‘We Cannot Let Big Tech Censorship Destroy Political Debate,’ Lawyers Suing Twitter Over Bans Respond to Critics

SILICON VALLEY CAUGHT LYING AND SAYING THAT ANYTHING THEY DON'T LIKE IS "TERROR"!

AP Photo/Richard Drew

by ADAM CANDEUB AND NOAH PETERS 20

In December of last year, Twitter announced a rule banning accounts of individuals or

organizations that are “affiliated with a violent extremist group.”

Although the rule is written broadly to apply to accounts that “use or promote violence,” or are affiliated with groups that do, it appears to have been applied only to right-wing and conservative users. Worse, many of the users banned under this rule appear never to have broken Twitter’s rules, advocated violence, or made any threats against anyone.

Social media plays a key role in driving the news cycle and political debates. It has become an important mechanism allowing individuals to participate in public affairs and interact with politicians, journalists, and government officials directly. In last year’s decision in *Packingham v. North Carolina*, the Supreme Court described social media sites like Facebook and Twitter as “the modern public square.” Selectively kicking off users with controversial viewpoints or off-platform affiliations thus poses a serious threat to Americans’ ability to freely express themselves.

The current crackdown on conservatives using social media sites such as Facebook, YouTube and Twitter has generated a great deal of controversy. It has also, understandably, sparked a number of lawsuits. We are counsel on one such suit, involving Jared Taylor, a self-described “race realist.” While Taylor’s views are controversial, that only reinforces the fact that his efforts to respectfully share those views must be protected. In the words of the late Supreme Court justice Oliver Wendell Holmes, Jr., “if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.”

Our suit relies on a legal doctrine precisely tailored to this situation, developed by the state of California. In *Robins v. Pruneyard Shopping Center* (1979), the California Supreme Court held that its state constitution’s protections for freedom of speech and petition apply to not just to the government, but to privately-owned public forums as well. Thus, students could not be prohibited from handing out “pro-Zionist” leaflets in a privately-owned shopping center. In a 1980 U.S.

Supreme Court decision, the High Court found no conflict between California's doctrine and the U.S. Constitution, squarely rejecting the shopping center's argument that it had "a First Amendment right not to be forced by the State to use [its] property as a forum for the speech of others." Thus, Twitter, though a private entity, cannot ban users because it disagrees with their viewpoints or off-platform affiliations.

Professor Noah Feldman has argued that Twitter isn't a public forum for others' speech. Rather, it's a "platform designed to deliver … Twitter's expression." In other words, all the millions of tweets, tweeted all over the world, all are "intended to express [Twitter's] own political values." Therefore, the *Pruneyard* case would not apply; Twitter is no public forum and is free to ban anyone it disagrees with.

But to claim that its platform expresses "its own political values" would be news to Twitter. Twitter's stated corporate mission is to "[g]ive everyone the power to create and share ideas and information instantly, without barriers." Its self-proclaimed corporate value is that it "believe[s] in free expression and believe every voice has the power to impact the world." Twitter freely acknowledges that it is "the public square," not a platform for its own corporate speech.

Feldman argues that Twitter's act of passively allowing millions of users across the globe to post their thoughts, feelings and media is equivalent to Twitter posting the exact same content from its own account. We contend this is absurd. Even Feldman acknowledges that "no one thinks that Twitter is doing the talking when individuals tweet from their own accounts."

How can Twitter be regarded as expressing itself through the Tweets of individual users when "no one thinks Twitter is doing the talking when individuals tweet from their own accounts"? Feldman does not explain, and his failure to do so is telling. It was for this very reason that the U.S. Supreme Court rejected the argument that California's rule violates the First Amendment rights of the owners of public forums to prohibit speech on their premises. The Court found that there was no serious risk that the views expressed by individuals on the forum would be identified as those of the owner.

Moreover, Twitter would never want to claim that all of its tweets express its "own political values." If it did, it would run afoul of Section 230 of the Communications Decency Act. This federal statute grants "interactive computer services," such as Twitter, Google, YouTube and Facebook , near total legal immunity from being held liable as "publishers" of their users' content. For instance, Twitter is not liable for any libelous tweets on its platform.

