Six Principles for State Legislators Seeking to Protect Free Speech on Social Media Platforms

By James Taylor

Background

Political free speech in the United States is under attack. Tech media giants who own and control virtually all social media platforms available to Americans are working together to silence groups with whom they do not agree.

In just the past year, large, multi-billion-dollar, multinational corporations—including Apple, Amazon, Facebook, Google, and Twitter—prevented a sitting president from communicating directly with the American people. Members of Congress have been banned from communicating with their constituents. Newspapers were stopped from providing important reports about election topics. And perhaps worst of all, everyday Americans have regularly been blocked from sharing their own political views with friends and family on popular social media platforms.

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Confronted with these assaults on speech, the founders of Parler listened to big-tech apologists who endlessly told conservatives, "If you don't like it, you can go build your own platform," and built their own social media business. But after experiencing monumental growth by promising to be a bastion for free speech, big-tech companies crushed Parler, shutting the entire platform down. As of this writing, it remains unclear whether Parler will return.

When Congress passed the Communications Decency Act (CDA) in 1996, which created the now infamous Section 230 statute that big-tech companies use as a justification to silence speech, America's powerful big-tech cartel did not exist. The internet was much more democratized than it is today.

At the time Congress passed CDA, it explicitly found that the internet played a crucial role in empowering people to share their views without censorship, including political views. Congress also made clear that it believed users should control for themselves the information they do and do not wish to receive and share. In fact, Congress explicitly stated that Section 230 was designed to *preserve* open political discourse and to encourage internet platforms to continue providing uncensored political speech—not to suppress it.

However, the rise of the present big-tech cartel has destroyed the internet as it existed in 1996. Even those who have long been defenders of giving companies great leeway in determining how they control their businesses and property, including

libertarian icon Ron Paul, are now warning against, in Paul's words, the "social media purges" conducted by large technology corporations.

Paul has rightfully said these "purges" are "shocking and chilling," and that a nefarious marriage between massive tech companies and government has formed that regularly restricts political speech and suppresses dissent.

"Those who continue to argue that the social media companies are purely private ventures acting independent of US government interests are ignoring reality," Paul said.

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Free speech is the central tenet of any representative form of government, and it is far too important to allow a cartel of multinational corporations to attack and restrict it while intellectuals discuss and debate how market forces might somehow, someday, some way find a strategy to penetrate the government-protected tech cartel that now operates in a system that is anything but a free market. The situation has been made even more difficult because government works hand-in-hand with the tech cartel, grants market-inhibiting advantages and protections through corporate law, and provides additional market-inhibiting protections through the misapplication of Section 230.

Currently, the internet is a ubiquitous and extremely powerful means of shaping and potentially repressing free speech, political discourse, individual rights, the outcomes of elections, and a host of other important political activities. Multinational tech giants currently block Americans from utilizing the internet to discuss many important topics, including irregularities in election vote-counting, COVID-19 medications that could save thousands of lives, and self-contradictory statements issued by the World Health Organization.

The Heartland Institute believes in finding and promoting free-market solutions to social and economic problems. That means that in the vast majority of cases, we believe the fewer regulations and restraints on businesses, the better. Everyone prospers in a truly free-market system. However, tech giants like Amazon, Facebook, and Google are not the products of a free market. They arose in large part because of market-corrupting government favoritism and legal protections, and they have exploited those advantages to suppress political free speech. When such a cartel of multinational corporations works in concert to suppress individual rights, champions of free speech and human rights must avail themselves of all means advisable and necessary to protect Americans' most basic liberties.

The Heartland Institute offers the following perspectives and principles for state legislators crafting political free-speech protections in their states:

PRINCIPLE #1

Big-tech companies operate and thrive in a government-corrupted market, exploit the corrupted market to their advantage, and often oppose free-market reforms. Therefore, this cartel is in no position to object to free-speech protections in the name of "free markets."

Objections to states stepping up to protect free speech based on appeals to the "free market" fail to recognize that large technology companies do not operate under free-market conditions now, and they only exist because of important special protections offered by government. Eliminating nearly all of those favoritisms and protections would be the ideal solution. But in the absence of such an ideal solution existing or appearing imminent, Americans' vital free-speech rights far outweigh the selfish interests of players in a corrupted market.

Parler attempted to play by free-market rules. The destruction of Parler illustrates that there simply is no free market when a few tech giants can work in concert to prevent a market from even forming, let alone competing.

