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### Abstract

Political or ideologically-based corporate censorship of social media content and users is a discernable social, economic and political problem. As private conduct, it is not a violation of the First Amendment's speech clause. The problem appears intractable because of a combination of broad statutory protection for online service providers, one-sided terms of service and a lack of federal regulatory acknowledgment of the problem. This paper suggests, however, that a state-based consumer protection initiative requiring the "good faith" application of social media platforms' terms of service to user bans could overcome these obstacles and would be consistent with a wide range of consumer-oriented remedial regimes that have survived constitutional and other attacks.

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**Statement of the Problem**

The First Amendment prevents government from interfering with virtually all expressive activities of “traditional” or “mainstream” corporate media such as television networks, Hollywood studios and newspaper conglomerates. The control these private firms maintain over the content published on their respective “platforms” is absolute. Traditional notions of free expression, however, are premised on the idea that anyone is free to compete with these organs of communication by establishing competing platforms. Nonetheless, doing so is hardly a trivial undertaking for numerous reasons, not least the daunting capital requirements and the uphill battle against network effects. Despite this, alternative traditional media expressing views and reporting news and information from perspectives on both the left and right of this consensus have always had a place in the free market of ideas. Moreover, some media channels that are not in precise synchronization with what may be described as the liberal / neoconservative consensus, most notably Fox News and various widely-syndicated conservative radio talk programs, have had considerable financial and social success.

A different challenge to free expression, however, is presented by corporate-owned social media. While few of these channels are much more than 20 years old, the most successful of what were once essentially apolitical artifacts of the Silicon Valley “startup” culture have, with the assistance of private venture capital and Wall Street, grown into global corporate powers and even, in the case of Google and Facebook, aggressive commercial conglomerates. Unlike traditional private media, social media platforms such as Twitter and Facebook and social-media-based service providers such as PayPal and GoFundMe have opened unprecedented vistas for communication, collective activism and other forms of democratic expression.

As the name “social media” implies, these new channels differ from traditional corporate media by being structured as open forums or resources that enable would-be speakers to merely agree to neutrally-phrased terms of service in exchange for the opportunity to participate and to develop a “following” based on content and strategy. On the other hand, while these platforms are valued and perceived as “democratic,” “neutral” or “open” forums for expression, it is widely recognized that they cannot function in that manner if users are subject to harassment or intimidation. The terms of service of all these services therefore set out a range of impermissible conduct that may subject users to being restricted or even removed from participation. The social media platforms are also subject to regulation as well as political and operational pressures in foreign jurisdictions, including regimes that restrict or monitor content to a degree not permissible under U.S. law. This includes regimes that regulate media for compliance with either “hate speech” or religiously-based “blasphemy” standards.

What by all indications began as an arguably value-neutral endeavor to manage “traffic” on these thoroughfares of communication, however, has unquestionably metamorphosized into a campaign of widespread corporate censorship directed at conservatives and others identified as “right wing” or who oppose certain political or ideological orthodoxies. The last few years have seen the private firms that control these forums and resources aggressively increase their restriction and management of content and participation in these environments. It is not denied, even by prominent participants in this process, that this activity is motivated by frank political or ideological ends. As a result, many prominent users of these platforms associated with conservative, traditional or right-wing points of view have been banned from them, or “deplatformed.” Moreover, once banned from a single prominent service such as YouTube, such users are typically subjected to a cascading process by which a ban from one platform is soon

used as a rationale for a ban from many or even all others. It is widely accepted, though not empirically proved, that network effects make the establishment of competing social networks almost impossible.

This widening and technologically sophisticated corporate censorship program has been shown in many cases to be orchestrated by, or to be managed in concert with, groups that are not part of the social media companies' ownership or management. These include issue-advocacy and special-interest groups, organizations known as civil rights advocates that have become highly politicized, political consultants and, in some cases, foreign governments and their proxies. These outside advisors or consultants are almost exclusively associated with left-wing advocacy and ideology, with the seemingly odd exception of Muslim advocacy groups who are despite the underlying ideological conflict are aligned with left-wing political forces for tactical and cultural reasons.

