July 11, 2024

Curation Litigation: Social Networks' Right to Be Unsociable

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> "*My freedom of speech stimulates your freedom to tell me I'm wrong.*" – P.J. O'Rourke

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In what is certainly the most important First Amendment decision of the term, if not recent memory, the US Supreme Court this summer will decide two cases involving state laws seeking to regulate social media platforms' right to moderate or curate the content that appears on their websites. At their core, these cases turn on whether large media platforms, which are said to be tantamount to the modern public square, may censor content from their sites. Or, put another way, can the government tell a private social media company what it may or may not allow to be posted on its platform.

This article reviews the central arguments made in these two cases and landscape of free speech rights as they relate to content-based restrictions, compelled speech, and viewpoint discrimination. The rulings on these two cases will likely define how free speech is safeguarded or restricted in the electronic town square.

First Amendment Precedent: Compelled and Expressive Speech

> "*If the First Amendment is intended to protect anything, it's intended to protect offensive speech. If you're not going to offend anyone, you don't need protection.*" – Larry Flynt

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Privacy - Terms

The government may not force a speaker to deliver another's message. This is the heart of the compelled speech doctrine. Not only may the government not suppress what people want to say, but it may not compel people to express things they do not want to say. "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." John Roberts, Chief Justice. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 57 (2006). "When speech is compelled … individuals are coerced into betraying their convictions…. Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus v. AFSCME, Council 31*, 585 US., 138 S. Ct. 2448, 2464 (2018) (*citation omitted*).

Newspapers and other media outlets routinely avail themselves of this right. In *Miami Herald Pub Co. v. Tornillo*, 418 US 241 (1974), the Supreme Court held that newspapers are not required to publish editorial replies as was required by Florida's "right to reply" statute. That law gave a political candidate equal space to answer criticism and attacks by a newspaper. Tornillo was a political candidate who demanded space in the Miami Herald to answer criticism of his candidacy. The Court held that Florida's statute was an intrusion on the function of editors. It further found the law compelled the newspaper to print that which it otherwise would not and thus violated its rights to free speech.

There are limits on this doctrine, though. For example, the right against compelled speech does not entitle a property owner to avoid the use of their property as a forum for speech by others. In *PruneYard Shopping Ctr. v. Robins*, 447 US 74 (1980), the Supreme Court upheld a California Supreme Court decision saying that a group of residents had a right to speak and petition in shopping areas even where the centers are privately owned. *Id.* at 78. The shopping center may be forced to use its property as a forum for the speech of others. *Id.* at 85. The Court rejected the argument that a private property owner had a First Amendment right not to provide his property as a forum for the speech of others. The Court reasoned the law did not force the shopping center to say anything and that it could disavow the speech by posting signs where they spoke, emphasizing that no specific viewpoint is dictated by the State to be displayed on the shopping center's property. Id., at 85-88.

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp of Boston*, 515 US 557 (1995), the Court struck down a Massachusetts accommodation law's application to a St. Patrick's Day parade. The Supreme Court found it unconstitutional for forcing parade organizers to allow the participation of the Irish American Gay, Lesbian & Bisexual Group. The law effectively declared

the sponsors' speech itself to be the public accommodation. *Id.* at 573. The Court held that the "speaker has the autonomy to choose the content of his own message." *Id.* Organizing the parade and selecting the participants was expressive, so applying the public accommodation law to force the organizers to include unwanted speech was an impermissible intrusion on the parade sponsors' freedom of speech.

In *Rumsfeld*, supra, the government sought to enforce the Solomon Amendment requiring law schools to open their campuses to military recruiters. The Court stated that the government is limited in its "ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld*, 547 US at 60. Nonetheless, the Court held the Solomon Amendment was constitutional and that the law schools' denial of access is not inherently expressive so as to implicate the First Amendment. The law schools' conduct (in denying access) was only understood in light of the law school's speech explaining such, which they were still free to do.

