

Choices and Consequences in Computing

INFO 1260 / CS 1340

Lecture 6 (First Amendment, Section 230)

February 2, 2024

Last time...

- Different theories of why free speech matters
- First Amendment “magnetism”

Today...

- What does the First Amendment actually protect?
- How does the First Amendment apply online?
- (if we have time) Are platforms liable for harmful things their users do?

What does the First Amendment actually protect?

(a quick and non-exhaustive tour)

Does the First Amendment mean that the government can under no circumstances restrict what you say?

- No!
- Even when speech is protected, governments can sometimes enact content-neutral restrictions on the “time, place, and manner” of speech – like requiring permits for protesting, soliciting
- Some kinds of speech are protected to a lesser degree
 - Commercial speech
 - Student speech in K-12 schools: schools can censor speech that creates “substantial disruption” to educational mission (Tinker v. Des Moines, 1979)
- Some kinds of speech are unprotected

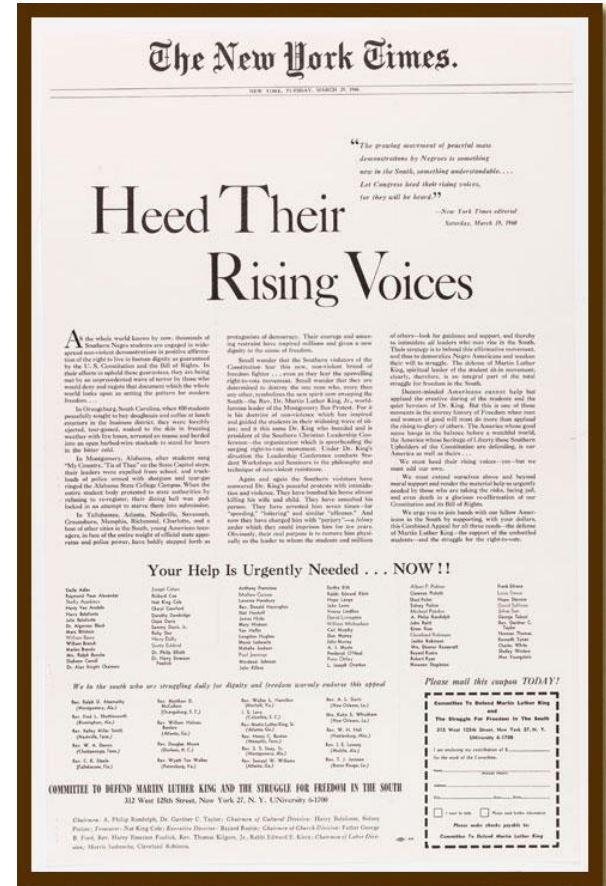
Not protected: incitement

- *Brandenburg v. Ohio* (1969): Speech is protected unless it is likely to provoke *imminent violent action*
- Courts will look at factors like: size of the audience, likelihood of harm, imminence and specificity of harm – includes who the speaker is, how people are likely to interpret the speech, the context and relationship between speaker and audience



Not protected: defamation

- False statements that harm somebody's reputation
- Different standards apply based on whether the person being defamed is a public or private figure, and whether the issue is of public or private concern
 - For public figures, must show statements were made maliciously; for private figures it's enough if they were made negligently
- New York Times v. Sullivan (1964): NYT ran ad with a few minor errors about Alabama police's actions against MLK; SCOTUS says that's not enough for defamation
 - "Erroneous statement is inevitable in free debate"—we want to avoid chilling discussion
 - Note that NYT was sued as the publisher, even though they didn't write the ad; the publisher could be just as liable as the speaker



Most hate speech is protected

- A large category of speech is “lawful, but awful”
- Language that is offensive, encourages hate, or asserts inferiority of a group is protected by the First Amendment unless it constitutes incitement to violence, “true threats,” or “fighting words”
 - A city cannot ban the wearing of Nazi uniforms in a parade (Collin v. Smith, 1978)
 - A state can ban cross-burning only with evidence that the cross-burning was done “with the intent to intimidate” (Virginia v. Black, 2003)
 - A state cannot bar a hate group from protesting at funerals in extremely offensive ways (Snyder v. Phelps, 2011) – but can pass time, place, and manner restrictions against it

Does the First Amendment mean that private companies can't restrain your speech?

