Is Big Tech Censorship Unconstitutional?

Nate Hochman
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Last week, the Heritage Foundation released a petition promising "to hold Big Tech accountable": "It is time for aggressive reforms to ensure Big Tech is held accountable," the petition read. "As Big Tech's influence over every day American life continues to grow, often hand-in-glove with the government, we cannot let these companies reshape our society." But the Cato Institute's Matthew Feeney wasn't having it. Yesterday, Feeney criticized the new initiative on Twitter, writing:

"The Heritage Foundation's "Big Tech" petition is fascinating for many reasons, but its claim that "Big Tech" content moderation violates Constitutional rights is especially noteworthy. It's a radical departure from a traditional American conservative theory of rights and govt."

Is Big Tech censorship a violation of constitutional rights? The answer to that question largely hinges on one's view of powerful tech companies — i.e., whether platforms like Twitter and Facebook are akin to common carriers, serving as a kind of new digital "public square." That's worth debating, but — contrary to Feeney's assertion that it's "a radical departure from a traditional American conservative theory of rights and gov[ernmen]t" — there's a viable conservative argument for the affirmative, as I have argued before. Clarence Thomas, whose conservative credentials are second to none, suggested as much last April. In a concurring opinion to *Joseph Biden v. Knight First Amendment Institute at Columbia University* (2021), Thomas wrote:

In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. Federal law dictates that companies cannot "be treated as the publisher or speaker" of information that they merely distribute. 110 Stat. 137, 47 U. S. C. §230(c).
The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size. The Internet, of course, is a network. But these digital platforms are networks within that network. The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share—is valuable relative to other search engines

because more people use it, creating data that Google's algorithm uses to refine and improve search results. These network effects entrench these companies. Ordinarily, the astronomical profit margins of these platforms—last year, Google brought in $182.5 billion total, $40.3 billion in net income—would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.

Now, if tech platforms *are* common carriers, as Thomas suggests, there is ample precedent in the American legal tradition for treating their censorship as a violation of constitutional rights. As Columbia Law School professor Philip Hamburger wrote in the *Wall Street Journal*:

Some of the material that can be restricted under Section 230 is clearly protected speech. Consider its enumeration of "objectionable" material. The vagueness of this term would be enough to make the restriction unconstitutional if Congress directly imposed it. That doesn't mean the companies are violating the First Amendment, but it does suggest that the government, in working through private companies, is abridging the freedom of speech.

This constitutional concern doesn't extend to ordinary websites that moderate commentary and comments; such controls are their right not only under Section 230 but also probably under the First Amendment. Instead, the danger lies in the statutory protection for massive companies that are akin to common carriers and that function as public forums. The First Amendment protects Americans even in privately owned public forums, such as company towns, and the law ordinarily obliges common carriers to serve all customers on terms that are fair, reasonable and nondiscriminatory. Here, however, it is the reverse. Being unable to impose the full breadth of Section 230's censorship, Congress protects the companies so they can do it.

Some Southern sheriffs, long ago, used to assure Klansmen that they would face no repercussions for suppressing the speech of civil-rights marchers. Under the Constitution, government cannot immunize powerful private parties in the hope that they will voluntarily carry out unconstitutional policy.

So again: The question of whether Big Tech censorship is a violation of constitutional rights, like many political issues, is complicated. But that's precisely the point — *it's complicated.* Feeney offers an easy answer to a difficult question. The Heritage Foundation is the conservative movement's preeminent think tank; regardless of whether one agrees with every policy Heritage supports, its arguments should not be so readily dismissed. But Feeney waves away its assertion that "tech companies, in conjunction with the government, are actively and deliberately eroding" our constitutional rights as an obvious betrayal of traditional conservative principles. At the very least, that's a simplistic reading.