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## **Feigning Freedom: Social Media Companies and the Mirage of Free Speech**

*Prompt: How does the right to freedom of speech apply to social media and to what extent do media companies have the right to restrict certain dialogues on their platforms? How do monopoly power, AI, and corporate responsibility complicate this power??*

The notion that free speech is crucial for a sustained and flourishing democracy that progresses with new ideas gives it credence for societal tolerance of disagreements. This gives rise to the myth that the First Amendment protects the entirety of content in the speech of individuals, that people can capriciously express and the Constitutional statute protects their freedom to convey regardless of the unpopularity or unsavoriness of the content [1]. This myth of freedom of every and whatever expression - verbal or written - presupposes a right for Americans to express any and all thoughts, whether or not the thoughts are in alignment with their actual beliefs or within the norms of the masses' acceptance. In fact, the First Amendment does not directly protect the content of all expressions. Rather, it stipulates that Congress shall not enact laws that reduce the freedom of speech, with the *Gitlow v. New York* case in 1925 extending it to states [2]. The boundary conditions of free speech, then, have been shaped, deliberated, and decided by Congress and the courts for years.

Freedom of *any and all* speech is not, in fact, an irrevocable right. Our governments at different levels have been clarifying the confines of protected expressions. Congress has made law after law that narrows or expands the criteria for what qualifies as free speech. For example, the Sedition Act of 1918, an amendment to the Espionage Act of 1917, forbade all negative

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speech acts surrounding the American government, its flag, and its military. The Supreme Court upheld its constitutionality in *Abrams v. the U.S.* [3]. Furthermore, false advertising was ruled unconstitutional by the United States District Court, C.D. in *Spann v. JCPenney Corporation* [4], making lies about the ingredients of a food product an unprotected expression under the First Amendment. *Chaplinsky v. New Hampshire* set the precedent that “fighting words,” or personally abusive words which may elicit a violent reaction from others, were not covered by freedom of speech. There are legal interpretations for online activity as well. *Packingham v. North Carolina* stipulated that restricting sex offenders’ access to social media sites violates their right to free speech [5]. *Elonis v. U.S.* added that threats online are protected under the First Amendment unless they are proven to have legitimate concerns to safety [6]. However, the boundary conditions of the content of free speech become ambiguous in the novel context of social media platforms.

By virtue of social media’s ease of use, amplification power, and the default process of “disseminate first, moderate later,” freedom of speech as applied to social media posts comes close to the myth of “any and all content is fair game.” The boundary conditions as interpreted by the government and courts become moot as a massive volume of social media content is allowed to be posted and disseminated by users as they see fit. The First Amendment stipulates that the government cannot make laws to restrict freedom of speech [7]. However, this requirement does not extend to private companies. While it is unconstitutional for our government to take down a Twitter post or TikTok video, for example, Twitter and Tiktok as private companies are able to restrict posts and ban accounts. Social media companies, as private entities, become the sole arbiters of propriety of content, thus becoming the enforcers and decision-makers of free speech online. Social media companies hire employees whose sole job is

to remove what the companies - not laws - deem inappropriate content from the platforms [8]. Social media companies typically remove posts and ban accounts they find to be racist, sexist, and discriminatory, but the criteria and timing for removal remain elusive and arbitrary. In 2014, ISIS uploaded a video of the beheading of American journalist James Foley on Youtube, which was viewed by millions and duplicated many times before it was taken off the platform [9]. Youtube reported in a recent quarter of three months' time that it removed five million videos from the platform [10]. There is no validation of whether the content is legitimately discriminatory or inappropriate, or if the media companies simply decided to keep the content away from the eyes of their consumers based on arbitrary criteria.

The idea of freedom of speech online starts to feel manufactured with the realization that much of the content they consume has been predetermined, and the content spurs production of new content that is often related to the consumed information, creating the semblance of an echo chamber. Not only do social media companies separately control their own platform's content moderation rules and criteria, they determine the "free speech" shown to users. All social media platforms use proprietary algorithms to curate and customize content for each user to view and respond [11]. The idea of freedom of speech must be taken with a grain of salt when much content that people see, hear, read and respond to resides within the narrow box of their own manufactured narratives.