Unlike traditional corporate-owned media, whose ownership and management of its messaging function is correctly perceived as being a private matter, public media platforms are widely perceived as an electronic public square. They are, however, legally, constitutionally and functionally corporate endeavors with the same interest in maximizing profit as traditional media corporations. This means that, among other things, they manage content to maximize profits while also operating in the parameters set by regimes over which they have little or no control. This includes influential social and political advocacy groups as well as overseas regimes whose content-regulation requirements are inconsistent with those of the U.S., but which may have effects on U.S. users. The result of these forces acting in array has been a growing tendency toward political and cultural corporate censorship of conservative, traditional or right-wing views on social media platforms, rationalized by essentially pretextual reference to the social media

services' respective terms of service. Banned users have had little success at challenging the determinations made to "deplatform" them.

### **Additional Factual Predicates**

Beyond the facts set out above, several important, but not necessarily intuitively obvious, facts concerning the issues discussed in this paper must be laid out here in brief as context for the treatment that follows.

- It is widely understood that "users" of social media platforms are not its "customers." Holders of social media accounts do not pay for them. Users or account holders are instead more properly thought of as these companies' "products." The corporations that own these platforms generate revenue primarily through advertising directed to account holders and through different ways of monetizing aggregate data generated by users.
- Some social media account holders, notably on YouTube and Facebook (which provide integrated systems by which users can monetize their own content) but also on Twitter and Instagram, build substantial revenue-generating businesses using their accounts.
- The distinction between traditional media and social media posited in Statement of the Problem is suggested as an analytical paradigm and not a rigorous description of reality. All traditional media corporations operate extensive social media channels, usually more than one, in addition to extending their brand and influence reach through social media through the social media activity of their reporters, writers and celebrity news readers.

### **Selected Legal Predicates**

It is far beyond the scope of this paper, and the sophistication of its author, to either encapsulate or survey the scope of First Amendment jurisprudence that might bear on the free speech aspects relevant to these issues. It is important, however, to address 47 U.S.C. § 230, widely known as Section 230 of the Communications Decency Act, which states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This law protects intermediaries such as social media platforms that host or republish speech against claims that might otherwise result in liability for what others say and do and extends to all online service that publish third-party content.

Section 230(c)(2)(A), often overlooked in discussions of the statute, is very important for purposes of this discussion. It permits covered companies to act “in good faith” to moderate content, even to the extent such content is merely deemed “objectionable.” This broad extension of protection from liability reads as follows:

No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

### **Unlikely Solutions**

Targets of corporate censorship on social media platforms and their supporters have floated, and in some cases attempted unsuccessfully to press through litigation, a number of approaches to persuading or forcing the corporations that own social media platforms to restore them. They have met with little success.

## First Amendment challenges

There is little support for the suggestion that the constitutional right to free speech is implicated here. The First Amendment's free speech protections operate, fundamentally, to prevent government from acting to restrict speech. In contrast, censorship of speech in private forums or platforms by those who own those forums or their agents, with very few exceptions, do not implicate these protections. Nonetheless, the suggestion has been made, in part with reference to what is arguably inapposite case law or dictum in case law, that social media platforms should be treated as de facto public forums, notwithstanding their private ownership, and afforded First Amendment protection. These arguments have not been well received by the courts and commentators, and it seems unlikely that they will be.

