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Thinking Clearly About Speaking Freely – Part 4

by

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This is the fourth part in this “Thinking Clearly About Speaking Freely” series. Links to Parts 1, 2, and 3 are at the end of this one. I'm far enough along now that I don't intend to engage in much repetition, so I encourage you to read those parts as predicates to this one, which, in the main, focuses on Senator Roger Wicker's newly-introduced "PRO – SPEECH Act."

As I have made clear from the outset – and will each time for the benefit of those who have not read the earlier parts – I believe the rapidly mushrooming Cancel Culture is harmful to America. 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."

In [Part 2](#) I introduced Justice Clarence Thomas's suggestion in [Biden v. Knight First Amendment Institute of Columbia University](#) that major social media platforms like Facebook, Twitter, and Google's YouTube might be deemed common carriers, and in [Part 3](#) I explored this suggestion more fully. As I explained there, the two most common indicia of common carriage at common law, and the predicates for the federal and state statutory enactments that followed the common law, are whether the carrier – or, for now, "platform" if you will – (1) holds itself out to serve all comers indiscriminately, and (2) possesses market power, a factor sometimes considered in conjunction with whether the service is deemed "affected with the public interest."

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If the dominant social media platforms were deemed common carriers, they then would incur an obligation to post, without discrimination, all proffered lawful messages. Much like traditional telephone and telegraph companies historically deemed common carriers, they could not pick and choose among messages allowed to be posted on their platforms based on the content of the message.

In Part 3, examining the traditional indicia of common carriage set forth above, I pointed out factors, such as market power and "holding out indiscriminately" that would tend to support an imposition on the major social media sites of common carriage obligations. But I also pointed to other factors, such as the relative potential differences in market power, say, among Google's YouTube, Facebook, and Twitter, not to mention the hundreds of less dominant social media sites, that make generalizations tricky.

And applying the "holding out indiscriminately" test is tricky too. As I explained, on the one hand, anyone can sign up for a Twitter account. On the other hand, [Twitter's terms](#) reserve the right to remove an account "at any time for any or no reason." That clear reservation of editorial control, which Section 230's broad conferral of immunity from liability supports, doesn't square with traditional understandings of common carriage. Rather, it's publisher-speak.

For the reasons I explained in [Part 3](#), I do not advocate, at least at this time, subjecting the platforms, even the dominant ones, to common carrier regulation. Instead, I'm still considering other potential remedies to address the dominant social media sites' role in the Cancel Culture.

In the meantime, Senator Roger Wicker, the ranking member of the Senate Commerce Committee, has introduced a bill called the ["PRO – SPEECH Act."](#) In his statement accompanying its introduction, Senator Wicker stated:

The big social media companies continue to abuse their market power by censoring content, suppressing certain viewpoints, and prioritizing favored political speech. My bill would put safeguards in place to preserve internet freedom, promote competition, and protect consumers from these blatantly biased practices. It is time for Congress to act to ensure the internet can be an open forum where diverse views are expressed.

As I've made clear throughout this series, I share some of Senator Wicker's concerns regarding suppression of certain viewpoints by the big social media platforms that are the impetus for his PRO – SPEECH Act. While I am still considering all of its implications, I want to offer some preliminary observations that are pertinent to thinking about Senator Wicker's bill as a potential remedy. In any event, I commend the introduction of the legislation as a spur to further consideration of what to do about Big Tech's cancellation power.

In essence, and without delving into more detail here, the PRO – SPEECH Act would give the dominant social media sites a choice to operate either as (1) an "Internet platform" that would not be allowed to block users from posting and accessing lawful content, or degrade or impair the access of a user to lawful Internet traffic; or (2) a "publisher" just like the *New York Times*, *Newsweek*, *MSNBC*, and others that exercise editorial control over the content they make available. [Note that, in general, Senator Wicker's bill differentiates between "small" and "large" Internet platforms, with small platforms exempt from the must-post mandate.]