At the beginning of the meteoric rise of the internet age, Congress enacted the Communications Decency Act of 1996 which encompassed section 230, and gave social media platforms immunity from liability for content generated by their users and specified that social media platforms are not treated as publishers of users' content [12]. It protected and accelerated the exponential growth of social media companies, allowing a proliferation of content produced

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by individuals to be disseminated through the amplifying power of the internet. The ongoing Supreme Court *Gonzalez v. Google* case puts Section 230 under a microscope as it relates to terrorism-related content posted online [13]. In 2015, Reynaldo Gonzalez's daughter, Nohemi, an American exchange student at the time, died in a terrorist attack in France. Gonzalez sued Google, YouTube, Twitter, and Facebook for allowing ISIS an account on their platforms, claiming that the platforms helped fuel international terrorism that led to Nohemi's death [14]. A similar pending case of *Twitter v. Taamneh* before the Supreme Court may also determine the liability of social media companies for terrorism-related content posted on their platforms [15]. These two cases, despite their focus on terrorism content, allow the Court to decide the extent that social media companies are legally responsible for user-generated content.

The Court should not. One concern with the Justices siding with Gonzalez in the case is that the floodgates for lawsuits open for all social media companies, whether or not the content deemed inappropriate is related to terrorism. However, a more important lens goes back to the fundamental tenet that a collection of new ideas and disagreements that come from free speech lead to societal progress, and that it is imperative for the users of online platforms to have agency over their voice free of censorship in order to challenge the status quo and build tolerance of dissenting views. The courts should not be the ultimate deciding parties to put a credo on limiting an individual's freedom of speech. The boundaries of Section 230 should be decided by state or federal legislators.

As such, lower courts have overreached their power to legislate the law on censoring freedom of speech. The state of Texas argues that picking and choosing the content violates the ideal of free speech in the recent case *Netchoice v. Paxton* [16]. The Texas state government passed legislation prohibiting the removal or censorship of content for all social media

companies that had fifty million users or more. However, the Fifth Circuit ruled that Texas's law violated the First Amendment, as the interpretation of the Constitution prohibits government interception of social media content. Further, federal courts have sided with media companies, agreeing that they could censor some content to improve the viewer experience. The regulation of the voice of the people ought to be decided by legislators elected by the people, not by justices appointed to the court.

The tremendous growth of users ballooned the social media companies to their behemoth sizes. The majority of these juggernaut social media companies are owned by a few conglomerates, creating monopolies. The top 4 social media platforms, with a combined 9.1 billion monthly active users, are owned by only two companies, Meta and Google [17]. Meta, for example, owns Facebook, Instagram, Messenger, and Whatsapp [18]. Facebook alone attracts 2.9 billion monthly average users [19]. Considering that most major social media companies are owned by these conglomerates and the extent to which social media platforms control and censor content based on their own proprietary and arbitrary criteria, the semblance of "free speech" that can forward societal progress suddenly becomes highly blurred. Instagram and Facebook may seem like different companies, but both are owned by the parent company Meta, and controlled by the same top management team [20]. When the First Amendment allows for monopolies to dictate their own content moderation rules, freedom of speech becomes playdough for billionaires.

The right to free speech is characterized as a human right. Artificial intelligence is the polar opposite of humans, mimicking human thought without human cognition [21]. It aggregates a mish-mash of publicly available data generated by algorithms, determined by tech companies, that can include violations of the First Amendment [22]. Algorithms have seeped

into social media, and portray human thought to spread disinformation and false events [23]. Twitter bots were used by cybercriminals and government actors alike to generate fake accounts on social media and amplified racial propaganda by retweeting deep fake images [24]. With AI still a fledgling field and the tech companies' algorithms being contested in courts, the extent of social media companies' liability for AI generated content will continue to be shaped and reshaped. Another question, still, is the ownership of content generated from publicly available data aggregated using code. The public relies on social media companies' code of corporate responsibility to govern appropriateness of AI generated content, policing according to their uncodified ethics. This creates the mirage of human agency, making individuals increasingly susceptible to believing the information spread on the platforms. Free speech is not free speech as we know it anymore. AI changes the definition of free speech, from a human expression of opinions to a machine regurgitating data fed by cybercriminals or malicious actors.

However, despite social media's disadvantages and our intolerance for some dissent, social media platforms are resources that lift and amplify our voices. Rather than relying on monopoly powers and courts to determine the boundaries of free speech, careful legislation should be the tool to balance effective challenges to the status quo and social harm. The progress of our society is predicated upon uncensored dialogues because there is merit in empowering everyday users to amplify their freedom of speech to make, change, and build on the ideals of a flourishing democracy.

## Notes

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