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There's Nothing "Conservative" About Trump's Views on Free Speech and the Regulation of Social Media
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Yesterday was President Trump's big "Social Media Summit" where he got together with a number of right-wing firebrands to decry the power of Big Tech to censor conservatives online. According to the Wall Street Journal:

> Mr. Trump attacked social-media companies he says are trying to silence individuals and groups with right-leaning views, without presenting specific evidence. He said he was directing his administration to "explore all legislative and regulatory solutions to protect free speech and the free speech of all Americans."
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> "Big Tech must not censor the voices of the American people," Mr. Trump told a crowd of more than 100 allies who cheered him on. "This new technology is so important and it has to be used fairly."

Despite the simplistic narrative tying President Trump's vision of the world to conservatism, there is nothing conservative about his views on the First Amendment and how it applies to social media companies.

I have noted in several places before that there is a conflict of visions when it comes to whether the First Amendment protects a negative or positive conception of free speech. For those unfamiliar with the distinction: it comes from philosopher Isaiah Berlin, who identified negative liberty as *freedom from* external interference, and positive liberty as *freedom to* do something, including having the power and resources necessary to do that thing. Discussions of the First Amendment's protection of free speech often elide over this distinction.

With respect to speech, the negative conception of liberty recognizes that individual property owners can control what is said on their property, for example. To force property owners to allow speakers/speech on their property that they don't desire would actually be a violation of their liberty — what the Supreme Court calls "compelled speech." The First Amendment, consistent with this view, generally protects speech *from* government interference (with very few, narrow exceptions), while allowing *private* regulation of speech (again, with very few, narrow exceptions).

Contrary to the original meaning of the First Amendment and the weight of Supreme Court precedent, President Trump's view of the First Amendment is that it protects a *positive conception* of liberty — one under which the government, in order to *facilitate* its conception of "free speech," has the right and even the duty to impose restrictions on how private actors regulate speech on their property (in this case, social media companies).

But if Trump's view were adopted, discretion as to what is necessary to facilitate free speech would be left to future presidents and congresses, undermining the bedrock conservative principle of the Constitution as a shield *against* government regulation, all falsely in the name of protecting speech. This is counter to the general approach of modern conservatism (but not, of course, necessarily *Republicanism*) in the United States, including that of many of President Trump's own judicial and agency appointees. Indeed, it is actually more consistent with the views of modern *progressives* — especially within the FCC.

For instance, the current conservative bloc on the Supreme Court (over the dissent of the four liberal Justices) recently reaffirmed the view that the First Amendment applies only to state action in *Manhattan Community Access Corp. v. Halleck*. The opinion, written by Trump-appointee, Justice Brett Kavanaugh, states plainly that:

> Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." §1. The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that **the Free Speech Clause prohibits only governmental abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech**… In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. **By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty**. (Emphasis added).

Former Stanford Law dean and First Amendment scholar, Kathleen Sullivan, has summed up the very different approaches to free speech pursued by conservatives and progressives (insofar as they are represented by the "conservative" and "liberal" blocs on the Supreme Court):

> **In the first vision…, free speech rights serve an overarching interest in political equality. Free speech as equality embraces first an antidiscrimination principle: in upholding the speech rights of**

> **anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers, the Court protects members of ideological minorities who are likely to be the target of the majority's animus or selective indifference….** By invalidating conditions on speakers' use of public land, facilities, and funds, a long line of speech cases in the free-speech-as-equality tradition ensures public subvention of speech expressing "the poorly financed causes of little people." On the equality-based view of free speech, it follows that the well-financed causes of big people (or big corporations) do not merit special judicial protection from political regulation. And because, in this view, the value of equality is prior to the value of speech, politically disadvantaged speech prevails over regulation but regulation promoting political equality prevails over speech.
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> **The second vision of free speech, by contrast, sees free speech as serving the interest of political liberty. On this view…, the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas.** And on this view, members of the public are trusted to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons. Government intervention might be warranted to correct certain allocative inefficiencies in the way that speech transactions take place, but otherwise, ideas are best left to a freely competitive ideological market.
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> **The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech**. Justice Kennedy's opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, articulates a robust vision of free speech as serving political liberty; the dissenting opinion by Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, sets forth in depth the countervailing egalitarian view. (Emphasis added).

