

The Internet and the First Amendment

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What makes the Internet different?

- Different (?) substantive First Amendment doctrines
- Platforms engage in content moderation
- Section 230 preempts most platform liability
- Unsettled rules about how the First Amendment applies to platforms

A disclaimer

Much of this presentation will track *Internet Law: Cases and Problems* so closely that it ought to be considered advertising material



INTERNET LAW
CASES AND PROBLEMS
Thirteenth Edition

James Grimmelmann

Substantive First Amendment Law

Harmful speech challenges online

- Virality
- Anonymity and impunity
- Context collapse
- Spam spam spam spam spam spam spam spam spam spam spam
- New (?) kinds of harms, e.g. nonconsensual pornography

Content Moderation

Platforms!

- Social media: Facebook, Twitter, YouTube, TikTok, Reddit, Parler, Discord
- Publishing: Medium, Spotify, Substack, itch.io
- Infrastructure: Cloudflare, AWS, Verizon, GoDaddy, Verisign
- Payments: PayPal, VISA, Venmo, Bitcoin, Coinbase, Patreon, GoFundMe
- App Stores: Apple, Android, PlayStation, Epic
- Communications: Gmail, Cornell, Slack, Signal
- Marketplaces: Redbubble, Amazon, eBay, Poshmark
- Gig economy: Lyft, Grubhub, Doordash
- Search: Google, Bing, DuckDuckGo, Yelp, Redfin, Kayak
- Aggregators: Netflix, Disney+, Google Play, Spotify
- One size does not fit all

E.g., Facebook's Community Standards

- Violence and Incitement
- Dangerous Individuals and Organizations
- Coordinating Harm and Promoting Crime
- Restricted Goods and Services
- Fraud and Deception
- Suicide and Self-Injury
- Child Sexual Exploitation Abuse and Nudity
- Adult Sexual Exploitation
- Bullying and Harassment
- Human Exploitation
- Privacy Violations
- Hate Speech
- Violent and Graphic Content
- Adult Nudity and Sexual Activity
- Sexual Solicitation
- Account Integrity and Authentic Identity
- Spam
- Cybersecurity
- Inauthentic Behavior
- False News
- Manipulated Media
- Intellectual Property

Moderation procedure

- Algorithmic flagging + user reporting
- Low-paid contractors in call centers do high-volume review
 - Stressful work dealing with psychically scarring content
- Internal escalation to supervisors, company, Trust & Safety team
- Limited ability to file request for review

Layers of rules

- TOS: very broad, legally binding
- Community standards: moderately broad, binding only on users
- Published guidance: application of standards to particular cases
- Internal moderator handbooks: detailed guidance on specific cases

Facebook's "Supreme Court"

- Oversight Board can hear appeals from users whose content was taken down or whose accounts were banned
- Results "binding" on Facebook in specific case
- Jurisprudential issues: judicial appointment, judicial ethics, jurisdiction, mootness, scope of precedent, advisory opinions, ...
- Does any of this matter?

Section 230

47 U.S.C. § 230 (“Section 230”)

(c)(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(c)(2) No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected ...

Leaving up and taking down

- (c)(1) provides absolute immunity for *leaving up* UGC
- (c)(2)(A) provides qualified immunity for *taking down* UGC
 - Courts have read (c)(2)(A)'s “otherwise objectionable” and “good faith” requirements narrowly for FRCP 12(b)(6) purposes
 - But many of these suits fail due to TOS or no cause of action
 - And courts have read (c)(1) to protect takedown decisions, too (!)

Explicit § 230 exceptions

- § 230(e)(1): federal criminal law
- § 230(e)(2) (federal?) IP: copyright, trademark, ...
- § 230(e)(4): communications privacy law
- § 230(e)(5): FOSTA/SESTA sex trafficking laws

Judicially interpreted boundaries

- First-party content not “provided by *another*”
- Liability not based on treatment “as the *publisher or speaker*”
 - E.g., online marketplaces, e.g. Airbnb
- Liability on the provider’s contractual promises
 - In theory yes, but in practice no
- Algorithmic recommendations?
 - The Supreme Court ducked this issue in *Gonzalez v. Google*

The Internet's First Amendment?

- Harvard Law Review Note: Many of Section 230's protections would also be required under the First Amendment
- Eric Goldman: Section 230 protects platforms in many cases that the First Amendment doesn't, and it's a good thing that it does
- Blake Reid: Section 230 has prevented the development of First Amendment doctrine on the Internet by preempting liability
- James Grimmelman: Section 230 plays the same role as the First Amendment: it sets the boundaries of substantive law, and has to deal with all of the same controversies

Platforms and the First Amendment

General problem: public or private?

- Formal answer: platforms are privately owned and operated
 - Except when the government orders platforms to remove speech
 - Harder case: government jawboning
- *Marsh/Barron* tradition: some platforms are effectively public
 - So far, never successfully applied to Internet platforms
 - The ideology of this argument is rapidly flipping

Jawboning: *Murthy v. Missouri*

- District Court enjoins a wide range of conduct by a wide range of government officials to pressure platforms to remove speech
- Fifth Circuit narrows but retains the injunction
- Supreme Court grants certiorari and stays the injunction
- Question presented: “Whether the government’s challenged conduct transformed private social-media companies’ content-moderation decisions into state action and violated respondents’ First Amendment rights”

Government use of social media

- Numerous politicians and government agencies use social media
 - Can they moderate content and block critics and harassers?
- There are at least three issues here:
 - When is an account official rather than personal? (Pending at the Supreme Court in *O'Connor-Ratcliff v. Garnier* and *Lindke v. Freed*)
 - What kinds of content moderation, if any, are allowed?
 - Is there an affirmative obligation for the government to listen?

Must-carry laws

- Florida SB 7072 and Texas HB 20 prohibit many forms of content moderation by social media
 - The Fifth Circuit upholds HB 20 in *NetChoice v. Paxton*
 - The Eleventh Circuit strikes down SB 7072 in *NetChoice v. Moody*
 - Both cases are pending at the Supreme Court
- At the federal level, the FCC is reimposing network neutrality
 - Are ISPs and social media comparable or distinguishable?

State social-media restrictions

- Montana's ban on the use of TikTok struck down
- Texas's ban on the use of TikTok by state employees on state-owned devices and networks upheld
- Arkansas's age-verification law struck down
- Texas, Louisiana, and Utah's age-verification laws are in force for now
 - They are enforced by private plaintiffs, so there is no standing to bring pre-enforcement challenges against state officials

The End