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## Is the First Amendment Obsolete?

Tim Wu  
*Columbia Law School*

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# IS THE FIRST AMENDMENT OBSOLETE?

Tim Wu\*

*The First Amendment was brought to life in a period, the twentieth century, when the political speech environment was markedly differently than today's. With respect to any given issue, speech was scarce, and limited to a few newspapers, pamphlets or magazines. The law was embedded, therefore, with the presumption that the greatest threat to free speech was direct punishment of speakers by government.*

*Today, in the internet and social media age, it is no longer speech that is scarce—rather, it is the attention of listeners. And those who seek to control speech use new methods that rely on the weaponization of speech itself, such as the deployment of “troll armies,” the fabrication of news, or “flooding” tactics. This Essay identifies the core assumptions that proceeded from the founding era of First Amendment jurisprudence, argues that many of those assumptions no longer hold, and details the new techniques of speech control that are used by governmental and nongovernmental actors to censor and degrade speech. It concludes by arguing that protection of free speech may now depend on law enforcement recognizing its role in the protection of the American speech environment.*

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\* Julius Silver Professor of Law, Science and Technology, Columbia Law School. My thanks to David Pozen for extensive help, Jeffrey Stein for research assistance, and to the Knight First Amendment Institute at Columbia University. I am also grateful to Zeynep Tufekci, who pioneered the recognition of new forms of censorship, Vincent Blasi, and Geoffrey Stone.

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## INTRODUCTION

The First Amendment was a dead letter for much of American history. Unfortunately, there is reason to fear it is entering a new period of political irrelevance. We live in a golden age of efforts by governments and other actors to control speech, discredit and harass the press, and manipulate public debate. Yet as the expressive environment deteriorates, the First Amendment has been confined to a narrow and frequently irrelevant role. Hence the question—when it comes to political speech in the twenty-first century, is the First Amendment obsolete?

The most important change in the expressive environment can be boiled down to one idea: it is no longer speech itself that is scarce, but the attention of listeners. Emerging threats to public discourse take advantage of this change. As Zeynep Tufekci puts it, “[c]ensorship during the internet era does not operate under the same logic [as] it did during the heyday of print or even broadcast television.”<sup>1</sup> Instead of targeting speakers directly, it targets listeners or undermines speakers indirectly. More precisely, the emergent techniques of speech control depend on new punishments, like the unleashing of “troll armies” to abuse critics, the fabrication of news, and “flooding” tactics that distort or drown out other speech through the payment of fake commentators or the deployment of propaganda robots.<sup>2</sup> Powerful actors, both public and private, have adopted speech itself as a weapon for controlling speech, yielding challenges for which the First Amendment is unprepared.

The First Amendment first came to life in the early twentieth century, when the main threat to the nation’s political speech environment was state suppression of dissidents. Since its activation, the First Amendment has presupposed an information-poor world, and it focuses near-exclusively on the protection of speakers from government, as if they were rare and delicate butterflies threatened by one terrible monster.

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1. ZEYNEP TUFEKCI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* 226 (2017).

2. A third, slightly older technique—control of speech platforms—is also used to regulate speech, but it is not the subject of this Essay. See, e.g., JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998). Control of speech platform techniques has already been subject to extensive scholarly attention, and laws that require such platforms to control speech are usually subject to First Amendment scrutiny. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

But today, speakers are more like moths: their supply is apparently endless, and they tend to congregate on brightly lit matters of public controversy. The fundamental challenge comes not from cheap speech itself, but that its cheapness makes it easier to weaponize as a tool of speech control. The unfortunate truth is that speech may be used to attack, harass, and silence as much as it is used to enlighten. And the use of speech as a tool to suppress speech is, by its nature, challenging for the First Amendment to deal with—especially if it is taken as being in the business of protecting speech, no matter what the form. As it stands, the First Amendment seems to be waiting for a pamphleteer to be arrested before it will recognize a problem. Even worse, it may be used to try and block efforts to deal with some of the problems described here.

It may sound odd to say that the First Amendment is growing obsolete when the Supreme Court has an active First Amendment docket and there remain plenty of First Amendment cases in litigation. So that I am not misunderstood, I emphasize that the First Amendment's core protection of the press and political speakers against government suppression is hardly useless or undesirable.<sup>3</sup> With the important exception of cases related to campaign finance,<sup>4</sup> however, the landmark free speech decisions of the last few decades have centered not on political speech but on economic privileges, like the right to resell patient data<sup>5</sup> or the right to register offensive trademarks.<sup>6</sup> If we accept that protection of political speech is a core function of the First Amendment, many of the recent cases are not merely at the periphery of this project but arguably on another continent.<sup>7</sup> The apparent flurry of First Amendment activity masks the fact that the Amendment has become increasingly irrelevant in its area of historic concern: the coercive control of political speech.

The protection of a healthy speech environment in our times demands a rethinking of what it means to protect the channels of political speech in the

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3. There may, moreover, be more work to be done now in areas such as libel law. Given the raft of libel-trolling suits that burden small presses, stronger and faster First Amendment protection has arguably become necessary. See Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES MAG. (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html> (on file with the *Michigan Law Review*); Peter Pomerantsev, *The Menace of Unreality: How the Kremlin Weaponizes Information, Culture and Money*, INTERPRETER (Nov. 22, 2014), <http://www.interpretermag.com/the-menace-of-unreality-how-the-kremlin-weaponizes-information-culture-and-money/> [<https://perma.cc/63VM-F4T3>].

4. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

5. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

6. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

7. The merits of the recent, economic-rights case law is not the subject of this Essay. Suffice it to say that these rulings have some academic supporters and many detractors. See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

internet age. It is clear that part of the answer lies outside of the legal system—it has instead to do with the norms, ethics, and practices of the private speech platforms. Suffice it to say that the major and minor internet platforms by which the public's attention is actually reached have proved vulnerable to manipulation, distortion and corruption by malicious actors and those acting in bad faith. The rise of troll harassment campaigns, the Russian manipulation of Facebook, and the deployment of propaganda bots are just a few of the examples. The question of how internet platforms might do better represents an ongoing discussion of great importance to this question.

But the legal system need not sit on the sidelines, and I believe an important part of the answer lies with law enforcement. We need recognize the role and, indeed, the duty of those who enforce the laws to uphold the First Amendment by defending the principal channels of online speech from obstruction and attack, whether by fraud, deception, or harassment of speakers. While the recognition of constitutional duties is less common in American constitutional law, the Court has, since the civil rights era, recognized that law enforcement has a duty to protect speakers from private efforts to silence them.<sup>8</sup> In our times that translates into civil and criminal protection of the integrity of public debate—through law enforcement, both criminal and civil, against those who practice fraud; deception, including the impersonation of humans; and violation of campaign finance and other laws designed to protect the electoral process. As discussed below,<sup>9</sup> there has already been some prosecution of those who violently threaten journalists, and special counsel Robert Mueller has indicted Russian hackers targeting the American electoral practice. But law enforcement can and should do more.

In addition, the judicially enforced First Amendment itself can and should adapt in important ways. It need, for one thing, be tolerant of the efforts undertaken to punish fraud and deception online. But it might also be proactive: the time is right to explore the importance of accomplice liability under the First Amendment. That is, we might ask when the state or political leaders may be held constitutionally responsible for encouraging private parties to punish critics. If public officials direct, encourage, fund, or covertly command attacks on their critics by private mobs or foreign powers, the First Amendment should be implicated.

These explorations should not distract from the main point of this Essay, which is to demonstrate that a range of speech-control techniques have arisen from which the First Amendment, at present, provides little or no protection. In the pages that follow, this Essay first identifies the core assumptions that proceeded from the founding era of First Amendment jurisprudence. It then argues that many of those assumptions no longer hold, and it details the new techniques of speech control that are used by governmental and non-

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8. See *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *Feiner v. New York*, 340 U.S. 315, 326–27 (1951) (Black, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

9. See *infra* Section IV.B.

governmental actors to censor and degrade speech. The Essay concludes with ideas about what might be done.

