Vox

Two Republican judges just let Texas seize control of Twitter and Facebook

The Fifth Circuit wants to put Texas Republicans in charge of social media platforms.

By Ian Millhiser | Sep 19, 2022, 5:20pm EDT

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An especially right-wing panel of the already **conservative** United States Court of Appeals for the Fifth Circuit handed down an **astonishing opinion** on Friday, effectively holding that the state of Texas may seize control of content moderation at major social media platforms such as Twitter, Facebook, and YouTube.

The mere fact that this opinion exists is not surprising. When Texas initially passed the law at hand, which imposes strong restrictions on major social media companies' power to moderate content and ban users deemed to be offensive or worse, the same panel of judges raced to defend it.

Trade organizations representing the major social media companies sued to block the law from taking effect, and a federal trial court agreed with them. In May, the Fifth Circuit handed down a **brief, unexplained order in *NetChoice v. Paxton***, which reinstated the Texas law — until the Supreme Court **blocked that decision** a few weeks later, effectively suspending the law once again.

Now, the Fifth Circuit is attempting to permanently reinstate the law. Its latest opinion, which explains why the court sided with Texas's law, is exceedingly difficult to square with longstanding First Amendment law. Indeed, it turns that law on its head, holding that the government may force private companies — or, at least, large private social media companies — to publish content that the companies do not wish to host.

The Texas law is potentially an **existential threat to the social media industry**. Its supposed anti-censorship provisions are so strict that it would likely prevent the major social media platforms from removing content touting Nazism or white supremacy, or even from blocking social media users who engage in campaigns of harassment against other users. Additionally, the law imposes disclosure and procedural requirements on the major platforms that **may literally be impossible to comply with**.

Given the Supreme Court's previous intervention in this case, there is a good chance that the law will be suspended again in fairly short order. But the law — and the back-and-forth over it — raise interesting questions about just how much power social media companies should have over public discourse.

How the Texas law works

Under existing First Amendment law, individuals and private businesses have a right to speak their own minds, and also a right *not to speak* when they do not wish to, or when they disagree with a particular viewpoint. As the Supreme Court explained in ***Rumsfeld v. Forum for Academic and Institutional Rights*** (2006), "this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."

This freedom allows companies to choose which viewpoints of its users it publishes, too. (More on this later.)

Nevertheless, the **Texas law** prohibits a social media platform "that functionally has more than 50 million active users in the United States in a calendar month" from banning a user — or even from regulating or restricting a user's content, or altering the algorithms that surface content to other users — because of that user's "viewpoint." The Texas law permits individual social media users who believe that a platform has violated the law to sue in order to force compliance. It also permits suits by the state's attorney general.

Technically, the law's restrictions only apply to Texas residents, businesses that operate in Texas, or to a social media user who "shares or receives content on a social media platform in this state." As a practical matter, however, social media platforms are likely to struggle to identify which users view social media content within Texas, and which businesses have Texas operations. So they could be forced to apply Texas's rules to every user in order to avoid being sued for unwittingly targeting someone who the Texas law applies to.

Texas Republicans have been quite open about the fact that they intend the law to address what **Texas Gov. Greg Abbott (R) described** as a "dangerous movement by social media companies to silence conservative viewpoints and ideas." But, while some individual conservatives have been banned from some platforms, including former President Donald Trump, the evidence that social media companies are engaged in any kind of systemic discrimination against conservative viewpoints **is quite thin**.

And, in any event, the law applies broadly to nearly all forms of viewpoint discrimination, regardless of whether the speech at issue is political.

Suppose, for example, that someone, angry that a woman he met online refused his advances, decides to bombard that woman with harassment, much of it calling her "ugly." If Twitter bans this user for calling the woman "ugly," Texas's law most likely would also

require Twitter to ban anyone who calls the woman "beautiful" — because the law prohibits discrimination on the basis of viewpoint.

Similarly, if a literal Nazi launched a YouTube account that posts videos calling for the systematic extermination of all Jews, Texas's law would **prevent YouTube from banning this user or removing the Nazi videos**, unless it also took the same action against users who express the opposite viewpoint — that is, the view that Jewish people should not be exterminated.

Additionally, the law would require the major social media platforms to publish a "biannual transparency report" disclosing every single "action" they took against a particular piece of content. It would also require them to set up a process where decisions to remove content can be appealed — and **these appeals must be resolved within 14 days**.

But, as Facebook explained in a court filing, it alone "**makes decisions about 'billions of pieces of content**' and '[a]ll such decisions are unique and context-specific ... and involve some measure of judgment.'" It is far from clear whether Facebook, or any of the other major platforms, have the physical capacity to comply with the law's disclosure and appeals requirements.

The Texas law, in other words, could potentially turn every major social media site into a **cesspool of racial slurs, misogyny, and targeted harassment** that the platforms would be powerless to control — and that's assuming that the platforms are even capable of complying with the law.

The First Amendment forbids this law

In order to understand why this law violates the Constitution, it's helpful to understand three well-established principles of First Amendment law.

The first principle is that, under what is known as the "**state action doctrine**," the First Amendment generally only prohibits the *government*, and not private actors, from taking actions that restrict speech. This doctrine respects the gross power deferential between the government and literally any other actor.

If Facebook doesn't like what you have to say, it can kick you off Facebook. But if the government doesn't like what you say (and if there are no constitutional safeguards against government overreach), it can send armed police officers to haul you off to prison forever.