Last summer, the Supreme Court decided the case of *303 Creative, LLC v. Elenis*, 600 US 570, 585 (2023). There the Court held that Colorado could not force a wedding website designer to provided services for gay weddings on the grounds the speech of the website designer is protected First Amendment expressive conduct. Colorado's public accommodation statute was content-based and created compelled speech, because the law forced the artist to speak a message betraying her beliefs. Does this ruling inform the NetChoice cases? Or is it distinguishable because it relates to a public accommodation statute specifically?

Viewpoint Discrimination

> "*Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.*" – Harry Truman.

Where the government regulates speech based on the ideology of the speaker, it is a more egregious form of content discrimination known as "viewpoint discrimination." The government may not discriminate against speech based on the ideas or opinions the speech conveys. *Iancu v. Brunetti*, --US--, 139 S. Ct. 2294, 2299 (2018). *See also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 US 819, 115 S. Ct. 2512 (1995) (denial of funds based upon the message of the student group was viewpoint discrimination because it regulated speech based on ideology or opinion). A law which only restricts criticism is not

content neutral; if it simultaneously is not narrowly tailored, it likely violates the First Amendment. *Boos v. Berry*, 485 US 312 (1988) (striking down a DC statute that criminalized the display of a sign criticizing a foreign government within 500 feet of its embassy). But can a government use this logic to compel a private entity not to discriminate on the basis of viewpoint?

With these precedents in mind, we turn to the *NetChoice* cases presently before the Court.

Social Media Cases Pending at the Supreme Court

NetChoice, LLC v. Paxton

> "*Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime …*" - Supreme Court Justice Potter Stewart

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Suppose that instead of restricting the free speech of citizens, the government mandates that a private business not be allowed to decide the speech it will allow when it hosts a forum for speech or other expression. This is the backdrop of *NetChoice, LLC v. Paxton*. In this matter, the State of Texas passed a law in 2021 barring social media companies from censoring users based on their viewpoints. Texas designated these platform companies as "common carriers." Under the common carrier doctrine, states may impose non-discrimination obligations on such companies that hold themselves out to the public.

Texas Statute HB20 regulates social media platforms with more than 50 million monthly active users. Section 7 of the statute provides a platform may not censor a user, a user's expression, or a user's ability to receive expression of another based on the viewpoint of the user or other person, the viewpoint represented in the user's expression or other person's expression, or a user's geographic location in this state. The prohibition on viewpoint-based censorship does not limit the expression of the platform. "Censor" under Texas state law means "to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." Tex. Civ. Prac. & Rem. Code §143A.001(1).

NetChoice challenged the law, claiming that platforms have a First Amendment right to decide whether to host specific instances of speech as they see fit. The government, they say, cannot tell platforms what they can and cannot "print." *See e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 US 241, 256 (1974). The district court issued an injunction after finding that the social media

platforms were not "common carriers" and were simply engaging in editorial discretion by managing and arranging content on their platforms.

The Fifth Circuit reversed the injunction entered by the district court. The Court approved of the concept that social media platforms are common carriers and also held HB20 does not chill speech, it chills censorship, for which there is no support in the First Amendment. Id. at 448. The Court further held that Section 7 of HB20 does not regulate a platform's speech at all, rather it protects other people's speech and regulates the platform's conduct. *Id.* The Firth Circuit noted that section 230 of the Communications Decency Act supports this view, as Congress indicated platforms are not "speaking" when they host other people's speech. Finally, the Court held that even if Section 7 regulates the platforms' speech, the statute satisfies the intermediate scrutiny that applies to content-neutral rules. *Id.* at 485.

"We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's free speech guarantee. The platforms are not newspapers. Their censorship is not speech." *Id.* at 494. "[T]he Platforms cannot invoke 'editorial discretion' as if uttering some sort of First Amendment talisman to protect their censorship. Were it otherwise, the shopping mall in *PruneYard* and the law schools in *Rumsfeld* could have changed the outcomes of those cases by simply asserting a desire to exercise 'editorial discretion' over the speech in their forms." *Id.* at 464.

