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Thinking Clearly About Speaking Freely – Part 2

by

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"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." John Milton

"I disapprove of what you say, but I will defend to your death your right to say it." Voltaire

"For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it." Thomas Jefferson

"If all of mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind." John Stuart Mill

"The ultimate good desired is ultimately reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition in the market." Oliver Wendell Holmes

"Everyone is in favor of free speech. But some people's idea of it is that they are free to say what they like but if anyone else says anything back, that is an outrage." Winston Churchill

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"The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." Anthony Kennedy

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In Part 1 of this series, I claimed that, due to the growing Cancel Culture, the "shrinking of the public space in which citizens may speak freely constitutes a threat to America's ability to sustain a healthy democracy." And I concluded this way:

> Even though the First Amendment rightly prohibits only government censorship, its rationale for protecting free speech clearly applies in the private sphere as well. And so the free speech values at the heart of the Founders' First Amendment, an important part of our Constitutional Culture, should be nourished and supported in the private sphere too.
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> This is truer now than ever before – in a way the Founders could not possibly have imagined – when so much of our Digital Age speech, today's trade in ideas, takes place on the giant online platforms that Jack Dorsey has called "public squares" and "global town squares."

I understand that the Cancel Culture – taking actions to delete, bury, relegate to secondary status, or otherwise diminish "disfavored" speech – is not limited to the online world. Certainly, the phenomenon has taken hold in certain mainstream print newsrooms, universities, corporations, and other venues outside of cyberspace domains. The instances are too numerous and well-known to recount. For only one current example, witness the recent petition by more than 200 employees of Simon & Schuster demanding that the book publisher not publish a book by former Vice President Mike Pence or by any authors associated with the Trump administration.

Here I am focused on online platforms, and more specifically on the platforms operated by the dominant Big Tech companies like Google's YouTube, Facebook, and Twitter, which, for better or worse, are the venues where so much of today's public speech occurs. Indeed, as I pointed out in Part 1, Twitter CEO Jack Dorsey has referred in congressional testimony to Twitter as a "public square" and "a global town square" while emphasizing the importance of a "free and open exchange" of ideas on the site. In a March 2019 post, Facebook CEO Mark Zuckerberg described Facebook as the "digital equivalent of a town square." Not surprisingly, Google's @TeamYouTube proudly claims on Twitter that "YouTube is a platform for free expression of all sorts."

But some sorts of free expression posted on the self-proclaimed online public squares are verboten, or cancelable, while other sorts are not. If you need a reminder, just ask the editors and writers at the *New York Post* about Twitter's and Facebook's treatment of the paper's Hunter Biden laptop story during last year's election campaign. By the way, Twitter's Jack Dorsey – the same one that touted Twitter as a "public square" – testified at a March 2021 congressional

hearing that Twitter's action blocking the *New York Post's* Hunter Biden email story was a "total mistake."

To be clear, my concern here is with lawful speech, not speech that falls outside the scope of protection under traditional First Amendment jurisprudence. Furthermore, I fully understand that much of the speech that occurs in the digital public squares of Twitter, Facebook, and YouTube is vile and hateful. But that does not assuage my worry that, increasingly, speech that, by all rights, ought to be within the bounds of legitimate, open public debate is canceled and considered out of bounds.

In Part 1, I mentioned in passing Justice Clarence Thomas's April 5 concurring opinion in Biden v. Knight First Amendment Institute of Columbia University. Now, as I begin to focus more concretely on possible approaches to respond to the problem of the major digital platforms' speech cancellation practices, Justice Thomas's opinion is a good place to start.

In the Knight First Amendment Institute case, the Supreme Court dismissed as moot a case in which the Second Circuit Court of Appeals had held that former President Donald Trump's Twitter feed constituted a "public forum" and, therefore, that the President violated the First Amendment when he blocked certain persons from accessing his feeds' comment threads. Recall that Donald Trump was permanently suspended from Twitter on January 9, 2021, while he was still president, and he has remained permanently "deplatformed" ever since.

While, on the one hand, you might think President Trump's Twitter case largely *sui generis*, on the other hand, as Justice Thomas shows, it highlights the conundrum, if not the supreme irony, presented by Twitter's content moderation policies. In examining the Second Circuit's "public forum" analysis, Justice Thomas said this at the outset:

> The disparity between Twitter's control and Mr. Trump's control is stark, to say the least. Mr. Trump blocked several people from interacting with his messages. Twitter barred Mr. Trump not only from interacting with a few users, but removed him from the entire platform, thus barring all Twitter users from interacting with his messages. Under its terms of service, Twitter can remove any person from the platform—including the President of the United States—"at any time for any or no reason." Twitter Inc., User Agreement (effective June 18, 2020).

And this:

> On the surface, some aspects of Mr. Trump's Twitter account resembled a public forum. A designated public forum is "property that the State has opened for expressive activity by part or all of the public." . . . Mr. Trump often used the account to speak in his official capacity. And, as a governmental official, he chose to make the comment threads on his account publicly accessible, allowing any Twitter user—other than those whom he blocked—to respond to his posts.
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> Yet, the Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, our frequent description of public forums as

> "government-controlled spaces.". . . Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account "at any time for any or no reason." Twitter exercised its authority to do exactly that. [Citations omitted]

The tension to which Justice Thomas refers is apparent.

The remainder of Justice Thomas's opinion explores possible legal doctrines to address what he sees as "concerns about stifled speech" resulting from actions taken by social media platforms. In doing so, he suggests there is a "fair argument" that Google, Facebook, Twitter, and perhaps other platforms could be deemed common carriers. If they were, they would incur an obligation to carry, without discrimination, all lawful messages posted to the sites, regardless of their content. In other words, the platforms would be required to operate, for purposes of carrying content, like the telephone and telegraph companies deemed common carriers under the Communications Act. They could not pick and choose among messages they wished to carry.

Somewhat as an aside, Justice Thomas also suggested that the social media platforms also might be considered places of "public accommodation," akin to common carriers, that would not be allowed to exclude posts from their platforms based on content.

Even if legally proper, and I have my doubts, I have serious concerns about imposing traditional common carrier obligations on social media platforms, even the giant ones like Google and Facebook. But in forthcoming parts of this series, I likely will examine that option more closely, along with others, such as revisions to the immunity from liability provisions of Section 230 of the Communications Act and imposition of competition-related remedies.

In Knight First Amendment Institute, Justice Thomas observed: "We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." That likely seems right.

But in the meantime, as I said in closing Part 1, the free speech values at the heart of the Founders' First Amendment are central to our country's Constitutional Culture. They should be nourished and supported in the private sphere by individuals and private sector firms and institutions. In other words, a robust Constitutional Culture, properly understood, should play an important role in combatting the growing Cancel Culture.

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Randolph J. May, Thinking Clearly About Speaking Freely – Part 1, (April 19, 2021)