● No!!!

- This is called the *state action doctrine*
- The First Amendment only prevents the government from restraining your speech
 - Not just Congress, but other branches/levels of government too (incorporation doctrine)
- (We will come back to this shortly)

Does freedom of speech mean you can say anything you want at any time without consequence?

- Of course not!
- Recall that the whole premise of the “marketplace of ideas” is that not every idea deserves to succeed. Consequences are, in a sense, the market working.
- Things that are not a violation of your First Amendment rights:
 - You being fired (except if your employer is the government and you are speaking in private capacity)
 - You being kicked off a social network
 - You being asked to leave a restaurant
 - You losing a record contract, endorsement deal, book contract, or advertiser
 - People not liking you

Along comes the internet!

Big changes in how speech works online:

- A lot more speech happening
- Reduced gatekeeping to production and dissemination of speech
- Different ways of finding listeners
- More persistence of speech (that thing you posted in 2015 is probably still visible somewhere)
- Attention scarcity, not information scarcity
- New questions about how platforms rank, promote, and display information, and who benefits

So how does the First Amendment apply online?

Platforms and the First Amendment

- Remember that platforms aren't constrained by the First Amendment! (state action doctrine)
- But the First Amendment still matters here because:
 - Platforms themselves have speech rights
 - Even the Constitution changes over time, and we may see movement on some aspects of these issues in the future (i.e. VERY SOON!)
 - The principles and jurisprudence of the First Amendment can be useful guides for companies making (little-p) policies
- Platforms are speech intermediaries: they facilitate others' speech, but are also speakers themselves with editorial privilege

Platforms' own speech rights: Zhang v. Baidu (2014)

- Baidu search engine is sued (in the U.S.) because it removes search results that are pro-democracy
- Plaintiffs are people who have written things about the democracy movement in China, and are upset that Baidu is blocking them
- Baidu: we are a speaker too, and it's our call whether to list your articles in our search results
- Court holds for Baidu:
 - Freedom of speech includes the freedom not to say certain things
 - “The central purpose of a search engine is to retrieve relevant information from the vast universe of data on the Internet and to organize it in a way that would be most helpful to the searcher. In doing so, search engines **inevitably make editorial judgments** about what information (or kinds of information) to include in the results and how and where to display that information (for example, on the first page of the search results or later).”
 - Remember: no neutrality!

Platforms' own speech rights: Zhang v. Baidu (2014)

Court:

“Search engine operators ... lack the physical power to silence anyone's voices, no matter what their alleged market shares may be. ... Baidu does not have the ability to block “pro-democracy” writings from appearing on the Internet in this country altogether; **it can only control whether it will help users find them.**

And if a user is dissatisfied with Baidu's search results, he or she has access, with just a click of the mouse, to Google, Microsoft's Bing, Yahoo! Search, and other general-purpose search engines, as well as to almost limitless other means of finding content on the Internet.”

What if it's not about censoring content altogether, but using other levers to demote, flag, demonetize, etc.? (“soft removal”)

Platforms' own speech rights: PragerU v. Google (2017)

- PragerU made very controversial videos: statements about terrorism, Islam, abortion, ...
- YouTube restricted access to some of PragerU's videos, flagged as inappropriate, demonetized some (3rd party advertisers can't advertise on the videos)
- PragerU: this violates our First Amendment rights
- Court: YouTube has the First Amendment right to do whatever it wants
- One of PragerU's (losing) arguments: YouTube is *basically* not a private company

Conservative Radio Host Dennis Prager
Complains 'the Left Has Made It Impossible to
Say the N-Word'

Prager U founder was satirized by TBS' Samantha Bee

[Lindsey Ellefson](#) | February 13, 2020 @ 4:20 PM

Last Updated: February 13, 2020 @ 4:21 PM



Does the state action doctrine make sense anymore??