The snippets on which these arguments are frequently based come from a few cases. Some are quite old, and one is new. The new ones go back a long way. One is the 1946 decision in *Marsh v. Alabama*, in which the Supreme Court held that there was a First Amendment right to distribute religious literature on the sidewalk of a "company town" – private property that in every meaningful respect looked, felt and acted like a public area. The justices reasoned that once a company town is left more or less open to the public for all purposes, it cannot be selectively closed off to free speech and the free press. Over the following decades, however, the Supreme Court walked back its broad holding, eventually ruling in 1972 in a case called *Lloyd Corporation, Ltd. v. Tanner* that privately owned malls were not the equivalent of city sidewalks for purposes of First Amendment activity and finally, in 1976's *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), that there was no First Amendment right to exercise free speech in privately owned shopping malls.



In 1980, however, the Supreme Court ruled *PruneYard Shopping Center v. Robins* that California could interpret its state constitution to protect political protesters from being evicted from private property, held open to the public, without running afoul of the Fifth Amendment. In other words, California law could, the justices held, legally prevent a shopping mall owner from excluding a group of high school students who were engaged in political advocacy on their premises. The Supreme Court's decision was not based on the First Amendment, but rather was a rejection of a claim by the mall owners that the California law requiring it to permit the students onto the premises violated their Fifth Amendment right not to have their private property taken by government without compensation. *PruneYard Shopping Center* is, however, an important endorsement of state regulation to protect free speech.

The new case is a 2017 U.S. Supreme Court decision called *Packingham v. North Carolina*, in which the Court ruled 8-0 that a North Carolina law prohibiting previously convicted sex offenders from accessing or using "social networking" websites violated the First Amendment because its restrictions were too broad. In the course of that opinion, the court waxed a bit prosaic, writing as follows:

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. ... Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general.

This language was from the majority opinion. Although all the justices voted to strike down the North Carolina law, however, they did not all join in that opinion, which was written by now-

retired Justice Anthony Kennedy. And in a dissenting opinion, three justices – Alito, Roberts and Thomas – attempted to stand athwart the majority’s rhetoric and cry “stop,” writing as follows:

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court’s loose rhetoric. After noting that “a street or a park is a quintessential forum for the exercise of First Amendment rights,” the Court states that “cyberspace” and “social media in particular” are now “the most important places (in a spatial sense) for the exchange of views.” ...

The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral “time, place, and manner” restrictions. But if the entirety of the Internet or even just “social media” sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders.

These words are what is called “dictum”: Something a judge writes in an opinion that is not really part of the line of legal reasoning on which the outcome depends. As a recent commentary in the *Harvard Law Review* notes, the caution sounded by the conservative justices who joined in Justice Alito’s dissent aptly reflects the consensus of legal scholars concerning Justice Kenney’s broad and ambitious formulation:

Although there is an appeal to concretizing the internet, and especially social media, as “the modern public square,” Justice Alito’s misgivings about “the implications of the Court’s unnecessary rhetoric” were well founded. While making for soaring prose, *Packingham*’s expansive language flung open a Pandora’s box, unleashing complications related to the digitization of certain First Amendment precepts. Most notably, the Court’s analogizing to public space suggested that the public forum doctrine – whereby the government protects expressive activity on property that it owns or controls – might extend to all or parts of the internet and social media. Specifically, the Court’s rhetoric furthered a nascent theory expounded in recent litigation and scholarship: that government-administered Facebook pages and Twitter timelines constitute public fora. But in likening social media to quintessentially public spaces like streets, parks, and squares, the Court’s language was crucially incomplete, in that it – like the aforementioned theory – glossed over the dual public and private nature of digital arenas.

While the *Harvard Law Review* article expresses trepidation regarding the power of dictum in influencing lower courts, it would be a mistake not to consider that the justices who joined in that concurrence were the senior conservative members of the Supreme Court. It seems unlikely that the courts are going to “run with” Justice Kenney’s “public forum” ideas, with their potential for radically upsetting numerous jurisprudential apple carts, any time soon.

