

## Free Speech in a Social Media World

### A talk with Nadine Strossen

- The way we communicate and express ideas are increasingly through social media and other online publishing platforms. Social media companies have come under scrutiny for the type of content they allow to be published and promoted on their sites. With the seeming rise in online hate speech and cyberbullying, to what extent can and should private companies censor content?
- First Amendment free speech
  - First Amendment in part:
    - *Congress shall make no law... abridging the freedom of speech.*<sup>1</sup>
  - The sphere of constitutionally unprotected speech is small. Includes incitement, true threats, fighting words, obscenity, and defamation.
  - The First Amendment applies to state actors. It does not restrict private actors from regulating speech on their channels. Social media companies like Facebook and Twitter are free to allow any and all types of speech or to apply content-based censorship if they so choose.
- Social media has become so important as the modern-day marketplace of ideas that government may not restrict access entirely.
  - *Packingham v. North Carolina*<sup>2</sup>
    - North Carolina enacted a law making it a felony for a registered sex offender to access any social media platform on which a minor might also be a user or member. N. C. Gen. Stat. Ann. §§14–202.5(a), (e). Petitioner was convicted for violating the law after posting on Facebook about getting a traffic ticket dismissed.
    - The Supreme Court held the statute violated the First Amendment, finding the statute overbroad in blocking social media access entirely even for legitimate speech purposes.
- Social media companies are not liable for moderating third party content.
  - Section 230 of the Communications Decency Act:
    - (c)(1) No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.
    - Safe harbor provision: (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,

<sup>1</sup> First Amendment: [https://www.senate.gov/civics/constitution\\_item/constitution.htm - amdt\\_1\\_\(1791\)](https://www.senate.gov/civics/constitution_item/constitution.htm - amdt_1_(1791))

<sup>2</sup> 47 U.S.C. § 230: [https://www.supremecourt.gov/opinions/16pdf/15-1194\\_0811.pdf](https://www.supremecourt.gov/opinions/16pdf/15-1194_0811.pdf)

- lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”
- Congress recognized the value that ISPs provided in creating a forum for diverse political discourse. Purpose of Section 230 was to give ISPs the freedom to moderate as little or vigorously as they want to allow them to develop and innovate.
  - Social media companies regularly censor content they deem violates their terms of service or “community standards.”
    - Social media companies block content that constitute illegal speech, like harassment, threats, inciting violence, or terrorism. They also censor other types of speech that are constitutionally protected, like adult nudity, images showing violence, and racist speech.
    - Whether or not particular content violates the company’s term of use may be entirely subjective.
      - For example, the following social media companies define hate speech as:
        - Facebook
          - “Hate speech” defined as “direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability.” An “attack” is “violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation.”<sup>3</sup>
        - Twitter
          - “Hateful conduct” is not permitted. Conduct not permitted: “promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.”<sup>4</sup>
        - YouTube
          - “Hateful content” is “content that promotes or condones violence against individuals or groups based on race or ethnic origin, religion, disability, gender, age, nationality, veteran status, or sexual orientation/gender identity, or whose primary purpose is inciting hatred on the basis of these core characteristics. This can be a delicate

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<sup>3</sup> Facebook Community Standards: <https://www.facebook.com/communitystandards/>

<sup>4</sup> Twitter Rules: <https://help.twitter.com/en/rules-and-policies/twitter-rules>

balancing act, but if the primary purpose is to attack a protected group, the content crosses the line.”<sup>5</sup>

- Content is generally regulated by a small group of moderators and algorithms, using subjective standards. Moderators are given sets of rules to help determine whether particular content violates their standards. Most companies have an appeals process; the details of the process among companies differ. The specific sets of rules of content moderation and appeals process is not publicly shared.
- Social media companies have been criticized for not doing enough to restrict harmful content and, at the same time, for taking down too much legitimate speech.
- Policy considerations
  - What happens when social media companies dictate standards for online speech and deny its sites to certain users
    - Relegate certain groups to deep corners of the web or drive them to create their own social media sites that become an echo chamber of hateful speech.
  - Should social media companies bow to market pressures to censor “hate speech”? Should social media companies be the authority on what kind of speech is acceptable online?
  - Reality is that increased online “hate speech” is having real world consequences. If not censorship by social media companies, then what else?

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<sup>5</sup> YouTube Community Guidelines: [https://www.youtube.com/about/policies/ - community-guidelines](https://www.youtube.com/about/policies/-community-guidelines)