"[T]he First [A]mendment doctrine permits regulating the conduct of an entity that hosts speech, but generally forbids forcing the host itself to speak or interfering with the host's own message." *Id.* at 455. In distinguishing *Miami Herald* and *Hurley,* the Court wrote, "the compelled speech violation[s] (in those cases) … resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 459. "Section 7 does nothing to prohibit the Platforms from saying whatever they want to say in whatever way they want to say it." *Id.* at 455. Hosting content is not tantamount to endorsing the same. Relying on *PruneYard,* the majority wrote that platforms, like the "the mall owner could 'expressly disavow any connection with the [pamphleteers'] message by simply posting signs." … Nor did the … law impermissibly compel the mall itself to speak." *Id.* at 456, citing *PruneYard*, 447 US at 87- 88.

The Court opined that the platform's so-called expressive right would arise, if it did, much like that in *Rumsfeld*, where "accommodating the military's message [did] not affect the law schools' speech." *Id.* at 459, *citing Rumsfeld*, 547 US at 64. Thus, even though the law required the entity to accommodate the speech of others, it did not limit what the host could say nor require the

host to say anything. *Id.* As such, the majority reasoned that nothing in HB20 prohibits the platforms from speaking or proscribes any content-based penalty. "HB20 is constitutional because it neither compels nor obstructs the Platform's speech in any way." *Id.* at 494.

The Court thus held that a speech host must make one of two showings to mount a First Amendment challenge. Either the challenged law (1) compels the host to speak or (2) restricts the host's own speech. It found neither to be the case in *NetChoice*. *Id.* at 459. The Fifth Circuit concluded that requiring the platforms to host certain content thus does not implicate the holding in *Hurley*. There, the law could not require the host to accommodate speech in contrast to their values or expressive message. *Hurley* is limited to a speech host who is intimately connected with the hosted speech and the platforms did not contend they were "intimately connected" with the communication. *Id.*, at 461.

The Parties' Briefs

In their briefing to the Supreme Court, the social media platforms, as Petitioners, argue that Texas law compels them to disseminate speech against their wishes. Following *Hurley* and *Miami Herald*, the Platforms say this law is unconstitutional. They claim the notion that government may compel private speech in the name of quelling concerns turns the First Amendment on its head. Because the law is content-based, Petitioners contend Texas must show the law is narrowly tailored to serve a compelling state interest. Whatever intent the state has in ensuring the public receive a wide variety of views, that interest cannot justify compelling private parties to disseminate content with which they disagree. Petitioners' Brief, p. 2; *see Tornillo*, 418 US 247-48.

Petitioners argue the First Amendment protects private parties' editorial rights, citing *Hurley* and *Miami Herald*. The Fifth Circuit was wrong, they say, to characterize this editorial right as "conduct" or "censorship" as only a government may censor. Laws that censor are "viewpoint-based" and trigger strict scrutiny. Simply put, the platforms contend the law fails strict scrutiny because governments cannot compel private actors to speak messages they do not want to say. They further claim the freedom to disseminate speech necessarily means the freedom to choose whether and how to disseminate speech. Editorial expression is protected by the First Amendment; the editorial function itself is an aspect of speech. "Whenever laws 'requir[e]' private entities 'to include voices they wished to exclude,' governments 'impermissibly require them to 'alter the expressive content of their' compilations. *303 Creative, LLC v. Elenis*, 600 US 570, 585 (2023) (quoting *Hurley*, 515 US at 572-73).

Petitioners add that neither *PruneYard* nor *Rumsfeld* involved private parties making editorial choices about what speech to publish. Instead, both cases involved access to property. Nothing in *Rumsfeld* required the law schools to publish military-approved messages or invite the military to lecture to its students.

In its Brief, Texas argues that the platforms are the censors; the government is simply providing redress. Because the platforms engage in viewpoint discrimination, and effectively occupy the field, Texas contends they are thus in a position to control what people see and hear on social media. This makes them either uniquely susceptible to regulation or a "common carrier."

Texas likens the social media platforms to telegraphs operating in the early 1900s, who sometimes chose what messages to send and what not to, based on politics or financial gain. The federal government regulated the telegraphs, requiring them to transmit messages with impartiality. Texas says Facebook and YouTube, among others, are using that same power and control to stifle free discourse. So the question becomes, do the social media platforms control the arena? Are they *de facto* utilities? Or are they simply private media companies which want to publish their messages and opinions by curating content.