# I. CORE ASSUMPTIONS OF THE POLITICAL FIRST AMENDMENT

As scholars and historians know well, but the public is sometimes surprised to learn, the First Amendment sat dormant for much of American history, despite its absolute language (“Congress shall make no law . . .”) and its placement in the Bill of Rights.<sup>10</sup> It is an American tradition in the sense that the Super Bowl is an American tradition—one that is relatively new, even if it has come to be defining. To understand the basic paradigm by which the law provides protection, we therefore look not to the Constitution’s founding era but to the First Amendment’s founding era.

As the story goes, the First Amendment remained inert well into the 1920s. The trigger that gave it life was the federal government’s extensive speech-control program during the First World War. The program was composed of two parts. First, following the passage of new Espionage and Sedition Acts,<sup>11</sup> men and women voicing opposition to the war were charged with crimes directly related to their speech. Eugene Debs, the presidential candidate for the Socialist Party, was arrested and imprisoned for a speech that questioned the draft, in which he memorably told the crowd that they were “fit for something better than slavery and cannon fodder.”<sup>12</sup>

Second, the federal government operated an extensive domestic propaganda campaign.<sup>13</sup> The Committee on Public Information, created by Executive Order 2594, was a massive federal organization of over 150,000 employees. Its efforts were comprehensive and unrelenting. As George Creel put it: “The printed word, the spoken word, the motion picture, the telegraph, the cable, the wireless, the poster, the sign-board—all these were used in our campaign to make our own people and all other peoples understand the causes that compelled America to take arms.”<sup>14</sup> The Committee on Public

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10. The First Amendment even sat silent when Congress passed its first laws restricting speech in 1798, not long after the adoption of the Bill of Rights and with the approval of many of the framers. Sedition Act of 1798, ch. 73, 1 Stat. 596. This fact, among others, has long been slightly embarrassing to originalists who may be inclined to support a strong First Amendment. Robert Bork was rare among the first wave of originalists in calling attention to the Amendment’s unpromising early history. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

11. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (repealed 1921); Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified as amended in scattered sections of 18, 22, and 50 U.S.C.).

12. *Debs v. United States*, 249 U.S. 211, 214 (1919).

13. See, e.g., ALAN AXELROD, *SELLING THE GREAT WAR: THE MAKING OF AMERICAN PROPAGANDA* (2009); JAMES R. MOCK AND CEDRIC LARSON, *WORDS THAT WON THE WAR: THE STORY OF THE COMMITTEE ON PUBLIC INFORMATION, 1917–1919* (1939).

14. GEORGE CREEL, *HOW WE ADVERTISED AMERICA: THE FIRST TELLING OF THE AMAZING STORY OF THE COMMITTEE ON PUBLIC INFORMATION THAT CARRIED THE GOSPEL OF AMERICANISM TO EVERY CORNER OF THE GLOBE* 5 (1920).

Information's "division of news" supplied the press with content guidelines and appropriate stories to run. All told, the American propaganda effort reached a scope and level of organization that would be matched only by totalitarian states in the 1930s.<sup>15</sup>

The story of the judiciary's reaction to these new speech controls has, by now, attained the status of legend. The federal courts, including the Supreme Court, widely condoned the government's heavy-handed arrests and other censorial practices as necessary to the war effort. But as time passed, some of the most influential jurists—especially Learned Hand, Louis Brandeis, and Oliver Wendell Holmes—found themselves unable to stomach what they saw, despite the fact that each was notably reluctant to use the Constitution for antimajoritarian purposes.<sup>16</sup> Judge Hand was the only one of the three to act during wartime,<sup>17</sup> but eventually the opinions of these great judges (mostly expressed in dissent or concurrence) became the founding jurisprudence of the modern First Amendment.<sup>18</sup> To be sure, their views remained in the minority into the 1950s and 60s, but eventually the dissenting and concurring opinions would become majority holdings,<sup>19</sup> and by the 1970s the core political protections of the First Amendment became fully active, achieving more or less the basic structure we see today.

Left out of this well-known story is a detail quite important for our purposes. The Court's scrutiny extended only to part of the government's speech-control program: its censorship and punishment of dissidents. Left untouched and unquestioned was the Wilson Administration's unprecedented domestic propaganda campaign. It does seem surprising, in retrospect, that there was no serious challenge brought contesting the president's power to create a major propaganda agency on the basis of a single executive order.<sup>20</sup> The fact of constitutional scrutiny of censorship coupled with a free ride for propaganda set the stage for what the First Amendment would be-

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15. As described in TIM WU, *THE ATTENTION MERCHANTS* (2016), and sources cited therein.

16. On this tension, see Vincent Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment* (2017) (unpublished manuscript) (on file with the *Michigan Law Review*).

17. See *Masses Publ'g. Co. v. Patten*, 244 F. 535, 542–43 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917) (granting a preliminary injunction to the publisher of *The Masses*, a revolutionary journal that the Postmaster General's office intended to withhold from the mails because it featured cartoons and text critical of the draft); see also Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*; *Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1 (1990).

18. See, e.g., *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

19. In cases like *Dennis v. United States*, 341 U.S. 494 (1951), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

20. See, e.g., *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION: SUPPLEMENT I* 590–91 (Leonard W. Levy, Kenneth L. Karst & Adam Winkler eds., 2d ed. 2000) (describing the absence of a constitutional challenge to the Committee on Public Information).

come. It is notable because the propaganda campaign may have had the greater influence over wartime speech and almost certainly a stronger limiting effect on the freedom of the mainstream press.

I should also add that the story just told only covers the First Amendment's protection of political speech, or what we might call the story of the "political First Amendment."<sup>21</sup> Beginning in the 1950s, the Court also developed constitutional protections for nonpolitical speech, such as indecency, commercial advertising, and cultural expression, in landmark cases like *Roth v. United States*<sup>22</sup> and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>23</sup> The Court also expanded upon both who counted as a speaker<sup>24</sup> and what counted as speech<sup>25</sup>—trends that have continued into this decade.<sup>26</sup> I mention this only for making the boundaries of this Essay clear: it is focused on the kind of political and press activity that brought the First Amendment to life in the 1920s.<sup>27</sup>

Let us return to the founding jurisprudence of the 1920s. In its time, for the conditions faced, it was as convincing and thoughtful as judicial writing can be. The opinions have the unusual distinction of living up to the hype. For a First Amendment aficionado, rereading the canonical opinions is an exciting and stirring experience not unlike rewatching a classic film. Which is also the problem. The paradigm established in the 1920s and fleshed out in the 1960s and '70s was so convincing that it is simply hard to admit that it has grown obsolete for some of the major political speech challenges of the twenty-first century.

Consider three main assumptions that First Amendment law grew up with. The first is an underlying premise of informational scarcity. For years, it was taken for granted that few people would be willing to invest in speaking publicly. In the 1920s, the printed press, newspapers, magazines, and pamphlets were unquestionably at the center of political speech. It was safe to assume that with respect to any given issue—say, the war—only a limited number of important speakers could compete in the "marketplace of ide-

21. Cf. Bork, *supra* note 10, at 27–28 (defining political speech as "speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative"); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (arguing that the First Amendment "protects the freedom of those activities of thought and communication by which we 'govern'").

22. 354 U.S. 476 (1957).

23. 425 U.S. 748 (1976).

24. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

25. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

26. The trend is summarized well in Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

27. In other words, this is an Essay about speech and reporting concerned with how we are governed, which includes political criticism, campaigning, and public debates over policy or specific regulatory or legislative initiatives. Cf. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).



as.”<sup>28</sup> The second notable assumption arises from the first: listeners are assumed to have abundant time and interest to be influenced by publicly presented views. Finally, the government is assumed to be the main threat to the “marketplace of ideas” through its use of criminal law or other coercive instruments to target speakers (as opposed to listeners) with punishment or bans on publication.<sup>29</sup> Without government intervention, this assumption goes, the marketplace of ideas operates well by itself.

