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Patrick Ganninger*

Introduction

Throughout early American history, the primary methods of communication between politicians and the public occurred in person. Politicians would make stump speeches on the campaign trail, where they literally just stood on a tree stump to speak to a crowd of people. Similarly, politicians interacted with their constituents at town hall style meetings in government buildings, school auditoriums, or even outside in the town square.

Today, the rise of the internet and social media has allowed for instantaneous communication between politicians and members of the public. This obviously has many benefits, as the internet has arguably become the most effective means of disseminating ideas and promoting discourse in human history. However, there have very clearly been consequences to go along with the rise of social media as a means of political communication.

One of the more polarizing political issues of 2021 was when social media platforms like Twitter permanently banned President Donald Trump from their platforms. Many Republicans cried that this was an unprecedented act of censorship, while many Democrats argued that this was simply private corporations exercising their rightful discretion to ban a user who did not comply with their standards. This article is not concerned with partisan arguments regarding this conduct; rather, it will explore the First Amendment principles surrounding the speech and the platform.

To get right to the question, does Twitter's permanent ban of Donald Trump violate the First Amendment?¹ Currently, the answer is almost certainly no. As the law stands, most experts are in agreement that the First Amendment does not restrict online social media platforms from exercising broad discretion to censor content or individuals that do not comply with

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¹ For the sake of simplicity, this article will focus on Twitter.

their terms of service.² In fact, social media platforms seem to have the ability to censor, suspend, or ban people without even explaining why.³ Overall, the government has taken a relatively hands-off approach to social media platforms' supervision of speech on their platforms. However, as social media becomes an increasingly large part of modern society, the power to control discourse on these platforms becomes increasingly important. Therefore, even if social media platforms have a right to unilaterally ban users from their platforms, should they? More importantly, should we let them?

Figuring out exactly how the Supreme Court or Congress might someday apply free speech principles to private online platforms is far outside the scope of this brief article. Instead, this article will explore three free speech principles: (1) the First Amendment broadly protects political speech, (2) prior restraints on speech are viewed unfavorably, and (3) the First Amendment can prevent private entities from restricting speech in limited circumstances.⁴ Based on these premises, this article seeks to demonstrate that, although permanent bans of political actors by social media platforms do not currently violate any law, they likely do violate some of the values underlying the freedom of speech in America.

Analysis

1. The First Amendment Places a High Value on Political Speech

The First Amendment, in relevant part, provides that "Congress shall make no law ... abridging the freedom of speech."⁵ This text, on its own, provides surprisingly little information; there is so much more to free speech jurisprudence than this clause would indicate. For example, this clause does

² See Adam Liptak, *Can Twitter Legally Bar Trump? The First Amendment Says Yes*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/first-amendment-free-speech.html>.

³ See e.g., Lon Baker *After 11 Years on Twitter, I was Permanently Suspended Without a Good Reason*, BETTER MARKETING (Jul. 24, 2021), <https://bettermarketing.pub/dear-jack-twitter-is-broken-f2eecadd59ee>; see also Ellissa Bain, *Why Is My Snapchat Permanently Locked? #Unlockoursnaps Trends On Twitter As Users Report Error!*, HITC, (<https://www.hitc.com/en-gb/2020/11/17/why-is-my-snapchat-permanently-locked/>).

⁴ See *infra* notes 8–10, 15–18, and 23–28.

⁵ U.S. CONST. amend. I.

not explain that speech can be separated into different categories, which are afforded different levels of protection. Some categories, like obscenity, fighting words, and defamation, can be entirely outside the protection of the First Amendment.⁶ Then, there are other categories of speech, such as commercial speech, which are protected by the First Amendment, but can still be limited by government interests.⁷ Finally, the most highly protected category of free speech is political speech, or more broadly, speech on matters of public concern. Federal courts have expressed that “political expressions are crucial to self-government and are afforded broad protection in order to ... ‘assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”⁸ Similarly, the Supreme Court has held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”⁹ Thus, the caselaw makes it clear that the First Amendment places a high value on speech related to matters of public concern.

