

A Brief Discourse of Laws Regarding the First Amendment and the Internet

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Author Note

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Introduction

A talented group of students in room #3420 of Boelter Hall on the south campus of UCLA decided to see if they could send a message from one computer to another across campus. With some trial and error, they finally succeeded. Although, it's not really impressive¹ because a machine-to-machine message relay is a relatively simple achievement, as there is no other traffic to get in the way or deal with. The date was October 29, 1969, and the real accomplishment came next—a messaging (or networking) system for more than three end users. The system of packet messaging they created would evolve and grow until all the departments were networked. The next logical step was to connect UCLA's computer network to another university for testing and quicker communication.^{2 3}

This model would continue to expand until every major university in the United States had at least one primary connection, forming what would be called the *U.S. Advanced Research Projects Agency Network* (ARPANET). As the number of connections increased, it became clear that they needed quicker connection speeds than ARPANET's original 2.4 kilobits per second (kbps) transfer speeds. By the 1980s, they would reach 50 kbps.⁴ The days of a simple *testing*

¹ Not to say it wasn't a big deal. But in comparison to what they would ultimately achieve, it seems almost pedestrian.

² Thus far, it's probably the first universally “cool” thing invented by a computer engineer that didn't immediately segregate non-engineers once they realized they didn't understand any of it.

³ To fact check this general knowledge anecdote, see:
https://ethw.org/Milestones:Birthplace_of_the_Internet,_1969

⁴ A point of reference: 56 kbps is the fastest that data can travel over a phone line. Cable lines and fiber optic lines are much quicker in comparison. A fun fact, the average dialup modem speed in the 1980s was rated at 14.4 baud or 0.14 kbps. Even with a 33.6 baud or a 56k dialup modem, it was pretty rare for anyone to actually achieve half of any of these speeds for more than 2 second spurts every 8 minutes. It should be noted that all information in this footnote is basic general knowledge, but not everyone may agree with that assessment. The author spends too much time around technology.

network were over. It had served its purpose, and ARPANET would be retired in 1989. They replaced it a couple of years later with the Internet and the World Wide Web—although it looked little like today.

This paper intends to [very] briefly skim the primary and important legislature and executive orders surrounding the First Amendment and the Internet, separately and together. These topics (and their respective structures) should be of the utmost importance to every citizen throughout every aspect of their daily life—and just as importantly, keeping these topics in their current states of freedom. They represent not just the country, but with the social media supplement; they can represent every person with computer access.⁵ Furthermore, when combined, these topics become entangled with even more criticality. Freedom of expression is very much venerated by the Internet, and in turn, the Internet is very much a symbol of the U.S.'s unparalleled freedom of expression.⁶ Which coincidentally transitions very neatly to this paper's thesis. Section 230 of the Communications Decency Act is the most important legislation protecting the Internet and our freedom of expression—specifically from organizations like the Federal Communications Commission (FCC) or any other government entity wanting to regulate it.⁷ However, the First Amendment needs to be addressed before that can be discussed.

⁵ And usually, the terrible motivation that it should be used to communicate all the rest of their false and horrible ideas and beliefs with the world. One might assume this is done to find like-minded individuals, or to offer a differing perspective for others to learn from—but one would be very wrong. Social media is now one of the largest observatories for information-based *echo chambers* and so many human biases. Biases like confirmation bias, or a series of actions that completely avoid and totally ignore all information that opposes the person's idea. Hence the term *echo chamber*. To add insult to injury, *echo chambers* are the primary location and method for many people when they are fact checking everyone else and especially their own agendas.

⁶ And a literal example of its technological prowess. As if somehow, this wouldn't already be common knowledge to the entire planet.

⁷ It would likely be a copy and pasting of the bureaucratic methods successfully used in radio, broadcast, and cable which are top of the line in production of headaches and migraines.

A Brief Discourse of Laws Regarding the First Amendment and the Internet

The First Amendment and its Origins

The First Amendment of the U.S. Constitution consists of five ideas or clauses related to the unencumbered exercise of expression vital to the health of the democratic polity. These freedoms include religion, speech, press, assembly, and petition (U.S. Const. amend. I.). The two topics relevant to the scope of this paper are speech and press—the others will not be discussed any further.⁸ Specifically, the First Amendment states that the government cannot make any law prohibiting or restricting freedom of speech or the press (U.S. Const. amend. I.). The origin of the idea of free speech goes back well into the old world and ancient Greece, where the word *parrhesia* ["παρρησία" in modern Greek] (which roughly means *candid speech*) was in common use (History.com Editors, 2021).