Each of these assumptions has, one way or another, become obsolete in the twenty-first century, due to the rise in importance of attention markets and changes in communications technologies. It is to those phenomena that we now turn.

## II. ATTENTIONAL SCARCITY AND THE ECONOMICS OF FILTER BUBBLES

As early as 1971, Nobel Laureate Herbert Simon predicted the trend that drives this Essay:

[I]n an information-rich world, the wealth of information means a dearth of something else: a scarcity of whatever it is that information consumes. What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it.<sup>30</sup>

If it was once hard to speak, it is now hard to be heard. Stated differently, it is the attention of listeners that is now scarce. Unlike in the 1920s, information is abundant and speaking is easy, while listener time and attention have become highly valued commodities. It follows that one important means of controlling speech is targeting the bottleneck of listener attention, instead of speech itself.<sup>31</sup>

Several major technological and economic developments over the last two decades have transformed the relative scarcity of speech and listener at-

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28. A metaphor suggested, though not actually used, by Justice Holmes. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 4.

29. This corresponds to Balkin’s “old-school” speech regulation techniques. See Balkin, *supra* note 2, at 2298.

30. Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (Martin Greenberger ed., 1971).

31. Consider that information—including speech—is not actually received or processed unless it attracts the fickle attention of the listener. As William James first pointed out in the 1890s, and as neuroscientists have confirmed, the brain ignores nearly everything, paying attention to a very limited stream of information. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 409 (1890). At a minimum, the total capacity for attention is limited by time—168 hours a week—which becomes of particular relevance when the listeners in question are members of Congress, regulators, or others who are the supposed customers in the marketplace for good policy ideas.

tention. The first is associated with the popularization of the internet: the massive decrease since the 1990s in the costs of being an online speaker, otherwise known in Eugene Volokh's phrase as "cheap speech," or what James Gleick calls the "information flood."<sup>32</sup> Using blogs, microblogs, or platforms like Twitter or Facebook, just about anyone, potentially, can disseminate speech into the digital public sphere. This has had several important implications. As Jack Balkin, Jeffrey Rosen, and I have argued, it gives the main platforms—which do not consider themselves to be part of the press—an extremely important role in the construction of public discourse.<sup>33</sup> Cheap speech also makes it easier for mobs to harass or abuse other speakers with whom they disagree.

The second, more long-term, development has been the rise of an "attention industry"—that is, a set of actors whose business model is the resale of human attention.<sup>34</sup> Traditionally, these were outfits like broadcasters or newspapers; they have been joined by the major internet platforms and publishers, all of which have business models that demand maximizing the amount of time and attention that people spend with them. The rise and centrality of advertising to their business models has the broad effect of making listener attention ever more valuable.<sup>35</sup>

The third development is the rise of the "filter bubble."<sup>36</sup> This phrase refers to the tendency of attention merchants or brokers to maximize revenue by offering audiences a highly tailored, filtered package of information designed to match their preexisting interests. Andrew Shapiro and Cass Sunstein were among the first legal writers to express concern about filter bubbles (which Sunstein nicknamed "The Daily Me"<sup>37</sup>). Over the 2010s, filter bubbles became more important as they became linked to the attention-resale business model just described. A platform like Facebook primarily profits from the resale of its users' time and attention: hence its efforts to

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32. See, e.g., JAMES GLEICK, *THE INFORMATION: A HISTORY, A THEORY, A FLOOD* (2011); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1808–33 (1995).

33. See, e.g., Balkin, *supra* note 2; Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525 (2012); Tim Wu, *Is Filtering Censorship? The Second Free Speech Tradition*, BROOKINGS INST. (Dec. 27, 2010), <https://www.brookings.edu/research/is-filtering-censorship-the-second-free-speech-tradition> [<https://perma.cc/8WD3-XA5T>].

34. See generally WU, *supra* note 15.

35. *Id.*

36. See ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011). Scholarly consideration of filtering came earlier. See, e.g., CASS SUNSTEIN, *REPUBLIC.COM* (2001); Dan Hunter, *Philippic.com*, 90 CALIF. L. REV. 611 (2002) (reviewing SUNSTEIN, *supra*); see also Elizabeth Garrett, *Political Intermediaries and the Internet "Revolution"*, 34 LOY. L.A. L. REV. 1055 (2001).

37. Borrowing a term popularized by Nicholas Negroponte, the founder of MIT's Media Lab. See Nicholas Kristof, Opinion, *The Daily Me*, N.Y. TIMES (Mar. 18, 2009), <https://www.nytimes.com/2009/03/19/opinion/19kristof.html> (on file with the *Michigan Law Review*).

maximize time on site.<sup>38</sup> That, in turn, leads the company to provide content that maximizes engagement, by tailoring information to the interests of each user. While this sounds relatively innocuous (giving users what they want), it has the secondary effect of exercising strong control over what the listener is exposed to and blocking content that is unlikely to engage.

The combined consequence of these three developments is to make every minute of listener attention highly contested. As the commercial and political value of attention has grown, much of that time and attention has become subject to furious competition, so much so that even institutions like the family or traditional religious communities find it difficult to compete. Additionally, some form of celebrity, even “microcelebrity,” has become increasingly necessary to gain any attention at all.<sup>39</sup> Every hour, indeed every second, of our time has commercial actors seeking to occupy it one way or another.

Hopefully the reader (if she hasn’t already disappeared to check her Facebook page) now understands what it means to say that listener attention has become a major speech bottleneck. With so much alluring, individually tailored content—and so much talent devoted to keeping people clicking away on various platforms—speakers face new challenges in reaching an audience of any meaningful size or political relevance. I want to stress that these developments matter not just to the hypothetical dissident sitting in her basement but for the press as well. Gone are the days when the CBS evening news might reach the nation automatically or when whatever made the front cover of the New York Times was known to all. The challenge, paradoxically, has only increased in an age when the president himself consumes so much of the media’s attention.<sup>40</sup> The population is distracted and scattered, making it difficult even for those with substantial resources to reach an audience.

The revolutionary changes just described have not gone unnoticed by First Amendment or internet scholars. By the mid-1990s, Volokh, Kathleen Sullivan, and others prophesied the coming era of cheaper speech and suggested it would transform much of what the First Amendment had taken for granted.<sup>41</sup> Sullivan, for example, memorably described the reaction to the internet’s arrival as “First Amendment manna from heaven.”<sup>42</sup>

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38. See Lauren Drell, *Why “Time Spent” Is One of Marketing’s Favorite Metrics*, MASHABLE (Dec. 13, 2013), <https://mashable.com/2013/12/13/time-spent-metrics/> [<https://perma.cc/K2A4-A8YL>].

39. See Wu, *supra* note 15, at 303.

40. See Tim Wu, Opinion, *How Donald Trump Wins by Losing*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/opinion/sunday/how-donald-trump-wins-by-losing.html> (on file with the *Michigan Law Review*).

41. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998); Volokh, *supra* note 32.

42. Sullivan, *supra* note 41, at 1669.

But even as changes to the press and media opened new avenues for expression, scholars began to appreciate the possibility of new forms of control. Lawrence Lessig's brilliant "code is law" formulation suggested that much of the future of regulation—including censorship and speech control—would reside in the design of this network and its major applications.<sup>43</sup> In *Who Controls the Internet*, Jack Goldsmith and I argued that powerful states would attempt to reshape the network and its architecture to serve their interests.<sup>44</sup> Jeffrey Rosen, Jonathan Zittrain, Christopher Yoo and others highlighted the censorial potential that lay in the use of intermediaries, either in the network infrastructure (with "net neutrality" as a counterweight) or in the main platforms (search engines, hosting sites, and later social media).<sup>45</sup> The use of infrastructure and platforms as a tool of censorship has been extensively documented overseas,<sup>46</sup> and also in the United States.