- Platforms aren't government actors, but aren't they *basically* government actors?
- Funny paradox: online speech is less constrained, yet in some ways *more* dependent on private intermediaries than speech was before! Where are you going to speak if not on a private platform?
- Zuckerberg: "In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and ... we're really setting policies."
- Many people try to argue this! But still: no.
- Historical precedent: the company town.

Chickasaw Shipyard Village -->



Can private actors be government-ish enough that the First Amendment constraints their actions?

- Private actors can qualify as “state actors” if they wield power that usually only belongs to the state.
- Marsh v. Alabama (1946): in a privately owned company town, where the company was taking on all government functions, the company could not ban someone from distributing religious literature on the sidewalk – because there was no alternative means of communication.
- BUT courts have not taken a similar view with respect to platforms!
 - PragerU court: “YouTube may be a paradigmatic public square on the Internet, but it is not transformed into a state actor solely by providing a forum for speech.”
 - Even if YouTube is ubiquitous!

Very exciting developments about the First Amendment and platforms!

Is it state action when local government officials block residents from their social media pages? (O'Connor-Ratcliff v. Garnier, and Lindke v. Freed; argued in October)

Is it state action when government officials informally influence platforms' editorial discretion? (Murthy v. Missouri; will be argued March 18)



DEEP DIVE

Missouri v. Biden: An Opportunity to Clarify Messy First Amendment Doctrine

On the legality of "jawboning," more clarity is needed.

BY JENNIFER JONES & MAYZE TEITLER
SEPTEMBER 27, 2023

Very exciting developments about the First Amendment and platforms!

NetChoice cases:

- Florida and Texas pass state laws regulating platforms' content moderation in various ways (including preventing moderation based on users' viewpoints), requiring them to post info about content moderation activities
- A circuit split: 11th Cir. struck down parts of FL law as violating platforms' First Amendment rights; 5th Cir. upheld TX law
- Both of these rely heavily on analogy

Very good explainer:

<https://epic.org/documents/netchoice-v-paxton-moody-v-netchoice/>

Oral argument Feb. 26!

Supreme Court to Hear Challenges to State Laws on Social Media

The tech industry argues that laws in Florida and Texas, prompted by conservative complaints about censorship by tech platforms, violate the First Amendment.



Share free access



46



The court's decision to hear the cases was unsurprising. Both sides in both cases had urged the justices to do so, citing a clear conflict between two federal appeals courts. Kenny Holston/The New York Times

So (currently) does the First Amendment have any effect on what platforms do?

- Yes: it shapes their philosophies, little-p policies, and norms
- Klonick: most of the people setting early content moderation policy online were First Amendment lawyers; “platforms’ baseline in free speech”
- Early internet normative commitments tended toward libertarianism, market-based solutions

So: platforms can do pretty much whatever they want with respect to limiting users' speech.

What responsibilities do platforms have when it comes to illegal things users say or do on the platform?

For this we look to Section 230!

Remember the 1990s?

- The web exists; early days of search engines. Social networks as we know them now don't yet exist. People more commonly getting internet in their homes.
- Early online services like CompuServe, AOL, Prodigy – proto-social networks that included content recommendations, search, bulletin boards, etc.



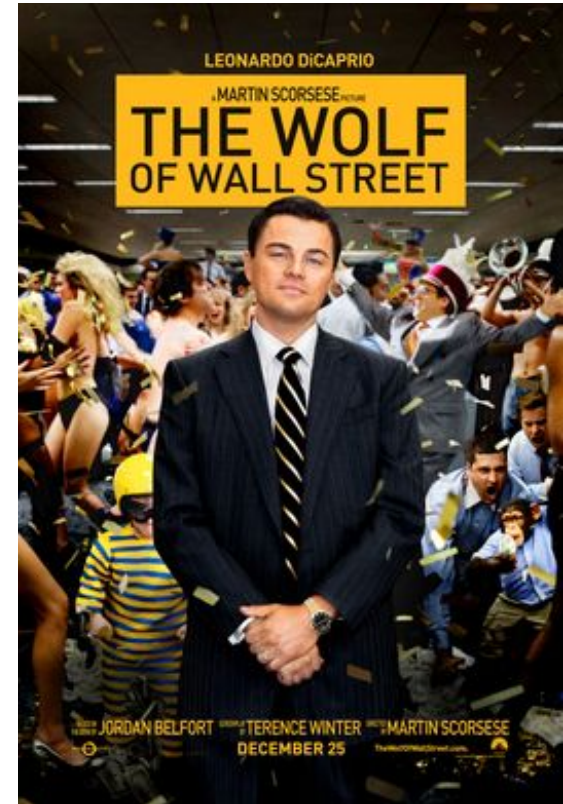
People start defaming each other on the early internet...

