Online Speech at the US Supreme Court in Moody v. Netchoice

Elettra Bietti

11.07.2024 doi: 10.59704/213f32b71f7b38fe

Introduction

The First Amendment of the US Constitution raises some of the most difficult legal hurdles for regulating the global digital public sphere today. In *Moody v. Netchoice*, 603 U. S. ___ (2024), the US Supreme Court heard appeals from two judgments, an appeal from a decision of the Fifth Circuit declaring that Texas' social media law H.B. 20 did not violate the First Amendment, and an appeal from a decision of the Eleventh Circuit finding Florida's social media law S.B. 7072, instead, unconstitutional. These laws are similar in that they both attempt to impose must-carry and non-discrimination obligations on social media platforms, which in practice amounts to requiring them not to discriminate against conservative users' posts. They both also require platforms to provide some transparency to users whose content is removed or altered. The compatibility of these two laws with the First Amendment cuts across a plethora of crucial issues on the future of social media regulation which the court could, but didn't fully, address. These include the possible constraints that could be imposed on content and community guidelines, the regulation of recommendation and other AI systems implicated in social media business models, as well as the lawfulness of transparency obligations and safeguards akin to those provided under the Digital Services Act in Europe.

This much-awaited decision is far less enlightening than many expected, but it provides some hints regarding the future of online speech regulation. In many ways it reinforces the First Amendment's libertarian underpinnings, finding that imposing must-carry obligations on social media applications likely violates the First Amendment, and tentatively confirming the Eleventh Circuit's analysis that the Florida law is unconstitutional. The Justices also noted, however, that non-discrimination and must-carry obligations could possibly be lawfully imposed either on less expressive functionalities (e.g. messaging apps) or to advance non-expressive goals such as competition, antimonopoly regulation, and possibly the regulation of foreign ownership. In short, libertarian speech standards continue to govern cyberspace, but not all pro-regulatory hope is lost.

Much ado about nothing?

The court's core and unanimous ruling was the need to remand the case to the lower courts and to direct the plaintiff (the trade association Netchoice, representing Big Tech platforms) to plead First Amendment violations by reference to more specific companies, applications and types of content moderation which the two laws in fact interfere with. Across the board, liberal and conservative Justices were reluctant to express definite views on online speech and avoided ruling on the merits; strongly emphasizing instead the procedural limitations of facial challenges. The majority judgment, delivered by Justice Kagan and joined by 5 other justices in full or in part, warned for example that the Supreme Court are "a court of review, not of first view" and as such could not engage in factual inquiry without proper briefing. Justices Barrett, Jackson and Alito each noted a comparable reticence. Justice Jackson for instance explained that the court "should strive to avoid deciding more than is necessary" and Justice Alito added that "[p]remature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments." The Supreme Court's recent record indicates that this decision is a rare instance of restraint on their part.

The Court's tentative First Amendment guidance

Despite the Justices' reticence to articulate concrete guidance, some tentative First Amendment principles emerge from the judgment. It sheds some light on the (il)legality of must-carry provisions in the social media context, and on a few other ancillary points.

The majority opinion, including three liberal and three conservative judges, broadly adopted a libertarian approach, which paradoxically was meant to combat the two laws' differently libertarian aspirations of non-discrimination against conservative voices. The majority celebrated the First Amendment's emphasis on the "marketplace of ideas" and held that the provisions forcing platforms to "de-bias" or "re-balance" the public sphere to include more conservative voices would most likely violate the First Amendment. In so doing, it emphasized three ideas: (a) the First Amendment protects acts of compiling and curating others' speech, such as online content moderation, against must-carry provisions; (b) must-carry provisions are proscribed by the Constitution even if the platform in question hosts most items and excludes just a few; and (c) the government's interest in improving, or better balancing, the marketplace of ideas can't overcome these First Amendment constraints on must-carry provisions. In other words, as Kagan put it, "it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others." The majority also indicated that while regulating social media applications such as the Facebook timeline or the YouTube feed would quite clearly violate the First Amendment, regulating other applications that are less "expressive" in their functions, such as messaging apps, might be lawful.

In an interesting footnote 10, the majority cited to *Turner Broadcasting v. FCC*, where the court found it lawful under the First Amendment to impose must-carry obligations on cable operators obliging them to give some of their channel space to local broadcast stations. This precedent could be distinguished in *Netchoice*, the Supreme Court said, because in *Turner* the government did not intend to balance expressive content. Its intent was rather to save local broadcast providers and fight "monopolistic" cable operators. In other words, it seems that competition could be a legitimate—though very narrow—reason for imposing must-carry and non-discrimination obligations on tech platforms.

