

Inquiring Minds, August 6, 2021

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First Amendment- Free Speech (and social media)

Discussion Questions

- 1. What should the criteria be for kicking someone or an organization off a social media platform?**
- 2. What should be done (if anything) to have the government more involved in regulating free speech on social media?**
- 3. How effective are oversight boards on regulating free speech on social media platforms?**
- 4. Should Section 230 of the Communications Decency Act (“CDA”), which prohibits the application of on-line intermediary laws that would hold social media companies responsible for what others say or do on their platforms (you tube, Facebook, Twitter, etc) be amended or changed to remove the social media exemption?**
- 5. How do/should State vs National laws interact in the free speech arena such as the new Florida laws concerning social media companies?**
- 6. Should social media companies be broken up or should there be new laws concerning how they should handle free speech on their platforms?**

Among other cherished values, the First Amendment protects freedom of speech. The U.S. Supreme Court often has struggled to determine what exactly constitutes protected speech. The following are examples of speech, both direct (words) and symbolic (actions), that the Court has decided are either entitled to First Amendment protections, or not.

The First Amendment states, in relevant part, that:

“Congress shall make no law...abridging freedom of speech.”

Freedom of speech includes the right:

- Not to speak (specifically, the right not to salute the flag).
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

- Of students to wear black armbands to school to protest a war (“Students do not shed their constitutional rights at the schoolhouse gate.”).
Tinker v. Des Moines, 393 U.S. 503 (1969).
- To use certain offensive words and phrases to convey political messages.
Cohen v. California, 403 U.S. 15 (1971).
- To contribute money (under certain circumstances) to political campaigns.
Buckley v. Valeo, 424 U.S. 1 (1976).
- To advertise commercial products and professional services (with some restrictions).
Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
- To engage in symbolic speech, (e.g., burning the flag in protest).
Texas v. Johnson, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

Freedom of speech does NOT include the right:

- To incite actions that would harm others (e.g., “[Shouting] ‘fire’ in a crowded theater.”).
Schenck v. United States, 249 U.S. 47 (1919).
- To make or distribute obscene materials.
Roth v. United States, 354 U.S. 476 (1957).
- To burn draft cards as an anti-war protest.
United States v. O’Brien, 391 U.S. 367 (1968).
- To permit students to print articles in a school newspaper over the objections of the school administration.
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
- Of students to make an obscene speech at a school-sponsored event.
Bethel School District #43 v. Fraser, 478 U.S. 675 (1986).
- Of students to advocate illegal drug use at a school-sponsored event.
Morse v. Frederick, __ U.S. __ (2007).

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Lawsuits alleging free speech violations against social media companies are routinely dismissed. The primary grounds for these dismissals are that social media companies are not state actors and their platforms are not public forums, and therefore they are not subject to the free speech protections of the First Amendment. Consequently, those who post on social media platforms do not have the right to free speech on these social media platforms. This article will attempt to explain the relationship between social media and free speech so that we can understand why.

Who Can Restrict Free Speech - State v. Private Actors

The overarching principle of free speech under the First Amendment is that its reach is limited to protections against restrictions on speech made by the government.¹ The text of the First Amendment itself only prevents Congress (i.e., U.S. Congress) from making laws that restrict the freedom of speech. This protection is extended to the states, and to local governments, through the State Action Doctrine and the Due Process Clause of the Fourteenth Amendment.² **However, under the State Action Doctrine, First Amendment restrictions traditionally do not extend to private parties, such as individuals or private companies.³ In other words, a private person or private company (such as a social media company) cannot violate your constitutional free speech rights, only the government can do so.**

Where Can Speech Be Restricted - Public v. Private Forums

When speech takes place in a public forum, that speech can qualify for protection of speech under the First Amendment.¹⁰ This is known as the Public Forum Doctrine. While there is no constitutional right for a person to express their views in a private facility (such as a shopping center),¹¹ speech that takes place in a traditional or designated public forum for expressive activity (such as a sidewalk or park on government property) is protected and only limited restrictions of speech are allowed.¹² A designated public forum can only be created when the government intentionally opens a nontraditional forum for public discourse.¹³ A private forum (such as a grocery store or comedy club), however, does not perform a public function by merely inviting public discourse on its property.¹⁴