President Trump's views on the regulation of private speech are alarmingly consistent with those embraced by the Court's progressives to "protect[] members of ideological minorities who are likely to be the target of the majority's animus or selective indifference" — exactly the sort of conservative "victimhood" that Trump and his online supporters have somehow concocted to describe themselves.

Trump's views are also consistent with those of progressives who, since the Reagan FCC abolished it in 1987, have consistently angled for a resurrection of some form of fairness doctrine, as well as other policies inconsistent with the "free-speech-as-liberty" view. Thus Democratic commissioner Jessica Rosenworcel takes a far more interventionist approach to private speech:

> The First Amendment does more than protect the interests of corporations. As courts have long recognized, **it is a force to support individual interest in self-expression and the right of the public to receive information and ideas**. As Justice Black so eloquently put it, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Our leased access rules provide opportunity for civic participation. They enhance the marketplace of ideas by increasing the number of speakers and the variety of viewpoints. They help preserve the possibility of a diverse, pluralistic medium—just as Congress called for the Cable Communications Policy Act… **The proper inquiry then, is not simply whether corporations providing channel capacity have First Amendment rights, but whether this law abridges expression that the First Amendment was meant to protect**. Here, our leased access rules are not content-based and their purpose and effect is to promote free speech. Moreover, they accomplish this in a narrowly-tailored way that does not substantially burden more speech than is necessary to further important interests. In other words, they are not at odds with the First Amendment, but instead help effectuate its purpose for all of us. (Emphasis added).

Consistent with the progressive approach, this leaves discretion in the hands of "experts" (like Rosenworcel) to determine what needs to be done in order to protect the underlying value of free speech in the First Amendment through government regulation, even if it means *compelling* speech upon private actors.

Trump's view of what the First Amendment's free speech protections entail when it comes to social media companies is inconsistent with the conception of the Constitution-as-guarantor-of-negative-liberty that conservatives have long embraced.

Of course, this is not merely a "conservative" position; it is fundamental to the longstanding bipartisan approach to free speech generally and to the regulation of online platforms specifically. As a diverse group of 75 scholars and civil society groups (including ICLE) wrote yesterday in their "Principles for Lawmakers on Liability for User-Generated Content Online":

> ***Principle #2*: Any new intermediary liability law must not target constitutionally protected speech.**
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> The government shouldn't require—or coerce—intermediaries to remove constitutionally protected speech that the government cannot prohibit directly. Such demands violate the First Amendment. Also, imposing broad liability for user speech incentivizes services to err on the side of taking down speech, resulting in overbroad censorship—or even avoid offering speech forums altogether.

As those principles suggest, the sort of platform regulation that Trump, et al. advocate — essentially a "fairness doctrine" for the Internet — is the *opposite* of free speech:

> ***Principle #4*: Section 230 does not, and should not, require "neutrality."**
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> Publishing third-party content online never can be "neutral." Indeed, every publication decision will necessarily prioritize some content at the expense of other content. Even an "objective" approach, such as presenting content in reverse chronological order, isn't neutral because it prioritizes recency over other values. By protecting the prioritization, de-prioritization, and removal of content, Section 230 provides Internet services with the legal certainty they need to do the socially beneficial work of minimizing harmful content.

The idea that social media should be subject to a nondiscrimination requirement — for which President Trump and others like Senator Josh Hawley have been arguing lately — is flatly contrary to Section 230 — as well as to the First Amendment.

Conservatives upset about "social media discrimination" need to think hard about whether they really want to adopt this sort of position out of convenience, when the tradition with which they align rejects it — rightly — in nearly all other venues. Even if you believe that Facebook, Google, and Twitter are trying to make it harder for conservative voices to be heard (despite all evidence to the contrary), it is imprudent to reject constitutional first principles for a temporary policy victory. In fact, there's nothing at all "conservative" about an abdication of the traditional principle linking freedom to property for the sake of political expediency.

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