TECHNOLOGY

A Facebook Like Is Now Covered by the First Amendment

The Founders could not have anticipated Facebook. In another way, though, they totally anticipated Facebook.

By Megan Garber

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SAVE



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In November of 2009, B.J. Roberts, the sheriff of Hampton, Virginia, ran for re-election. A group of workers in Roberts' office, however, among them one Bobby Bland, weren't enthused about the prospects of their boss's continuation in his role. So they took to their Facebook accounts to protest the run: They Liked the campaign of Roberts's opponent, Jim Adams. Despite the minuscule mutiny, however, Roberts won the election. He then chose not to retain Bland and the others as his employees. The dismissals, Roberts said at the time, were the result not only of budgeting concerns, but also of the workers' hindrance of "the harmony and efficiency of the office." The sheriff had not liked his workers' Likes.

Bland and his colleagues took Roberts to court, arguing that, in the dismissals, Roberts had violated their First Amendment rights. In April of 2012, however, the U.S. District Court of Eastern Virginia dismissed the case on the grounds that a Like didn't involve an "actual statement," and therefore was “insufficient speech to merit constitutional protection.”

Simple clicks of a button are now enshrined as constitutionally protected conduits of self-expression.

Yesterday, however, that decision was overturned. A federal appeals court ruled that a Facebook Like is, indeed, a form of expression that is covered by the First Amendment. Clicking a button is, per the decision, a protected form of speech.

Bland v. Roberts has been watched closely, and for good reason. It's obvious that First Amendment freedoms extend to the Internet. It's more obvious still that the expressions and discussions that happen to be mediated through fiber-optic cables are precisely the kind of thing Mr. Madison and his merry band of misfits envisioned when they went out of their way to write the Bill of Rights as extensively as they did. So courts have, in the past, granted First Amendment protection to written posts on

Facebook, as Judge Raymond Jackson pointed out in his initial ruling. Which is both appropriate and unremarkable, and precisely how the Bill of Rights was meant to work: Its protections expand to accommodate new times and new technologies.

But all the obviousness is obvious only insofar as the conduct carried out on digital platforms has been directly analogous to the protections laid out in the First Amendment: speech, assembly, press, religion, petition. The question *Bland v. Roberts* really explores is the extent to which digitally mediated expressions are, indeed, expressions in the same way that petitioning and pamphleteering and, yes, speech-making are. In the case of the Like button, does a form of expression so devoid of creativity on the part of the expresser -- to click or not to click -- deserve protection?

Judge Jackson's answer was no. When he dismissed the suit last year, he did so under the logic that First Amendment freedoms may be extended only to "substantive statements" -- to digital speech in the strictest sense of the term.

The appeals court's decision reverses that, widening the definition of speech to include, yep, the click of a button. Simple signals of intention and reaction -- the most individually uncreative forms of expression imaginable -- are now enshrined as constitutionally protected conduits of self-expression.

Call it expression collapse. Digital worlds are constructed of, by, and for speech; within them, it's increasingly hard to tell where one form of speech ends and another begins.

That's a good thing -- and not from the perspective of "Like as speech," necessarily, but from the perspective of "Like as asse[illegible]." Clicking a Like button, after all, has less to do with self-expression and more to do with expression that is, implicitly,

communal: It is, as an analogy to the modes of expression that existed in 1791, more akin to taking part in a rally or a protest or any other public gathering.

And that's what makes *Bland v. Roberts* so interesting as a matter of legal precedent: It hints at the creative collapse of First Amendment protections, at the merging of speech and assembly and petition and press into a singular digital activity. It hints at the way our new digital environments are imposing themselves onto some of the oldest assumptions of our legal system. When the Founders wrote the Bill of Rights, expression -- in all its forms -- was mediated by physicality. Crowds assembled in town squares; religion took place, generally, within churches; expression via a press required, literally, a press. Digital affordances eviscerate those divisions, giving us one place -- one Internet -- to do our speaking and meeting and protesting and petitioning.

And that means that the distinctions between forms of expression blur. Lines intersect, and categories cave in, and divisions merge in their meaning. A blog may be speech and press. A comment on that blog may be protest. A click on a Like button may be assembly, and maybe even petition. Call it expression collapse. Digital worlds are constructed of, by, and for speech; within them, it is increasingly difficult to tell where one form of speech ends and another begins.

The Like-as-speech ruling recognizes that. In some ways, it celebrates it. And it also justifies the decisions made by a group of guys those 200-ish years ago. The brilliance of the Bill of Rights is that it is, in its way, very of-the-Internet: Its logic appreciates, implicitly, the power of the network. Its authors acknowledged their own ignorance. They knew they couldn't anticipate the telegraph or the telephone or the Internet, so they inscribed their protections in a way that would accommodate an unknown future. They could not anticipate Facebook; in another way, though, they totally anticipated Facebook. Which is certainly something to Like.

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Megan Garber is a staff writer at *The Atlantic*.

