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The Internet Changes Everything, and Nothing

*Mark S. Kende**

INTRODUCTION

This is not the first essay declaring that the Internet is revolutionary. For scholars, the Internet has enabled unparalleled access to information from all over the globe; it has permitted what were previously impossible collaborations; and it has even led to further evolution of the medium. New developments include social media, artificial intelligence, crypto-currency, and more. The Internet's major "platforms" like Facebook, Google, Apple, Microsoft, and others have even become the robber barons of our age. They are drawing scrutiny from both the U.S. Congress and states regarding how they are changing society, our children, business, and even warfare. The Internet also played an important and innovative role in keeping us linked to each other during a pandemic. Yet things are actually more complicated. This Essay argues that the Internet has had a surprisingly unimportant effect on free speech doctrine. If anything, it has helped lock down the Supreme Court's libertarian categorical approach to the First Amendment, which is rather unique internationally.

Part I of this Essay will initially highlight three questionable Supreme Court speech cases that demonstrate this libertarian tact. Part II will discuss two questionable internet speech cases which follow the formula. Indeed, they may be even more awkward than the brick and mortar cases. The Essay's conclusion is that the Court should become less libertarian in all of these areas, and should follow the approach taken in many Western democracies of proportionality analysis or a type of balancing.

I. THREE QUESTIONABLE SUPREME COURT SPEECH CASES

The essence of the Supreme Court's libertarian approach is an almost perverse aversion to laws that discriminate based on content, no matter how harmful the speech. The Framers would

* James Madison Chair in Constitutional Law and Director, Drake University Constitutional Law Center. The author has published extensively about cyberspace.

not have approved, and society's current polarization is in part due to tolerating such harms. Here are three examples.

A. Hate Speech

In *R.A.V. v. City of St. Paul*, the Supreme Court in 1992 struck down a St. Paul ordinance that criminalized the display of a burning cross, swastika or other symbol that one has reason to know creates "anger, alarm, or resentment" in others.[1] The law could have easily been struck down as overbroad, as advocated by the concurrences.[2] Instead, Justice Scalia and the majority ruled the law discriminated against content discriminatory fighting words.[3] This decision makes little sense since the broader category of fighting words itself is prohibited.[4] The Court also ignored that the prohibited fighting words were precisely the kind most likely to cause riots and disturbances in urban areas and other places. The case went far beyond where it needed to go; it made the U.S. a tragic outlier given its racist past and present. Even free speech "absolutist" Geoffrey Stone has recently changed his mind and opposes certain types of hate speech.[5]

B. Horrific Cruel Speech

In *Snyder v. Phelps*, the U.S. Supreme Court upheld the right of Westboro Baptist Church members to shout epithets towards the funeral of an American soldier, blaming his death on supposed American corruption such as the tolerance of gay people.[6] The father of the soldier lost his claim for intentional infliction of emotional distress, despite the obvious lack of any social value in the shouting.[7] The Court's focus was on how upholding the claim would amount to content discrimination.[8] The fact that the speech involved was acknowledged to be "outrageous" by the Court adds to the flaws in the case.[9] The Court simply found that the speech did not fall into a prohibited category, rather than balancing competing interests.[10] Indeed, the speech would be considered hate speech in many countries. The only possible justification would be

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1 505 U.S. 377, 391–92, 396 (1992).

2 *See id.* at 397–415 (White, J., concurring); *see also id.* at 415–16 (Blackmun, J., concurring); *id.* at 416–36 (Stevens, J., concurring).

3 *See R.A.V.*, 505 U.S. at 392.

4 *See generally* Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942).

5 *See* David Raban, *Racism Thrives at the Law School*, THE CHI. MAROON (Mar. 5, 2019), http://www.chicagomaroon.com/article/2019/3/5/racism-thrives-law-school/ [http://perma.cc/3XNW-7XNV].

6 562 U.S. 443, 454, 460–62 (2011).

7 *See id.* at 459.

8 *See id.* at 458.

9 *See id.*

10 *See id.*

that allowing the speech averts even worse behavior, like violence. But that is pure speculation.