In 2014 Jack Balkin summarized much of this with a useful distinction between "old school" speech control—the state's arrest and silencing of dissidents—and "new school" techniques corresponding to the control of speech intermediaries just described.<sup>47</sup> Yet, in retrospect, what no one really anticipated was the new challenges arising from speech itself being used as censorial weapon both by powerful states and motivated private parties, or that scarcity of attention would make effective "flooding" and similar tactics. To be sure, writers like Julian Dibbell and Danielle Keats Citron have long been interested in the problem of online hate mobs and trolls.<sup>48</sup> But these were always presumed to be malicious private actors: the missing piece was the threat posed by state-organized trolling and systematic use of hate speech as a censorial tool. The future always retains its power to surprise, and few of those celebrating greater access for all or "semiotic democracy" anticipated the arrival of fake news, human-impersonating robots, and other deliberate attacks on the integrity of the speech environment.

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43. Lessig, *supra* note 2; see also LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

44. GOLDSMITH & WU, *supra* note 2.

45. See *id.*; Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697 (2010); Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003); Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES (Nov. 28, 2008), <https://www.nytimes.com/2008/11/30/magazine/30google-t.html> (on file with the *Michigan Law Review*).

46. The Open Net Initiative, launched as a collaboration between several universities in 2004, was and is perhaps the most ambitious documentation of online censorship around the world. See Evan M. Vittor, *HLS Team to Study Internet Censorship*, HARV. CRIMSON (Apr. 28, 2004), <https://www.thecrimson.com/article/2004/4/28/hls-team-to-study-internet-censorship> [<https://perma.cc/6SRS-RCYS>].

47. See generally Balkin, *supra* note 2 (describing "new school" speech control).

48. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (discussing online hate mob attacks on women and other vulnerable groups); Julian Dibbell, *A Rape in Cyberspace*, VILLAGE VOICE (Dec. 23, 1993), <https://www.villagevoice.com/2005/10/18/a-rape-in-cyberspace/> [<https://perma.cc/PB7S-VLU5>].

One might try to suggest that all of this constitutes another facet of “new school” speech control,<sup>49</sup> but the approach strikes me as sufficiently distinctive and confounding to the First Amendment in distinct ways that I believe it deserves separate treatment. The next Part describes, in broad strokes, this new generation of speech controls, which have in common the approach of using speech itself as a weapon.

### III. A NEW GENERATION OF SPEECH CONTROLS

#### A. *A Diminished Reliance on Direct Censorship*

Despite its historic effectiveness, direct and overt government punishment of speakers has become relatively less significant in the twenty-first-century media environment, even in nations without strong free speech traditions. This fact is harder to see in the United States because of the First Amendment tradition, but the point is made clearer when observing the techniques of governments that are unconstrained by similar constitutional protections.<sup>50</sup>

The study of Chinese speech control provides a good example of a regime that, despite its full powers to directly arrest speakers and censor, does not rely exclusively or even predominantly on the technique. In a fascinating ongoing study of Chinese censorship, Gary King, Jennifer Pan, and Margaret Roberts have conducted several large-scale investigations into the government’s evolving approach to social media and other internet-based speech.<sup>51</sup> What they discovered is a regime waging a war not just of suppression, but also of distraction—that is, an approach to speech control less intent on completely eliminating critical speakers or their speech but instead focused on distraction, cheerleading, and preventing meaningful collective action or organizing. The point should not be overstated: the Chinese government still preemptively censors many foreign sites (like Wikipedia, Facebook, Tibetan independence sites, and so on), encourages media and internet firms to self-censor, and also places prominent dissidents and their families under house arrest during politically sensitive times.<sup>52</sup> But it does not engage in ongoing

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49. This is the approach Balkin has taken so far. See Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. (forthcoming 2018) (manuscript at 6–38), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3186205](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186205) [<https://perma.cc/VWJ7-7UJ9>].

50. See generally TUFEKCI, *supra* note 1.

51. Gary King et al., *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484 (2017) [hereinafter King et al., 2017 APSR]; Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326 (2013).

52. For an overview of Chinese direct censorship techniques, see *Country Report China*, FREEDOM HOUSE (2017), <https://freedomhouse.org/report/freedom-world/2018/china> [<https://perma.cc/EV8W-3HP6>]. Information on the house arrests can be found at, for example, Christian Shepherd, *Families of Chinese Activists Face House Arrest, Harassment from “Smiling Ti-*

mass arrests of every online critic, and for the most part, King, Pan, and Roberts conclude, the state's agents "do not censor posts criticizing[] the regime, its leaders, or their policies" and "do not engage on controversial issues."<sup>53</sup> The authors suggest that the reasons are as follows:

Letting an argument die, or changing the subject, usually works much better than picking an argument and getting someone's back up . . . . [S]ince censorship alone seems to anger people, the [Chinese] program has the additional advantage of enabling the government to actively control opinion without having to censor as much as they might otherwise.<sup>54</sup>

Another reason for this approach is that, under conditions of attentional scarcity, high-profile government censorship or the mass imprisonment of speakers runs the risk of backfiring. The government is, effectively, a kind of celebrity whose actions draw disproportionate attention. And such attention may help overcome the greatest barrier facing a disfavored speaker: that of getting heard at all. In certain instances, the attention showered on an arrested speaker may even, counterintuitively, yield financial or reputational rewards—the opposite of chill.

In internet lore, one term for this backlash potential is the Streisand effect.<sup>55</sup> Named after celebrity Barbra Streisand, whose lawyer's efforts to suppress aerial photos of her beachfront resort attracted hundreds of thousands of downloads of those photos. The term stands for the proposition that "the simple act of trying to repress something . . . online is likely to make it . . . seen by many more people."<sup>56</sup> To be sure, the concept's general applicability might be questioned, especially with regard to viral dissemination, which is highly unpredictable and rarer than one might imagine.<sup>57</sup> Moreover, for a state like China, abilities of some dissidents to organize resistance efforts

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gers," REUTERS (Apr. 16, 2018, 6:32 AM), <https://www.reuters.com/article/us-china-rights/families-of-chinese-activists-face-house-arrest-harassment-from-smiling-tigers-idUSKBN1HN1BA> [<https://perma.cc/9B6K-4J8H>].

53. King et al., 2017 APSR, *supra* note 51, at 496 (emphasis omitted).

54. *Id.* at 497 (citation omitted).

55. Mike Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*, TECHDIRT (Jan. 5, 2005, 1:36 AM) [hereinafter Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*], <https://www.techdirt.com/articles/20050105/0132239.shtml> [<https://perma.cc/XL9J-JL3J>]. The term was coined in an article about a cease-and-desist letter sent by Marco Beach Ocean Resort to Urinal.net—a "site [that] has hundreds of fans who regularly submit pictures of urinals they take from locations all over the world"—threatening legal action unless the website stopped mentioning the resort's name alongside photos from its bathroom. The cease-and-desist letter prompted more attention than the original posts on Urinal.net. Mike Masnick, *Is It Against the Law to Put the Name of the Toronto Airport on the Web?*, TECHDIRT (Nov. 13, 2003, 1:43 PM), <https://www.techdirt.com/articles/20031113/1338207.shtml> [<https://perma.cc/4VTM-VLQM>].

56. Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*, *supra* note 55. But the Streisand example may be obscuring that many other cease-and-desist letters—even issued by celebrities—never attract much attention.

57. See Sharad Goel et al., *The Structural Virality of Online Diffusion*, 62 MGMT. SCI. 180 (2016).

might make the government consider it worth the attention to keep someone under arrest. Even still, the possibility of creating attention for the original speaker makes direct censorship less attractive, given the proliferation of cheaper—and often more effective—alternatives.

As suggested in the introduction, the new tools of speech control—those that use speech itself as a weapon—can be understood as content-driven efforts (attacks and harassment of critics; atrocity propaganda and discrediting), and distribution-driven efforts (flooding; computerized propaganda). These techniques are practiced to different degrees by different governments abroad. Yet given that they could be used by U.S. officials as well<sup>58</sup>—and that they pose a major threat to the speech environment whether or not one's own government is using them—all are worth exploring in our consideration of whether the First Amendment, in its political aspects, is obsolete.