### **Antitrust challenges**

Some deplatformed users and commentators have also argued that some of the social media platforms are monopolies and should be regulated as such. There are several problems with this approach. The most difficult is the one that inheres in almost all antitrust claims, namely the definition of the relevant market. Laura Loomer’s antitrust claim was dismissed largely because the court found that she had failed to meet the rigorous standard for describing the relevant market from which she, as a user of social media services (for free), was excluded. Is there one market for “social media”? If so, what does it include – Twitter and Facebook? YouTube? LinkedIn? Instagram? Also, how is market power defined in this market? Does a ban by Twitter, short of proof of coordination by other providers, result in “antitrust injury” if she is still on Facebook and YouTube? Alternatively, is Twitter itself a “market”?

Courts are typically suspicious of a market claimed to consist of one product or service offered by one provider. Moreover, how does a user of a free service establish that she has been the victim of an “anticompetitive” practice by being injured – whom is she competing with? How is the supposed monopolist protecting or establishing his monopoly by banning a “user,” much less one who is not really even a “customer”? Is Laura Loomer a “supplier” (of content) to Twitter, and if so, what is anticompetitive about declining to “buy” what she is “selling”?

These are very difficult problems with the antitrust approach to solving the censorship problem, which is not to say that other antitrust angles on the domination of major firms in online media are not potentially ripe for consideration. Having said this, federal judges are unlikely to be receptive to civil antitrust claims involving social media in the absence of enforcement activity directed at the same conduct by either the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission. So far, that is not happening.

As a pragmatic matter, moreover, the author of this paper does believe, based both on experience in private antitrust litigation and academic study of politics, economics and law, including antitrust law, that the essentially quiescent present state of federal antitrust enforcement and activity profoundly affects the legal viability of private antitrust. By way of analogy, it is a commonplace that federal judges are almost uniformly hostile to civil claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO). While their inclination to dismiss such claims is readily understandable for a variety of substantive and procedural reasons, it may also be observed that in the absence of a related criminal RICO investigation or prosecutions, judges seem unlikely to credit private litigants' allegations that business competitors are "racketeering" enterprises. Similarly, it seems unlikely, in the present judicial culture, that federal judges will be receptive to civil antitrust claims involving social media, such as those that might be brought under the Sherman Act, in the absence of enforcement activity directed at the same conduct by either the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission. This is especially true considering, in addition to the lack of federal enforcement activity: (i) the potential national, indeed international, scope that such claims would encompass; (ii) the novelty of such claims; and (iii) the fact that very few judges currently on the bench are old enough to have the degree of

substantive experience with antitrust law – either as judges, in private practice or in government – that was common in the judiciary only 20 years ago to feel comfortable “making new law” in this area.

### **Other private legal claims**

Private tort claims are, for all practical purposes, a dead letter because of Section 230. So are garden-variety tortious interference claims, which are typically based on the theory that banning users without justification results in the unjustified frustration of the users’ reasonable economic expectancies. The same is likely true for claims premised on breach of the terms of service by the social media companies, breach of the implied covenant of good faith and fair dealing relating to those terms, claims sounding in quasi-contract as well as claims based on fraudulent inducement.

Moreover, the terms of service of these social media companies typically require users to agree to arbitration and to the providers’ forum selection for the resolution of any dispute, making litigation or even arbitration in those locations inconvenient and expensive. Because of the strong policies and precedent supporting the enforcement of such clauses, especially the Federal Arbitration Act, they can be regarded as well-nigh impossible to circumvent. Arguments to the effect that the terms of service amount to contracts of adhesion have not been well received. Invoking legal realism again, it is the author’s impression that judges tend to be unsympathetic to a party seeking relief from a contractual provision on the ground that the agreement is a contract of adhesion where that party has not even paid for the service involved – as is the case with social media. Similar fates have awaited claimants seeking relief under state consumer protection laws, which are traditionally thought of as protecting consumers from being “fleeced.”

