When is Freedom of Speech Not Freedom of Speech?

By Paul Engel

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- Can Freedom of Speech be used to suppress speech?
- Do the owners of corporations have the legal right to control what content is on the platforms they own?
- Was the decision of the Circuit Court in NetChoice & CCIA v. Ken Paxton, Attorney General of Texas a win for free speech or a loss?

You may have heard about Texas bill H.B. 20, an attempt by the government of Texas to prevent censorship by social media companies. You might also have heard about the case making its way through the federal judicial system regarding this particular law. The central question we should be asking is: When is freedom of speech not freedom of speech? Put another way, can government, either legislatively or judicially, force private companies to share communication with which they disagree?

Social media censorship is a touchy subject, it tends to bring up emotional reactions on both sides. Here at The Constitution Study, we read and study the Constitution so we can place its actual language above our emotions and preferred outcomes. So let’s start at the beginning, with Texas H.B. 20

Texas H.B. 20

Texas Governor Abbot signed H.B. 20 into law in September,

2021. What is in H.B. 20?

relating to censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages.

Texas H.B. 20

What basis did the Texas legislature use to justify this legislation?

SECTION 1 The legislature finds that:
(1) each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information;
(2) this state has a fundamental interest in protecting the free exchange of ideas and information in this state;

Texas H.B. 20

So far so good. Yes, every person has a fundament interest in the free exchange of information. You could even say we have the right to freedom of speech and the press. And since we create governments to protect our rights, the state has a fundamental responsibility to protect that right. However, from here on out, Texas' case doesn't fare so well constitutionally.

(3) social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and

Texas H.B. 20

The Texas legislature cannot simply claim that social media companies are effectively common carriers. Legally, a common carrier is defined as:

An individual or business that advertises to the public that

it is available for hire to transport people or property in exchange for a fee.

Common Carrier – The Free Legal Dictionary

Social media companies do advertise that they are available to the public, but not to transport people or property. They do exchange information, but not for a fee, so let's go on.

A common carrier is legally bound to carry all passengers or freight as long as there is enough space, the fee is paid, and no reasonable grounds to refuse to do so exist. A common carrier that unjustifiably refuses to carry a particular person or cargo may be sued for damages.

Common Carrier – The Free Legal Dictionary

A common carrier is legally bound to carry all passengers or freight, but only as long as certain conditions exist. There must be enough space, the fee is paid, and there are no "reasonable" grounds to refuse. H.B. 20 doesn't deal with advertising on social media, so there is no fee to be paid and space is generally not an issue, but what about reasonable grounds? Since every user must agree to terms and conditions before they are allowed to sign up for the account, they agree to the company's reasonable grounds for access. Because of that, we are not done yet.

The states regulate common carriers engaged in business within their borders. When interstate or foreign transportation is involved, the federal government, by virtue of the Commerce Clause of the Constitution, regulates the activities of such carriers. A common carrier may establish reasonable regulations for the efficient operation and maintenance of its business.

Common Carrier – The Free Legal Dictionary

Unless the State of Texas requires that any connection to a

social media app by a user within its state connects to a datacenter also within the state, we're dealing with interstate commerce, which is regulated by the federal government, not the states. That means another important question is whether the regulations established by these social media companies is "reasonable" and who ultimately decides?

(4) social media platforms with the largest number of users are common carriers by virtue of their market dominance.

Texas H.B. 20

That's not what the legal dictionary says. If all it takes for a government to declare a business a common carrier and regulate how it does business, is for the business to succeed, then private property is a joke. Nothing in the legal definitions of common carrier have anything to do with "market dominance".

Regardless of all of these problems with the legislation, the focus has been on part of Section 7.

Sec. 143A.002. CENSORSHIP PROHIBITED. (a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:
(1) the viewpoint of the user or another person;
(2) the viewpoint represented in the user's expression person's expression; or
(3) a user's geographic location in this state or any part of this state.
(b) This section applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.

Texas H.B. 20

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

This led two trade associations (referred to as “The Platforms” in the suit), to sue the Texas Attorney General in federal court to prevent the law from going into effect.

The district court issued a preliminary injunction on December 1, 2021. It first held that Section 7 is facially unconstitutional. The court “start[ed] from the premise that social media platforms are not common carriers.” It then concluded that Platforms engage in “some level of editorial discretion” by managing and arranging content, and viewpoint-based censorship is part of that editorial discretion.

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

I’ve already shown that the question of social media companies being common carriers is problematic. Since it’s almost assured that people in Texas are accessing systems in another state, that would make this a question of interstate commerce, and therefore a federal issue.

