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The Bipartisan Urge to Control Online Speech

According to the Biden administration, federal officials who urged social media companies to suppress “misinformation” about COVID-19 and other subjects were merely asking platforms like Facebook and Twitter to enforce their own rules. But according to the social media users whose speech was stifled as a result of that campaign, it crossed the line between permissible government advocacy and censorship by proxy.

The U.S. Supreme Court has agreed to resolve that dispute by deciding whether a federal judge and an appeals court were right to conclude that the administration violated the First Amendment when it sought to limit the influence of content it viewed as dangerous.



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The case is one of several controversies that illustrate the bipartisan urge to control online speech.

Two other cases on the Court’s docket involve Florida and Texas laws that, like the Biden administration’s anti-misinformation crusade, aimed to shape private content moderation decisions. While President Joe Biden demanded removal of posts he thought social media companies should not allow, Republicans who backed the state laws insisted that the platforms allow speech they otherwise might be inclined to remove.

A Democratic president was offended by conservative speech that contradicted his agenda. Republican legislators and governors, meanwhile, were angry at social media companies they perceived as biased against conservatives. Although those situations might look different, they raise the same basic issue.

Should social media companies be free to set and enforce their own content rules, or should politicians have the power to override those decisions? The answer seems clear if you think the First Amendment protects editorial discretion, as the Supreme Court has repeatedly held.

New York legislators rejected that proposition when they enacted a 2022 law that requires social media platforms to police “hateful” speech, which is indisputably protected by the First Amendment. A federal judge enjoined enforcement of that law in February, and New York is now asking the U.S. Court of Appeals for the 2nd Circuit to intervene.

While attempts to censor “hate speech” are mainly a Democratic thing, members of both major parties agree that they should not have to put up with irksome criticism when they use their social media accounts for official purposes. Politicians ranging from former President Donald Trump to Rep. Alexandria Ocasio-Cortez, D-N.Y., have asserted the prerogative to block users whose opinions annoyed them.

That practice, the banished critics argued, violated their First Amendment right to participate in public



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forums created by thin-skinned government officials. In a 2019 case involving then-president Trump's personal Twitter account, the 2nd Circuit agreed.

"Once the President has chosen a platform and opened up its interactive space to millions of users and participants," the appeals court said, "he may not selectively exclude those whose views he disagrees with." Although that case became moot after Trump left office, the underlying issue persisted, as reflected in two cases that the Supreme Court will hear during its current term.

Another point of bipartisan agreement: When it comes to protecting the youth of America from online content that politicians think they should not see, the First Amendment goes out the window. The Kids Online Safety Act, which a Senate committee unanimously approved in July, would impose an amorphous "duty of care" on interactive platforms, online games, messaging applications, and streaming services, demanding "reasonable measures" to "protect" against and "mitigate" a long list of potential "harms" to users younger than 17.

That ambiguous mandate would be enforced by federal regulators and by state attorneys general with a wide range of views about which content is appropriate for minors. In practice, it would undermine the right to engage in anonymous speech and encourage restrictions on constitutionally protected content for adults as well as children.

That danger did not dissuade 46 Democrats and Republicans from co-sponsoring the Senate bill — further evidence that we cannot trust either party to respect freedom of speech. Although they sometimes differ on the details, they are united in believing that political imperatives trump constitutional guarantees.

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