Mark Tushnet

Reflections on the First Amendment and the Information Economy

Susan Crawford

Panel 1

First Amendment Common Sense

Providers of high-speed Internet access, including Verizon and the cable industry, are arguing that limitations on their activities raise serious constitutional concerns under the First Amendment that should trigger heightened scrutiny. The providers, however, are selling the modern-day version of general-purpose two-way telephone services, economic regulation of which has never been thought in the past to raise constitutional concerns. Today, the providers' arguments would likely fail given the Court's carefully-reasoned (and unanimous) opinion in Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006). But given the absence of either competition or oversight in this market, providers are poised to have the market power to “edit” digital communications seen by users and to force interconnecting networks and content providers to pay tribute, thus becoming more “like” The New York Times for speech purposes. Because of this temporal element of the providers’ claims, and because the consequences of the adoption of the providers' arguments would be to make every Congressional enactment in this area subject to a presumption of unconstitutionality (and to strip the F.C.C. of the deference to which it is normally entitled), this is a critical time for courts to carefully and deliberately explain why the carriers are wrong. This article provides a roadmap for this explanation.

Comments: Stuart Benjamin

Sonja R. West

Panel 2

Press Exceptionalism

Armed with nothing more than a smart phone or a laptop, each of us is now able to share information about matters of public interest to a potentially broad audience in a timely manner—the very activities that were once considered the exclusive province of the press. To some, these advances in modern technology suggest that we have all become “the press.” This article, however, disagrees and contends that there remains a subset of speakers who are constitutionally unique. These “press” speakers fulfill the distinctive roles in our democracy of informing the public and checking the powerful. Our goal, therefore, should be identifying these special communicators. They are the speakers who, if empowered with rights beyond those granted by the Speech Clause, will most effectively use First Amendment press rights to benefit society as a whole. Embracing this view of press exceptionalism, this article then offers a workable and constitutionally based framework in our search for “the press” in the Internet age.

Comments: RonNell Andersen Jones, David Anderson
Marvin Ammori

This article argues that, 50 years after New York Times v. Sullivan, some of the most important First Amendment lawyering goes on not only at newspapers but also at top Internet technology companies. More and more, we form our opinions and beliefs based on information accessed through new media. More and more, we express our opinions through new media. This article draws on discussions and interviews with lawyers and ex-lawyers at Twitter, Google, Facebook, Tumblr, WordPress.org and other companies to understand how lawyers at these companies advance their interest in ensuring freedom of expression for their users. Drawing on these discussions, this article reveals some striking non-judicial influences upon free expression today: the terms of service of private companies, the norms and laws in foreign countries, and lauded congressional legislation. Indeed, not Supreme Court decisions but certain congressional statutes such as Section 230 of the Communications Decency Act may be the most celebrated laws ensuring freedom of expression online today—the equivalent of today’s New York Times v Sullivan that will be celebrated 50 years later.

Comments: Marjorie Heins, Jonathan Zittrain

Rebecca Tushnet
More than a Feeling: Emotion and the First Amendment

Defamation relies on emotion: defamatory speech is often harmful because its falsity causes other people to feel differently about the victim, looking down on him or her. First Amendment law has generally been leery about government attempts to change the marketplace of emotions—except when it’s not. Meanwhile, scientific evidence indicates that emotion and rationality are not opposed, as the law often presumes, but rather inextricably linked: there is no judgment, whether moral or otherwise, without emotions to guide our choices.

What, then, are we to make of judicial distrust of emotion-based speech regulation? While defamation law’s scope is constrained by its focus on falsifiable claims of fact—which then have emotional impact on deceived hearers—other bodies of law are not so limited. This short paper will examine cases in which courts have found the First Amendment implicated by attempts to manipulate and control emotions—primarily smoking warnings—and contrast them to cases in which the courts have been unworried by structurally identical attempts—primarily abortion-related disclosure requirements and trademark dilution law. When the government regulates speech, the regulation will always have an emotional component. Objections to emotion-based regulations should not be based on the obviousness of that component. Rather, the acceptability of the government’s aim should be the guide, especially when nongovernmental speakers are free to use emotional appeals to press their own cases. The government may often be required to be neutral (as I will argue with respect to trademark dilution); it is not required to be neutered.

Comments: Caroline Corbin
Jack M. Balkin

Old School/New School Speech Regulation

In the early twenty-first century the digital infrastructure of communication has also become a central instrument for speech regulation and surveillance. The same forces that have democratized and decentralized information production have also generated new techniques for surveillance and control of expression.

“Old-school” speech regulation has traditionally relied on criminal penalties, civil damages, and injunctions directed at individual speakers and publishers to control and discipline speech. These methods have not disappeared today. But now they are joined by “new-school” techniques, which aim at digital networks and auxiliary services like search engines, payment systems, and advertisers. For example, states may engage in collateral censorship by threatening Internet intermediaries with liability to induce them to block, limit, or censor speech by other private parties.

Public/private cooperation and co-optation is often crucial to new-school techniques. Because the government often does not own the infrastructure of free expression, it must rely on private owners to assist in speech regulation and surveillance. Governments may use a combination of carrots and sticks, including offers of legal immunity in exchange for cooperation.

Governments have also devised new forms of digital prior restraint. Many new-school techniques have effects similar to prior restraints, even though they may not involve traditional licensing schemes or judicial injunctions. Prior restraints are especially important to the expansion of government surveillance practices. Gag orders directed at owners of private infrastructure are now ubiquitous in the United States; they have become fully normalized and bureaucratized elements of digital surveillance, as routine as they are invisible, and largely isolated from traditional first amendment protections.

Comments: Yochai Benkler, Dawn Nunziato

Open panel discussion