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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

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

- Explicit exceptions for federal criminal law, IP, etc.

Who likes and dislikes Section 230?

- Pro: technology companies and scholars

  - Companies don't want to be sued

  - Scholars think that liability leads to overmoderation

- Con: scholars and activists on the left

  - They think Section 230 protects harmful attacks on the vulnerable

- Con: scholars and activists on the right

  - They think Section 230 subsidizes left-leaning Big Tech

A Cavalcade of Caselaw: First Amendment and Section 230

Murthy v. Missouri, 603 U.S. 43 (2024)

- District Court enjoins a wide range of conduct by a wide range of government officials to pressure platforms to remove posts

- Fifth Circuit narrows but retains the injunction

- Supreme Court reverses: the plaintiffs lack standing because they cannot prove their posts will be removed as result of *government* pressure, rather than the *platforms'* own decisions

Moody v. NetChoice, 603 U.S. 707 (2024)

- State laws require social-media platforms not to discriminate on the basis of viewpoint (TX) or remove posts by candidates (FL)

  - 5th Circuit: the Texas law is constitutional

  - 11th Circuit: the Florida law is unconstitutional

- *Held*, both decisions vacated because these were facial challenges

- But platforms' moderation decisions are generally covered by the First Amendment, so the Texas law is likely unconstitutional

Lindke v. Freed, 601 U.S. 187 (2024)

- Jason Freed is City Manager of Port Huron, MI

- Kevin Lindke posts critical comments on Freed's Facebook page

- Freed blocks Lindke; Lindke sues

- *Held*, a public official is enaged in state action only if (1) they have actual authoirty to speak on the state's behalf and (2) purported to exercise it when using social media

Gonzalez v. Google, 598 U.S. 617 (2023)

- The plaintiffs sue YouTube, arguing that videos racidalized the ISIS members who killed their relatives

    - Google defends by pointing to Section 230

- The Supreme Court takes the case to decide whether algorithmic recommendations are protected by Section 230

    - But it ducks the issue

Anderson v. TikTok, 116 F.4th 180 (3d Cir. 2024)

- 10-year-old Nylah Anderson watches TikTok videos on the "blackout challenge," which encourages self-asphyxiation

  - She fatally hangs herself attempting it

  - Her mother sues TikTok for products liability and negligence

- 3d Circuit: Because recommendation is First Amendment-protected expressive activity under *Moody*, recommendations are first-party speech under Section 230

- The case didn't reach the Supreme Court, but a case like it will have to

Twitter v. Taamneh, 598 U.S. 471 (2023)

- Another ISIS social-media case

- The Supreme Court grants certiorari as a companion case to *Gonzalez*, but this time on the platforms' substantive liability

  - Did they "aid[] and abet[], by knowingly providing substantial assistance" to ISIS?

- *Held*, no, the plaintiffs did not "allege that the platforms here do more than transmit information by billions of people"

  - (This is why the court was able to duck in *Gonzalez*)

Free Speech Coalition v. Paxton, 609 U.S. 461 (2025)

- Texas and other states enact age-verification laws that require pornographic sites to verify that users are over 18

- *Held*, states have a "traditional power to prevent minors from accessing speech that is obscene from their perspective."

- Adults have a right to access speech that is obscene for minors, but not a right to avoid age verification

- TBD: how does *Paxton* apply to laws that prevent minors from accessing social media sites, rather than pornographic ones?

TikTok v. Garland, 604 U.S. 56 (2025)

- The Protecting Americans from Foreign Adversary Controlled Applications Act required TikTok to be divested by January 19, 2025

  - If not, U.S. providers may not provide it with service

  - TikTok didn't divest, but instead sued under the First Amendment

- *Held*, PAFACAA is constitutional, because Congress was concerned about protecting Americans' data from China

- A year later (!) the administration says that divestment has happened

First Amendment Issues in Generative AI

Defamation by AI

- E.g., *Walters v. OpenAI*, where ChatGPT hallucinated the plaintiff's involvement in financial improprieties at a nonprofit foundation

- Do people believe what AI chatbots tell them?

- What standard (actual malice, negligence, etc.) should apply to AI companies whose chatbots emit defamatory outputs?

- Can AI companies raise Section 230 as a defense?

TAKE IT DOWN Act

- Makes it a federal crime to publish a "digital forgery," defined as an "intimate visual depiction of an identifiable individual" created with software, without that person's consent

- Platforms must have a notice-and-takedown system for nonconsensual intimate visual depictions by May 19, 2026

  - No private right of action; enforcement by FTC

  - Does this include digital forgeries???

A First Amendment Right to AI?

- Does the First Amendment prevent state regulation of generative AI?

- Are AI outputs "speech" protected by the First Amendment?

- Is training an AI model "speech"?

- If there is speech here, can privacy, defamation, copyright, or some other interest (e.g., fear of a robot apocalypse) justify the restriction?

- How much do the specifics of the regulation matter?

The End