In terms of the American Revolution, John Madison authored the Bill of Rights, but he was also influenced by the ideas of 17th-century philosopher John Locke [and a handful of other prominent thinkers]. None of this is a big surprise; Locke's *Second Treatise of Government* influenced most of the founding fathers (Stern, 1966). Locke considered all men equal in a polity, and no man should be harmed in his life, liberty, or possessions (Locke, 1980, p. 9). In that example, Thomas Jefferson clearly borrowed Locke's phrasing almost verbatim when writing the U.S. Constitution. Madison once referred to this idea that all men are equal when addressing Congress in 1789 about the constitutional amendments being *natural rights* (Madison, 1789).

⁸ See <https://constitution.congress.gov/constitution/amendment-1/> to learn more about the other topics.

First Amendment Principles v. the Government

U.S. national security and the constitution's amendments have had a complicated history, where in war times, freedoms were often suppressed to ensure the security of troops, information, and the country's defense. From this troubled past, the law and supreme court created various tests for future incursions to aid in quicker resolutions which all originated from threats to actual acts of terrorism on U.S. citizens. Some examples are the clear and present danger test and also the balancing test (Bullock, 1982). With freedom of expression, there will be an increased public concern for welfare. When used with violent intent, this means that words can be penalized criminally.⁹

Presidential executive orders are often met with skepticism and are generally disliked by most voters. Most recently, Donald Trump's order regarding race and sex stereotyping from 2020 was met with skepticism as to the true legal intent by Democrat voters (Exec. Order No. 13950, 2020). On the other side of the political coin, Biden's order on economic competition contained many actions that worry those who desire a smaller federal government (Exec. Order No. 14036, 2021). But as with any piece of legislature, interpretations often vary by reader, their biases, and their political agenda. That covers the background and most prominent and recent issues with the First Amendment by itself. As mentioned, once we apply the second topic of the Internet, things become quite complicated.

⁹ For further reading, see <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/12/Law-enforcement-First-Amendment-Guidance.pdf>

The Internet

Britannica defines the Internet as a computer framework that has transformed information exchange and business by permitting communications systems all over the planet to communicate with one another—called the "network of networks" by others (Dennis & Kahn, 2023). Internet connections are usually handled locally by a communications company; these companies are referred to as Internet Service Providers—or ISPs (Verizon, 2023).¹⁰ Some ISPs have been known to watch user downloads with automatic response systems that detect if any users have downloaded something illicit or anything that otherwise breaks the law (Dept. of Justice, 2021). One way to override or go around such tactics is by using a Virtual Private Network—or VPN—to completely mask everything a user downloads. This anonymity is accomplished by software on the user's computer connecting directly and securely to a VPN proxy server through their regular ISP. These VPN services often suggest that their services have no log files. This means that if the government ever raids them, there are no logs or other identifying information stored on their servers about any activity that has occurred (Kaspersky, 2023).¹¹

The Internet's Legal Support

Over the years, there has been a growing amount of legal support for the Internet—some more controversial than others. The two main legal supporters have been the Telecommunications Act of 1996 and Net neutrality or Open Internet Order. Net neutrality is the

¹⁰ This source is obviously biased about some of the information it provides, specifically the products it sells and is trying to sell. That information is not important to this discussion and as such is irrelevant, but the other general information backs up the given definition.

¹¹ Fun fact about VPNs. They can also be used to change your perceived location in the world. So if there's a Russian website you want on but can't connect to because your IP is American, now you can connect to your VPNs Russian servers and appear to be from Russia. Or even more useful, you can allegedly connect to Netflix from different country VPNs and access shows that may be banned or no longer in play in your country.

simple idea that all internet traffic should be treated without discrimination or favoritism based on content or source. The Open Internet is a 2015 order by the FCC that classified broadband as a utility and established net neutrality rules in the U.S. However, the FCC repealed the Open Internet Order only a few years later, in 2017 (*FCC Releases Open Internet Order*, 2023). The issue of net neutrality remains contentious and continues to be the subject of legal and regulatory battles.