Most other industries do not enjoy Section 230's extraordinary gift of "publisher" immunity. Classified ads can form the basis for legal liability for newspapers, and restaurants may have liability for libelous graffiti scrawled on their bathroom stall walls.
But Section 230 immunity is predicated on Twitter's not being the speaker or publisher of its users' tweets. Contrary to Professor Feldman, Twitter assuredly does not want its platform to "express its own political values" lest it face a blizzard of legal liability for every tortious statement made by any user of its platform.

In our lawsuit, we argue Twitter can't have it both ways. Either Twitter is a closed platform with liability for everything published therein, or it is an open platform that respects the rights of its users to respectfully share their views. What it cannot be is an unaccountable censor of public debate. Congress's intention in drafting Section 230 was not to provide legal cover for large Internet companies to trample on the free speech rights of their users, but the exact opposite: to promote the development of the Internet as a forum for "a true diversity of political discourse" and "encourage the unfettered and unregulated development of free speech on the Internet." Our lawsuit simply says that these large corporations cannot have their cake and eat it too — immunity from "publisher" liability, and the unfettered power to censor.

Feldman accuses us of seeking to "turn[] social media platforms into free speech zones." Instead, our suit contends that that's precisely what they are already. As the Supreme Court noted in *Packingham*, "social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." Twitter has consistently marketed itself as an open forum for members of the public to express themselves. Having made this choice,

Twitter must obey the laws that protect the public's free speech rights in such forums. While the First Amendment does not apply to Twitter as a public entity, California has consistently held that its constitutional protection for free speech is broader than that of the First Amendment and applies to private entities that host public forums.

California's broad protection for free speech on public forums is also good public policy. Indeed, the implications of not recognizing Twitter as a "free speech zone," but holding instead that it may practice viewpoint discrimination at will, are quite disturbing. It has been stated that no political candidate can win election without a Twitter presence. Can Twitter shut down the nascent political campaigns of those who disagree with its corporate policies by banning them? Will the precedent set by Twitter allow other social media platforms like Facebook and Google to search through users' posts at will and delete ones it disagrees with?

Feldman is incorrect in asserting that our lawsuit would leave social media platforms powerless to prevent abuse of the forum or protect other users. California law holds that *Pruneyard* public forums can impose reasonable "time, place and manner" restrictions on expressive activity, so long as those rules are enforced even-handedly. And Section 230 protects "any action voluntarily taken in good faith [by an interactive computer provider or user] to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." This section was designed to allow website hosts to keep their sites "family friendly" without thereby being subjected to "publisher" liability for the statements of its users. It protects certain forms of regulation by website hosts, but with two important limitations: 1) the regulation must be undertaken in "good faith," and 2) the restricted content must involve or be similar to pornography, graphic violence, obscenity, or harassment. But users who share their viewpoints in a respectful manner, and refrain from posting content that is obscene, violent, harassing, or the like, pose no threat to anyone. Section 230 provides no immunity for attempts to ban such users based on their controversial viewpoints or alleged off-platform affiliations.

In today's world, much of our public debate occurs on the "vast democratic forums of the Internet in general, and social media in particular." Indeed, the Supreme Court in *Packingham* identified social media websites as "the most important places . . . for the exchange of views" in the modern day. Twitter now seeks to censor the expression of certain views on social media.

Allowing Twitter to play this new role of viewpoint censor poses a direct threat to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Our nation has a long and cherished tradition of protecting the rights of communists, radicals, religious minorities, and other speakers with controversial or unpopular views to speak in the public square.

Discarding California's *Pruneyard* Doctrine in the Internet age, as Feldman wishes to do, is dangerous and naïve. It would allow corporate America to destroy the vast power social media places in the hands of individuals to shape public debate. Like the shopping center in *Pruneyard*(which, as Feldman notes, strictly banned any expressive activities not related to commercial purposes), social media platforms could use their power to shut down any sort of meaningful debate. Perhaps Feldman, Twitter and others would prefer for public debate in the Internet age to be less wide-open and robust, and more timid and deferential. But allowing large tech companies to impose viewpoint censorship in hopes of achieving a better-mannered public debate is a fool's bargain. It would have devastating consequences for our democracy for generations to come.

Read More Stories About:

Big Government, Tech, Jared Taylor, Pruneyard Doctrine, Twitter