NSR Tech Policy: Contemplating the End of the Social Media Platforms Current Business Model (Wait, What?)

By Blair Levin | May 23, 2022

Plus, Republicans Intro Their Antitrust Bill

What's New. We admit that when it comes to policy analysis, we are usually describing 10-30 degree turns. Occasionally a merger might signal a 45 degree turn in terms of impact. But recently, in two separate cases, the Fifth Circuit signaled what might be characterized as a 180 degree turn for universal service and current social media platform business models.[1]

In a companion Weekend Update we discuss what is happening on the universal service side (LINK). In this note, we discuss the possibility that a recent one sentence Fifth Circuit order upholding the Texas social media law could materially impact the ability of social media platforms to attract a large audience and advertising revenues.

Is it the end of Social Media as we know it? Probably not but the odds are better than they were a week ago.

The 5th Circuit recently signaled that it may uphold a Texas law that we think will disrupt the current business models of social media and make it difficult to sustain and grow its current levels of revenues and profits. While we believe the law is likely to be struck down. Indeed, the 11th Circuit just struck down a similar law that Florida had passed. Still, the Fifth Circuit's decision gives Republican lawmakers in Texas hope. With a court signaling that the odds of this law surviving legal review are no longer infinitesimal, more Republican legislators (state and federal) may push to get bills like the Texas one signed into law.[2] But for now, we will focus on the path and potential impact of the Texas law.

The Texas law. Last fall, the Texas legislature passed a law banning platforms with more than 50 million monthly users in the U.S. from removing a user over a "viewpoint," and makes the platform potentially liable for a number of actions, including content removal, content demonetization, content deprioritization, the addition of an assessment to content; and account suspension. Effectively, the law creates a "must carry" condition. It also has some transparency requirements. In our analysis, we will focus on the "must carry" provisions as those have, in our view, the most significant economic consequences.

Defines social media as common carriers. Importantly, the legislature justified the passage of the law on the grounds that "social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and social media platforms with the largest number of users are common carriers by virtue of their market dominance."

The District Court issues injunction against the law. The District Court issued an injunction, blocking enforcement of the law. In a 30 page opinion, the Court held that the law violated the First Amendment rights of social media to exercise editorial discretion over their platforms, is unconstitutionally vague, and further held that "social media platforms are not common carriers."

The Court of Appeals removes the injunction. In a one sentence order, the Court of Appeals reversed the District Court and removed the injunction. While we can't know what the Court was thinking, we can know two things. First, from the oral argument, it was clear that several judges did not understand the difference between a common carrier and a social media platform. Second, it is clear from the one sentence order that the court feels no shame in not explaining the basis of their decision.

A Brief Detour on Five Centuries of Common Carriage. Five centuries ago, English common law--itself based on ancient Roman law--required that certain companies engaged in transporting goods and persons offer service on a non-discriminatory basis. That idea, called common carriage, traveled to the US.[3] In 1860 Congress funded the transcontinental telegraph while requiring messages to be "impartially transmitted in order of their reception." Subsequently, the US imposed common carriage principles on railroads, trucking companies, taxis and telephone networks, among others.

Three decades ago, the commercial internet arose on the telephone network, which the FCC treated as a common carrier. Then cable, whose video business was not subject to such rules, started transmitting data. The FCC found that while the cable internet product had some attributes of common carriage, it also had attributes of an information service and therefore should be classified as such. The classification question went to the Supreme Court, where, in a 6-3 decision, the court sided with an FCC on the grounds of Chevron deference. Justices Scalia, Souter, and Ginsberg dissented,[4] with Scalia describing the critical distinction between an "information service" that involves "the capability of getting, processing, and manipulating information, while common carriage, by contrast, involved no "change in the form or content of the information as sent and received."