Moreover, the bar for qualifying as protected political speech is fairly low. For example, consider Westboro Baptist Church protests outside of military funerals. It may be an understatement to call this speech outrageous and offensive. Nevertheless, the Supreme Court has held that as long as this speech is broadly on a matter of public concern, it deserves protection of the First Amendment, and any government-imposed limitation on it must survive strict scrutiny.¹⁰

Turning to the case of Donald Trump’s permanent suspension, the content of Trump’s speech on Twitter (generally, as well as the tweets that actually got him suspended) most likely would be considered protected political speech in other contexts. Twitter suspended Donald Trump’s account after two particular tweets. The first tweet read, “The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA

⁶ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–84 (1992).

⁷ *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

⁸ *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 415 (E.D. Pa. 2016) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁹ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

¹⁰ *Id.* at 1216.

GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!”¹¹ The second tweet read, “To all of those who have asked, I will not be going to the Inauguration on January 20th.”¹²

These tweets, and practically every statement made by a sitting President, likely constitute speech on matters of public concern, and therefore, are entitled to broad First Amendment protection. A potential argument against this is that Trump’s speech may constitute fighting words. Fighting words are words, which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹³ Indeed, it was the fear of further violence that led to Twitter suspending Trump.¹⁴ However, looking at the content of the words above, the fighting words doctrine is likely too narrow to encompass Trump’s tweets. Even Trump’s critics likely would not think that the above words, by their very nature, incite violence. Perhaps a stronger argument is that Trump’s tweets, given the context, constituted incitement of lawless action. Under this doctrine, speech is outside the protection of the First Amendment when it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁵ In the case of Donald Trump’s tweets in early January of 2021, it likely would be difficult to prove in court that Donald Trump actually intended for his supports to engage in lawless action, and may be equally difficult to prove causation. Nevertheless, as Donald Trump promulgated a theme of the election being stolen from him, while stating things like “If you don't fight like hell you're not going to have a country anymore,” there is a possibility that a court would find that some of his tweets represented an imminent incitement of lawless action.¹⁶ However, even if some of Donald Trump’s tweets are not protected speech, the next section will demonstrate that a total ban from the platform, rather than simply removing unprotected speech, is not consistent with the values of free speech.

¹¹ Twitter, Inc., *Permanent suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html.

¹² *Id.*

¹³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁴ *See supra* note 11.

¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁶ *Capitol riots: Did Trump's words at rally incite violence?*, BBC (Feb. 12, 2021), <https://www.bbc.com/news/world-us-canada-55640437>.

Thus, the vast majority of Donald Trump's tweets, however controversial they may be, constitute political speech, or at least speech on matters of public concern, for the purposes of the First Amendment. Again, this does not mean that private entities like Twitter cannot legally restrict this speech. Rather, it means that the principles underlying freedom of speech suggest that political speech has value, and contributes to the public discourse in a free society. Therefore, although Twitter currently has this power, censoring political speech is not something that it should do lightly.

2. The Law Disfavors Prior Restraints

Another problem with permanent Twitter suspensions has to do with the law's disfavor towards prior restraints. A prior restraint occurs when an individual or entity is denied access to a forum for expression before the expression occurs.¹⁷ Prior restraints on speech have been called "the most serious and least tolerable infringement on First Amendment rights."¹⁸ Underlying this deep disdain for prior restraint is the idea that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."¹⁹ Free speech advocates fear that prior restraints can be imposed based on predictions of danger that would not actually materialize and thus would not be the basis for subsequent punishments.²⁰

This doctrine is often applied to the freedom of the press, where courts have generally rejected government attempts to prevent publication of unprotected content.²¹ However, the underlying rationales might be useful in understanding why permanent bans on speech are not consistent with the freedom of speech.

In the case of Twitter bans, it likely would be more consistent with freedom of speech for Twitter to remove any individual post that violates its terms

¹⁷ *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000).

¹⁸ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

¹⁹ *Id.* at 559.

²⁰ Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *Minn. L. Rev.* 11, 49–54 (1981).

