’s rights as they navigate the complexities of digital life in the same way we have been since our creation. As Darwinian evolution teaches, when faced with a new pressure, one must adapt to survive, or fall behind and perish. In order to ensure America continues to be the just nation it prides itself on being, it must adapt its fundamental rights to the digital age. Establishing the freedom to connect as a fundamental right by amending our constitution is the only true way to ensure our nation’s next stage of evolution.

⁵⁷ *Abrams v. United States*, 250.



Works Cited

- Dutta, Prabhash K. "Internet Access a Fundamental Right, Supreme Court Makes It Official: Article 19 Explained." *India Today*, 10 Jan. 2020, www.indiatoday.in/news-analysis/story/internet-access-fundamental-right-supreme-court-makes-official-article-19-explained-1635662-2020-01-10.
- Hjelmgaard, Kim. "'Tool of Repression': Iran and Regimes from Ethiopia to Venezuela Limit Internet, Go Dark Online." *USA Today*, Gannett Satellite Information Network, 23 Nov. 2019, www.usatoday.com/story/news/world/2019/11/23/irans-internet-blackout/4268948002/.
- Honig, Elie. "The Sky Didn't Fall When the Supreme Court Went Live." *CNN*, Cable News Network, 4 May 2020, www.cnn.com/2020/05/04/opinions/supreme-court-went-live-opinion-honig-cross-exam/index.html.
- Koeze, Ella, and Nathaniel Popper. "The Virus Changed the Way We Internet." *The New York Times*, The New York Times, 7 Apr. 2020, www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html.
- Schultz, Kai, and Sameer Yasir. "India Restores Some Internet Access in Kashmir After Long Shutdown." *The New York Times*, The New York Times, 26 Jan. 2020, www.nytimes.com/2020/01/26/world/asia/kashmir-internet-shutdown-india.html.

Cases Cited

- Griswold v. Connecticut*, 381 U.S. 479 (1965).
- Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
- United States v. American Library Association*, 539 U.S. 194 (2003).
- Schenck v. United States*, 249 U.S. 47 (1919).
- Abrams v. United States*, 250 U.S. 616 (1919).