The actual truth of the matter, however, as alluded to above, is that while social media “users” benefit from having Twitter or Instagram accounts, they are not in a meaningful sense either the customers of corporate social media companies. Nor are they, generally speaking, even the primary beneficiaries of the particular economic transaction between users and platforms that the terms of service regulate. For this reason, it can be posited, at least in the theory, that the obstacle to the extension of judicial sympathy premised on the concept of gratitude that should flow to providers of “free services” might be overcome if the relationship were properly framed. A consumer or small business – say, as an example, a restaurant and bar – may well be “fleeced” by Twitter despite not paying for a Twitter account if it has invested \$20,000 in a social media consultant but its Twitter account is deleted because an employee, owner or activity runs afoul of ideological standard-setters.

It is not clear how many attempts at articulating this point have been made, though it is in any event speculative to presume that this would make all that much difference in a typical private litigation proceeding. It is submitted that, here too, the absence of regulatory activity or legal precedent as well as the virtually complete deference given to arbitration clauses and the effect of Section 230 reinforce judges’ generally (judicially) conservative orientation.

### **The Possible Role for State Consumer-Protection Regulation**

Based on the foregoing, private litigation to protect users of social media services from banishment, whether under antitrust, other tort or contract theories, can be understood as facing the following fundamental obstacles:

1. Paralysis on the federal level respecting either antitrust initiatives or legislative solutions, especially to a problem that appears to harm only one side of the severe partisan divide in contemporary politics;

2. A legal-cultural resistance to providing legal relief to litigants asking courts not to enforce such terms based on a supposed systematic wrong committed in a private contractual context, where no organ of government has attempted a regulatory response to the supposed wrong; and
3. Terms of service that limit relief, provide little recourse and close the courthouse door to claimants in favor of expensive and inconvenient arbitration at best;
4. Section 230's apparent iron lock on attempts to hold online services liable for "good faith" moderation of "objectionable" content, which is understood to include banning any user who promulgates such content

It can be argued, however – and the author of this paper has done so on social media, resulting in a number of interesting responsive insights – that a state regulatory response focused on consumer protection could cut across all these problems. Axiomatically, a properly structured approach could bypass obstacle (1), the hopelessness of a political or regulatory solution emanating from Washington because, in contrast to the political situation at the national level, many states may be able to undertake an appropriate initiative.

Similarly, by definition, such an initiative would remedy (2), the posited psychological / cultural block that makes judges – and, arguably, regulators – reluctant to be the first to act on a problem widely understood to exist but regarding which the parameters of solution are daunting or at least not well understood. Regarding (3), the terms of service problem, an initiative in the nature of **consumer protection enforcement that mandates even-handed and regular administration and application of social media terms of service** need not and should not offend either the contractual relationships involved, or the constitutional protection afforded such relationships. Indeed, it arguably strengthens such relationships by insisting on the fair and

consistent application of the bilateral agreements that regulate them – a common component of state regulation affecting consumer contracts.

As for (4), a consumer-protection-oriented regulatory initiative would be **consistent** with both Section 230(c)(2)(A)'s requirement that content moderation be undertaken "in good faith" as well as, it can cogently be argued, Congress's intent concerning that statute. And it would have to be, because under modern jurisprudence, the Supremacy Clause and the Commerce Clause of the Constitution are understood to give Congress the power to regulate all "interstate commerce" – which the courts have defined as meaning just about anything Congress wants to regulate. Once Congress has decided to step in, moreover, any state regulation in that area may either be preempted, meaning states can't do their own version of the same thing unless Congress explicitly lets them, or it must at least be in harmony with Congress's dictates. Here, too, reference to the Supreme Court's decision in *PruneYard Shopping Center*, while not dispositive, would nonetheless appear to actually support such an initiative.