²¹ *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 735–36 (1931).

of use, as opposed to banning an individual from all future expression on the forum. Twitter's stated reason for banning Trump was to reduce the risk of incitement of violence.²² However, by permanently banning Trump from Twitter outright, Twitter is not only censoring speech that could incite violence, but also censoring all other speech, which could be entirely innocent. This is not to say that Twitter should never permanently suspend accounts. Twitter often suspends the accounts of ISIS operatives, QAnon conspiracy theorists, and other individuals who consistently violate their guidelines or pose a threat to public safety.²³ Few people take issue with this. However, permanently banning political actors, let alone a sitting president, from ever accessing the forum again is a dangerous road to go down and is a much more restrictive act of censorship than the principles of free speech might prefer.

3. The First Amendment Can Limit the Rights of Private Entities

Again, the First Amendment states, "Congress shall make no law abridging the freedom of speech."²⁴ However, the courts have made it entirely clear that the First Amendment is not limited to acts of Congress, despite the language of this clause. Rather, courts have extended the First Amendment to many kinds of government action.²⁵ Furthermore, the First Amendment has even been applied to private entities in limited circumstances. Cases like *Marsh v. Alabama* demonstrate that private property can function as a public forum where people have free speech rights.²⁶ In *Marsh*, Jehovah's witnesses were handing out literature on private property owned by the Gulf Shipbuilding Company.²⁷ The private property in question actually

²² See *supra* note 11.

²³ See Twitter, Inc., *An update on our efforts to combat violent extremism*, TWITTER (Aug. 18, 2016), https://blog.twitter.com/en_us/a/2016/an-update-on-our-efforts-to-combat-violent-extremism.html; Li Cohen, *Twitter Unveils Plan to Limit QAnon Activity in New Crackdown*, CBS NEWS (JULY 22, 2020 / 4:23 PM), <https://www.cbsnews.com/news/qanon-conspiracy-twitter-bans-accounts-crackdown/>.

²⁴ *Supra* note 5.

²⁵ See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (holding that the First Amendment applies to state and municipal governments); See also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that the First Amendment can protect speech in local public schools).

²⁶ *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

²⁷ *Id.*

looked and functioned like an ordinary town; but it was nevertheless wholly owned by a corporation.²⁸ The Court noted that, regardless of who owns the town, there is an “identical interest in protecting free channels of communication.”²⁹ Furthermore, the Court stated, “Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”³⁰ Therefore, the Court held that because the private property was free and accessible to the public, the private company could not curtail the liberty of press, religion, and speech there.³¹

Marsh obviously deals with a very different context than Twitter. However, the language above demonstrates that a private entity does not necessarily have absolute power to restrict speech. Furthermore, the Supreme Court, in *Packingham v. North Carolina*, recently said that the most important place for the exchange of views in the modern world is “cyberspace—the ‘vast democratic forums of the Internet’ in general . . . and social media in particular.”³² The Court further stated that one of the most fundamental principles 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.”³³ There, the majority opinion and the concurrence explicitly stated that the Court has been, and should be, extremely cautious in applying free speech principles to the internet because it is so vastly different from the physical world.³⁴ However, the way the court describes social media demonstrates that the Court clearly views the internet as the single most important forum for the exchange of ideas moving forward. Therefore, although it is true that social media platforms have broad discretion to censor content and ban users right now, that might not always be the case. It is not difficult to imagine that Congress or the courts will play a role in curbing the power of social media platforms over the course of the coming years.

²⁸ *Id.* at 502–03.

²⁹ *Id.* at 507.

³⁰ *Id.* at 506.

³¹ *Marsh*, 326 U.S. at 508–09.

³² 137 S. Ct. 1730, 1735 (2017).

³³ *Id.*

³⁴ *Id.* at 1736, 1744.

Conclusion

Freedom of speech is one of the most highly regarded values in American law. Free speech, especially on public issues, contributes to a diverse marketplace of ideas in American society. Therefore, our society should remain determined to protect free speech in all of its forms, even when it is controversial. Most peoples' opinions about the permanent suspension of Donald Trump likely correlate directly to their politics. However, the idea that a handful of social media companies can effectively cut off the most direct channels of communication between a sitting president and millions of constituents should scare people on both sides of the aisle. If we truly care about the values underlying freedom of speech in America, then perhaps our society should more seriously consider how we feel about social media companies like Twitter possessing unilateral discretion to control access to their platforms.

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