Section 230 of the Telecommunications Act of 1996 (also known as the Communications Decency Act) was Congress' response to the fear of minors accessing pornography online. However, it also provides legal immunity to online platforms regarding user-generated content—as long as they had no hand in developing that user content (Telecommunications Act, 1996). Many have argued that this law has been instrumental in allowing the Internet to thrive as an open platform for expression and innovation. The First Amendment doesn't stop protecting free expression at the doors of the Internet; instead, it provides a strong foundation for protecting a wide range of speech and ideas online.

Privacy is likely considered a requirement by the standards of most Americans, whether it is online or not. Privacy allows individuals to control their personal information and make informed choices about how their data is used. Laws such as the California Consumer Privacy Act (CCPA) may be important in protecting individuals' online privacy rights. An early display of consent agreements on the Internet occurred in a long-dead website hosting and building company that opened in 1994 called Geocities. They offered free web hosting with some size

limitations with the idea that anyone could make their presence known to the online world.¹² They also pioneered displaying the site's privacy practices, information collected about their users, and the user's right to correct or completely remove their data (Valentine, 2013).

U.S. Legislature v. the Internet

The Internet has had many more legal detractors than it has legal supporters, including the Stop Online Piracy Act (SOPA) and the Cyber Intelligence Sharing and Protection Act (CISPA). SOPA was a bill introduced to Congress to combat online piracy and copyright infringement (Stop Online Piracy Act, 2012). Nonetheless, the bill was widely condemned for potentially restricting the First Amendment and harming internet innovations. CISPA was a bill that tried to improve information sharing between the government and private companies to combat growing cyber threats (Cyber Intelligence Sharing and Protection Act, 2016). However, some groups judged the bill negatively for its potential to infringe on privacy and free speech.

Executive Orders v. the Internet

Once again, the two most recent freedom-discriminating executive orders, this time pertaining to the Internet, come from the desks of the previous two orders, Trump and Biden. Donald Trump's 2020 order on preventing online censorship claimed to limit the legal protections afforded to online platforms under section 230 of the 1996 communications act (Exec. Order No. 13925, 2020). The opposing party immediately and heavily criticized it. When Biden arrived in office, he expunged the order. The following year, Joe Biden's order on improving critical infrastructure in cybersecurity was passed and was intended to improve

¹² And that dream came true for a lot of hopeful people with no artistic talents. Animated GIFs and some of the ugliest designs that honestly should have had epilepsy warnings on them to protect users from endless bright blinking colors. It was a designer's nightmare. It also started a lot of careers in web design, like the author's.

national networks and critical infrastructure (Exec. Order No. 14028, 2021). Many Republicans criticized it as a potential threat to privacy and civil liberties.

The Problems with Social Media

Humans are very social creatures, so it would make sense theoretically that the Internet should also have virtual social outlets. Depending on whom you ask, this social experiment has returned varying levels of success and outright failure. For those that feel social media has failed, some point the finger at the Zuckerbergs of social media sites, while others blame algorithms and emerging artificial intelligence. For those who see social media as a positive thing, many aren't aware of the many studies¹³ that denounce their use for mental health reasons, while the rest are probably indifferent but glad for an outlet and a convenient place to share memes.

The supreme court has already ruled (8-0) that the Internet plays the same role as a public forum. Multiple justices have remarked on the power and necessity for Internet access as a constitutional right to information. In 2018, a parole board's decision to send a man back to jail in West Virginia was reversed because he had no open access to the Internet (Wood, 2020). Even in its brief scope, this review has shown that the topics are multi-faceted and only become more complex when combined.

¹³ A surface keyword search on the University library for “dangers social media mental health” with only peer reviewed articles returned 173 unique results.

Analysis

The First Amendment

Analysis of the First Amendment review is more or less on par with the facts presented. However, it seems that Donald Trump's executive orders contended for different purposes than what they were allegedly written to do. In contrast, the criticisms of Joe Biden's orders by the political right are usually gross exaggerations or are only possible under extremely specific circumstances. Such obvious circumstances that they would probably catch the attention of at least one person in the federal government before it could transpire.