### B. *Troll Armies, Atrocity Propaganda, and Fake News*

Among emerging threats are the speech-control techniques linked to online trolling, which seek to humiliate, harass, discourage, and even destroy targeted speakers using personal threats, embarrassment, and ruining of their reputations. These are the techniques of trolling, and whether directly employed by, loosely associated with, or merely aligned with the goals of the government or particular politicians, the techniques rely on the low cost of speech to punish speakers. While the following does not describe all that trolling campaigns do, it does describe the efforts meant to silence or punish opponents.

While there have long been internet trolls, in the early 2000s the Russian government pioneered the systematic use of trolling as a speech-control technique with the establishment of a “web brigade” (Веб-бригады), often called a “troll army.” Its methods, discovered through leaks and the undercover work of investigative reporters,<sup>59</sup> range from funding groups that pay commentators piecemeal to employing full-time staff to engage in around-

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58. In fact, reports suggest that President Trump and his associates may have already engaged in the distraction and cheerleading techniques described above. See, e.g., Oliver Darcy, *Lawsuit: Fox News Concocted Seth Rich Story with Oversight from White House*, CNN (Aug. 2, 2017, 1:37 AM), <https://money.cnn.com/2017/08/01/media/rod-wheeler-seth-rich-fox-news-lawsuit/index.html> [<https://perma.cc/P6T2-VF2Z>]; Taylor Link, *President Trump Gave a Shout Out to an Apparent Twitter Bot, Hasn't Removed the Retweet*, SALON (Aug. 6, 2017, 6:46 PM), <https://www.salon.com/2017/08/06/president-trump-gave-a-shout-out-to-an-apparent-twitter-bot-hasnt-removed-the-retweet/> (on file with the Michigan Law Review).

59. Pomerantsev, *supra* note 3; Max Seddon, *Documents Show How Russia's Troll Army Hit America*, BUZZFEED NEWS (June 2, 2014, 1:48 PM), <https://www.buzzfeed.com/maxseddon/documents-show-how-russias-troll-army-hit-america> [<https://perma.cc/HP3H-WJDJ>]; *Russia Update: Questions About Putin's Health After Canceled Meetings & Vague Answers*, INTERPRETER (Mar. 12, 2015), <http://www.interpretermag.com/russia-update-march-12-2015/> [<https://perma.cc/E4PM-4S7H>].

the-clock propagation of progovernment views and attacks on critics.<sup>60</sup> Soviet-born British journalist Peter Pomerantsev, who was among the first to document the evolving Russian approach to speech control, has presented the operative questions this way:

[W]hat happens when a powerful actor systematically abuses freedom of information to spread disinformation? Uses freedom of speech in such a way as to subvert the very possibility of a debate? And does so not merely inside a country, as part of vicious election campaigns, but as part of a transnational military campaign? Since at least 2008, Kremlin military and intelligence thinkers have been talking about information not in the familiar terms of “persuasion,” “public diplomacy” or even “propaganda,” but in weaponized terms, as a tool to confuse, blackmail, demoralize, subvert and paralyze.<sup>61</sup>

There are three characteristic features of the Russian approach to trolling. The first is obscuring government’s role and influence. The hand of the Kremlin is not explicit; funding comes from “pro-Kremlin” groups or nonprofits, and those involved usually disclaim any formal association with the Russian state.<sup>62</sup> In addition, individuals and even news outlets sympathetic to the cause often join as de facto volunteers, creating a mixture of government-funded and private actors.

A second feature are its defamation campaigns, or the deployment of what was once called “atrocious propaganda.” This refers to the fabrication and propagation of stories and rumors alleging vile or atrocious conduct with the intent of turning people against the target and damaging his or her reputation.<sup>63</sup> A typical allegation is that the target abuses children or sexual partners, has illegitimate children or a loathsome disease, or engages in deviant sexual or religious practices.<sup>64</sup> Milder versions, which may be more creditable, might be fabricated allegations that the target mistreats a sensitive group, like military veterans.

Such defamation is certainly not unique to the internet age; as a matter of statecraft, its origins lie in the First World War, where the British, Belgians, and Germans pioneered the approach by spreading reports about

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60. Peter Pomerantsev, *Inside The Kremlin’s Hall of Mirrors*, GUARDIAN (Apr. 9, 2015), <https://www.theguardian.com/news/2015/apr/09/kremlin-hall-of-mirrors-military-information-psychology> [https://perma.cc/HN29-KWDU].

61. Pomerantsev, *supra* note 3; see also Pomerantsev, *supra* note 60.

62. Pomerantsev, *supra* note 3.

63. Larry A. Grant, *Atrocity Propaganda*, in 1 ATROCITIES, MASSACRES, AND WAR CRIMES: AN ENCYCLOPEDIA 40, 40 (Alexander Mikaberidze ed., 2013) (“Atrocity propaganda is a subcategory of propaganda. The term propaganda . . . refers to the systematic dissemination of material to generate or manipulate in a population a particular view . . . . The atrocity narratives generate moral revulsion and inflame passions against an enemy by the presentation of often graphic depictions of acts of extreme cruelty that show an enemy flagrantly engaging in cruel and unjust actions.”).

64. Cf. Paul Morrow, *A Theory of Atrocity Propaganda*, 9 HUMANITY 45, 47 (2018) (citing HAROLD D. LASSWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR (1927)).



German commitment of atrocities in Belgium.<sup>65</sup> The Germans were accused (in unsubstantiated, but official, reports generated by the government and published by the British Press) of specific barbaric deeds such as the execution of an innocent nurse, the use of civilians as human shields, and the impaling of babies on bayonets.<sup>66</sup> Today, the online version of such approaches is more often described as a category of “fake news.”

An important variation of such defamation campaigns are discrediting campaigns—efforts to impugn not just the character of the target but its status as a source of reliable information. While attacking the credibility of a speaker is, to be sure, a legitimate part of debate, the more extreme, malicious version relies on unsubstantiated allegations that the speaker or outlet is actually a foreign agent, a front paid for by corporations or nefarious sources, or a deliberate liar. While discrediting of reputable media outlets is a time-honored tradition,<sup>67</sup> its reemergence is a feature of the internet age.

A third feature, and perhaps most distinctive feature of online trolling as a means of punishing speakers are the vicious, swarm-like attacks over email, telephone, or social media to harass and humiliate targets (originally, critics of President Putin or opponents of the State).<sup>68</sup> While the online hate mob is certainly not a Russian invention,<sup>69</sup> its systematic deployment for political objectives by a state or other powerful party is a novel development.

While these various “troll army” techniques were first systematically employed by Russia for domestic purposes, they have spread, both by imitation and also through Russian use against perceived opponents around the world.<sup>70</sup> Some of the external deployments included attacks in the Ukraine and Finland, where trolls savagely attacked journalists who favored joining NATO (or questioned Russian efforts to influence that decision).<sup>71</sup> Other countries have begun to borrow the techniques pioneered by Russia. For example, as Zeynep Tufekci writes, the Turkish government has embraced similar strategies as critics of the state have found “an enormous increase in

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65. Grant, *supra* note 63, at 41.

66. JAMES BRYCE, REPORT OF THE COMMITTEE ON ALLEGED GERMAN OUTRAGES 38–43 (1915); Grant, *supra* note 63, at 41.

67. Nicole Hemmer, *The Conservative War on Liberal Media Has a Long History*, ATLANTIC (Jan. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/01/the-conservative-war-on-liberal-media-has-a-long-history/283149/> [https://perma.cc/Z47Y-XMKB].

68. See e.g., Andrew Higgins, *Effort to Expose Russia’s ‘Troll Army’ Draws Vicious Retaliation*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/world/europe/russia-finland-nato-trolls.html> (on file with the *Michigan Law Review*).

69. Cf. Citron, *supra* note 48.

70. Fred Weir, *Before Russia’s “Troll Farm” Turned to US, It Had a More Domestic Focus*, CHRISTIAN SCI. MONITOR (Feb. 21, 2018), <https://www.csmonitor.com/World/Europe/2018/0221/Before-Russia-s-troll-farm-turned-to-US-it-had-a-more-domestic-focus> (on file with the *Michigan Law Review*).