The second principle is that corporations may assert free speech protections just as surely as individuals can. This proposition became controversial, especially among left-leaning critics of the Supreme Court, after the Court held in ***Citizens United v. FEC*** (2010) that corporations have a First Amendment right to spend lavishly to influence elections. But the proposition that corporations have First Amendment rights long predates *Citizens United*, and is one of the foundations of press freedoms in the United States.

In ***New York Times v. Sullivan*** (1964), for example, the Court ruled that Jim Crow state officials could not use malicious libel suits to punish a media corporation that published an advertisement with a pro-civil rights viewpoint. If corporations could not assert First Amendment claims, then the New York Times Company would have lost this case.

The third principle of First Amendment law is that the Constitution protects both against government censorship and against government actions that force people to speak when they would rather remain silent. The seminal case is ***West Virginia State Board of Education v. Barnette*** (1943), which held that the government could not require schoolchildren to salute the flag or say the Pledge of Allegiance.

Subsequent decisions establish that the prohibition on forced speech prevents the government from telling media companies what they must publish. In ***Miami Herald v. Tornillo*** (1974), for example, the Court held that a newspaper's "choice of material to go into a newspaper" is subject only to the paper's "editorial control and judgment," and that "it has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press."

Then, in ***Reno v. ACLU*** (1997), the Court held that the same First Amendment regime that applies to physical media also applies to the internet. *Reno* acknowledged that the internet is distinct from other forms of communication because "the Internet can hardly be considered a 'scarce' expressive commodity" — that is, unlike a newspaper, there is no physical limit on how much content can be published on a website. But the Court ultimately concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."

To all of this, Judge Andy Oldham, the Trump appointee and former law clerk to Justice Samuel Alito who authored the **Fifth Circuit's opinion in *NetChoice***, argues that the First Amendment doesn't apply to Texas's law because the law "does not chill speech," and

instead "chills censorship" by preventing social media companies from limiting who is allowed to post on their platforms or what they can say.

But that decision is hard to square with *Miami Herald* and similar cases, which establish that media companies may refuse to publish content that they do not wish to publish. Texas could not, for example, force Vox Media to publish a guest column entitled "Greg Abbott is the **kindest, bravest, warmest, most wonderful human being I've ever known in my life**." So why can it effectively force YouTube to publish content from Nazis?

Oldham's primary response to *Miami Herald* is that social media platforms are "nothing like the newspaper in *Miami Herald*" because, he claims, "the Platforms exercise virtually no editorial control or judgment." But this is false.

It is true that social media companies are unlike newspapers in that they typically let users post whatever they want, and then pull down content that violates their rules after the fact. But Oldham's claim that the platforms exercise "virtually no editorial control" is not credible. As Judge Robert Pitman, the trial judge who heard *NetChoice*, explained in his **opinion striking down the Texas law**:

> [I]n three months in 2021, Facebook removed 8.8 million pieces of "bullying and harassment content," 9.8 million pieces of "organized hate content," and 25.2 million pieces of "hate speech content." During the last three months of 2020, YouTube removed just over 2 million channels and over 9 million videos because they violated its policies. While some of those removals are subject to an existing appeals process, many removals are not. For example, in a three-month period in 2021, YouTube removed 1.16 billion comments.

So, while social media companies permit more individuals to publish on their platforms than a traditional newspaper, they still exercise a fair amount of editorial control. And the First Amendment, as interpreted by decisions like *Miami Herald* and *Reno*, permits Facebook to decide that it will not publish bullying or "organized hate content."

It also permits Facebook, as a private company, to decide not to publish Republicans' content, if that's the company's decision.

Censorship by social media companies raises difficult questions, but the solution cannot be to turn over content moderation to Texas Republicans

Having explained why Oldham's opinion is at odds with the First Amendment, I want to acknowledge the difficult questions presented by a world where private companies get to

decide who gets to participate in such potent forums. Mark Zuckerberg may not have the power to have his critics arrested, but the amount of control that he wields over political conversations throughout the globe is alarming — and it's **not like Facebook has always used its power responsibly**.

But the solution suggested by Oldham's opinion is that one set of state legislators in Texas should get to decide the rules around what content must be published on social media platforms. That's infinitely worse than the current regime. Among other things, if Texas's GOP-controlled legislature has the power to decide what content shows up on social media, it has an obvious interest in using that power to benefit Republicans and to hurt Democrats.

The inherent dilemma inherent in all cases of speech regulation is that, once the government is given the power to regulate speech, that power will ultimately rest with government officials with their own political agendas. If you do not like living in a world where Zuckerberg wields outsized control over public debates, imagine living in one where the ultimate power to decide what content is published online rests with Greg Abbott. Or with Andy Oldham. **Or with Samuel Alito**.

Oldham's opinion, moreover, necessarily permits a single state — the state of Texas — to decide the free speech regime that applies to every major social media company. That's despite that people in the other 49 states, not to mention people in other countries, have no say over who wields power in Texas.

And what happens if another state — perhaps a blue state with very different views about what sort of content should be published online — enacts a law that contradicts Texas's statute? What is Twitter or Facebook supposed to do if states enact conflicting laws and it is literally impossible to comply with both of them?

Current case law — cases like *Barnette*, *Miami Herald*, and *Reno* — respect these realities. They understand that, whatever the costs of giving media companies an outsized ability to shape political debates and culture, the cost of giving this power to government is so much worse.

It is likely that even the current Supreme Court, with its Republican-appointed supermajority, will respect existing law. After all, the Court **already voted to block the Texas law last May, albeit in a 5-4 decision**.

For now, though, the law is technically in effect, endangering the entire world's ability to openly debate ideas online.