When is a dog a duck? For the last two decades we have been rearguing this issue but generally the conservative view has been we should not apply common carriage to networks that bundle the transmission function with information manipulation. Now, Texas is arguing that common carriage should be applied to enterprises who are not in the transmission business but are powerful edge providers, something that is new in common carrier law.[5] Scalia's argument boiled down to if it walks like a duck and talks like a duck, it's a duck. The Texas law boils down to if it walks like a dog and talks like a dog, but we call it a duck, it's a duck. A court, however, could hold that the legislature has the power to call a dog a duck. We think that unlikely and believe the most likely path is the one just taken by the 11th Circuit which, in overturning Florida's law said "The State's second argument seeks to evade — or at least minimize — First Amendment scrutiny by labeling social media platforms 'common carriers.' We find neither argument convincing."

What happens now? The law is now in effect, which means that a user in Texas could sue a platform for removing his or her content. The parties have filed an emergency application to the Supreme Court to put the law on hold while the case proceeds through the courts, but if that application isn't granted, the law will remain in place.

These maneuverings are procedural. Eventually, a district court judge will rule on the merits of the law. After that, the losers will likely appeal, and the case could make its way back to the Supreme Court. If it does, we think it will be overturned. First Amendment experts across the political spectrum have argued that the law clearly runs afoul of current First Amendment jurisprudence.

But we could be wrong. Like nearly every observer we read, we thought the Circuit Court would uphold the District Court.[6] So we must contemplate what the Texas law could mean for social media platforms if it goes into effect.

If upheld, what's ahead for social media platforms? Scylla and Charybdis. In Homer's Odyssey, Odysseus must navigate his boat in the narrow straits between Scylla, a six-headed man-eating, cliff-dwelling monster, and Charybdis, a treacherous whirlpool. The implication from the saga is that few, if any boats, successfully navigate that passage. We think that may describe the fate of social media platforms[7] if the law is upheld.[8]

The Scylla of endless and unpredictable litigation. One choice is to continue the current content moderation practices in the hopes that the courts, overtime, establish rules they can live with. There are two problems, at least, with that hope. First, it is likely they would lose these cases in court because the law clearly prohibits most platforms' current content moderation practices. The law on its face would require continuing to feature content that is very problematic to most users of platforms.[9] Second, the law gives an incentive for people to continually test the boundaries of a platforms' policies, offering increasing problematic content until finally kicked off, so they can expand the parameters of the policy.

The Charybdis of a materially smaller advertising market. On the other hand, if the platform, or the court decisions that follow enable various viewpoint content that could include, for example hate speech, threats of violence, sexually explicit material, dangerous medical advice, psychologically damaging materials, among others, fewer people will want to be on the platform and advertisers will be less likely to want to advertise on the platform. This is not to suggest that the revenue drops to zero. It is to predict that the Texas law, if upheld, would lead to a downward cycle in which the value of every major social media platform will be less than it currently is.

Bottom Line: If upheld, the law will change the business model in ways that are negative and likely material for investors. There is a view among some that the content moderation practices of the social media platforms reflect partisan or ideological preferences of those running the platforms. We are dubious of that claim but are certain of a larger truth that the content moderation practices are designed to optimize for an environment

that increases user engagement and advertiser interest. If the government forces different practices, it is likely to cause a less optimal business model from a profit perspective.

But the downstream effects could go in multiple ways. The most likely scenario is that eventually the Supreme Court upholds the 11th Circuit and overturns the Fifth Circuit, and the must carry provisions do not go into effect. If they do, however, the consequences are likely to be negative for social media platforms. But we do not know how advertisers will move their budgets around. We don't know to what extent platforms will restructure the physical relationship between ads and content to avoid advertising being near problematic content. We don't know how the larger platforms will have an advantage, due to the ability to absorb more legal and regulatory costs, over their mid-sized but affected competitors. What we do know is that a must carry provision disrupts the current model in a material way, and unless and until the Texas law is overturned, there is a cloud over all the major social media platforms.

Quick Hit

Republicans Introduce Their Own Antitrust/Break-Up Bill. This week, a bipartisan group of Senators introduced The Competition and Transparency in Digital Advertising Act, legislation that would, among other things, force Alphabet to divest various parts of its digital advertising business. Unlike other proposed antitrust reforms, this legislation has the support of Senator Mike Lee, considered to be the leader of Republicans on antitrust issues.

