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The First Amendment is not a right to say anything, anywhere

By Jesse R. Loffler

One of the core components of the American identity is its broad freedom of speech. Often spoken of as synonymous with the First Amendment, the American experience of free speech is best captured by French Enlightenment writer Voltaire's work – whose views regarding free speech were influential among America's Founding Fathers: "I disapprove of what you say, but I will defend to the death your right to say it." Indeed, the First Amendment is frequently invoked in political discourse, often to allow unpopular or even spiteful views.

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As the Information Age has matured and the ability to widely disseminate ideas on the wide range of social media platforms now available – e.g. Twitter, YouTube, Facebook – the First Amendment has frequently been invoked as a defense for those who have been banned from such social media. Think Infowars' Alex Jones and the Proud Boys' Gavin McInnes, who were banned by Twitter and Facebook.

Yet, despite its invocation, the First Amendment does not apply to these platforms. Those individuals might have free speech rights, but they do not have a First Amendment right against Facebook or Twitter. That is because the First Amendment only prevents the government from interfering with free speech.

That is one of the reasons why the Supreme Court's decision this term in Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921 (2019), was so interesting. The court was considering whether Manhattan Community Access Corporation ("MNN"), a private non-profit that operated New York City's public access television channels, themselves created under state law and franchise agreements but lacking many more connections to the government, could be considered a "state actor" to which the First Amendment applied.

The case was interesting because an expansive decision could open up new arguments that the First Amendment could apply to social media. Previously, the lower courts had almost uniformly held that a social media account could be a public forum but the platform itself was not. President Trump's Twitter account is a public forum, but Twitter itself is not; a municipal government's Facebook page is a constitutional public forum, but Facebook itself is not.

This author was one of the team representing MNN at the Supreme Court, and the Second Circuit decision on appeal was both a split with other circuits on the narrow question of the applicability of the First Amendment to public access television channels and their operator, as well as the first step down the broader slippery slope that could see social media platforms subjected to First Amendment liability. If the minimal governmental connection was sufficient in MNN, other entities subjected to government regulation or that resembled a traditional public forum could be similarly situated.

This was not the typical slippery slope argument heard, and often rejected, by courts. It was a serious matter for the technology and media industries. A number of *amici* – including the Internet Association (which represents approximately 40 leading technology companies) and the Electronic Frontier Foundation – warned the Court that it should "limit its decision to the unique facts of this case so that its decision does not unintentionally disrupt the modern, innovative Internet"[1] or "wreak unintended havoc on the rights of online speakers and the private platforms they use to disseminate their messages."[2] This was the rare case where the slippery slope was real for more than just the parties.

In fact, one of the more interesting parts of the case from a practitioner's perspective was how these arguments did not necessarily change, but, given unexpected developments, the strategy changed more than is typical between the certiorari and merits stages. Previously, Justices Kennedy and Ginsburg stated in the 1994 Denver Area case that they would have held any public access channel was a public forum regardless of who was running it, private or public. Thus, the vote-counting that traditionally occurs was focused on others. However, six days after MNN filed its petition for certiorari, Justice Kennedy announced his retirement. His replacement, Justice Kavanagh, would eventually be the author of the 5-4 decision holding that MNN was not a "state actor." This significant mid-litigation shift required a re-review of strategy in a way that the vast majority of Supreme Court cases do not require, and made for an interesting re-reading of the tea leaves.

There are good reasons that the First Amendment generally does not apply to private entities. Private individuals and companies need not give equal time to those with whom they disagree. Of course, while people have a right to say virtually *whatever* they want, they do not have a legal right to say it *wherever* they want.

Nonetheless, given the ubiquity of social media and the increasing calls for regulation of the Internet and social media providers, MNN will not be the last time news media and the First Amendment tangle in the courts. ■

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[1] Brief of Internet Association as Amicus Curiae in Support of Neither Party at 1, *Manhattan Community Access Corporation v. Halleck*, No. 17-1702 (U.S. Dec. 11, 2018).

[2] Brief of Amicus Curiae Electronic Frontier Foundation in Support of Neither Party at 2-3, *Manhattan Community Access Corporation v. Halleck*, No. 17-1702 (U.S. Dec. 11, 2018).