71. Higgins, *supra* note 68.

challenges to their credibility, ranging from reasonable questions to outrageous and clearly false accusations. These took place using the same channels, and even the same methods, that a social movement might have used to challenge false claims by authorities.”<sup>72</sup> The goal, she writes, was to create “an ever-bigger glut of mashed-up truth and falsehood to foment confusion and distraction” and “to overwhelm people with so many pieces of bad and disturbing information that they become confused and give up trying to figure out what the truth might be—or even the possibility of finding out what is true.”<sup>73</sup>

Relevant to this Essay, the Russian government began actively deploying the troll army to attack the American speech environment around the time of the 2016 presidential campaign.<sup>74</sup> More than a thousand trolls were assigned by Russian authorities to attack the political debate surrounding the U.S. election.<sup>75</sup> As in Russia, the campaign managed to enlist American fellow travelers, including parts of the American press, thereby creating a mixture of private and public actors.

Looking back at the 2016 election, the basic trolling techniques are easy to find. For example, among the less subtle story lines pushed by Russian trolls during the 2016 election was the allegation that candidate Hillary Clinton and campaign manager John Podesta participated in satanic rituals, an allegation linked to their proposed attendance at a “spirit cooking” performance.<sup>76</sup> The well-known “pizzagate” story linked Clinton and Podesta to a criminal pedophilia ring based out of a Washington pizza restaurant.<sup>77</sup> Both

72. Tufekci, *supra* note 1, at 246 (footnote omitted).

73. *Id.* at 231, 241.

74. See Natasha Bertrand, *It Looks Like Russia Hired Internet Trolls to Pose as Pro-Trump Americans*, BUS. INSIDER (July 27, 2016, 8:23 AM), <https://www.businessinsider.com/russia-internet-trolls-and-donald-trump-2016-7> [<https://perma.cc/R3WA-9SM2>]; Rachel Roberts, *Russia Hired 1,000 People to Create Anti-Clinton “Fake News” in Key US States During Election, Trump-Russia Hearings Leader Reveals*, INDEPENDENT (Mar. 30, 2017, 1:01 PM), <https://www.independent.co.uk/news/world/americas/us-politics/russian-trolls-hilary-clinton-fake-news-election-democrat-mark-warner-intelligence-committee-a7657641.html> [<https://perma.cc/2526-FWSZ>].

75. See Roberts, *supra* note 74. The degree to which trolls operating in the United States are funded by or otherwise coordinated with the Russian state is a topic of wide speculation. Based on leaked documents and whistleblower accounts, however, at least some of the attacks on Trump critics in 2016 and 2017 were launched by Russia itself. See, e.g., Alexey Kovalev, *Russia’s Infamous “Troll Factory” Is Now Posing as a Media Empire*, MOSCOW TIMES (Mar. 24, 2017, 6:03 AM), <https://themoscowtimes.com/articles/russias-infamous-troll-factory-is-now-posing-as-a-media-empire-57534> [<https://perma.cc/94VP-NQ26>].

76. Ben Popken, *Russian Trolls Pushed Graphic, Racist Tweets to American Voters*, NBC NEWS (Nov. 30, 2017, 10:40 AM), <https://www.nbcnews.com/tech/social-media/russian-trolls-pushed-graphic-racist-tweets-american-voters-n823001> [<https://perma.cc/M7GY-XHAS>].

77. Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), [https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c\\_story.html](https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html) [<https://perma.cc/G5JE-ZE8W>].

of these stories had at least some Russian involvement in their invention and dissemination.<sup>78</sup>

We also have very vivid examples of the personal troll army attacks, particularly those directed at journalists. As David French of the National Review puts it: “The formula is simple: Criticize Trump—especially his connection to the alt-right—and the backlash will come.”<sup>79</sup> Consider, for example, French’s description of the response to his criticisms of the president:

I saw images of my daughter’s face in gas chambers, with a smiling Trump in a Nazi uniform preparing to press a button and kill her. I saw her face photo-shopped into images of slaves. She was called a “niglet” and a “dindu.” The alt-right unleashed on my wife, Nancy, claiming that she had slept with black men while I was deployed to Iraq, and that I loved to watch while she had sex with “black bucks.” People sent her pornographic images of black men having sex with white women, with someone photoshopped to look like me, watching.<sup>80</sup>

Rosa Brooks tells a similar story. Brooks, a law professor and popular commentator, wrote a column in late January 2017 that was critical of President Trump and speculated whether the military might decline to follow plainly irrational orders, despite the tradition of deference to the commander in chief.<sup>81</sup> After the piece was picked up by Breitbart News, where it was described as a call for a military coup, Brooks experienced the following, which is worth quoting at length:

By mid-afternoon, I was getting death threats. “I AM GOING TO CUT YOUR HEAD OFF. . . . BITCH!” screamed one email. Other correspondents threatened to hang me, shoot me, deport me, imprison me, and/or get me fired (this last one seemed a bit anti-climactic). The dean of Georgetown Law, where I teach, got nasty emails about me. The Georgetown University president’s office received a voicemail from someone threatening to shoot me. New America, the think tank where I am a fellow, got a similar influx of nasty calls and messages. “You’re a fucking cunt! Piece of shit whore!” read a typical missive.

My correspondents were united on the matter of my crimes (treason, sedition, inciting insurrection, etc.). The only issue that appeared to confound and divide them was the vexing question of just what kind of undesirable I was. Several decided, based presumably on my first name, that I

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78. Popken, *supra* note 76.

79. David French, *The Price I’ve Paid for Opposing Donald Trump*, NAT’L REVIEW (Oct. 21, 2016, 4:55 PM), <https://www.nationalreview.com/article/441319/donald-trump-alt-right-internet-abuse-never-trump-movement> [<https://perma.cc/Q8JB-THJS>].

80. *Id.*

81. Rosa Brooks, *3 Ways to Get Rid of President Trump Before 2020*, FOREIGN POL’Y (Jan. 30, 2017, 9:26 AM), <https://foreignpolicy.com/2017/01/30/3-ways-to-get-rid-of-president-trump-before-2020-impeach-25th-amendment-coup/> [<https://perma.cc/NRZ2-TA6Y>].

was Latina and proposed that I be forcibly sent to the other side of the soon-to-be-built Trump border wall. Others, presumably conflating me with African-American civil rights heroine Rosa Parks, asserted that I would never have gotten hired if it weren't for race-based affirmative action. The anti-Semitic rants flowed in, too: A website called the Daily Stormer noted darkly that I am "the daughter of the infamous communist Barbara Ehrenreich and the Jew John Ehrenreich," and I got an anonymous phone call from someone who informed me, in a chillingly pleasant tone, that he supported a military coup "to kill all the Jews."<sup>82</sup>

As suggested above, while the Russian state was the first to systematically employ trolling to serve the goals of the state, the techniques have spread to be employed by a variety of private actors. At this point it is not correct to suggest that the abusive, censorial online mob is always linked to Russia or always a tool of neofascists or the political right. Without assuming any moral equivalence, it is worth noting that there seems to be a growing parallel tendency of leftist mobs to harass and shut down disfavored speakers as well.<sup>83</sup>

### C. Reverse Censorship, Flooding, and Propaganda Robots

A second set of techniques is focused on control over distribution and propagation, or on the total mixture of what people see and hear. In this sense, they are more clearly targeted at winning the war for attention. At bottom, these techniques depend on the idea of generating a sufficient volume of information to drown out disfavored speech, or at least distorting the sense of how much support any given view has. Whatever form they take, these techniques clearly qualify as listener-targeted speech control.

Once again, in the internet era, it has been the Chinese and Russian governments who have led the way in developing mass-flooding strategies.<sup>84</sup> It is particularly instructive to focus on how China has sought to control internet speech domestically because its techniques rely heavily on the attentional flooding.