- Cubby v. CompuServe (1991):
CompuServe provides a newsletter called Rumorville; it alleges that Cubby's new startup (a competitor rumor site) is a "scam" and that its founder was fired from a previous job
- CompuServe didn't have stated rules or moderate content
- Is CompuServe liable for defamation (assuming the content is defamation)?
- Court: no. CompuServe is like a newsstand; it's just distributing information and can't be expected to censor content



People start defaming each other on the early internet...

- Stratton Oakmont v. Prodigy (1995): a user posts on a financial bulletin board that Stratton Oakmont committed financial fraud
- Prodigy does have community rules and moderate user content
- Is Prodigy liable for defamation (assuming the content is defamation)?
- Court: yes. Prodigy is like a newspaper; it is treated as a “publisher” because of its “own policies, technology, and staffing decisions ... to gain the benefits of editorial control.” (remember NYT v. Sullivan)



This doesn't seem ideal!

CompuServe:

No moderation

Treated like a newsstand

Less liability

Prodigy:

Moderation

Treated like a newspaper

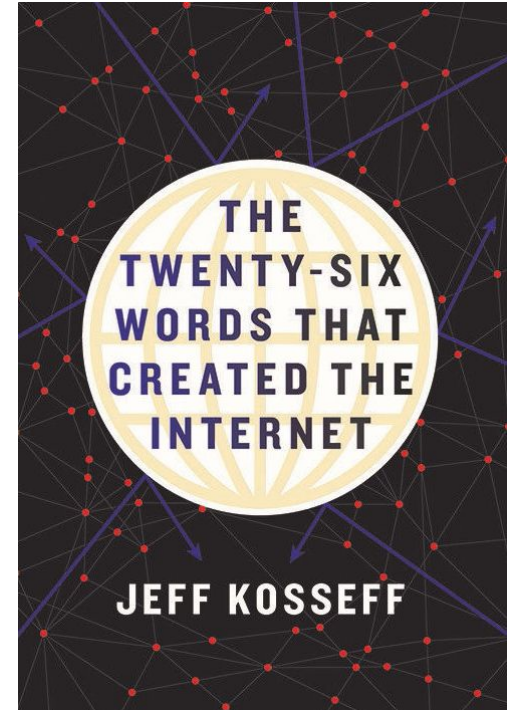
More liability

Clearly this incentivizes platforms not trying to moderate! Not great for the growth of the internet, especially as schools/families begin to try to make use of it as a resource.

So Congress steps in to clear this up: Section 230 of the Communications Decency Act of 1996.

Section 230: the 26 words that created the internet

- “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.” (the “**shield**” provision)
- “No provider or user of an interactive computer service shall be held liable on account of ... 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.” (the “**sword**” provision)
- In other words: platforms can moderate if they want to, and doing so doesn't take away their protection against liability!



Why 230?

- To promote innovation and the growth of the internet
- To encourage platforms to moderate content! (a “good Samaritan” law)
- Some narrow exceptions to 230:
 - Federal criminal law, intellectual property law, electronic communications privacy law
 - 2018 amendment (FOSTA-SESTA): exception for material that promotes sex trafficking
 - Many deride this as making sex work much more dangerous because it drives it offline

As a result...

[note: harassment, sexual violence]

As a result...

