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Thinking Clearly About Speaking Freely – Part 3

by

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This is the third part in this “Thinking Clearly About Speaking Freely” series. Links to Parts 1 and 2 are at the end of this one.

Previously, I made clear – or hoped to – that, in my view, the rapidly mushrooming Cancel Culture is harmful to America in a meaningful way. As I put it in Part 1, the Cancel Culture's "shrinking of the public space in which citizens may speak freely constitutes a threat to America's ability to sustain a healthy democracy."

I understand that "Cancel Culture" is susceptible to various meanings. For my purposes here, a [recent op-ed](#) in the *Washington Post* by contributing columnist Matt Bai contains a serviceable definition that captures the essence of what I mean:

[C]anceling is about a shift in the primacy of free expression. It refers to the idea that someone who traffics in the wrong ideas, or who has been accused of some profound moral transgression, does not deserve the right to be heard at all. Canceling stems from the idea, ascendant on the left, that free expression is too often an excuse to oppress minority views — and therefore it's sometimes necessary, in the interests of a just society, to silence hurtful voices.

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But whether someone "traffics in the wrong ideas" or has committed a "profound moral transgression" is often disputable, and, as I put it in Part 2, ought to be "within the realm of legitimate, open public debate." And that's true whether the impetus for the speech suppression comes from the right or left side of the ideological spectrum.

One very current example of a claimed "wrong idea" that may be as important as any other: [Facebook's about-face](#) regarding its previous months-long policy to take down posts suggesting that the novel coronavirus might have originated in the Wuhan Institute of Virology laboratory or otherwise have been man-made. This reversal by Facebook occurred on the very same day that [President Biden announced](#) that he had instructed "the Intelligence Community to prepare a report on their most up-to-date analysis of the origins of COVID-19, including whether it emerged from human contact with an infected animal or from a laboratory accident."

The fact that Facebook's reversal of its earlier cancellation action took place contemporaneously with President Biden's announcement should give pause, at least to those who might be concerned about the independence and integrity of Facebook's decisionmaking process. There is no doubt that the origination of COVID-19 is a matter of the utmost public concern that should have remained within the realm of public examination and debate.

How to redress the Cancel Culture's deleterious impact on the ability to speak freely is, without doubt, a difficult question, with perhaps multidimensional solutions. I understand there is much room for good faith disagreement regarding the efficacy, desirability, and lawfulness of potential remedies.

In Part 2, I highlighted Justice Clarence Thomas's April 5 concurring opinion in [Biden v. Knight First Amendment Institute of Columbia University](#). Like me, Justice Thomas is concerned about what he calls "stifled speech" resulting from various cancelling actions taken by social media platforms, especially the large ones like Google, Facebook, and Twitter. He suggests – remember, Justice Thomas's musings in the context of his concurring opinion have no precedential effect – that perhaps these platforms could be deemed common carriers.

Were they, presumably they then would incur an obligation to carry, without discrimination, all lawful messages posted to their websites. In other words, the platforms would be required to operate much like traditional telephone and telegraph companies historically deemed common carriers. They could not pick and choose among messages posted on their platforms based on the content of the message.

While the common carrier remedy may be superficially appealing, I'm reluctant to embrace it, at least for now. As traditionally applied, the core elements of common carriage – rate regulation and nondiscrimination mandates – stifle investment and innovation. And, in any event, the traditional criteria used to assess whether an entity is a common carrier don't neatly fit the web platforms, or at least not all of them. And, in any event, the common law history and judicial precedents regarding common carriage, and the later day statutory creations and applications, are somewhat muddled.

Nevertheless, in the main, a key factor in assessing the applicability of common carrier obligations has been consideration of whether an entity holds itself out to serve all comers

"indiscriminately," so as, in the context relevant here, to transmit neutrally content of the user's own choosing. Again, the telegraph company, in its capacity as a common carrier, couldn't refuse to carry a telegram on the basis that it contained offensive, but lawful, speech. Likewise, the telephone company with regard to telephone conversations.

On the one hand, the social media platforms – think YouTube, Facebook, and Twitter, for example – at first blush seemingly hold themselves out as indiscriminate neutral speech conduits, or mere distributors of speech. Anyone can sign-up. And from their inception, they've always made a point, almost a fetish, of insisting that they be called "platforms," not "publishers," because publishers typically exercise editorial control over speech. Language matters – in suggesting and reinforcing legal constructs.

