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PERSPECTIVE

Social media, cancel culture and the First Amendment

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The great deplatforming of January 2021 will likely be remembered as the turning point in the battle for control over digital speech. Within days of the attack on the Capitol, former President Donald Trump was banned or suspended by Twitter, Facebook, Instagram, Snapchat, Twitch and YouTube. Stripe stopped processing payments for his campaign's website. Reddit banned the r/DonaldTrump subreddit and Discord removed the server connected to the pro-Trump group TheDonald. win. Shopify also took down the online stores for both for the Trump campaign and the Trump Organization.

Many of Trump's most ardent followers met a similar fate. After banning Trump from its platform, Twitter suspended more than 70,000 accounts associated with QAnon and the Capitol attacks. After his ban on Twitter, many assumed that Trump would simply pivot to Parler, the social network mainly catering to Trump supporters, but Parler went dark when both Apple and Google removed the app from their stores and Amazon Web Services declared that it would no longer host it on its cloud computing services.

Banning or suspending, also known as deplatforming, is not unprecedented, but the increasing rise of the practice has led conservatives to lambast "cancel culture." The implications of deplatforming for free speech, however, have worried advocates on both sides of the issue. Social media critics have argued unsuccessfully for years that internet sites violate their First Amendment rights, Section 230 of the Communications Decency Act and anti-discrimination laws when site owners ban or suspend them from social media websites.

The U.S. Supreme Court has repeatedly ruled that a private entity, such as Facebook or Twitter, is only subject to the First Amendment when it functions as a state actor and performs a traditional exclusive public function. As recently as 2019, the court analyzed whether a private operator of a public access channel functioned as a state actor and was subject to the First Amendment.

In *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921 (2019), the government handed over a public access cable channel to a private entity to operate. Writing for the majority, Justice Brett Kavanaugh stated that providing a forum for public speech is not an activity exclusive to governmental entities; therefore, a private entity does not transform into a state actor under the First Amendment just because it provides a forum for public discussion. After all, Kavanaugh argued, private property owners and private lessees often open their property for speech, grocery stores put up community bulletin boards and comedy clubs host open mic nights.

Another challenge to private entity censorship is whether federal law requires social media companies to be neutral in moderating content on their sites. CDA Section 230 protects websites and web users from third-party content published on their sites. It also provides protection from liability for moderating content, including deleting posts or banning an individual for violating its terms and conditions. Many federal lawmakers claim that this immunity only applies to neutral public forums while others argue there is nothing in Section 230 requiring a website to be neutral or public to obtain the benefits of the statute. In January 2020, then-presidential candidate Joe Biden called for Section 230 to be revoked in its entirety, thus it will most likely be modified but how and when remains to be seen.

As Congress, the executive branch and the Department of Justice debate deplatforming in the United States, world leaders from across the globe have condemned Twitter's suspension of Trump's account.

Although some welcomed the move, many — even critics of the former president — blasted the action as politically motivated and an infringement on free speech. A spokesman for German Chancellor Angela Merkel has stated that Twitter's decision to preemptively ban an elected president (rather than continue to flag specific problematic tweets as inaccurate) is "problematic" based on the "fundamental importance" of freedom of opinion. Her comments are echoed by a representative of the French government, Clement Beaune, who warned that "a digital oligarchy" constitutes a threat to democracy.

Conservatives, GLBQT+, and African-American Groups Alike Challenge Google/YouTube's Moderation of Uploaded Content

In addition to deplatforming, speech rights are at issue in a recent spate of cases challenging YouTube and its parent company Google's practice of moderating content on its site, claiming that the practice unfairly restricts marginalized groups' content. YouTube offers an optional opt-in setting called "Restricted Mode." Many libraries, universities and other public institutions, as well as a small percentage of YouTube users (presumably parents) screen out content flagged as age-restricted or "potentially adult" by opting in to Restricted Mode. YouTube additionally uses automated software to identify content as inappropriate for advertising, resulting in what critics deem "demonetization," arguably a form of censorship. YouTube says it does this pursuant to its terms of service with content providers in order to ensure that ads do not appear alongside videos with content that certain audiences might find objectionable.

In 2020, the 9th U.S. Circuit Court of Appeals affirmed dismissal of a lawsuit brought by a conservative media company in *PragerU v. Google*, 951 F. 3d 991 (9th Cir. 2020). PragerU alleged that YouTube's classification of some of its videos as "Restricted Content" and its demonetization of some of its videos constituted an attempt to silence conservative viewpoints and perspectives on public issues. An example of a restricted/ demonetized video was one with the title, "Why Isn't Communism as Hated as Nazism?" Prager U argued that YouTube is a state actor because it performs a public function and sought to enjoin YouTube to declassify their videos as "Restricted Content." The court, however, ruled that while Google and YouTube might host speech, their platforms are private and not subject to the same First Amendment and civil rights constraints as a state actor.

Two other pending cases raise similar challenges. In *Divino Group LLC v. Google LLC*, 5:19-cv-04749 (N.D. Cal.), LGBTQ+ content creators filed a class action against YouTube and Google, claiming that the defendants' Restricted Mode discriminates against them by labeling their videos as shocking and sexually explicit. The *Divino* plaintiffs accused Google/YouTube of having a bias against those in the LGBTQ+ community who create and post video content or to whom the content is targeted.

Divino has been stayed pending the same court's ruling on a motion to dismiss a related class action, *Newman v Google*, 5:20-cv-04011 (N.D. Cal.). Newman was brought by African-American content creators, viewers and consumers who challenge Google's moderation of uploaded content, and who allege, like the plaintiffs in *PragerU* and *Divino*, that Google and YouTube excludes and/or wrongly demonetizes their videos either because of their membership in a protected class or alternatively, does so capriciously and arbitrarily. At issue are not only claims brought under the state and federal constitutions, but also alleged violations of the Lanham Act, California's Unruh Act, California's Unfair Competition Law, and breach of YouTube's terms of service. Finally, the Newman plaintiffs argue that Section 230 is unconstitutional under the First and 14th Amendments; the United States has not yet determined whether it will intervene.

In the wake of these challenges, YouTube has acknowledged that Restricted Mode is "not perfect," and advises that it is seeking to address the concerns raised by plaintiffs, including declassifying some videos so that they are not excluded by viewers who opt-in to Restricted Mode. ■

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