- Dating platform not liable for defamation when a user made a fake, offensive profile about an actress from Star Trek: Deep Space Nine, including home address; platform would not remove (Carafano v. MetroSplash)
- eBay not liable for sales of forged autographs (Gentry v. eBay)
- Yelp not liable for false and malicious user reviews (Hassell v. Bird)
- Facebook not liable for algorithmically promoting content from a terrorist organization (Force v. Facebook)
- Grindr not liable when a person used it to impersonate his ex, describing rape fantasies; sent 1000+ men to his house to demand sex. Grindr would not remove even though the victim asked them to 100 times (Herrick v. Grindr)
 - Grindr's lawyer: "a neutral system ... open to good users and to bad users"
 - Grindr was really the only party that could stop this

Additional possible drivers of change to 230

- Some dislike from both right and left
- Reasons:
 - Perception of political bias
 - Perception that innovation rationale no longer holds
 - Concern about tech companies' power to control speech
 - Proliferation of ugly speech online
 - Though note much of this is “lawful, but awful” so 230 doesn’t necessarily affect it anyway

Social media liability law is likely to be reviewed under Biden

Section 230 has become a favorite target of President Trump. Democrats have their own gripes about it.

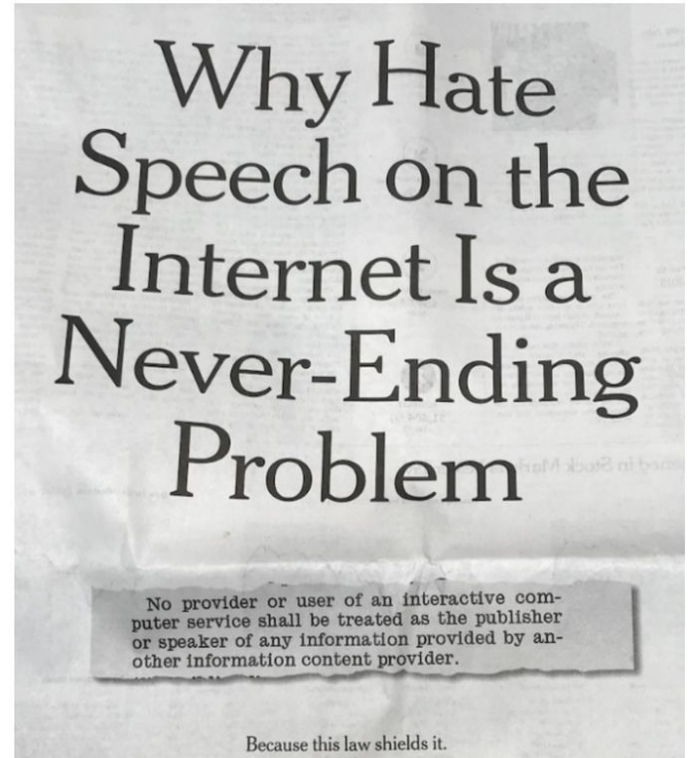


REPEAL SECTION 230!!!

12:08 PM · Oct 6, 2020 · Twitter for iPhone

2.3K Retweets 228 Quote Tweets 7.3K Likes

230 remains widely misunderstood

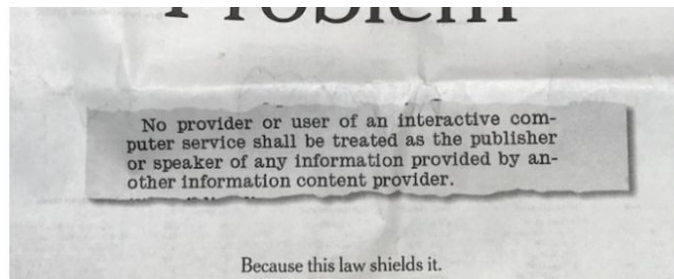


230 remains widely misunderstood



Correction: Aug. 6, 2019

An earlier version of this article incorrectly described the law that protects hate speech on the internet. The First Amendment, not Section 230 of the Communications Decency Act, protects it.



What would the internet look like without (the current version of) 230?

- It depends what replaces it!
- If no protection against liability: how could platforms deal with the flood of user content?
- Some argue that we could make 230 protection contingent on reasonable content moderation policies (oversight, reporting procedures, labor protections for moderators, etc.)
- Next week we'll talk more about what platforms actually do to moderate "bad behavior" by users