These extensions of consumer protection law would meet that test. Such an initiative could take the form of either specific legislation or could simply be realized through a program of enforcement of existing consumer protection laws known as "Little FTC Acts" in many states. The core principle would be to **make it unlawful for a social media company to deprive a user of his online account on arbitrary or capricious grounds and requiring that any ban or other adverse action be appealable or otherwise subject to some regular process**. It would not purport to create a new right or to circumvent Section 230, but would protect consumers from abusive practices arising out of merely one sort of contract regarding which they have uneven bargaining power, few alternatives – especially once the contract is executory – and



much more to lose from breach or abuse than the commercial party unilaterally setting the terms of that contract.

Thus, the suggested initiative would arguably operate the same as almost any remedial statute or regulatory scheme that protects consumers even in their bilateral contractual relations. Moreover, this approach would at once reinforce contractual rights while dispensing of the distracting and irrelevant argument that consumers have no ground to complain about being “fleeced” by a corporation whose services they are “not paying for.”

#### ❖ **Objections to the consumer-based initiative**

Most objections to this proposal when first mooted arose along the lines of Section 230 protections, but in the author’s view the “good faith” component in both the proposed initiative and explicitly required under the statute is a strong response. This may also be especially compelling where state regulatory authorities, whose actions are clothed with a legal presumption of validity, are the ones raising objections to the companies’ good faith in applying their terms of service.

Another objection was that this proposal would violate the First Amendment right to free association, in the sense that social media companies should not be forced by government to “associate” with users whose views it finds offensive by keeping them on their platform. This is not a serious objection; indeed, the premise of Section 230 itself, which is not considered problematic on First Amendment grounds, is that online enterprises are not, as a matter of law, deemed to be the speakers of what is said by the innumerable individual users who utilize their services. Additionally, what is readily observable as a grossly inconsistent application of terms of service “standards” for banning negates this objection. The offenses used as pretexts for social media bans other than those arising out of objectively genuine instances of harassment or

indecentcy are almost always ideological, and it is highly unlikely that an objecting social media corporation would wish to assert that it is voluntarily associating with hatemongers such as David Duke and Louis Farrakhan, who remain active users on Twitter.

One insightful commenter suggested that resistance to such a state-based consumer initiative could center on the “Dormant Commerce Clause,” i.e., the prohibition implicit in the Commerce Clause against states passing legislation that discriminates against or excessively burdens interstate commerce. As discussed above, it may not be necessary to pass new legislation to undertake this initiative. Moreover, the consumer initiative described would enhance, not burden, interstate commerce, because it prevents corporate social media companies from engaging in conduct that is itself anticompetitive or restrictive of commerce – an argument that has successfully carried the day in defending a host of state-based remedial statutes.

### The Author

Ronald Coleman is a partner in the Roseland, New Jersey and New York City offices of the law firm of Mandelbaum Salsburg P.C., where he practices intellectual property and commercial litigation focusing on torts of competition. He has been an active user of social media for decades, and represented Steven Brodsky in *Jews for Jesus v. Brodsky*, a domain name dispute which was one of the first to highlight the collision of private legal rights, free speech rights and technology. More recently he represented Simon Tam in his successful challenge to Section 2(a) of the Lanham Act's "non-disparagement" clause, which resulted in the Supreme Court declaring that provision unconstitutional in the 2017 decision, *Matal v. Tam* which rejected the concept of "hate speech" as a cognizable First Amendment category deserving of reduced protection. Mr. Coleman also represented the alternative social media platform Gab.com in its 2017 antitrust claim against Google based on alleged anticompetitive conduct concerning access to the Google Play Store and is currently lead counsel to Internet personalities Gavin McInnes and Laura Loomer in connection with their claims of being wrongfully "deplatformed."

The principle author of *The ABA Guide to Consumer Law* and *The ABA Guide to Small Business Law*, Mr. Coleman has been since 2005 the author of the "Likelihood of Confusion" blog on trademark and related law and free speech, one of the most widely-read law blogs in the English language. He is a graduate of Princeton University and Northwestern University School of Law and is a verified Twitter user with approximately 24,000 followers at his primary account, @roncoleman.