Presumably, a social media site that elects to operate as a platform, while not permitted to reject posts containing lawful content, would retain its present Section 230 immunity relating to those posts. On the other hand, a site electing to be treated as a publisher would be subject to whatever liability rules exist for publishers, including, when applicable, the stringent standard necessary to prove defamation in *New York Times v. Sullivan*.

Now, for purposes of what I want to accomplish in this Part 4, let's assume First Amendment objections are raised to Senator Wicker's bill, as they almost certainly inevitably will be. I don't think it's clear they will succeed, even though, as a practical matter, the effect of Senator Wicker's bill is to require that the dominant web platforms operate in a common carrier-like fashion if they wish to retain the broad immunity Section 230 presently confers. [Note that the PRO-SPEECH Act does not, by its terms, refer to either Section 230 or common carriage.]

With respect to possible First Amendment claims, it's useful to look to the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC* (1994). In a 5-4 decision, the majority upheld the portions of the Cable Television Consumer Protection and Competition Act of 1992 mandating that cable operators "must carry" certain local broadcasting and public broadcasting stations. The majority acknowledged that cable operators engaged in and transmitted speech and are entitled to the First Amendment's free speech protections. Nevertheless, considering the "must carry" requirements to be content neutral, the Court, applying intermediate rather than strict scrutiny, concluded that they were sufficiently tailored to serve the important governmental interest in the preservation of local broadcasting.

The assertion that, at least at that time, cable operators possessed what the majority called "bottleneck" or "gatekeeper" control over most of the video programming "channeled into the subscriber's home" was central to sustaining the "must carry" mandates in the face of First Amendment objections. In thinking about possible First Amendment objections to Senator Wicker's bill, having in mind similarities between cable operators' "must carry" obligations and Internet platforms' "must post" obligations, the market dominance of the major social media sites is certainly relevant. No doubt that's why Senator Wicker's press release declares: "They have become the gatekeepers for what consumers can access online and ultimately determine what millions of Americans read, view, and hear every day."

Justice Sandra Day O'Connor's dissent in *Turner* also warrants careful consideration by those wishing to think clearly about the lawfulness of "must post" legislative approaches like Senator Wicker's, particularly this language:

I have no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch. And I have no doubt that Congress can act to relieve this danger. . . Congress may also be able to act in more mandatory ways. If Congress finds that cable operators are leaving some channels empty--perhaps for ease of future expansion--it can compel the operators to make the free channels available to programmers who otherwise would not get carriage. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (upholding a compelled access scheme because it did not burden others' speech). Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or timesharing arrangement. Setting aside any

possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.

Concededly, in *Turner*, Justice O'Connor did not agree with the majority that the "must carry" requirements were content neutral or that the government had demonstrated a compelling interest in adopting them. But her acknowledgement that, upon a proper showing, Congress might require the cable companies to operate, at least to some extent, as common carriers is relevant to thinking about congressional responses like Senator Wicker's. His bill would require the large social media platforms to operate in a common carrier-like fashion in order to retain their currently-available Section 230 immunity.

Suffice it to say, that telephone companies deemed common carriers – and thereby obligated by the government to carry all lawful messages indiscriminately, whether they agree with the content or not – cannot object on First Amendment grounds.

In closing, I wish to emphasize I do not mean to suggest that, whatever "bottleneck" control cable operators were claimed to possess in the 1990s, such control exists today. It does not. Indeed, in my view, the cable operators, like the broadband Internet service providers that were subject to "net neutrality" requirements by the Obama-era FCC, possess less market power when it comes to suppressing speech than do Google, Facebook, Twitter, and Amazon.

Finally, I wish to emphasize that I am not here endorsing Senator Wicker's bill. But as I continue trying to think clearly about the impact of the often overly censorial moderation practices of the social media giants on the ability to speak freely, his legislative effort provides a helpful frame.

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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)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 3](#) (June 4, 2021)