The district court brought up the question of “editorial discretion”. What is editorial discretion?

a : individual choice or judgment
b : power of free decision or latitude of choice within certain legal bounds

discretion – Merriam-Webster Dictionary

So editorial discretion is the power to make editorial decisions. Is this protected by the Constitution of the United States? Yes. Since social media companies own their platforms, they have the right to exercise control over them, including what content will be allowed. Before I get into the details, let’s finish this thought from the circuit court.

So according to the district court, HB 20’s prohibition on viewpoint-based censorship unconstitutionally interfered with the Platforms’ protected editorial discretion. The court did

not explain why a facial attack on Section 7 was appropriate, other than asserting that Section 7 is "replete with constitutional defects" and the court believed "nothing . . . could be severed and survive."

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

There are two areas where Section 7 of H.B. 20 violates the Constitution of the United States, and both are found in the Fourteenth Amendment.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV, Section 1

Most social media companies are owned by people, and logically, that would include citizens of the United States for U.S. based companies like Facebook, YouTube or Twitter. By demanding that these companies provide on their platforms speech with which they disagree, they are violating the free speech rights of the owners of these platforms by compelling speech. The only difference between this case and the case of Jack Phillips is the size of the company involved. Second, since the government of Texas wants to wrest control of these platforms from their owners, they are depriving the lawful owners of their property without due process of law. Both of these are violations of the constitutions of both the United States and the State of Texas, (Article I, Sections 8 & 19).

Texas appealed this decision to the Fifth Circuit Court of Appeals, which found for the State of Texas. What I found most interesting in their opinion is its one-sided nature.

In urging such sweeping relief, the platforms offer a rather odd inversion of the First Amendment. That Amendment, of course, protects every person's right to "the freedom of

speech." But the platforms argue that buried somewhere in the person's enumerated right to free speech lies a corporation's unenumerated right to muzzle speech.

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

Inherent in the rights to freedom of speech is the right to not be compelled to speak in a certain manner. This is the argument behind the NIFLA case, where the Supreme Court recognizes that compelled speech is a violation of free speech.

The circuit court went on.

What's worse, the platforms argue that a business can acquire a dominant market position by holding itself out as open to everyone—as Twitter did in championing itself as "the free speech wing of the free speech party." … Then, having cemented itself as the monopolist of "the modern public square," … Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community,

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

This hyperbolic language shows the bias of this court. If a company, such as Twitter, claims to be a free speech platform, then turns out not to be, wouldn't that be a case of false advertising? And since Twitter does business across state lines, that means a federal lawsuit could be used for redress? While they may have a "dominant market position", that does not make them a monopoly. Neither does it cement their position, as the growth of numerous competitors shows.

Conclusion

According to the Fifth Circuit Court of Appeals:

Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say. Because the

district court held otherwise, we reverse its injunction and remand for further proceedings.

NetChoice & CCIA v. Ken Paxton, Attorney General of Texas

In point of fact, the court is using "freedom of speech" to suppress freedom of speech. It has placed "a freewheeling First Amendment right to censor what people say" squarely in the hands of government. When any government has the ultimate authority as to what communication a privately owned platform must allow, then government has become the censor. When any government has the power to dictate to a private company how they will be allowed to use their private property, then government has become the dictator. And what government can do to private corporations, it can just as easily do to you.

I am no fan of the censorship exhibited by many social media platforms, but placing that power in the hands of any government is far worse. Should the opinion not be overturned by the Supreme Court, then the State of Colorado could force Jack Phillips to place messages on his cakes or the State of California could demand that pro-life pregnancy centers advertise for abortion centers. For that matter, it could require that Jewish delicatessens sell pork or Muslim businesses celebrate Christian holidays. If those who claim to champion freedom and liberty use coercion and force to get their way, they are no better than those who are doing the censoring. If your ends justify your means, then you are no different than those who champion the Constitution when it benefits them, then throw it away when it does not.

What is the proper response to social media censorship? Stop using the censors. No one has a gun to your head forcing you to use Twitter, Facebook, or any other platform. Sure, it may be easier for you to reach more users, but that doesn't give you the right to tell these platforms what content they must carry. That is what the fascists do. You must decide, what is more important to you: Using these platforms or your freedom

of speech and press? That is why I recently posted a video on YouTube asking the opinions of my viewers about remaining on the platform. The best way to stop social media censorship is to deprive them of what they want most: Your money and that of your friends.

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