Justice Barrett's concurrence added some details, specifying first that she thought human-led curation would benefit from First Amendment protection where purely machine or AI-based curation might not. Her distinction could lead down a rabbit hole of confusions on the way machine learning operates in social media settings. In a hint to the *TikTok* law, Justice Barrett also underscored, *obiter*, that regulating or banning foreign ownership could fall outside the scope of speech protection and thus be allowed.

Justice Thomas, who only concurred in the majority judgment to remand the case, not the First Amendment analysis, expressed, *obiter*, his skepticism for the *Zauderer* case and for its test for examining the validity of disclosure requirements, the second part of these laws,under the First Amendment. Partly contradicting his deregulatory view on disclosure requirements, Thomas also expressed once again his enthusiasm for treating platforms as common carriers.

Justice Alito, who also concurred in the judgment but not the First Amendment analysis, was joined by Justices Thomas and Gorsuch. Despite more reticence toward settling any of the issues in the case, he described the laws in minute detail and formulated some of the clearest First Amendment guidance, obiter. He first reminded his audience that the First Amendment has historically protected speech against government attempts "to forbid, restrict, or compel a party's own oral or written expression", yet that some acts of compilation can be non-expressive and thus unprotected, such as where the head of a neighborhood group prepares a directory consisting of contact information submitted by all the residents who want to be listed. To show that a must-carry provision violates the First Amendment, a company like Meta must, in Justice Alito's view, show three things. First, it

must show that it exercises "editorial discretion in the selection and presentation" of the content it hosts. In other words, it must show that it is no mere conduit or passive receptacle of information. The second point, which is both interesting and cryptic, is that Meta must show that its platform is used to express "'some sort of collective point'—even if only at a fairly abstract level." To withstand government pressures to include certain speech, there must be a parade theme or a general ethos of the platform. This is something monopolistic social media companies like Meta have long struggled to come up with. Third, Meta must show that such collective ethos or personal viewpoint on the platform is affected by the speech it is being forced to host. After showing these three aspects, a platform must also show that the challenged regulation of its curation practices violates the applicable level of First Amendment scrutiny, strict or intermediate.

These principles are far more detailed than those of the majority opinion. They reveal a possible vision for the future of social media regulation whereby a social media platform is either expressly political, for instance, aimed at specific segments of the population, or, if it is a general platform functionality that welcomes all messages and views, it becomes subject to various forms of common carriage restrictions. The minority also further emphasized the importance of examining whether social media platforms could be regulated as common carriers. If they were found to be common carriers, much of the First Amendment discussion in the majority opinion may cease to apply. Like Justice Barrett, Justice Alito also emphasized the relevance of algorithmic recommendation systems and the possible changes those might entail for First Amendment analysis.

Takeaways

Justices Alito, Thomas and Gorsuch expressed First Amendment principles and addressed core issues in platform governance much more incisively and confidently than the mixed majority. Their emphasis on treating platforms as common carriers to the extent their business model is marketed as neutral and open to all seems both important and possibly correct, at least for some applications. Still, one might wonder where common carrier status might lead in practice. The emphasis on common carriage is in contradiction with the majority opinion, which instead views any attempt at regulating the speech of monopolistic and broadly neutral speech platforms such as Meta as deeply problematic and unconstitutional. If it weren't for footnote 10, the majority judgment would read as a bland celebration of the internet as a utopian marketplace, with little evidence to back any of these celebratory claims up, unfortunately.

To conclude, we can take three points away from the decision. First, must-carry provisions imposed against social media platforms to try to "unbias" the digital public sphere and level the political playing field will, in all likelihood, fail to pass First Amendment muster. However, the legality of such provisions may depend on the specific platform and functionality being regulated, meaning that the same obligations might be unconstitutional for a social media platform, but might be lawful where imposed on other kinds of applications. Second, the court was reluctant to put forward much guidance on the legality of the laws' disclosure and explanation requirements under the Constitution. In spite of Justice Thomas' critical *dicta*, the *Zauderer* case stands. Still, Justice Thomas and Justice Alito's analyses suggest that any DSA-like obligations would face uphill battles in the US. Third and finally, in addition to the minority's emphasis on common carriage obligations, all Justices left open the possibility of governing the digital public sphere and digital platforms for competition and antimonopoly reasons. In other words, imposing non-discrimination and must-carry obligations on digital platforms might withstand First Amendment scrutiny if it is motivated by competition or other ownership regulatory goals not related to platforms' expressive and political functions. This, at least, is good news.

ABOUT THE AUTHOR

Elettra Bietti

Elettra Bietti is an Assistant Professor of Law and Computer Science at Northeastern University, a Faculty Associate at Harvard University's Berkman Klein Center at Harvard University and an Affiliated Fellow at Yale Law School's Information Society Project (ISP).

SUGGESTED CITATION

Bietti, Elettra: Online Speech at the US Supreme Court in Moody v. Netchoice, Verfassungsblog, 11.07.2024, doi: 10.59704/213f32b71f7b38fe.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240712-152104-0.