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Thinking Clearly About Speaking Freely – Part 16: Combatting Cancel Culture With a Reinvigorated Constitutional Culture

by

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For over a year and a half now in this "Thinking Clearly and Speaking Freely" series, I've been addressing the Cancel Culture, especially its manifestation in the online environment. From the beginning, my contention has been that social media platforms, especially the dominant ones such as Facebook, Twitter, and YouTube, have been far too censorious. As we begin a New Year, in this piece I want to suggest that one way to combat the Cancel Culture is to reinvigorate our Constitutional Culture.

In my view, the speech suppression resulting from the Cancel Culture exhibits a leftward bias, at least on concededly consequential matters of public import. Think of the COVID-19 origin stories and reporting on Hunter Biden's laptop as censorship that surely involved consequential matters. Nevertheless, as I've made clear previously, the direction of the censorship bias doesn't really matter for my purposes because, regardless of the motivation, suppression of consequential speech, whether right-leaning or left, damages the health of our democracy.

Just because the Washington Post often fails in its own coverage – or lack thereof – to live up to the "Democracy Dies in Darkness" slogan it proudly (or pridefully) proclaims in its banner doesn't mean the sentiment is wrong.

At various points in the series, I've addressed different ideas for remedying the excessive censorship malady. Some, including Justice Clarence Thomas, have suggested that perhaps Internet platforms, at least the major social media sites like Twitter, Facebook, and YouTube, should be compelled to operate as common carriers so they would be required to carry all posts indiscriminately. Indeed, a Texas law does just that by prohibiting the major platforms from censoring content based on viewpoint. And the Court of Appeals for the Fifth Circuit, in an opinion now likely to be reviewed by the Supreme Court, rejected the argument that the Texas law violates the platforms' First Amendment free speech rights.

Considering my concerns regarding the censorship practices of the major platforms, which have only been heightened by the release of the various Twitter files, I'm sympathetic to the impulse motivating those suggesting common carrier treatment. Nevertheless, I've been reluctant to endorse more government control over private entities that, *generally*, are accorded protection under the First Amendment regarding their content moderation decisions, however biased or ill-conceived they may be.

I say "generally" accorded First Amendment protection because, in certain instances, the actions of private parties may be considered "state action." That is, under Supreme Court precedent, they may take on the mantle of the government if there is such a "close nexus" or "pervasive entwinement" between the government and a private entity that seemingly private actions "may be fairly treated as that of the State itself." Considering the pervasive entanglement between the FBI and Twitter documented in the Twitter files, it's arguable, at least regarding certain censorship actions, that Twitter has forfeited any claim to First Amendment protection. I plan to return to this subject in a subsequent essay.

But now, as we begin a New Year, I want to emphasize a point too often lost in the heat of the back-and-forth over the platforms' content moderation decisions. Just because Twitter, Facebook, YouTube, and the other social media sites, as private entities, may be protected by the First Amendment from being compelled to post speech they do not wish to carry, it does not mean they should continue to engage in their excessive censorship practices. And please recall that I am focusing on content involving matters of public import, not content encouraging terrorist acts or violence, facilitating sex trafficking or child pornography, or the like.

Here's the way I ended the very first piece in this series:

"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."

Without minimizing the possibility that some changes in law or policy may be appropriate, say, revising Section 230 of the Communications Act, which, as presently interpreted,

immunizes Internet platforms from liability for virtually all their moderation decisions, in the coming months I intend to focus more on ideas for reinvigorating our Constitutional Culture so that free speech is accorded more respect by more people with more diverse viewpoints. And not just with respect to social media sites and the online environment, but in our colleges and universities, businesses, and other venues.

Regardless of whether the First Amendment jurisprudence requires allowing particular speech under a particular set of facts, a greater appreciation of the value of robust debate that impelled the Founders to include the Free Speech Clause in the Constitution should serve to induce greater tolerance for diversity of thought and speech than currently exists.

Thought and speech are inextricably intertwined and mutually interdependent.

In *Ashcroft v. The Free Speech Coalition (2002)*, Justice Anthony Kennedy put it this way: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

In 2023, I hope to offer some ideas about ways to combat the Cancel Culture by reinvigorating our Constitutional Culture. In the meantime, I'll be happy to consider any suggestions you wish to offer – all in the service of "Thinking Clearly About Speaking Freely."

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