Censorship By Internet Corporations Is Still Censorship

The present brouhaha convulsing the Internet over the "banning", "shadow banning", "demonetizing", and "censoring" of various so-called "conservative" or "right-wing" personalities, web sites, and blogs by Facebook, Twitter, YouTube, Google, and so forth has generated far more uninformed talk than systematic analysis. For the prime example, many observers put forward the simplistic apology that, although "free speech" in a general sense *is* being curtailed, and particular political, ideological, religious, and other points of view *are* being discriminated against and penalized, by these "social media" and "search engines", nevertheless Facebook and the rest are not *governmental* entities but only *private* companies which as such have no constitutional or other legal duty to respect any but their own idiosyncratic conceptions of "free speech" (as embodied in the exceedingly vague and plastic "terms of service" and "community standards" in accord with which they police the speech allowed on their "platforms"). "Censorship" by such private corporations, so the argument goes, is not really "censorship" at all. This contention, however, is about as porous as a sieve.

First, as ostensibly private corporations, Facebook and the like surely expect that, were their "terms of service" and "community standards" to be challenged by the persons against whom they are discriminating, the courts of the several States, and perhaps of the United States as well, would uphold and see to the enforcement of those "terms" and "standards" as parts of private contracts. In fact, however, these "terms of service" and "community standards" are quintessential examples of "contracts of adhesion" which, because they evidently allow

for (and arguably are intended to facilitate) invidiously discriminatory practices plainly subversive of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the courts should think more than twice before approving. *See Shelley* v. *Kramer,* 334 U.S. 1 (1948).

Second, although perhaps "private corporations" in form (a question to be addressed below), these Internet "platforms" in fact were designed to serve, and now actually function, as "public fora" of the widest scope imaginable—certainly to a far greater degree than even the "company town" involved in the Supreme Court's decision in *Marsh* v. *Alabama,* 326 U.S. 501 (1946), was intended to and did serve as an effective "municipality" for its residents. In *Marsh*, the Court held that

[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. * * * [T]he [company] town * * * does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees [in the First and Fourteenth Amendments] * * * .

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other free citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing

these freedoms with respect to any other citizen.

* * * [T]he circumstance that the property rights to the premises where the deprivation of liberty * * * took place[ ] were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. [326 U.S. at 507-509 (footnotes omitted).]

In principle, the "public fora" established by Facebook *et alia* are no different from other "public fora", including those in "company towns". (It could even be said that the denizens of Facebook and Twitter, for instance, live in electronic "company towns" distinguishable from old-fashioned "company towns" only with respect to their absence of geographic borders.) In practice, though, "public fora" on the Internet are much more extensive in scope and intensive in use by the general public than any "public fora" in existence heretofore. Indeed, far more people use, and even rely for personal and other purposes on, Facebook and other Internet "platforms" than now live, or have ever lived, in "company towns" in this country. And in attempting to enforce their "terms of service" and "community standards" in aid of invidious discrimination, Facebook and the like will doubtlessly invoke on their behalf State laws, or even the laws of the United States, which apply to "corporations" and "contracts". So it would seem that the principles invoked in *Marsh* squarely apply to them.

Third, the excuse put forward by Facebook *et alia* for their discriminatory practices is that their "terms of service" and "community standards" are aimed only at so-called "hate speech", "offensive speech", "fake news", and "conspiracy theories". Perhaps it is enough to point out that neither Mr. Zuckerberg of Facebook nor any other *guru* in the "tech community" has a plausible, let alone a legitimate, claim to

set himself up as the arbiter of what constitutes "goodspeaking" or "goodthinking" (in the Orwellian sense). After all, Mr. Zuckerberg's "expertise" (such as it may be) relates to the arcana of computer codes, not to the code of laws which define "free speech".

More specifically, terminology such as "hate speech" and "offensive speech" has no basis anywhere within the corpus of constitutional law, least of all with respect to the First and Fourteenth Amendments. *See, e.g., Terminiello* v. *Chicago*, 337 U.S. 1 (1949), and *Cohen* v. *California,* 403 U.S. 15 (1971). Simply put, the enjoyment of one's constitutional rights—of *any* sort—cannot be made to turn on the invocation of tendentious labels. *See, e.g., Craig* v. *Missouri*, 29 U.S. (4 Peters) 410, 433 (1830); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *New York Times Company* v. *Sullivan*, 376 U.S. 254, 268-269 & notes 7 to 12 (1964); *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975); *City of Madison, Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 173-174 & note 5 (1976).

Fourth, Facebook and other Internet "platforms" have grown into abusive corporate monopolies, which should be curtailed with respect to *all* of their excesses for that reason alone, under the antitrust laws. After all, much of what flows through the Internet under the auspices of these "platforms" is "interstate commerce" or undoubtedly "affects interstate commerce", some of which "commerce" the "platforms" are openly attempting to suppress. And as the Supreme Court explained by way of analogy in *Marsh*,

[s]ince these facilities are built and operated primarily to the benefit of the public and since their operation is essentially a public function, it is subject to state regulation. And * * * such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. [326 U.S. at 506

(footnote omitted).]

Fifth, the question arises: *Why* is the government of the United States not applying the antitrust laws to break up these obnoxious Internet monopolies? Besides tried and true explanations bottomed on the insouciance, incompetence, or venality of public officials, two plausible answers come to mind—

(1) Certain dark forces within the General Government want to present to the public the monopolistic character of Facebook and other Internet "platforms" as a "problem" for which the "solution" will be artfully crafted "regulation". Not "regulation" in honest aid of untrammeled free speech, to be sure; but "regulation" which will enable those forces to employ those "platforms" to suppress indirectly, through ostensibly "private" action, speech which certain public officials disfavor but dare not suppress directly. Presumably, the "platforms" will actually welcome such "regulation", because (as their present misconduct evidences) they are equally desirous of and intent upon suppressing such speech. "Regulation" will simply protect and perpetuate their *anti-*constitutional activities under the deceptive color of law—with credulous Americans lulled into acquiescence by the fairy tale that "regulation" has magically transformed vicious monopolies once controlled by self-serving corporate executives into virtuous "public/private partnerships" newly controlled by no less self-serving bureaucrats acting in league with no less self-serving corporate executives.

(2) The even more disturbing explanation for public officials' reluctance to enforce the antitrust laws against the big Internet "platforms" is that those "platforms" never were, and are not now, really "private" endeavors at all. Rather, as many informed people believe with more than probable cause, they were originally inspired, invented, initiated, infused with capital, or otherwise encouraged and aided by the CIA, DARPA, or other entities lurking within the shadows of the

Deep State. The goal (which evidently has succeeded) was to set up ostensibly "private" companies as surreptitious agents or allies of the Deep State for the dissemination of propaganda, for political and cultural subversion, for thoroughgoing surveillance of the population—and ultimately for the regimentation of common Americans' minds at such a depressed level of triviality, infantilism, and even stupefaction that it would become virtually impossible for them to function as informed, competent citizens within the "Republican Form of Government" which Article IV, Section 4 of the Constitution guarantees. One may recall that, when asked what sort of government the Federal Convention of 1787 proposed, Benjamin Franklin responded: "A republic, if you can keep it." No one can expect to "keep" a "republic" in existence for very long, though, if such as Facebook and Twitter significantly affect, let alone determine, the quality of public discourse.

In sum, there can be no question that "censorship"—in the constitutional sense of that term—*is* at work on the Internet. And the Internet giants cannot shelter behind the flimsy façades

of their "corporate" charters. Honest and competent public officials, intent on serving the public interest, could bring this situation under control. Whether such officials exist in sufficient numbers to do the job remains to be seen.

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