Hawley Defends the Public Square | Jon Schweppe

Authors

Senator Josh Hawley of Missouri introduced a controversial Big Tech bill yesterday.

His detractors claim he wants to use the government to destroy companies like Facebook, Twitter, and Google. If you listen to the man himself—or read his bill—it's clear this legislation would defend free speech in the public square from a few multinational corporations' illegal efforts to censor American citizens and meddle in the 2020 election.

Hawley's bill, the Ending Support for Internet Censorship Act, seeks to discourage recent Big Tech efforts to censor political ideas. It does this by amending Section 230 of the Communications Decency Act, which currently offers Big Tech companies immunity from legal liability for content posted on their platforms. While this immunity is indeed a sweetheart deal for the largest Big Tech corporations, it's also a common sense regulation. Content curators like newspapers and private websites can directly control the type of content they allow to be viewed by users of their platforms, and thus bear some legal responsibility for what they publish. Open platforms thrive by allowing users to independently contribute content in real time. In this way, open platforms resemble the public square, and the free discussion of politics that takes place on these platforms resembles an open marketplace of ideas.

Unfortunately, many of these "open platforms" enjoying Section 230 immunity have begun to act as content curators, deplatforming conservatives and censoring content that flies in the face of Silicon Valley political orthodoxy. Hawley's bill amends Section 230 to clarify the distinction between platform and curator and ensure that Big Tech companies demonstrate that they are not unfairly promoting one political ideology over another through rigged algorithms or biased moderation practices.

This is a technical argument over a regulatory mechanism, but there is also a bigger issue at play here: What exactly is the "public square," and why does it matter?

The public square is where citizens come together to freely exchange ideas about culture, politics, and religion. It's where good ideas defeat bad ideas, and where truly great ideas are improved upon and refined. It's where democracy thrives.

Throughout American history, the public square has taken on familiar forms (a sidewalk outside an abortion clinic, a park where activists demand redress for their grievances) and controversial forms (Westboro Baptist goons protesting at military funerals, or Ku Klux Klan bigots legally obtaining a permit to march in a parade). The Supreme Court has ruled repeatedly that political expression in the public square is constitutionally protected under the First Amendment. However, in many of these rulings, there has been debate over what constitutes a "public square" in America. Can a privately-owned entity constitute a public square? Can First Amendment protections ever apply on private property?

Consider the precedent set in 1946 by *Marsh v. Alabama*. A Jehovah's Witness was arrested and charged with trespassing after attempting to proselytize on a sidewalk outside her local post office. Under normal circumstances, this would be a clear violation of her First Amendment rights, but this incident took place in a predominantly privately-owned "company town" owned by Gulf Shipbuilding Corporation. Did she still have constitutional rights on privately-owned property?

The Supreme Court determined by a vote of 5-3 that she did. In what was essentially a majority opinion, Justice Hugo Black wrote, "[T]he 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." A privately-owned entity that opens itself up to the public at large can indeed be considered the public square.

Moreover, the Internet is the modern public square. It's where many of us buy and sell goods. It's where we exchange ideas. It's where we speak and where we are heard. It's where we challenge our pre-existing ideas with better ideas. It's where we thrive.

Therefore, First Amendment protections extend to the Internet. The Supreme Court acknowledged this in *Packingham v. North Carolina* (2017). The State of North Carolina passed a law restricting individuals on the state's sex offender registry from accessing a number of websites, including social media platforms. They were sued, and ultimately the Supreme Court ruled in a 9-0 decision that the State infringed upon the First Amendment rights of individuals listed on the registry.

In his majority decision, Justice Anthony Kennedy explained the Court's reasoning:

> 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… By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.

Hawley's opponents have a standard criticism: These companies are privately owned; therefore, the idea that constitutional rights extend to their platforms is laughable, and the question of whether a social media company is an open platform or a content curator is irrelevant.

But judging by the precedents set by *Marsh* and *Packingham*, that's not necessarily the case. The Supreme Court has determined that when a private entity or location opens itself up to the general public, property rights are often eschewed in favor of First Amendment rights. The Court has also deemed the Internet a modern public square. What makes Google, Facebook, and Twitter any different from the "company town" in *Marsh*? When a private company makes a profit-based decision to become an open platform, and earns the benefits that come with that designation, it must respect the First Amendment rights of its users.

Moreover, Hawley's bill is benign. Big Tech companies already have a regulatory process for obtaining immunity from liability. Hawley's bill simply requires a few more checked boxes: Big Tech companies have to allow government regulators to audit their algorithms and moderation practices to ensure that unfair ideological censorship is not taking place. If a Big Tech company demonstrates that it is respecting the First Amendment rights of its users, it

will be granted Section 230 immunity.

Hawley's bill also allows Big Tech companies to freely determine whom they contract with—Facebook does not have to allow Alex Jones to advertise on its platform, and YouTube does not have to monetize Steven Crowder's videos—as long as the companies can demonstrate a "business necessity" for severing ties. This will not cause a Big Tech apocalypse. None of these companies would consciously decide to jeopardize their Section 230 immunity just so they could delete a few thousand memes. That would be nothing short of business malpractice—shareholders would obviously revolt.

Some libertarians and conservatives wince at the idea of greater regulation of Big Tech companies. But what other option do we have when powerful multinational corporations are infringing upon the First Amendment rights of U.S. citizens? Our government has a responsibility to defend our unalienable rights. Not all regulations are inherently bad. This one is so good it just might save the Internet.

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