
SOCIAL MEDIA, THE FIRST AMENDMENT, AND DEMOCRATIC DYSFUNCTION IN THE TRUMP ERA

SYMPOSIUM DISCUSSION: KENDE

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Audience Member: I wonder why you haven't pointed out the censorship of political speech by YouTube. For example, Gregor University had videos dealing with things such as the Ten Commandments, why we entered the Korean War, and Alan Dershowitz explaining the founding of Israel. Those videos were restricted. They were legally considered the equivalent of pornography to students and high school students.

Mark Kende: I just ran out of time. I have a whole section on YouTube. YouTube has claimed it's going to basically get rid of anything that suggests one race is superior to another. I'm not sure this is exactly what you're talking about. I don't think they're doing enough, and that's basically my argument: they could do more. I ran out of time, so I focused on Facebook because they're the biggest gargantuan.

Jack Balkin: I think the questioner is arguing in the opposite direction than you are. He's arguing they're doing too much censoring of speech that should be allowed whereas you're arguing they're not taking down enough.

Kende: In terms of that argument, I think the short answer is that these algorithms don't work perfectly. The argument has been that these companies rely on algorithms, but, to the extent that there are people who are censoring what you've described as mainstream, relatively political speech, that's a mistake. So I misheard you, and I agree with you. The companies are not fast in terms of changing in these areas, in ways that we sometimes think that they should, Facebook being the most obvious example. But I apologize for not getting the gist.

Audience Member: The major platforms can control speech all they want, but the nature of the Internet is such that those forms of speech are going to find an outlet. I don't think we can just police the Internet as a whole, so it becomes an economy-of-scale issue because you're not going to stop humanity from thinking these things and putting them out there because they believe them. I don't know that patrolling private companies and platforms for speech is the answer for trying to fix that. It's a societal issue, beyond the technology issue.

Kende: Facebook has 2.4 billion followers per month; YouTube claims to have 2 million active users who see their videos per month, so there's a power problem in terms of them doing everything they can. There's no question that if

you close one, it's like whack-a-mole, right? You whack down something and maybe it pops up elsewhere. But the scope of these particular platforms is such that I think they have unique power in terms of what they decide and what they seem to say, so I'm not saying you're going to get rid of the information at all. I'm just saying that if Facebook is the main source of information for a ton of people and that information is either unreliable or devastatingly terrifying, there are more things that these companies can do themselves and that they're allowed to do under statutes. The reason they're not doing them may not be just free speech, and that's my point. I hope that answered your question.

Balkin: I want to make use of your comparative constitutional law chops. Implicit in your argument is that these large platforms now play a role in the construction of democratic life, so you don't treat them as purely private companies. You treat them as being, as they used to say many years ago, affected with a public interest. They have a public purpose that should serve democracy. That will lead to a constitutional dispute over whether that's the right way to understand these companies. But I just want to go with your approach for the moment. When you think about various comparative and constitutional systems, what is the best analogy to these kinds of entities, which, although nominally private, perform an important public function and therefore should, based on your thesis, take on public duties and obligations?

Kende: Comparatively, the analogy is horizontality, which exists in many foreign constitutions but not all. For example, South Africa, which I'm particularly familiar with, does preclude certain kinds of racial discrimination and certain kinds of other actions by private entities. This is a highly underdeveloped part of South African constitutional law, but it has huge potential to potentially contribute to regulating private entities, with the caveat being that in a society that values the individual, such as ours, as much as it does, the South African approach might not work completely here, but that's the analogy that I can think of.

Balkin: What about the regulation of the press and broadcasting systems? I take it you're not arguing that Amazon as a bookseller should be forbidden from selling books that contain conspiracy theories. Right?

Kende: Yes.

Balkin: That is to say, you might advise them not to, but your view is that they can do that. The argument you seem to be making treats social media platforms more like broadcasting systems or radio systems in different countries, which are often heavily regulated in the public interest. So what I wanted to know is whether that was the direction in which you are going.

Kende: The candid answer is no, but I'd like to think about it. I think it's a really good point to try to make that analogy, but I'm not saying Amazon is like BBC 3, since Amazon, despite its size, is not a governmental entity. I think the argument that I'm making is one of self-policing, and that's the ideal scenario. One could go farther and say, well, we think that there's more going on than just an individual or private entity that's involved, but I'm not yet ready to go down that path.

Balkin: Well another, self-policing, model would be the for-profit media in the United States. The *New York Times*, CNN, and similar organizations are not controlled by the government. The government cannot tell them what to do or not do. But the public in general is very interested in what they cover and don't cover, and treat them as if they have duties to inform the public. When the *New York Times* or CNN covers a story in a certain way that the public doesn't like, boy do they get an earful from the public, who say, "You really handled this scandal badly." In other words, the media should have been more responsible as a broadcaster or journalist. Is that the model that you're imagining?

Kende: The short answer is no. You're giving me a lot to think about. The idea of editing, which is a fundamental aspect of what these newspapers do, would violate § 230a, which is the Communication Decency Act provision regarding immunity. I'm trying to walk the line, and the line is between that provision and the Communication Decency Act provision that says they can take Good Samaritan actions, but at the same time, they can't avoid editing. There was a Second Circuit case about that exact issue, where the majority said that there was no editing and that Facebook was not liable, and the dissent said the algorithms specifically link these people from different groups.

Balkin: I think you're getting hung up by this distinction. Whenever a content-moderation system takes down content, it's engaged in editing. It's deciding who gets to speak and who doesn't get to speak.

Back to my earlier question. Let's suppose the *New York Times* ran a series of op-eds by white supremacists. I suspect they would get enormous pushback by the public saying, "Why are you giving a platform to white supremacists?" The public would be criticizing the media company, saying that the choice of people you allow to speak and don't allow to speak is bad policy. Is that the analogy you're making?

Kende: I think that's closer. I'm still not ready to say it's exactly the same, to the extent that they're adopting a Good Samaritan approach and that the Good Samaritan doesn't think white supremacy is something we want to promote on our newspaper. I think that aspect is somewhat similar.