While it is among the world's last Communist states, China has not, like North Korea, sought to avoid twenty-first-century communications technologies.<sup>85</sup> Its embrace of the internet has been enthusiastic and thorough.<sup>86</sup> Yet

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82. Rosa Brooks, *And Then the Breitbart Lynch Mob Came for Me*, FOREIGN POL'Y (Feb. 6, 2017, 4:17 PM), <https://foreignpolicy.com/2017/02/06/and-then-the-breitbart-lynch-mob-came-for-me-bannon-trolls-trump> [<https://perma.cc/8MRE-WH9P>].

83. See, e.g., Katharine Q. Seelye, *Protesters Disrupt Speech by "Bell Curve" Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html> (on file with the *Michigan Law Review*).

84. See GOLDSMITH & WU, *supra* note 2 (including an earlier investigation into Chinese censorship innovations).

85. *Id.* at 87–104.

86. *Id.*

the Communist Party has nonetheless managed to survive—and even enhance—its control over politics, defying the predictions of many in the West who forecast that the arrival of the internet would soon lead to the government’s overthrow.<sup>87</sup>

Some of the techniques of Chinese online speech control are not those described here—direct censorship (like arrest of journalists) and control of intermediaries (like the blocking of websites, and the imposition of self-censorship duties on online media).<sup>88</sup> However, the Party also makes an ambitious effort to dominate discourse—most famously, by paying as many as two million people to post content that supports the Communist Party. As King, Pan, and Roberts wrote in 2017:

[T]he [Chinese] government fabricates and posts about 448 million social media comments a year. In contrast to prior claims, we show that the Chinese regime’s strategy is to avoid arguing with skeptics of the party and the government, and to not even discuss controversial issues. We show that the goal of this massive secretive operation is instead to distract the public and change the subject, as most of these posts involve cheerleading for China, the revolutionary history of the Communist Party, or other symbols of the regime.<sup>89</sup>

In an attention-scarce world, these kinds of methods are more effective than they might have been in previous decades. When listeners have highly limited bandwidth to devote to any given issue, they will rarely dig deeply, and they are less likely to hear dissenting opinions. In such an environment, flooding can be just as effective as more traditional forms of censorship.

In addition to writing paid-for messages, a flooding campaign might create fake groups and even fake rallies designed to suggest support for a cause. For example, during the 2016 election, the Russian troll army created fake groups and even staged fake events to promote its interests.<sup>90</sup> As documented by the *New York Times*, these goals were, in the main, accomplished through Facebook and Instagram.<sup>91</sup>

An alternative to paying people is the employment of fake accounts and human-impersonating robots on social media sites, with the goal of amplifying “favored” content. Researchers have estimated that Twitter has as many

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87. Predictions of the Communist Party’s downfall at the hands of the internet are surveyed in Chapter 6 of GOLDSMITH & WU, *supra* note 2.

88. Liz Tung, *What Makes Censorship in China So Effective?*, ATLANTIC (Sept. 10, 2013), <https://www.theatlantic.com/china/archive/2013/09/what-makes-censorship-in-china-so-effective/279467/> [https://perma.cc/T6BV-UPQW].

89. King et al., 2017 APSR, *supra* note 51, at 484.

90. Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html> (on file with the *Michigan Law Review*).

91. *Id.*

as 48 million bot users,<sup>92</sup> and Facebook has previously estimated that it has between 67.65 million and 137.76 million fake users.<sup>93</sup> Philip Howard, who runs the Computational Propaganda Project at Oxford University, argues that the robots play an important role in amplifying what might otherwise be fringe or ignored stories, including some of the atrocity propaganda described earlier.<sup>94</sup> As Howard points out, voters are strongly influenced by what they think their neighbors are thinking; fake crowds, deployed at crucial moments, can create a false sense of solidarity and support.<sup>95</sup> Howard and his collaborators studied the linking and sharing of news on Twitter in the week before the 2016 U.S. presidential vote. Their research produced a startling revelation: “junk news . . . was just as, if not more, prevalent than the amount of information produced by professional news organizations.”<sup>96</sup>

Robots can also be employed to attack the open processes of the administrative state. In the spring of 2017, the Federal Communications Commission put its proposed revocation of net neutrality up for public comment.<sup>97</sup> In previous years, such proceedings attracted vigorous argument by (human) commentators. This time, someone directed robots to impersonate—via stolen identities—hundreds of thousands of people; this flooded the system with fake comments, the vast majority of which—this time—were purportedly against federal net neutrality rules.<sup>98</sup> Since that time, other agencies, in-

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92. Michael Newberg, *As Many as 48 Million Twitter Accounts Aren't People, Says Study*, CNBC (Mar. 10, 2017), <https://www.cnbc.com/2017/03/10/nearly-48-million-twitter-accounts-could-be-bots-says-study.html> [<https://perma.cc/CM93-LS7A>]; see ONUR VAROL ET AL., *ONLINE HUMAN-BOT INTERACTIONS: DETECTION, ESTIMATION, AND CHARACTERIZATION* (2017), <https://arxiv.org/pdf/1703.03107.pdf> [<https://perma.cc/3CZ6-A38L>] (estimating that 9 to 15 percent of active Twitter users are bots).

93. Rebecca Grant, *Facebook Has No Idea How Many Fake Accounts It Has—But It Could Be Nearly 140M*, VENTUREBEAT (Feb. 3, 2014, 10:33 AM), <https://venturebeat.com/2014/02/03/facebook-has-no-idea-how-many-fake-accounts-it-has-but-it-could-nearly-140m> [<https://perma.cc/SS2W-PP2V>].

94. PHILIP N. HOWARD, ET AL., *JUNK NEWS AND BOTS DURING THE U.S. ELECTION: WHAT WERE MICHIGAN VOTERS SHARING OVER TWITTER?* 1 (2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/03/What-Were-Michigan-Voters-Sharing-Over-Twitter-v2.pdf> [<https://perma.cc/7TP6-3FDH>].

95. *Id.*

96. *Id.*

97. See Restoring Internet Freedom, 82 Fed. Reg. 25,568 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20); *Over Half of Public Comments to FCC on Net Neutrality Appear Fake: Study*, REUTERS (Nov. 29, 2017, 10:03 AM), <https://www.reuters.com/article/us-usa-internet-pew/over-half-of-public-comments-to-fcc-on-net-neutrality-appear-fake-study-idUSKBN1DT297> [<https://perma.cc/N2JN-E692>].

98. James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many Are Fake.*, WALL STREET J. (Dec. 12, 2017, 2:13 PM), <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188> (on file with the *Michigan Law Review*); Patrick Kulp, *Mysterious Bots Flood the FCC with False Anti-Net Neutrality Comments*, MASHABLE (May 10, 2017), <https://mashable.com/2017/05/10/bots-net-neutrality-comments-fcc/> [<https://perma.cc/ZY8J-V9XG>].

cluding the Securities and Exchange Commission, have also experienced bot commenting, though the full extent of the problem remains unknown.<sup>99</sup>

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As it stands, the First Amendment has little to say about any of these tools and techniques. The mobilization of online vitriol or the dissemination of fake news by private parties or foreign states, even if in coordination with the U.S. government, has been considered a matter of journalistic ethics or foreign policy, not constitutional law. Even the attacks on administrative procedure do not now register as classic First Amendment matters. Even if government itself were to use trolling, it has long been assumed that the U.S. government's use of domestic propaganda is not a contestable First Amendment concern on the premise that propaganda is "government speech."<sup>100</sup> But under the existing jurisprudence, it seems that little—other than political norms that are fast eroding—stands in the way of a full-blown campaign designed to manipulate the political speech environment to the advantage of whomever best uses these techniques. Hence the question posed by the last Section: What, if anything, can be done?

#### IV. PROTECTING THE CHANNELS OF SPEECH

The First Amendment, the centerpiece of the American free speech tradition, has become a bystander in an age of aggressive efforts to propagandize and control online speech. While it does wall off the most coercive technique of the government—direct and coercive punishment of disfavored speakers—that's just one part of the problem. What we need most is a reconceptualization of what it means, in our times, to protect and promote a healthy political speech environment.