HB20, Texas says, is an antidiscrimination law, requiring only that the social media platforms, as utilities or common carriers, may not pick and choose what messages to host. Relying on *PruneYard,* Texas argues that a state law that does not require a property owner to carry a specific message and thus can be required to open its doors to all on equal terms. *See* Respondent's Brief, p. 19. Texas notes that the law does not bar the platforms from saying anything they want. That is, HB20 regulates the social media companies' conduct, not their expression. "The Platforms' contrary theory has no limiting principle and runs headlong into *Rumsfeld*." *Id.*, at p. 13. "[T]he court rejected the notion that 'editorial discretion' standing alone, excluded an entity from antidiscrimination rules." *Id.*, at p. 14.

Texas points out that the social media companies have admitted that their relationship to the deluge of content that appears on their websites is "passive" and "highly attenuated." *See Twitter, Inc. v. Taamneh*, 598 US 471, 500 (2023). The platforms also profess to be providing a place for public discourse. While their service agreements provide that they do not monitor, endorse, or take responsibility for generated content, Respondent contends otherwise and says the platforms routinely engage in viewpoint discrimination. Respondent's Brief, at p. 7. Finally, Texas argues that *Rumsfeld* is the Court's jurisprudence regarding the distinction between speech and conduct, allowing conduct to be regulated unless inherently expressive. Here, Texas says HB20 regulates conduct rather than speech, and the social media platforms do not

genuinely engage in inherently expressive speech. Thus, they have no editorial right to exclude certain speakers with whom they disagree politically or otherwise. *Id.*, p. 28.

Moody v. NetChoice, LLC

> "*Everyone is in favor of free speech. Hardly a day passes without its being extolled, but some people's idea of it is that they are free to say what they like, but if anyone says anything back, that is an outrage.*" - Winston Churchill

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The second case comes from the Eleventh Circuit also involving NetChoice, but concerns a Florida statute. *See NetChoice v. Attorney General of Florida*, 34 F.4th 1196 (11th Cir. 2022) (Florida's "Stop Social Media Censorship Act" likely violated the First Amendment because Florida law sought to regulate content). The Eleventh Circuit viewed the social media companies' actions to curate content as an editorial function of a private company over which government has no power. "[S]o-called 'content-moderation' decisions constitute protected exercises of editorial judgment, and that the provision of the new Florida law restrict large platforms ability to engage in content moderation unconstitutionally burden that prerogative." *Id.*, at 1203. The appellate court observed that laws restricting the platforms' ability to speak through content moderation trigger Frist Amendment scrutiny (1) because decisions protecting "editorial judgment" and (2) decisions permitting inherently expressive conduct require it. *See id.*, p. 1210.

Effectively, the Eleventh Circuit accepted the argument that *Miami Herald* governed this action and reasoned that, just as the government cannot tell a newspaper what to publish, it cannot tell a social media company what content to allow on its platform. It thus held the First Amendment protects the exercise of editorial control and judgment. *Id.*, citing *Miami Herald*, 418 US at 258. The Eleventh Circuit distinguished *PruneYard* and *Rumsfeld*, which stand for the proposition that government may in certain circumstances regulate and compel private actors to "host" the speech of others. In *PruneYard,* the only First Amendment interest the mall owner was the right not to be forced to use its property as a forum. That is, the owner's own right to speak was not at issue; it did not argue its First Amendment right was hindered. Whereas, the platforms asserted that the Florida law requires them to carry messages contrary to their standards. Likewise, in *Rumsfeld*, the Court held the regulation did not implicate the First Amendment because it did not limit the schools' right to say what they wanted to say. As such, the Solomon Amendment did not unconstitutionally require the schools to host the military's speech and did not restrict the schools' expressive conduct. The Eleventh Circuit noted that recruiting activities are not

"'inherently expressive' – they're not speech – in the way that editorial pages, newsletters, and parades are." *Id.*, at 1216 citing *Rumsfeld*, 547 US at 64. Thus, accommodating the military is not compelled speech because it does no restrain the host's speech at all.

