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Bills bring national ‘cancel culture’ v. free speech debate to Wyo

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Wyoming has become the latest arena in the national conservative fight against “cancel culture” with the progress of multiple bills aimed at reining in social media platforms and the perceived stifling of First Amendment rights.

The Senate Judiciary Committee and the Senate Minerals Committee last week passed Senate File 100 – Internet freedom-prohibiting discrimination, and Senate File 99 – Unfair employment practices-offsite lawful activities, by wide margins. While neither bill’s intentions are explicitly stated in the bill text, their impetuses are clear: the perceived censoring of, and blow-back against, conservative speech in public life.

Sponsored by Sen. Affie Ellis (R-Cheyenne), SF 99 would prohibit employers from firing employees for their offsite, off-the-clock behavior, so long as that behavior is legal and doesn’t present a conflict of interest for the employer. For example, a staffer couldn’t be let go for unpopular, controversial or embarrassing social media posts made on their own time. The proposal would expand on existing protections in federal law that cover people who march in a political protest or express a controversial political opinion online.

“Typically, nowadays, if you have the wrong political views you can be cancelled, and hopefully this will prevent you from being canceled from your job,” Sen. Bo Biteman (R-Ranchester) said in a hearing on the bill last week before it passed out of committee unanimously.

SF 100, meanwhile, is a more ambitious piece of legislation sponsored by Sen. Cheri Steinmetz (R-Lingle) and is ruffling more feathers. It imposes penalties on out-of-state social media giants like Facebook or Twitter for “censoring” what people say on those platforms.

“I think you’d have to be hiding under a rock to not understand what this bill addresses today,” Steinmetz said Friday, referring to the nationwide debate that has followed the high-profile deplatforming of figures such as Donald Trump, Alex Jones, Milo Yiannapolous and Laura Loomer, among others.

Despite the support of conservative lawmakers and residents, questions linger about Wyoming’s legal authority to enforce such measures, specifically SF 100 — which even prominent conservatives have challenged.

A rallying cry

Accusations of political censorship by social media giants have become common rallying cries in recent months, particularly in conservative political circles.

Motivated by issues like the "cancelling" of figures like former President Donald Trump — whom Twitter suspended after he attempted to undermine the 2020 presidential election results — and Facebook burying an explosive and uncorroborated New York Post report about the contents of Hunter Biden's laptop, activists have sought to make internet accountability a key issue in Washington D.C. and in statehouses around the country. The Conservative Political Action Committee even made it the theme of this year's CPAC conference in Orlando, using the weekend as a platform to rail against the ostracization and fact-checking of certain opinions on social media.

"Cancel culture" concerns have even seeped into the firearms industry. This Tuesday, the House Judiciary Committee advanced House Bill 236 – Firearms transactions-financial discrimination by a 7-2 vote. That bill explicitly prohibits financial institutions from discriminating against firearms businesses, and can be interpreted as a direct rebuttal to the federal government's controversial "Operation Choke Point," an Obama-era initiative many believed was intended to freeze out firearms sellers and other industries from the banking system.

"I find myself in support of the bill quite simply because as I observe what's going on in the world of woke thinking, they have somehow found a way to turn something — in this case a constitutionally protected thing like firearms — into something that is amoral," Bill Winney, a Sublette County resident said during testimony Tuesday afternoon. "And I object to that."

Steinmetz's bill reflects similar concerns. SF 100 closely mirrors national efforts to reform Section 230 of the Communications Act of 1934. Section 230 was originally drafted to allow website owners to moderate content on their sites without legal repercussions. While those protections have proven to be a challenge to accountability efforts, some believe there is sufficient legal precedent to allow states, rather than the federal government, to take action themselves.

On Friday, SF 100's co-author, Columbia University Law professor Phillip Hamburger (whose work on Section 230 has proven divisive in the legal community) cited the landmark 1968 United States Supreme Court case Red Lion Broadcasting Co. *v.* FCC. That case pondered whether the Federal Communication Commission's fairness doctrine regulations concerning personal attacks made in the public interest violated people's freedom of speech. Ultimately, the court ruled that the FCC's fairness doctrine regulations enhanced, rather than infringed, the freedoms of speech protected under the First Amendment.

"In Red Lion, the Supreme Court says there's no sanctuary in the First Amendment for unlimited private censorship for those operating a medium open to all," Hamburger said.

Legal hurdles

That precedent, however, has some problems, according to those who testified against the bill. The fairness doctrine — which required broadcast license holders to fairly present both sides of controversial issues of public importance — was repealed in 1987, and the Red Lion case itself pertains only to broadcast cases, not to internet providers. Numerous legal experts — including those who testified Friday morning — have also argued bills like SF 100 could actually represent government overreach on private business.