PRINCIPLE #2

Shutting down an entire platform or blocking a particular user because of concerns about vague and amorphous "community standards" or anything other than sexually obscene, excessively violent, or indisputably criminal content is not in line with an originalist understanding of federal law. States must act to protect their residents' speech rights when the federal government fails to do so.

States should recognize that Congress' Section 230 protections apply narrowly to sexually obscene and excessively violent activity and communications. Internet and social media providers must not restrict content merely because the provider subjectively believes the content is erroneous, rude, incorrect, offensive, uncivil, or incendiary. Once a provider engages in content censorship beyond Section 230's protections regarding sexually obscene and excessively violent content, the provider opens itself up to regulation and civil liability as a "publisher" of content, rather than enjoying the status of a mere "platform" or open forum.

PRINCIPLE #3

Free-speech rights should outweigh corrupt market protections.

Currently, a small number of social media platforms control the venues through which tens of millions of Americans communicate and express their political, religious, and cultural views.

Free speech is too vital for human dignity and for the preservation of representative government to be deemed subservient to the censorship desires of crony multinational tech companies, businesses that, again, would not exist if it were not for special arrangements created by government.

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PRINCIPLE #4

Shutting down an entire platform because of concerns about criminal activity conducted by a small percentage of a platform's users is an overly intrusive, harmful, and unnecessary action.

States should welcome internet and social media platforms that do not censor individuals' nonviolent religious, political, or cultural speech. This position is in keeping with existing state laws governing other forums and services. For example, no one advocates for closing of cell phone companies because some people have been caught using their phones to commit crimes, including serious crimes like the attacks on the U.S. Capitol, state buildings, police precinct buildings, etc., that occurred over the past several months.

Thus, the argument that Parler and other platforms should be shut down because a small percentage of the application's users utilized Parler while conducting a criminal assault on the U.S. Capitol carries absolutely no weight, especially in light of the fact that numerous other social media and communication suppliers were also used by the attackers. Law enforcement can and should identify and arrest people who post such messages, of course, but shutting down a service provider because a miniscule number of its users engaged in criminal activity is an incredibly broad, unnecessary, and stifling act that limits free speech.

PRINCIPLE #5

Section 230 does not protect internet social media platforms from blocking anything other than activity that falls under the narrow categories of sexually obscene, harassing, and/or excessively violent material.

States should recognize the validity and application of Section 230(c)(2)(A)'s legal protection for internet and social media platforms that block or remove material that falls under the category

of "obscene, lewd, lascivious, filthy, excessively violent, harassing." All of these examples comply with the Good Samaritan purpose and title of Section 230(c): "Protection for 'Good Samaritan' blocking and screening of offensive material." Within that appropriate context and title of Section 230(c), the protection within Section 230(c)(2)(A) for internet platforms blocking or removing material that is "otherwise objectionable" clearly relates to—and is restricted to—material that fits within the category of sexually obscene or excessively violent. The term "otherwise objectionable" applies clearly within that narrow context and was not intended to give tech companies a free hand to suppress political speech.

PRINCIPLE #6

Banning a particular user for anything other than repeatedly posting sexually obscene, harassing, or excessively violent material exceeds Section 230's protections and should be subject to legislative action and civil causes of action.

States should recognize that technology companies seeking to be classified as a "platform," rather than a publisher, should not be empowered to ban a user for anything other than repeated violations of Section 230's explicitly and narrowly defined categories of sexually obscene, harassing, and/or excessively violent material. Banning a person for posting material subjectively defined as callous, hateful, incendiary, etc., imposes impermissible restrictions on free speech.

ABOUT THE AUTHOR

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Taylor is the former managing editor (2001–2014) of *Environment & Climate News*, a national monthly publication devoted to sound science and free-market environmentalism.

Taylor has presented analyses about energy and environment issues on CNN, CNN Headline News, Fox News Channel, Fox Business Channel, MSNBC, *PBS News Hour*, *PBS Frontline*, *CBS Evening News*, *ABC World News*, and other TV and radio outlets across the country. He has been published in virtually every major newspaper in America.

Taylor has also been a featured presenter at conferences sponsored by the National Conference of State Legislatures, American Legislative Exchange Council, Council of State Governments, National Association of Counties, National Foundation of Women Legislators, State Policy Network, CPAC, Cato Institute, Heritage Foundation, and the European Institute for Climate and Energy.

Taylor received his bachelor's degree from Dartmouth College, where he studied atmospheric science and majored in government. He received his juris doctorate from Syracuse University.