Social media platforms are often characterized as a digital public square. Yet, courts have repeatedly refused arguments that social media platforms are public forums subject to the First Amendment.¹⁵ This reasoning is justified because their networks are private, and merely hosting speech by others does not convert a private platform to a public forum.¹⁶ Only in limited cases have social media sites been found by courts to qualify as a public forum. For example, in a recent case, an appellate court held that the official Twitter page operated by then President Donald Trump was a designated public forum. As a result, government officials could not engage in viewpoint discrimination by blocking individuals from posting comments with critical views of the President and his policies.¹⁷ In contrast, a private person or organization's social media page is not a public forum and is not protected by the First Amendment.

Social Media's Immunity for User Content - 47 U.S.C. § 230(c)

Section 230 of the Communications Decency Act ("CDA"), codified as 47 U.S.C. § 230, was enacted in response to a court decision ruling that an internet service provider, Prodigy, was considered a "publisher" of defamatory statements that a third party had posted on a bulletin board hosted and moderated by Prodigy, and Prodigy could therefore be subject to a civil lawsuit for libel.¹⁹ Sec. 230(c)(1) remedies this by providing immunity to internet service providers from lawsuits that attempt to make them liable for the user content posted on their sites.²⁰ **Social media companies, which are currently**

considered to be service providers under Sec. 230(c)(1), are broadly protected from responsibility for what users say while using their social media platforms.²¹

The next question that logically follows is whether a social media company can restrict or exercise editorial control over content on its platform. Sec. 230(c)(2) of the CDA answers this, by precluding liability for decisions to remove or restrict access to content that the provider deem “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”²² **Social media platforms therefore set their policies and Terms and Conditions to state that they can remove violent, obscene, or offensive content and can ban users who post or promote such content.** For example, Facebook, Twitter, and YouTube have banned terrorist groups that post material promoting violence or violent extremism, and have also banned ISIS, Al Qaeda, and Hezbollah solely because of their status as U.S.-designated foreign terrorist organizations. As was recently seen following the 2020 Presidential election, Facebook, Twitter, Snapchat, YouTube (Google), Reddit, and Twitch (Amazon) also justified their suspension of the accounts of President Trump and some of his supporters under Sec. 230(c)(2) for continuing to post misinformation, hate speech, and inflammatory content about the election.

Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech On
May 24, 2021, in *News Releases*, by Staff
Under SB 7072:

- **All Floridians treated unfairly by Big Tech platforms will have the right to sue companies that violate this law – and win monetary damages.** This reform safeguards the rights of every Floridian by requiring social media companies to be transparent about their content moderation practices and give users proper notice of changes to those policies, which prevents Big Tech bureaucrats from “moving the goalposts” to silence viewpoints they don’t like.
- The Attorney General of Florida can bring action against technology companies that violate this law, under **Florida’s Unfair and Deceptive Trade Practices Act**. If social media platforms are found to have violated antitrust law, they will be restricted from contracting with any public entity. That “antitrust violator” blacklist imposes real consequences for Big Tech oligopolies’ bottom line.
- **Big Tech is prohibited from de-platforming Floridian political candidates.** The Florida Election Commission will impose fines of \$250,000 per day on any social media company that de-platforms any candidate for statewide office, and \$25,000 per day for de-platforming candidates for non-statewide offices. Any Floridian can block any candidate they don’t want to hear from, and that is a right that belongs to each citizen – it’s not for Big Tech companies to decide.

The U.S. Supreme Court on June 23, 2021 ruled 8-1 in favor of a Pennsylvania teenager who sued after a profanity-laced social media post got her banished from her high school's cheerleading squad in a closely watched free speech case, but it declined to outright bar public schools from regulating off-campus speech..

Some of the Twitter accounts permanently or temporarily suspended in 2021:

QAnon accounts, Donald Trump, Marjorie Taylor Greene, Chinese Embassy in US, Roughly two dozen Russia- and Iran-affiliated troll accounts, Ken Glueck, Executive VP of Oracle, Yevgeny Prigozin, Russian businessman, Fake accounts posing as “Amazon Fulfillment Center” workers to spread pro-Amazon and anti-union messages, Muhammadu Buhari, President of Nigeria.