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Texas' Social Media Law Recycles Left-Wing Media Theory

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Two days after the January 6 riot at the U.S. Capitol, Twitter, Facebook, and other social media platforms banned President Donald Trump and many of his supporters. In the wake of this "great deplatforming," Republicans' longstanding gripes with these platforms became a legislative priority.

One of the most aggressive of these Republican-led efforts to regulate social media is Texas' H.B. 20. Ostensibly passed to combat the "dangerous movement by social media companies to silence conservative viewpoints and ideas," this bill prohibits social media platforms from removing users or content "based on the viewpoint" of the user or content. In its effort to protect conservative speech, Texas Republicans have adopted a historically discredited left-wing legal theory, dispensing with core conservative values in the process.

In the 1960s, a group of progressive scholars argued that the First Amendment does not merely prohibit the government from censoring private speech and press. In fact, they argued, it granted the government the affirmative *power* to control the mass media. In a capitalist system, they reasoned, the government must ensure that private media owners do not exclude unwelcome viewpoints, in order to protect the "democratic interest" in free speech. To this end, the scholars championed the Fairness Doctrine, right-of-reply mandates, and expansive applications of "common carriage" doctrine, which enable the government to force the inclusion of certain content.

Borrowing from the same playbook, Texas now argues that First Amendment values *require*, rather than prohibit, government interference with private speech. H.B. 20 declares that social media platforms are common carriers like telephone companies and thus are subject to onerous restrictions over who and what they may host. According to Texas, H.B. 20 serves the democratic interest in protecting the free exchange of ideas and information. But like the collectivist efforts that preceded it, Texas' misguided attempt to advance "First Amendment rights in the Lone Star State" violates private platforms' First Amendment rights to choose what speech they publish.

As we explained in a recently filed *amicus curiae* brief on behalf of the Cato Institute, courts have repeatedly rejected such regulations, and for good reasons.

First, as a federal district court correctly noted last year, the First Amendment protects social media platforms' discretion to publish or remove content. The Supreme Court established this right in the 1974 case *Miami Herald Publishing Company v. Tornillo*, when it struck down a Florida law that forced newspapers to print responses to their criticism of political candidates. The Court explained that this "right-of-reply" law infringed on newspapers' right to choose what content they publish.

The Supreme Court affirmed that First Amendment rights apply with full force to internet media in 1997's *Reno v. ACLU*. Other federal courts have since upheld the editorial rights of search engines and social media sites. These precedents doom the Texas law. The state can't eviscerate platforms' well-established First Amendment rights by arbitrarily calling them common carriers.

Second, efforts like H.B. 20 *chill*, rather than encourage, the exercise of free speech. Both the Florida right-of-reply law and the Fairness Doctrine actually *discouraged* the media from covering controversial topics that would trigger the forced-hosting requirements. Likewise, H.B. 20 will encourage platforms to ban entire subjects (say, discussions of terrorism) to avoid facing the unappetizing choice to either host objectionable viewpoints (such as pro-terrorism material) or face liability for removing each piece of content.

Third, H.B. 20 violates fundamental property rights by forcing private platforms to host users and content they would otherwise exclude. The First Amendment does not authorize the government to co-opt private property to amplify certain viewpoints.

The supporters of the Texas law, like other conservative opponents of Big Tech, cite anecdotal accounts of inconsistent content moderation to support their claim of unfair bias. But it's more likely that these incidents are just casualties of the margin of error inherent in content moderation at scale. "Incorrect" removals of content happen millions of times per day to users representing every conceivable ideology. Conservatives are removed from platforms when they violate platforms' terms of service, but Texas' premise that conservatives are being unfairly targeted is unsubstantiated.

But even if it was substantiated, forced-hosting laws like H.B. 20 would contravene limited government, constitutional fidelity, and strong property rights, all of which are supposed to be core conservative values. If Texas Republicans really want to protect "conservative viewpoints," they should reacquaint themselves with those principles and reject giving the government more control over social media.

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