High Court Social Media Speech Ruling Could Implicate AI

By **Joseph Meadows and Quyen Dang** (March 6, 2024)

Soon, the U.S. Supreme Court will decide Moody v. NetChoice LLC
and NetChoice LLC v. Paxton, and whether certain laws in Florida and
Texas, respectively, can restrict content moderation by social media
platforms.[1]

The topic — one that has become a political football — has generated
significant interest and commentary in the legal and technology
worlds.

After oral **arguments** on Feb. 26, many expect the court to outlaw
the restrictions under the First Amendment, while some guess the
court may avoid the constitutional inquiry and decide the cases in a
narrow way or send them back to lower courts.

Joseph Meadows

Quyen Dang

First Amendment Protection for Editorial Discretion

The central issue before the court is the scope of the First
Amendment protection for editorial discretion — discretion on what to
publish and what not to publish. That protection was cemented in
1974 in Miami Herald Publishing Co. v. Tornillo.[2]

There, the Supreme Court struck down a Florida "right of reply" law
that required a newspaper to print a political candidate's reply to criticism in that
newspaper, holding that the law violated First Amendment protection afforded to editorial
discretion:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its
> intrusion into the function of editors. A newspaper is more than a passive receptacle
> or conduit for news, comment, and advertising. The choice of material to go into a
> newspaper, and the decisions made as to limitations on the size and content of the
> paper, and treatment of public issues and public official — whether fair or unfair —
> constitute the exercise of editorial control and judgment.[3]

Since Miami Herald, the Supreme Court has protected editorial discretion in other contexts.
For example, in 1986, it protected a public utility's decision on what to include in its
newsletters in Pacific Gas & Electric Co. v. Public Utilities Commission of California; and in
1995, it protected an organization's decision on whom to exclude from its parade in Hurley
v. Irish-American Gay, Lesbian and Bisexual Group of Boston.[4]

The NetChoice cases present the editorial discretion issue in the context of social media
content moderation, including use of algorithms.

NetChoice argues that the Florida and Texas laws intrude into their editorial discretion on
what online content to display, prioritize and block. The states argue that editorial discretion
is not at issue and their laws prevent censorship.

How, if at all, the Supreme Court decides these cases may further shape the editorial
discretion doctrine. It may also signal views on First Amendment protection that could apply

for a next level of automated internet speech — artificial intelligence speech.

Automated Internet Speech Cases

To begin with, the idea of First Amendment protection for automated internet speech is not new.[5] In fact, the protection has been successfully invoked in this exact area:

- By Google, in unfair competition and Digital Millennium Copyright Act cases, for its search engine results;[6]

- By Twitter, in a constitutional violation case, for its content moderating and filtering;[7] and

- By other online platforms, such as Local Technology Inc. and Rumble Canada Inc. in the constitutional violation case Volokh v. James, for their content and policy disclosures.[8]

The argument for First Amendment protection for automated internet speech has been grounded in a Miami Herald editorial-discretion rationale, with the U.S. District Court for the Southern District of New York's 2014 Zhang v. Baidu.com decision frequently cited for this proposition.

In Zhang, the court dismissed censorship claims against an internet search engine company. The court held that the company's search engine results are protected speech under the First Amendment.

In producing, or electing not to produce, results, the company made the same types of editorial judgments that media companies make when deciding what or what not to publish. It made no difference that decisions resulted from automated computer programming:

> Nor does the fact that search-engine results may be produced algorithmically matter for the analysis. After all, the algorithms themselves were written by human beings, and they inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries.[9]

First Amendment Protection for Artificial Intelligence Speech

The Zhang reasoning will be tested with advanced automated internet speech, like AI. If the First Amendment and editorial discretion analysis turns on how an AI operates, including the level of involvement and judgment of human engineers and programmers, the argument for constitutional protection of AI speech will hinge on technology.

Weak AI models require human input and control. Hybrid models — think generative AI, like ChatGPT — function more independently, needing humans only to prompt it or give it training data. In the future, strong AI models will operate autonomously — artificial general intelligence, or AGI, will behave and learn on its own without human input or direction.[10]

Under a Zhang approach, the degree of human involvement in AI factors into whether its speech deserves First Amendment protection. AGI, for example, will potentially deserve none, unless one contends that the traceability of that model to earlier, weaker models with human input — perhaps going back many years — grants it continued protection.

Any other approach that disregards the human aspect of AI speech would be a monumental development in First Amendment — indeed, constitutional — jurisprudence. Even in Citizens United v. Federal Election Commission, where the Supreme Court upheld First Amendment rights for artificial legal entities in 2010, the majority acknowledged that corporate speech derives from humans.

