LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

WEDNESDAY, DECEMBER 6, 2023

GUEST COLUMN

The founders' broad views of press freedom in online-speech cases should be upheld

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In 2021, Florida and Texas enacted laws that restrict the ability of social media services to choose what content they do, and do not host. According to Florida and Texas, the laws were designed to combat perceived anti-conservative bias and censorship on certain social media sites. Tech industry groups sued to challenge both laws, arguing that they violate the First Amendment. The groups won in Florida and lost in Texas, and now the Supreme Court has taken up the constitutionality of both laws in a case that will have major consequences for online speech and First Amendment rights more broadly. If the Court looks to history and evaluates the common understandings of the Founding generation, it should find these attempts by State governments to control content creation and editorial discretion would have been anathema to the free press rights the First Amendment was meant to protect. For that reason, both laws should be deemed to violate the First Amendment.

The two States' laws are similar in purpose but slightly different in operation. Texas's law, H.B. 20, prevents social media sites with over 50 million active monthly users from declining to host content based on "the viewpoint of the user" or "the viewpoint represented in the user's expression." The law empowers users and the state's Attorney General to sue for claimed violations of the statute.

Florida's law, S.B. 7072, bars large social media sites from "willfully deplatforming" any political candidates by deleting or suspending their accounts - with violations incurring fines of up to $250,000 per day. The law also prohibits the sites from using algorithms to promote or de-prioritize posts by or about candidates, and mandates that algorithms impacting content's visibility be applied consistently. Both laws also require social media sites to provide detailed explanations of their content-moderation policies.

In addressing the constitutionality of the Florida and Texas laws, the Supreme Court and its six-justice conservative majority will likely be guided by history and tradition. Although the Eleventh Circuit noted that "[n]ot in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok" (indeed, it's hard to imagine Ben Franklin lip-synching Yankee Doodle on TikTok), neither the Eleventh Circuit nor the Fifth Circuit really grappled with the historical record. What could have been the reception of such laws by the Founding generation? What would they have

thought about this type of government restrictions on content creation and editorial discretion? And how analogous are social media companies - which the Supreme Court has called "the modern public square" - to printers like Benjamin Franklin and others during the Revolution and its aftermath? All of these questions are likely to be on the Justices' minds.

The historical record shows that the Founding generation understood the "press" and its "freedoms" in broad terms when the First Amendment was ratified in 1791. The "press" included content creators that produced news (like the modern *New York Times*), book printers or pamphleteers (akin to a modern Harper Collins) and many other forms of persons and entities involved with producing printed communications.

Critically, printers both created their own original content and published the content of others. Pressmen were not mere cogs who mechanically set type and font - they actively engaged in making editorial decisions about what content would be printed on their press and for what attributes or views their press would be known. Would their press be a "neutral" platform for all sides to freely debate? Would it be a platform just for loyalists or patriots? Every printer could make that choice fully and freely - guided not only by that person's own ideology, but also by economic concerns about what approach would garner a larger, more loyal, and thus more lucrative reader base.

At bottom, all of those choices and the editorial discretion inherent in them were core to the Founders' understanding of a free press. And the Founding generation recognized how critically important a free press was to a free society. That understanding led to the ratification of the First Amendment and analogous state constitutional shields against government interference with content creation, content publication, and editorial discretion.

Today's social media companies are analogous to the printers of our Founding generation. They are both content creators and platforms for sharing content created by others. They make choices about what type of site they will create, what content they will host, and which users or members they will allow. A site can be a neutral free-for-all - a paragon of unfettered free speech. Or it can chose to host only liberal or conservative content, and "censor" all others. But just like the printers of old, social media companies are protected by the rights of a free press. They can make editorial judgments based on their ideology or their economic bottom line. But those judgments are theirs to make, unencumbered by the type of government interference Florida and Texas seek to impose.

Decades ago, the Supreme Court recognized that "the exercise of editorial control and judgment" is critical to the free press right enshrined in the First Amendment. The Founding generation understood that that freedom didn't apply just to what we know in the modern world to include things like newspapers, but rather the entire press - journalists, pamphleteers, book publishers, and content creators, editors, and publishers. Social media companies neatly fit that bill. They fall squarely into the buckets of content creators, producers, and sharers that the Founders would have recognized fell into the notion of a "press." The Supreme Court should reject the Texas and Florida laws and confirm that the press remains "free," regardless of whether state officials, members of the public, or even the Justices agree with each and every editorial choice made in its name.

The authors thank associates **Sasha Dudding** *and* **Iason Togias** *for their research assistance and drafting in the production of this article.*

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