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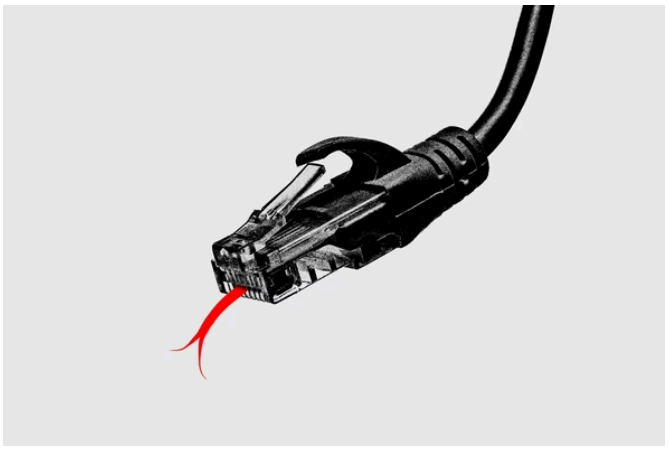


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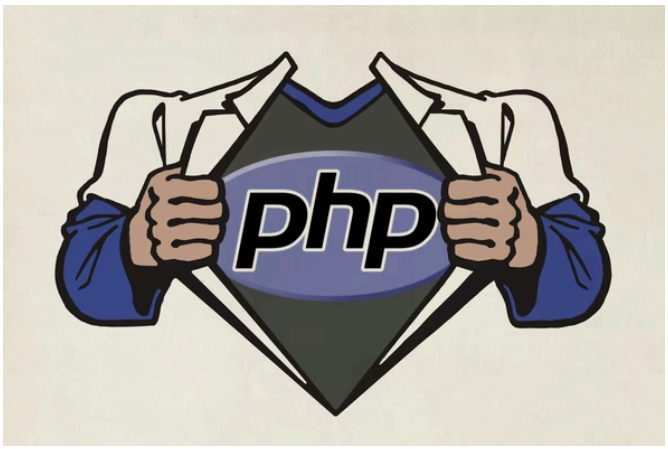


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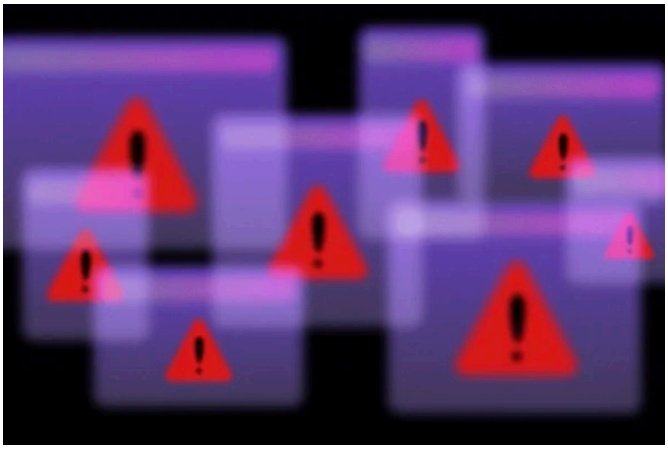


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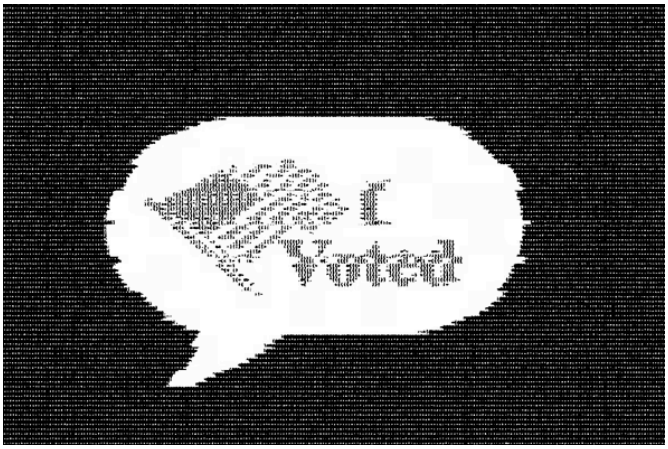


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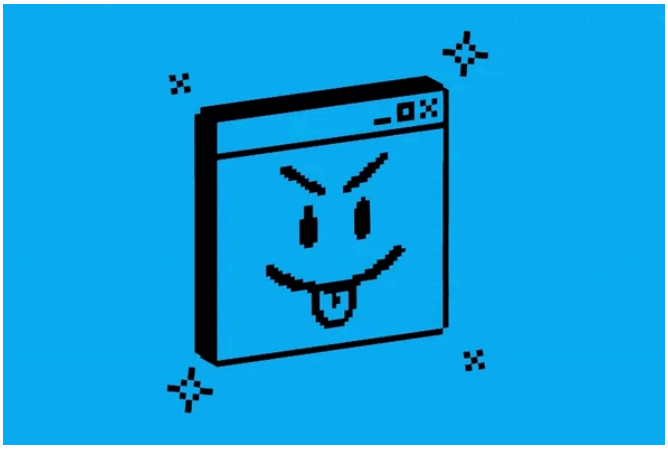


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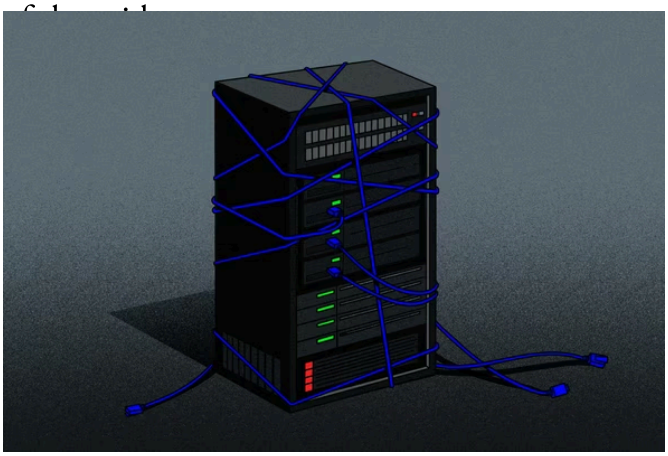


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