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The Two Imperatives of the First Amendment

By Mitchell Keiter

The Constitution embraces the Lockean principles of free speech and private property as "different aspects of an indivisible concept of liberty." *Intel v. Hamidi*, 30 Cal.4th 1342 (Brown, J, dissenting). But concerns about viewpoint-based censorship on social media expose a tension between the two. Do free speech principles prohibit political bias on media like YouTube and Twitter, or do these sites enjoy a property right to exclude whatever material they wish?

Two speech models: the civic forum and the autonomous publisher

The First Amendment encompasses both a civic and an autonomy imperative. Speech is the "essence of self-government," which requires an "uninhibited, robust" exchange of ideas. *Garrison v. Louisiana*, 379 U.S. 75 (1964). Property rights cannot justify censorship absolutely; police could not constitutionally arrest a women for distributing religious writings just because a company owned the town. *Marsh v. Alabama,* 326 U.S. 501 (1946). The California Supreme Court extended this principle to shopping malls, an "essential and invaluable forum for exchanging ideas," so a mall could not exclude students seeking petition signatures. *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899 (1979) [all emphases added]. The U.S. Supreme Court found this construction of state constitutional law permissible (though not mandatory), as the mall owner's property interest did not entitle him to exclude speakers. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Cyberspace is the successor to streets and malls, suggesting the civic forum imperative should apply there too. *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

On the other hand, the First Amendment promotes speaker autonomy, and protects the right *not* to speak or support speech. Championed by Thomas Jefferson ("To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical"), it has historically barred the state from forcing individuals to support religious institutions, and also protects against compulsory political expression. *Janus v. AFSCME*, 138 S.Ct. 2448 (2018); *NIFLA v. Beccera*, 138 S.Ct. 2361 (2018).

Those who choose to speak may do so in their own voice. The Court thus struck down a law forcing newspapers that had criticized candidates to provide them with a "right to reply." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Despite the statute's purpose of ensuring "an electorate informed about the issues," the newspaper could decide for itself what to publish: a "privately owned newspaper [may] advance its own political, social, and economic views." Or as the Court put it this summer: "Benjamin Franklin did not have to operate his newspaper as 'a stagecoach, with seats for everyone.'" *MCAC v. Halleck*, 139 S.Ct. 1921 (2019). *PruneYard* distinguished *Miami Herald*, as the mall was not a publisher, expressing a particular viewpoint.

These civic and autonomy imperatives collided when college students opposed having to support a speakers' fund, as they disagreed with some of the speech presented. *Board of Regents v. Southworth*, 529 U.S. 217 (2000). But as the fund promoted a "free and open exchange of ideas," rather any particular one, *PruneYard*, rather than *Miami Herald*, governed the decision. So long as the program was viewpoint-neutral, it fell outside the general rule forbidding compelled support for speech. The students were not sponsoring any particular *speech* but the *forum* as a whole.

The Communications Decency Act

The Communications Decency Act (CDA) followed the *Marsh/PruneYard* model. 47 U.S.C. Sec. 230. Rejecting the *Miami Herald* model, Congress wanted to cultivate the internet as "a *forum* for a true diversity of political discourse," so "interactive computer services" were *not* "publishers" of content provided by other parties.

"Publisher" status is a two-sided coin, permitting selectivity — but imposing responsibility for those selections. The *Miami Herald* concurrence observed "freedom of the press is not a freedom from responsibility for its exercise," so the paper's choosing what to publish and what to suppress rendered it liable if it published defamatory or other unlawful content. See also Cal Const., art. I, sec. 2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being *responsible for the abuse of this right*." Publishers bear responsibility for the ultimate product, even when it comes from another source.

The CDA instead treated websites like the U.S. Postal Service or telephone providers, common carriers which do not select or edit users' speech, and are not liable when customers use them to arrange drug deals or plan a murder. Such viewpoint neutrality can justify the exception to liability, just as *Southworth* held "Viewpoint neutrality is the justification for requiring the student to pay the fee" despite the general rule against forced funding of political speech.