C. Lying

The next year (in 2012), the Supreme Court in *United States v. Alvarez* struck down the Stolen Valor Act—which made it illegal for a person to falsely state that he was awarded a medal from the U.S. Armed Forces—as unconstitutional.[11] There was no doubt that a political candidate violated the law.[12] He lied.[13] Yet the Court mysteriously said this deceptive speech could not be the basis for prosecution.[14] The Court said that there was no categorical precedent for banning false speech.[15] And the Court said the law disfavored certain false speech over other types.[16] This makes no sense. False speech has essentially no social value, and damages political and other discourse. It contributes to political polarization. Cass Sunstein and others have gradually expressed opposition to this case.[17]

II. TWO QUESTIONABLE SUPREME COURT INTERNET SPEECH CASES

With the advent of the Internet, there was much speculation about how the courts would treat its expression. The answer is, surprisingly, in the same libertarian mode as other speech though its greater dangers are apparent. These include its interactivity, its history of predatory activity towards children, its especially graphic portrayals of sexual violence, its easy use for bullying or criminal collaboration, and the evidence that it is causing increasing amounts of depression and suicide, especially for the young. Yet, it is also the rare new technology quickly being protected by the Supreme Court, as opposed to being seen with fear such as film. Here are some examples of internet libertarianism.

A. Indecent Speech

In *Ashcroft v. ACLU*, the Court struck down the Child Online Protection Act which was even modeled on the Court's three-part

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11 567 U.S. 709, 730 (2012).
12 *See id.* at 713.
13 *See id.*
14 *See id.* at 728.
15 *See id.* at 723.
16 *See id.* at 734.
17 *See generally* CASS SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION (2021).

criteria for regulating obscenity.[18] The Court found the law, however, to be content discriminatory.[19] The law also problematically limited adults to seeing only material suitable for children.[20] This is true, but the law created affirmative defenses for adult-focused establishments when they took measures to protect children from access.[21] But the most bizarre part of the case was Justice Kennedy saying that filters would be better at screening indecent speech than a criminal law, contrary to the opinion of Justice Breyer.[22] Indeed, both Justices were using strict scrutiny but reached opposite results.[23] Yet Kennedy admitted parents could not even be required to buy filters.[24] This part of Kennedy's reasoning makes no sense. There have been several other laws designed to protect children from the Internet and they have almost all failed because of the Court's categorical approach.[25]

B. Threats

In 2015, the Supreme Court in *Elonis v. United States* rejected a prosecution for threats based on Facebook postings by an ex-husband against his ex-wife.[26] The threats repeatedly indicated that he would do physical harm to her.[27] She was terrified.[28] But he cautiously put some conditional language in his quotes to create a bit of doubt.[29] He prevailed because the Court ruled that there was insufficient proof of his subjective intent.[30] Again, the Court acted rigidly and protected speech with no social value.

CONCLUSION

To summarize, the Internet is revolutionary, but its impact on free speech doctrine has been surprisingly small. Indeed, the Supreme Court has become more protective precisely at a time when certain speech is more obviously a clear and present danger. This Essay has touched on a few of these key cases. The Court would do better to follow the proportionality approach used globally, and

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18 542 U.S. 656, 673 (2004).
19 *See id.* at 665.
20 *See* Ashcroft v. ACLU, 535 U.S. 564, 571–72 (2004).
21 *See id.* at 570.
22 *See Ashcroft*, 542 U.S. at 667; *see also id.* at 683–84 (Breyer, J., dissenting).
23 *See Ashcroft*, 542 U.S. at 670; *see also id.* at 677 (Breyer, J., dissenting).
24 *See Ashcroft*, 542 U.S. at 669.
25 *See* Jennifer A. Rupert, *Tangled in the Web: Federal and State Efforts to Protect Children from Internet Pornography*, LOY. CONSUMER L. REV., 130, 132–45 (1999).
26 575 U.S. 723, 727, 740 (2015).
27 *See id.* at 727–30.
28 *See id.* at 728.
29 *See id.* at 729–30.
30 *See id.* at 740.

advocated by Jamal Greene in his book, *How Rights Went Wrong*.[31] This would allow the Court to weigh the value of speech, the suitability of the applicable laws, and various other criteria. The Court could even start with an internet case, and add doctrine to its revolutionary impact.

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31 *See generally* JAMAL GREENE, HOW RIGHTS WENT WRONG, WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).