In his testimony, Carl Szabo — a member of the right-leaning American Legislative Exchange Council — spoke forcibly against the bill, calling it an example of overreaching government interference in private business decisions. His own organization has written four separate resolutions in opposition of similar legislation, he said, and while he is concerned about the prospect of free speech on the internet, SF 100 is not the mechanism to slake those worries.

Recently, he noted, the right wing content creator Prager U (whom Hamburger has contributed to in the past) brought a lawsuit against YouTube on similar grounds, only for the court to rule that its parent company, Google, was operating as a private company and not a public forum. Policing the decisions of a private company, Szabo said, would be tantamount to violating the free speech of those businesses, and could actually tie their hands in moderating the spread of truly dangerous content, like recruiting videos for terrorist organizations or other active calls for violence.

Like-minded bills at the federal level have run into similar problems. In 2019, Sen. Josh Hawley's (R-Missouri) "Ending Support for Internet Censorship Act" was panned by advocates on the grounds it could actually incentivize greater censorship, while groups like the libertarian-leaning Cato Institute have avoided prescriptive legislative efforts in favor of more hands-off approaches to accountability.

"There are a litany of other First Amendment problems with this bill and other constitutional problems. But more importantly is what is at the heart of this bill, what it is and what it will cause," Szabo said. "What it is, is government intervention with private contractors. And as a conservative, a member of ALEC and an active Republican … that I take issue with. This is basically the government telling private businesses what type of content they can and cannot decide is best for their users."

SF 100 also attracted attention from high-profile national groups like the advocacy organization TechNet and the influential Internet Association, all of whom spoke out against the bill as improperly infringing on the rights of businesses.

The bill garnered support from big names too, including the right-wing Heartland Institute, which said the bill would help ensure both religious and political free speech rights of all Wyoming residents and would do little to interfere with the specific concerns outlined in Section 230.

Other supporters argue that social media platforms have since grown into de facto monopolies and — like public utilities, railroads and other monopolies before them — are now large enough to be subject to strict regulation by their government.

In testimony supporting the bill, Harriett Hageman — an attorney, former gubernatorial candidate and the recently elected national committeewoman for the Wyoming Republican Party — argued that in the instances states allow monopolies, they do so under a heavy cover of regulatory bodies like the Public Service Commission, or others. Social media companies, she said, should be treated no differently.

The bill advanced out of committee, 4-1.

Can states actually do this?

Efforts to rein in censorship by technological giants in courtrooms around the country have consistently failed, David Greene, the civil liberties director and senior staff attorney for the Electronic Frontier Foundation, said in an interview. Legislation to do so will likely face a similar outcome once challenged, he said.

“These social media sites have a First Amendment right to curate their sites,” he said. “You don’t get to decide what content goes on them or doesn’t go on them.”

A photograph of David Greene from the Electronic Frontier Foundation Website (Electronic Frontier Foundation)

That precedent dates all the way back to the 1974 Miami Herald Publishing Company v. Tornillo decision, in which the United States Supreme Court struck down a law in the state of Florida that compelled newspapers to offer their endorsed political candidates and that candidates’ opponent equal space in the newspaper.

“This is a fairly well-established, ingrained interpretation of the First Amendment that private actors cannot be compelled to carry,” Greene said.

While SF 100 could be amended to build a decent argument that independent service providers function like common carriers due to their monopoly status in some communities, Greene said, the same argument is harder to apply to social media companies.

“I think it’s really difficult to make a common carrier argument to social media,” Greene said. “There’s more choice involved. A lot of people use it, a lot of people don’t use it. And there’s lots of competitors. They’re constantly evolving. It doesn’t really have any of the characteristics of a common carrier that is justified.”

A conservative divide

Debate on the bill also underscored a deeper rift within the conservative community, in which the movement’s long standing perception of ostracization comes in conflict with its stances on private businesses being able to conduct themselves as they see fit. For some, the question comes down to who is discriminated against.

“This is about censorship,” Sen. Brian Kolb (R-Rock Springs) said on Friday in response to Szabo’s testimony on SF 100. “I find it odd that I hear someone stating conservative values, when I can tell you there are very large internet providers that have censored people for what I consider just political reasons. And whatever we can do to limit that is a good thing. I don’t accept the argument that somehow conservative speech should be less able to be spoken.”

Sen. Tara Nethercott (R-Cheyenne), the lone dissenting vote out of the committee, said she is uncomfortable voting for any legislation that could set a precedent of impeding on the rights of a business owner to set their own terms of business.

“I think if we want to make social media into utilities, then we need to have that conversation and approach it that way through regulation,” Nethercott said. “But as a business owner myself, I am concerned about losing the ability to make decisions for my own business in a way that I think is best.

“I do think that we’re invading into that space,” she added. “As much as I recognize the frustration and the challenge and the need to do something, the broader implications are real.

And I think that that requires really that 30,000-foot level and a recognition that sometimes we don’t like how free we can be in the United States, and there are consequences to that.”