Distortions and double standards

Two cases pending before the Ninth Circuit are testing — and distorting — these principles. *Prager University v. Google, LLC*, 18-15712; *Gonzalez v. Google, LLC*, 18-16700. PragerU sued Google/YouTube for restricting its conservative videos. Google/YouTube's briefing justifies this suppression by celebrating its publisher status, asserting *Miami Herald* protects "editorial judgments . . . of how . . . or even whether to present, particular content." The converse appears in *Gonzalez*, where relatives of terror victims sued YouTube for posting ISIS videos that facilitated an attack. After championing its "editorial judgment" against PragerU, six months later *the same defendant denied it was a publisher*: "Section 230 forbids . . . treat[ing] Google as the 'publisher or speaker' of content posted by others."

For Google, it is "heads I win, tails you lose." It seeks to justify selectivity by claiming to be an exclusive publisher, but evade responsibility for its selections by claiming to be an inclusive forum. So it may censor Dennis Prager's speech, but broadcast ISIS'.

But selectivity makes even speech "posted by others" the publisher's own. *Southworth* considered the forum holistically, and not by reference to its separate speakers. Similarly, if social media sites present some speech and suppress some (or even push disfavored speakers to the bottom of the feed), it creates a distinctive, new message from that expressed by the original creators.

For example, Mideast journalists have acknowledged they fear losing access to sources within Gaza for their reporting, or worse, suffering violent reprisals, so they self-censor. If a broadcaster/publisher presents an Israeli police response but omits the precipitating violence, it conveys a different message than if it shows both.

Not just speakers but audiences lose when selective information distorts the debate. For example, Twitter suspended the account of Mary Ann Mendoza, whose son was killed by a man in the U.S. illegally (and who had failed to appear for his sentencing hearing on a prior conviction) unless she deleted, "@ Kamala Harris[,] What law can I break and have you defend me so staunchly? Provide me sanctuary from our laws?" Looser immigration and bail policies present both benefits and costs, but if the public hears only the former, it distorts the process of self-government, and the resulting laws we enact.

Twitter claimed Mendoza had violated its "hate speech" standards, which some consider necessary to protect vulnerable populations. But the tweet actually criticized a *United States senator*, and the First Amendment's most basic function is enabling scrutiny of governmental policies. Continental Europe, by contrast, developed its speech restrictions in order to shield the government and powerful institutions from challenge. Keiter, *Balancing a "'Right to be Forgotten' with a Right to Remember*," 13 Cal. Legal Hist. 421 (2018); *see also Reed v. Gilbert*, 135 S.Ct. 2218 (2015) (Alito, J. concurring): "Limiting speech . . . favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."

Speech is simultaneously receiving more protection than ever from the Supreme Court, and less from internet gatekeepers. One year after the Court held the government could not deny a trademark to "The Slants" for being offensive to Asian-Americans [*Matal v. Tam*, 137 S.Ct. 1744 (2017)], Twitter banned using transgender persons' "biological" rather than "social" pronouns, or birth name (e.g. referencing "Bruce Jenner" as "him"). This conflict presents competing interests, and *both* deserve protection.

We cannot be forced to express an idea we reject as a condition for driving, even on our own property. *Wooley v. Maynard*, 430 U.S. 705 (1977) [state could not condition driving on displaying "Live Free or Die" license plate]. *Packingham* suggests that "surfing the web" is just as important as driving to full social participation. Though Section 230(a)(4) announced minimum regulation worked "to the benefit of all Americans," silencing "wrong" pronoun users contravenes that principle. Nevertheless, forcing Twitter to express what it considers the "wrong" pronoun likewise infringes *its* rights — if it is expressing its own ideas as a publisher. But a common carrier like Verizon asserts no comparable infringement when its network communicates controversial speech.

The solution may lie in the compromise established in education. Public schools may not force students to pray or salute the flag, and they receive full funding from the government, whereas religious schools have more discretion in regulating student speech, but do without most of the funding otherwise available. A social media site should likewise be categorized as "public" or "private," a forum or a publisher. The former would be a true viewpoint-neutral platform for all ideas, and receive immunity from challenge for the material it presents. The latter would be free to maintain its values in expressing content, but responsible for its choices. By fostering an uninhibited exchange of ideas while preventing their involuntary expression, this would fulfill both First Amendment imperatives. ■

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