According to the Cornell Law School Legal Information Institute:

> The dissent says that "speech" refers to oral communications of human beings, and since corporations are not human beings they cannot speak. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association — just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.[11]

Some argue that AI could have its own free speech rights; perhaps, even, AI may sue to defend those rights. They focus less on speaker identity and more on listener rights.[12] Others argue against this, raising concerns about foundational First Amendment values and the dangers of AI.[13]

The legal issues start to blur into theoretical science: Will machines think and develop consciousness? Will humans and machines eventually "converge and form transhumanist beings escalating humanity to the next stage of evolution," as Thomas Ramge put it in "Who's Afraid of AI?"[14]

Someday, courts may grapple with AI speech cases that test the limits of the First Amendment.

Back to the NetChoice Cases

AI speech is not directly at issue in the NetChoice cases. NetChoice rests its First Amendment protection on the company's editorial discretion as exercised by humans and human-made algorithms.

Still, the issue of human versus machine making decisions on speech was raised, with Justice Clarence Thomas, for example, asking at oral argument, "what do you do with a deep-learning algorithm which teaches itself and has very little human intervention" and "who's speaking then, the algorithm or the person?"[15]

The outcome of these cases — to date, the most significant of the automated internet speech cases — could provide insight into the degree, if at all, that the First Amendment protects AI speech.

A decision focused on how NetChoice's algorithms work and the involvement and judgment of human engineers and programmers — i.e., a Zhang approach — could suggest little to no First Amendment protection for fully autonomous AI speech, like AGI. A decision focused less on speaker identity and more on the content of speech and its effect on listeners could suggest the opposite.

This matter is not science fiction. AI is here and advancements in the technology occur

daily. The First Amendment speech issue will need to be addressed … for those who use AI and for those who wish to regulate it.

Joseph Meadows is a partner and Quyen Dang is a law clerk at Gordon Rees Scully Mansukhani LLP.

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[1] Case Nos. 22-277 and 22-555 (Sup. Ct.).

[2] 418 U.S. 241 (1974).

[3] Id. at 258 (footnote omitted).

[4] 475 U.S. 1 (1986); 515 U.S. 557 (1995).

[5] See Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 436 (S.D.N.Y. 2014) (citing commentaries); see also Joe Meadows et al., First Amendment Protections for Internet Company / AI "Speech" (May 17, 2018), at https://www.beankinney.com/first-amendment-protections-for-internet-company-ai-speech/.

[6] See Hopson v. Google, LLC, 2023 WL 2733665, at *3 (W.D. Wis. Mar. 31, 2023) (citing cases); e-ventures Worldwide, LLC v. Google, Inc., 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) ("A search engine is akin to a publisher, whose judgments about what to publish and what not to publish are absolutely protected by the First Amendment.") (citing Miami Herald, supra at 258).

[7] See O'Handley v. Padilla, 579 F. Supp. 3d 1163, 1186-87 (N.D. Cal. 2022), aff'd sub nom., O'Handley v. Weber, 62 F.4th 1145 (9th Cir. 2023) ("Like a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by the First Amendment") (citing cases).

[8] See Volokh v. James, 656 F. Supp. 3d 431, 442 (S.D.N.Y. 2023) (citing NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1210 (11th Cir. 2022) and Pacific Gas & Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 17 (1986)); see also Arkansas v. Bates, No. CR-2016—370-2, at page 11 (Benton County Circuit Court (AR)), at https://www.documentcloud.org/documents/3473799-Alexa.html (Amazon, in a criminal case, arguing that "Alexa's decision about what information to include in its response, like the ranking of search results, is constitutionally protected opinion") (quotations and citation omitted).

[9] Zhang, supra at 438-39 (quotations and citation omitted).

[10] See generally Alexander Kuper, AI 101 (Sept.6, 2023), at https://bipartisanpolicy.org/blog/ai-101/.

[11] Citizens United v. Federal Election Commission, 558 U.S. 310, 392 n.7 (U.S. 2010)

(Scalia, J., concurring) (citation omitted).

[12] See, e.g., Toni M. Massaro et al., SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment, 101 Minn. L. Rev. 2481 (2017); Richard Stengel, The Case for Protecting AI-Generated Speech With the First Amendment, Time, May 9, 2023.

[13] See Alec Peters, Machine Manipulation: Why an AI Editor Does Not Serve First Amendment Values, 95 U. Colo. L. Rev. 307 (2024).

[14] Thomas Ramge, Who's Afraid of AI? 16 (The Experiment, LLC) (2023).

[15] Case No. 22-277, Feb. 26, 2024 Tr. at 89:8-15.