FREE SPEECH AND PRIVATE CENSORS

Larry Alexander [*]

In this piece I contrast societal conditions in which free speech can flourish with those in which it is threatened by private censors. I then suggest measures that would protect free speech in the latter conditions, conditions that unfortunately prevail today.

In contemplating the implications for free speech for censorship by private parties, we should first look at the conditions that existed in the last four decades of the twentieth century,[1] conditions that were as close to ideal as one can expect for promoting whatever values one thinks free speech serves. Those conditions included, in addition to the constitutional doctrines restricting government viewpoint regulation, a general social tolerance of different viewpoints—no significant political discrimination in hiring, contracting, and consuming—relatively objective journalism, and mass media that was not overwhelmingly univocal in its viewpoint and the viewpoints it allowed to be seen, heard, or read.

Today, on the other hand, things are markedly different insofar as free speech and its values are concerned. The doctrines that restrict governmental censorship are still intact. But for private restrictions on free speech, things have changed significantly.

First, to be sure, private individuals, as part of their freedom of speech, must perforce act as censors. I voice my point of view, not yours. Everything I write or say is an act of censorship. So freedom of speech rests at bottom on private censorship.

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[*] Larry Alexander is Warren Distinguished Professor at the University of San Diego School of Law (larrya@sandiego.edu). He wishes to thank Eugene Volokh and Jim Weinstein for their comments and suggestions.

[1] After the period of McCarthyism and the Hollywood blacklists.

That said, however, things change when the censoring private party is not you or I but is a sizable collection of individuals or a large enterprise.

Suppose, for example, that there were only one business, Corpzilla, and it employed everyone except those employed by the government. And suppose that its management decided that anyone who expressed views that differed from those of management would be fired or demoted. Unlike the government, it could not put people in jail for expressing the views it opposed. But it could fire people, people who would then be unemployed and unemployable. Would we still recognize the society as one in which the values of free speech were realized? Surely not. Size matters.

Or suppose we had several enterprises, not one, but they were all vulnerable to unwanted governmental regulations. And suppose the government let those enterprises know that it did not like those who express viewpoint *X*, which then led those enterprises to announce that anyone expressing viewpoint *X* would be fired. Government has ways of suppressing viewpoints without penalizing those who express them when it has a lot of regulatory power. Are the enterprises in this scenario freely speaking?

Next, suppose a private group of sufficient size were to abandon its live and let live approach to those with whom its members disagree and would organize or threaten a boycott of enterprises that do not fire or refuse to deal with people who express certain views. This group may not represent a majority or even close to a majority, but unlike the actual majority, its members are organized and vocal. The result is that a large number of enterprises now cater to the boycotters' wishes and fire or refuse to deal with those expressing the unwanted views. Is this an example of free speech in action or an example of its suppression?

Finally, suppose those private enterprises that control most of the means by which citizens communicate with each other decide to prevent those citizens from expressing certain views, whether because they themselves disagree with those views, or because they fear governmental regulations if they do not act to suppress them. If in the pre-social-media era, Ma Bell had restricted phone service to those with whose views it agreed, we would have thought that to be a violation of free speech, not the exercise of free speech by Ma Bell. Are things materially different in the example of parallel action by the dominant big tech platforms?

The exercise of free speech by private citizens has always come with a cost. Your friends may cut their ties to you. Your employer may fire you. Your customers may

abandon you. But in a society in which many jobs are available and in which most people adopt a live and let live approach to views with which they disagree, the costs of expressing your views will probably not be severe. Things seem to be different today.

The Supreme Court has not opined much on the issue. In *Marsh v. Alabama,*[2] it did endorse in effect a free speech easement over the private property of a company town. And in the *Logan Valley Plaza* case,[3] the Court extended *Marsh* to union picketing in a shopping center, only to retreat from *Logan Valley* almost immediately in *Lloyd Corp. v. Tanner*.[4] Significantly perhaps, in *Pruneyard Shopping Center v. Robins,*[5] the Court upheld the California Supreme Court's application of California's constitutional guarantee of free speech to permit petition activities in a shopping center over the objection of the shopping center's owners.

There are measures to combat private censorship that I believe would be both effective and consistent with the freedom of speech of the private censors. One such measure would be to add an additional protected class to existing antidiscrimination laws, namely, those discriminated against because of their political views, with political views defined capaciously to include, for example, cultural views that have political valence (e.g., views about same-sex marriage, transgenderism, and similar types of issues).[6] Such discrimination is, I believe, much more widespread today than discrimination based on race, sex, or national origin. And it is a major obstacle to people's ability to express themselves. Nor would extending antidiscrimination protection this way interfere with the freedom of the discriminators to express themselves. Even those who are not allowed to discriminate on the basis of race are allowed to express racist views—so long as those views are not expressed through discriminating.

A second measure would be one aimed at big tech. Platforms for mass communication that achieve a certain market share (say, 50%)—either themselves or in

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[2] 326 U.S. 501 (1946).

[3] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc, 391 U.S. 308 (1968).

[4] 407 U.S. 551 (1972).

[5] 447 U.S. 74 (1980).

[6] *See, e.g.*, Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. __ (2022).

combination with affiliated companies—must be treated as common carriers. Like the phone company, they would not be allowed to deplatform speakers. Of course, they may express their own views, including negative comments about speech by those they might otherwise have deplatformed. And they may report those whose speech is illegal to the relevant law enforcement authorities. But like the phone company, their hands would be tied when it comes to deplatforming speakers. Deplatforming speakers has become a serious threat to people's ability to communicate freely to a mass audience, especially given the obvious political biases of the major platforms. And because the platforms would still be able to express their views without deplatforming dissenters, treating them as common carriers only promotes and does not impair freedom of speech.

What are the prospects that the measures I propose will be enacted? This probably depends on which party controls Congress and the presidency, as currently one political party is more adversely affected by cancel culture and deplatforming than the other. But that may change, as may political control. Regardless, free speech depends on measures such as those I propose.