The timing of the bill's introduction is curious. There is already an antitrust proposal, the American Innovation and Choice Act, that has been through hearings and has some bipartisan support, though not from Senator Lee. Introducing another major antitrust bill this late in the session, would seem to suggest this is more of a messaging bill than one for which its sponsors are hopeful of passage in this session. The bill also appears to track the thrust of the state antitrust litigation against Google that Texas is leading, so if either fails, it's possible there will still be a comparable remedy as a result of the alternative process. Still, while we continue to believe that this Congress is unlikely to do anything material in the antitrust realm, the pollical throw weight of the sponsors (Klobuchar, Lee, Cruz and Blumenthal), it bears watching.

[1] Speaking of 180 degree turns, in the social media case, Republicans who have fought applying common carrier regulation to enterprises who perform functions traditionally performed by common carriers (see Scalia quote in the discussion of common carriage below) are now trying to apply common carriage to enterprises who do not perform the functions. Further, having fought against the “fairness doctrine” for broadcast television and radio, some Republicans are now trying to create a fairness doctrine for social media. So, we know how Beetlejuice feels.

[2] As noted above, Florida passed a similar law already, but the Circuit Court there threw it out.

[3] For those interested in delving into the weeds of the weeds, we recommend this article by distinguished communications scholar Eli Noam. Written in 1994, it “argues that the institution of common carriage, historically the foundation of the way telecommunications are delivered, will not survive. To clarify: "common carriers" (the misnomer often used to refer to telephone companies) will continue to exist, but the status under which they operate -- offering service on a non-discriminatory basis, neutral as to use and user -- will not. This conclusion is reached with considerable reluctance. Common carriage, after all, is of substantial social value. It extends free speech principles to privately-owned carriers. It is an arrangement that promotes interconnection, encourages competition, assists universal service, and reduces transaction costs. Ironically, it is not the failure of common carriage but rather its very success that undermines the institution. By making communications ubiquitous and essential, it spawned new types of carriers and delivery systems. But the argument is not that the blows to traditional common carriage originate from regular competition by new rival telecom carriers operating as common carriers, too. Rather, the pressure on common carriers come from two other directions: next-generation private networks offered by systems integrators; and broadband services offered by cable television operators. Neither operates as a common carrier, nor is it likely to.” The article is prescient in many ways, but certainly did not predict the reemergence of common carriage as a tool of conservatives seeking to control content moderation practices by private enterprises, something we doubt we would have predicted in 1994.

[4] We felt compelled to note the peculiar coalition to highlight that this is not exactly a traditionally right/left issue, but rather one in which applying old concepts to new technologies can create odd coalitions.

[5] To be fair to Texas, Justice Thomas, who wrote the decision from which Scalia, Souter and Ginsburg dissented, now is of the view that social media platforms should be treated as common carriers. He argues that "Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way." With due respect to the Justice, this suggests to us that like the Fifth Circuit judges at oral argument, his views about how things work seems, well, odd. We might suggest the Justice get rid of his ISP and then try to connect to Twitter, Facebook or YouTube. Go ahead. We'll wait. Still no connection? Hmmm.

[6] It somewhat resembles the position of the movie character who, when told his chances were about one in a million, happily exclaims "you're telling me there's a chance!"

[7] There will be a differential effect between specific platforms but for now, we are treating this as a category, rather than comparing, say, the impact of Facebook v. Snap.

[8] This raises the question of whether Musk will also want to renegotiate his bid for twitter in light of the possibility of significant government control over the platform. We have no opinion on that but we do just want to point out—because that is what footnotes are for---that OF COURSE Musk also found his way in the top news story of the last few weeks; the Johnny Depp/ Amanda Heard show.

[9] To note a horrible example, while the shooting in Buffalo constituted many crimes, it is not clear that posting a video of it would be illegal. Taking it down could be seen as a violation of the viewpoint restriction.

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