But so, too, do the platforms' own published terms of service matter. As Justice Thomas made clear in his [Knight First Amendment Institute](#) opinion, [Twitter's terms](#) reserve the right to remove an account "at any time for any or no reason." That reservation of editorial control, which Section 230's broad conferral of immunity from liability surely enables, doesn't "sound in common carriage," as we lawyers say. The terms of service of the other major platforms, similarly, indicate, in a variety of circumstances, that they may, in their discretion, censor "hateful," "harmful," or "offensive" content. This "sounds in editorial control," as in "publisher," not common carriage.

Aside from "holding out indiscriminately," another traditional indicator of common carriage at common law, recognized by Justice Thomas, is possession of market power. Often, at common law, this market power factor was considered in conjunction with consideration of whether the service in question was deemed more or less "essential" or "affected with the public interest." The more market power, and the more "essential" or "affected with the public interest" the service, the more likely the imposition of common carrier obligations. In the classical example, the owner of the only bridge over the Charles River might be deemed a common carrier. But the sole ice cream vendor at the bridge's entrance might not be, even though the vendor – given the propensity of ice cream to melt if carried too far -- possesses an effective monopoly.

There can be little disagreement that the major dominant social media platforms – Facebook, YouTube, Amazon, Twitter, and a few others – possess significant market power, compared to any potential rivals. The facts and figures supporting their market power in their respective social media lanes are readily available and some of them are recited in Justice Thomas's opinion. And there is widespread agreement that their existing market power is solidified by the "network effects" phenomenon that makes it difficult for rivals to emerge once the dominant platforms' accumulated user bases have reached such a substantial size. And they have collected huge amounts of personal information that entrenches their market dominance in light of their ability to target ads to users more effectively than any potential rivals.

This is not to conclude here that, as a matter of antitrust law, Google, Facebook, Amazon, Twitter, or others have committed antitrust violations, or that even if this were true, that any particular antitrust remedy is appropriate. It is simply to suggest that, in considering whether common carrier obligations should be imposed, the dominant platforms' market power is a factor tilting in the direction of common carriage, albeit more study and individual determinations would be required.

As an aside, it's hard not to acknowledge the irony in the way Google, Facebook, and Twitter exercise their prerogatives to censor speech and de-platform speakers – in other words, to act as anything but neutral conduits of speech – while continuing to argue that Internet service providers, like Comcast, AT&T, Verizon, Charter, and all the other ISPs, should be subject to strict "net neutrality" requirements. Apart from wrangling over increasingly obsolete quarter-century old Communications Act definitional constructs that have characterized the decades-old net neutrality legal battles, there is little doubt that, in today's Internet marketplace, the dominant web platforms possess at least as much, if not considerably more, market power and control over speech as the major ISPs.

All this said, I do not advocate subjecting the platforms, even the dominant ones, to common carrier regulation. While common carrier regimes may permit some degree of flexibility, in general, the enforcement of regulatory mandates requiring reasonable rates and nondiscriminatory practices historically have led to a stifling of innovation and investment. There is considerable scholarly literature in support of this substantive point. Moreover, the ongoing process of determining and reassessing whether rates are "reasonable" and terms of service "nondiscriminatory" – and then litigating enforcement actions administratively and judicially – is costly and burdensome. I know this – not only from studying the literature – but from personal experience.

So while the dominant platforms' continued advocacy arguing that ISPs should be classified as common carriers subject to neutrality diktats while they remain free to censor speech at will is, indeed, ironic, that's not a sufficient reason to take the "what's good for the goose" approach. What matters is what's good for the public at large, not any particular individual, company, or industry.

I intend to continue to explore other remedies to address the Cancel Culture phenomenon, including possible revisions to Section 230 and measures to increase competitive alternatives in the marketplace.

In the meantime, and short of any action by the government, in order for the ability to speak freely be sustained, individuals, firms, and institutions in the private realm must nourish and sustain a robust Constitutional Culture. That is an important way for the private sphere – as opposed to government – to combat the growing Cancel Culture.

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

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 2](#), (May 3, 2021)