The Internet

The government is going to spy on people. That's just what they do. It probably stems from the human desire to gossip, worry about the neighbor's lawn care plan, or the other embarrassing things that all dads do out of fear for their children's safety—and also old age. It doesn't justify anything, but nine times out of ten, understanding why something happens helps pacify most aggressions against it. Although, one caveat is that a *select* handful of guys seem to go to the bar only to get into fights. The question is if the government and corporations should be allowed to spy on their citizens (or customers) to aid in stopping copyright infringement or piracy. Both sides make compelling arguments, but ultimately it should come down to the agency's intent. Mostly, the outcome of catching digital pirates should never end in more than a fine. Ending some poor kids' future because they downloaded some crappy film doesn't teach anything valuable about economics to anyone; it just sends them to prison to become better criminals with even more connections than they had going into prison.

Section 230

If the world likes and enjoys the Internet as it is, they should care much more about Section 230. The Act should probably be revised one day, and the section should be relocated to its own solo show to clarify and remind people why the section is so important. That is assuming people enjoy how the Internet works as of 2023. Regulation of the Internet by the FCC would not only destroy all creative aspects of the Internet in publication but also decimate new innovations and advances specific to the Internet.

GeoCities was truly an amazing innovation and experience to have witnessed and been a part of. But it was also a great example of why web designers make so much money, and people who don't understand design really shouldn't publish anything until they figure it out.

Censorship

Trump's alleged order preventing censorship was astounding to read. In one document and plain English, he explained what his motivations were not while in office. None of them were for protecting the first amendment. None were for preventing censorship, except for rectifying the censorship he experienced on Twitter.

Social Media

Social media, in some form, will very likely survive as long as humans stay social. But there are some very important lessons to be learned from what Zuckerberg did with his algorithms at Facebook.¹⁴ Because, evidently, clicks are more important than mental health.

¹⁴ See, <https://sociable.co/social-media/facebook-business-model-poison-algorithms-amplify-misinformation/>

Conclusions

Public Opinions

Anyone who argues with deeply emotional certainties without the foresight of avoiding [and knowing] logical fallacies is incapable of having a rational, reasonable, and insightful intercourse on any topic. It is unfortunate that most people stuck in this mental deficit also speak the loudest and the most often, often creating uncertainty in everyone else about whether or not their opinions and ideas should be heard by anyone at all. Public opinion and free expression are important tools for lawmakers and can help them make informed decisions in regulating speech, online or offline, in a manner that truly reflects the values of the communities they represent. Furthermore, the First Amendment is often interpreted in light of public opinion. The courts are tasked with many jobs, like interpreting the First Amendment and protecting free speech rights. But they must also be sensitive to technology and evolving social and cultural norms. As such, public opinion can influence how the courts interpret the First Amendment—especially when the law heads into new territory where conflicting values are at stake.

Predictions

Legally, the scope of the First Amendment's protection of online speech will continue to be challenged, refined, and be a challenge. As new technologies emerge and new forms of online communication arise, the courts will have to be sensitive to novel situations that seem beyond the scope of the law. The tension between free expression and the efforts to dismantle disinformation—not excluding our understanding of hate speech—will continue to play out in the courts. It seems plausible that new laws or regulations will be passed regarding these issues, but it is nearly impossible to predict exactly how such laws will be balanced against the First Amendment.

Technologically, advances in artificial intelligence and machine learning will make it easier for platforms to monitor and moderate user content, potentially leading to more efficient and effective overall content awareness. However, concerns about privacy, free speech, and fear of the unknown could limit the use of these technologies. Depending on the direction society and its laws head, the rise of virtual and augmented reality technologies will present new challenges for the First Amendment. These technologies literally blur the line between online and offline reality. It is hard to say exactly how courts will apply the principles of the First Amendment to these emerging technologies.

Something that *can be* said with apathetic certainty and disregard for logic is that people are terrible at predicting the future. Just abysmal. So much so that it might be our most consistent trait as a species, regardless of the accuracy of those predictions, whatever happens next—the freedom of expression that is guaranteed by the First Amendment combined with section 230 of the telecommunications act has played a pivotal role in shaping what the Internet is, what it could be, what it can't be, and what it should never be.

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