A major part of this project lies outside the domain of the First Amendment or the legal system more generally. It is, instead, centered on changes to the norms and practices of the internet platforms that are, in practice, among the major speech brokers of our times. At its essence, the debate concerns whether the platforms like Twitter, Facebook, Google, and others need adopt norms and policies traditionally associated with twentieth-century

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99. Kulp, *supra* note 98.

100. The Supreme Court reaffirmed last spring that U.S. government propaganda is outside the reach of the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (noting, in dicta, that "the First Amendment did not demand that the Government balance the message of [pro-World War II] posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities"). For an argument that such propaganda ought to be subject to First Amendment controls, see William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1966).

journalism given their extensive influence and central importance.<sup>101</sup> The full debate goes beyond the scope of this Essay, but its importance means it cannot be neglected.

For the legal system there is a different priority. I believe that we need to recognize the importance of using the legal system to protect the main channels of online speech. I think it reasonable to suggest that basic protection of speakers and listeners can be understood as a constitutional duty to defend the basic values of the First Amendment. It is therefore important to recognize the most basic and obvious ways in which government can and should act on a regular basis to protect speakers and listeners from harassment, fraud, deception, and related practices. In this respect law enforcement has its work cut out for it.

#### A. Internet Platforms and Media Norms

First Amendment writers can sometimes overlook the role of the press and media ethics as a bulwark against some of the speech-control techniques described in this Essay. Ever since the rise of “objectivity” and “independence” norms in the 1920s, along with the adoption of formal codes of journalistic ethics, the mainstream press has generally considered certain conduct unprofessional and unseemly—such as publishing mere rumors and unsubstantiated accusations, knowingly serving as an arm of government propaganda, or printing news according to the demands of business interests.<sup>102</sup> The press, at its best, has also guaranteed its reporters some security from attacks and abuse.<sup>103</sup> To be sure, the press cannot be said to have always lived up to these standards or performed its duties consistently. There is a history of journalists becoming agents of domestic and foreign propagandizing,<sup>104</sup> and there are longstanding debates about what constitutes a “fact” or “objectivity.”<sup>105</sup> But the fact that the press does not always live up to its duties does not diminish the importance of their existence.

101. For a sample of the debate, see Robyn Caplan, Opinion, *Like It or Not, Facebook Is Now a Media Company*, N.Y. TIMES (May 17, 2016), <https://www.nytimes.com/roomfordebate/2016/05/17/is-facebook-saving-journalism-or-ruining-it/like-it-or-not-facebook-is-now-a-media-company> (on file with the *Michigan Law Review*).

102. See DAVID T.Z. MINDICH, *JUST THE FACTS: HOW “OBJECTIVITY” CAME TO DEFINE AMERICAN JOURNALISM* (1998); STEPHEN J.A. WARD, *THE INVENTION OF JOURNALISM ETHICS: THE PATH TO OBJECTIVITY AND BEYOND* (2d ed. 2015).

103. Ashley Feinberg, *A Crucial New Site Tracks Attacks on Press in the US*, WIRED (Aug. 2, 2017, 07:01 PM), <https://www.wired.com/story/us-press-freedom-tracker-site/> [<https://perma.cc/B2GS-A52C>].

104. *New York Times* reporter and Moscow Bureau chief Walter Duranty famously reported as fact the Soviet assessments of famines, show trials and other controversies. See Karl E. Meyer, Opinion, *The Editorial Notebook; Trenchcoats, Then and Now*, N.Y. TIMES, (June 24, 1990), <https://www.nytimes.com/1990/06/24/opinion/the-editorial-notebook-trenchcoats-then-and-now.html> (on file with the *Michigan Law Review*).

105. See, e.g., MINDICH, *supra* note 102; WARD, *supra* note 102.



In contrast, the major speech platforms, born as tech firms, have become part of the media world almost by accident. By design, they have none of the ethical filters or safeguards that the press historically has employed. There are advantages to this design: the anything-goes approach has supported the appealing idea that anyone, and not only professionals, might have her say. The fact that platforms essentially allow anyone to publish anything has precipitated a great flourishing of speech in various new forms, from populist organizing through blogging, user-created encyclopedias, and social media.<sup>106</sup> As Volokh prophesized in 1995: “Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant-garde—will be able to make their work available to all.”<sup>107</sup> But it has also meant, as we have seen, that the platforms are vulnerable to tactics that weaponize speech and use the openness of the internet as ammunition. The question now before us is whether the platforms need to do more to combat these problems for the sake of workable self-governance in the United States.

While Facebook has attracted its fair share of attention for its inattentiveness to media ethics,<sup>108</sup> we might focus simply on Twitter, which has served as a tool for computational propaganda (through millions of fake users),<sup>109</sup> dissemination of fake news,<sup>110</sup> and harassment of speakers.<sup>111</sup> Twitter does little about any of these problems. It has adopted policies that are meant, supposedly, to curb abuse. But the policies are widely viewed as ineffective, in no small part because they put the burden of action on the person being harassed. Columnist Lindy West, for example, has described her attempt to report as “abusive” a user who threatened to rape her with an “anthropomorphic train.”<sup>112</sup> Twitter staff responded that the comment was

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106. See CLAY SHIRKY, *HERE COMES EVERYBODY: HOW CHANGE HAPPENS WHEN PEOPLE COME TOGETHER* (Penguin Books 2009); cf. William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 193 (Stephen R. Munzer ed., 2001) (describing semiotic democracy).

107. Volokh, *supra* note 32, at 1807.

108. Cecilia Kang et al., *Mark Zuckerberg Testimony: Day 2 Brings Tougher Questioning*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/politics/zuckerberg-facebook-cambridge-analytica.html> (on file with the *Michigan Law Review*).

109. Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> (on file with the *Michigan Law Review*).

110. Steve Lohr, *It's True: False News Spreads Faster and Wider. And Humans Are to Blame.*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/technology/twitter-fake-news-research.html> (on file with the *Michigan Law Review*).

111. See, e.g., Debbie Chachra, *Twitter's Harassment Problem Is Baked into Its Design*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/technology/archive/2017/10/twitters-harassment-problem-is-baked-into-its-design/542952/> [<https://perma.cc/3HL9-36YN>].

112. Lindy West, *Twitter Doesn't Think These Rape and Death Threats Are Harassment*, DAILY DOT (Dec. 23, 2014, 6:30 AM), <https://www.dailydot.com/via/twitter-harassment-rape-death-threat-report/> [<https://perma.cc/N42C-SNTT>].

“currently not violating the Twitter Rules.”<sup>113</sup> When Twitter’s CEO once asked, “What’s the most important thing you want to see Twitter improve or create in 2017?” one user responded: “Comprehensive plan for getting rid of the Nazis.”<sup>114</sup> To suggest that private platforms could—and should—be doing more to prevent speakers from harassment and abuse is perhaps the clearest remedy for the emerging threats identified above. Moreover, the problem of identifying and labeling sources of fake news is not intractable. Consider that Wikipedia does not have a widespread fake news problem.<sup>115</sup> And if the troll problem is not new to the web, back in the 1990s the stakes were lower.<sup>116</sup> Today, we are witnessing efforts to destroy the reputations of real people for political purposes,<sup>117</sup> to tip elections,<sup>118</sup> and to influence foreign policy.<sup>119</sup> That mandates the conclusion that the law need play a more robust role in the fighting of such scourges.

### B. First Amendment Duties of Action

The law and the legal system should not sit at the sidelines given the new challenges to the American and, indeed, global speech environment. The question, I suggest, is what should be done to protect the primary public channels of speech from deliberate attack. That means understanding and emphasizing the government’s duty to protect both listeners and speakers, and thereby promote an environment conducive to political debate.

The premise that the government has a duty to protect speakers and listeners is not new or unprecedented. In his classic *Free Speech and Social Structure*, Owen Fiss argued that “[t]he duty of the state is to preserve the integrity of public debate” so as to “safeguard the conditions for true and free

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113. *Id.*

114. Lindy West, Opinion, *I’ve Left Twitter. It Is Unusable for Anyone but Trolls, