“Free Speech in the Age of AI: Should the 1st Amendment Ban Regulation of Chatbot Output”

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Overview

- Our panel is about **who gets sued in the Age of AI**
- In very many AI lawsuits, the 1st Amendment may be a key defense against litigation
- (1) Develop the **intuition for broad 1st Amendment defenses**
  - If “code is speech”, then maybe strict scrutiny of state action to regulate code
- (2) **Narrow that intuition**
- (3) **Conclusions** on “code is speech” and breadth of 1st Amendment defenses

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My background and approach today

- Now
  - Professor, Georgia Tech School of Cybersecurity and Privacy, College of Computing
  - Research Director, Cross-Border Data Forum (lots of data in AI)
- Previously
  - Taught 17 different courses in law schools, many regulatory
  - Was editor of SSRN Cyberspace Law Abstracts, beginning in 1997
    - Technology is moving fast, perhaps all previous law is outdated
  - Also, government service
- For today
  - Issue spot this topic, based on my experience
  - See what others have said
  - Generally aligned, but try to offer my own perspective

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I. The Intuition for Strong 1st Amendment Defenses

- **Chatbot output – it SURE LOOKS LIKE SPEECH**
  - AI produces words that never existed before
  - The words make sense
  - The ”authors” of the model mold the semantics/content
- **Users’ 1st Amendment rights**
  - “Give me the best arguments for and against this Senate candidate”
- **Marketplace of Ideas**
  - Model A – MAGA; Model B -- Democratic Socialists; Model C: Chinese government
- **Lots of competitors**, especially with open-weight models
- **“Code is speech”**

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“Code is Speech” & Possible Lochner II

- Encryption cases in 1990’s said “code is speech”
- ”This court can find **no meaningful difference between computer language**, particularly high-level languages as defined above, **and German or French**....Like music and mathematical equations, computer language is just that, language, and it communicates information either to a computer or to those who can read it...”
- Perhaps 1st Amendment jurisprudence becomes a “**new Lochner**” – **intense limits on state/federal ability to regulate the speech from chatbots**
  - Lochner v. New York (1905) – state could not write a maximum-hours law; violated 14th Amendment freedom of contract
  - Dissent by Oliver Wendell Holmes – the Constitution does not enforce laissez faire economic theories
  - Eventually, the New Deal (1930s) overruled Lochner approach
  - **For AI, every Chatbot answer could be seen as protected speech, subject to strict scrutiny**
    - Strict scrutiny: "**strict in theory, but fatal in fact**"

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Part II: Limits On a New Lochnerism (1 of 3)

- Exception for **especially protected classes**
  - Muller v. Oregon (1908): Oregon law ok when it set maximum hour laws *for women*
    - Based on facts ("Brandeis brief"), Supreme Court allowed the statute
  - Recently have seen this to protect children
    - 2025, Supreme Court allowed Texas to require age verification for porn sites, despite teens' 1st Amendment rights to access information
- Regulation applies to categories that are **clearly "speech"**
  - No free speech right to defame; or defraud (including securities fraud)
- Regulation applies to **longstanding regulatory/safety areas**
  - Can regulate medical device safety, airline safety, personalized drugs
  - Therefore, ok to regulate the code that threatens that sort of safety

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Limits on Lochnerism (2 of 3)

- **Tort claims can win**
  - AI companies directly engage with user, so probably **don't get Section 230** (social media) protection from liability
  - **Cognizable injuries**
    - In data breaches, consumers lose because it has been hard to prove compensable injuries
    - If AI crashes a car, though, the victim has physical harm
    - If AI counsels a student to kill themselves, then physical and emotional distress

Limits on Lochnerism (3 of 3)

- **Cybersecurity**
  - Yes, regulations and tort claims can overcome free speech defense if AI hacks into the plaintiff's system, causing damage
- **AI existential risk**
  - Would this win in court? "Sorry, free speech is more important than preservation of the human species. The 1st Amendment therefore blocks regulation."
  - Clearly not.
  - If 1st Amendment is consistent with regulation here, then that creates an opening for broader regulation for at least the other topics discussed here

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Assessing “Code is Speech”

- The 1990’s encryption cases, with cryptographers happy because “code is speech” and their code was protected by the 1st Amendment
- However, there are settings where the AI/software code will **not** be treated as “speech” requiring 1st Amendment strict scrutiny
  - That is **“functional”** code – the code functions to hack the system or make the airplane unsafe
  - **That is ”conduct”** that will be found illegal, even if done by code
    - When the AI causes physical injury or infliction of severe emotional distress

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Conclusion on 1st Amendment as Limit on Chatbot Output

- **Some government rules would clearly violate free speech**
  - A law stating “no criticism of the President”
  - Likely an easy case if the state chooses among viewpoints for core political speech
- **LLMs will be too important -- can’t have them immune from ALL legal requirements**
- Since effects of AI seem likely to be pervasive in society, will need to bring **nuance** to First Amendment jurisprudence

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