In distinguishing *Rumsfeld*, the Eleventh Circuit stated that the case "isn't controlling here because social media platforms warrant Frist Amendment protection on both grounds (compelling speech and inherently expressive conduct) that schools in *Rumsfeld* did not. *Id.* at 1216. The Court went to say that Florida's law interferes with the platform's ability to speak because the manner in which to disseminate third-party speech is itself speech. *See Pacific Gas*, 475 US, at 10-12 ("If the government can compel speaker to propound messages with which they disagree, the First Amendment's 'protection would be empty.").

The Eleventh Circuit held the Florida content moderation restrictions are subject to either strict or intermediate scrutiny depending on how the provisions are content-based or content-neutral. *Id.*, at 1226. Regardless, it concluded that none of the Florida law's content moderation provisions survive intermediate scrutiny let alone strict scrutiny, and are thus unconstitutional. *Id.*, at 1227. Intermediate scrutiny requires the government show the law is "narrowly drawn to further a substantial governmental interest … unrelated to the suppression of free speech." *Id.* (citation omitted). The court found that the law's content moderation provisions do not further a substantial governmental interest, let alone a compelling one. *Id.*, at 1228. The court held there is not a substantial governmental interest in leveling the expressive playing field." *Id*, at 1228. The court also disagreed with Florida's argument that the content moderation provisions impose no greater burden on the platforms than essential in the furtherance of that interest." *Id.*, at 1229.

<u>The Parties' Briefs:</u>

In their brief to the Supreme Court, the Petitioner, Florida, argues the Eleventh Circuit was wrong because the social media platforms act as the public square and the law prevents them from misusing that power. The false premise, Florida argues, is that what appears on the platforms is their expression. Instead, the platforms engage in business activity by hosting all kids of content, and that activity may be regulated, because the law regulates conduct, not expression. The First Amendment protects expression of private entries, but it does not give them license to selectively silence the speech they host. *PruneYard*, 447 US at 87; *Rumsfeld*, 547 US at 62-65. While the platforms assert they do not endorse and are not responsible for content, Florida argues they are like common carriers because they host other speakers in a manner generally open to all. And the platforms express no message. The Florida law does not little

more than require the platform to adhere to the business practice of hosting speech open to all comers and content. Florida's law interferes with no message. Platforms are not seeking to speak when they restrict speakers any more than the law schools did in *Rumsfeld*. Florida states its law is content neutral, only requiring platforms to refrain from silencing certain users, and it serves an important interest in ensuring the platforms apply their rules consistently.

The Respondents contend the opposite and argue the Eleventh Circuit got it right in relying on *Miami Herald* and holding that SB 7072 unconstitutionally countermands the platforms' editorial decisions. They assert the law compels speech. Respondent's Brief, p. 2. They also contend Florida has singled out companies the law applies to, thus adding viewpoint discrimination to law's problems, and that it is subject to strict scrutiny because it regulates content. They further assert the court properly held the platforms are not "common carriers," reasoning the platforms do not open their websites to the public on an indiscriminate basis. *Id.*, at p. 13. The platforms argue that all speech involves choices of what to say and what to leave unsaid, relying on *Hurley*. Id., at pp. 15-16. They also analogize the statute at issue with the improper "right to reply" laws rejected in *Miami Herald*, arguing the statute unduly burdens the platforms' editorial rights. Id., at p. 26.

Conclusion

At bottom, it appears the Supreme Court will have to determine whether laws relating to content curation govern conduct that may be regulated or speech (or expressive conduct) that may not. Whether social media platforms are shopping malls or newspapers. Whether their expressive interest is in editing certain viewpoints or whether the act of censoring is in fact conduct. Or some new hybrid. The manner in which the Court decides these cases will have a profound effect not only on what can or cannot be said on social media platforms, but also how the government can tell private media entities what to say or do and not say or do. Opinions are expected this term.

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