

The First Amendment & Section 230: Protecting Free Speech on the Internet

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tl;dr

The First Amendment and Section 230 immunity work together to protect free speech on the Internet. Attempts at Section 230 reform based on how online platforms use their editorial discretion will run into Constitutional limitations.

The Debate:

Complaints of anti-conservative bias by major online platforms have led to proposals to modify Section 230 immunity in ways that target the manner in which platforms moderate user-generated content. Proponents contend that absent some sort of liability these dominant digital “gatekeepers” of news and social opinion will skew their content-moderation practices to reflect their own political preferences, dishonestly labeling conservative views as offensive or otherwise in violation of the platform’s terms of use.

But... online platforms have a First Amendment right to adopt whatever content standards they choose. With very few exceptions the government may not mandate speech. But a law requiring online platforms to adopt a particular set of content moderation practices – say, to maintain a “balance” of political views – would do just

that. Conditioning Section 230 immunity on online platforms giving up their right to editorial discretion would be unlikely to survive the strict standard of review to which such government regulation of speech would be subjected by the courts.

KEY TAKEAWAYS

THE FIRST AMENDMENT PROTECTS ONLINE PLATFORMS’ RIGHT TO EDITORIAL DISCRETION

Much like newspapers before them, online platforms have a right to editorial discretion that has been recognized by many district courts. In *Miami Herald v. Tornillo*, the Supreme Court ruled that even where newspapers have market power and the ability to write editorials which were “unfair” to a candidate or an issue, the government cannot interfere with the right to editorial discretion by compelling newspapers to publish replies. Online platforms have the same right to editorial discretion in moderating content on news feeds, search results, and timelines.

GOVERNMENT ACTION MANDATING SPEECH WOULD BE SUBJECT TO STRICT SCRUTINY

Complaints about anti-conservative bias by online platforms are premised on the idea

that these platforms should not exercise editorial discretion in certain ways. But under *Tornillo*, mandating speech on online platforms is subject to strict scrutiny.

CONDITIONING SECTION 230 IMMUNITY ON GIVING UP EDITORIAL DISCRETION WOULD ALSO BE SUBJECT TO STRICT SCRUTINY

Similarly, in *Rumsfeld v. FAIR*, the Supreme Court laid out the test for whether a condition on editorial discretion could pass constitutional muster. In that case, since the Constitution gave Congress the power to “raise and support armies,” and Congress could directly impose a requirement that schools allow equal access by military recruiters to law students, it could also do so through funding conditions. However, since Congress can’t directly regulate bias on online platforms, they can’t condition Section 230 immunity on those companies giving up editorial discretion.

ATTEMPTS TO TAKE AWAY EDITORIAL DISCRETION OF ONLINE PLATFORMS WOULD FAIL STRICT SCRUTINY

Strict scrutiny requires the government to prove a challenged action is narrowly tailored to a compelling interest. Even accepting for the sake of argument that ensuring diversity of opinion is a compelling government interest, many proposed changes to Section 230 are not narrowly tailored. Diversity of opinion is abundant on even the online platforms being decried as biased. A rule mandating neutral carriage of political messages or conditioning Section 230 immunity on the same is unnecessary in a competitive marketplace for online speech platforms, where one can go to a different platform with one swipe or click.

For a fuller explanation of these and related issues, see Ben Sperry’s op-ed in *The Hill*, “[Trump's executive order targeting protections for social media platforms should be resisted](#),” and his blog post on *Truth on the Market*: “[Senator Hawley's Unconstitutional, Unconservative Attack on the Internet](#).”

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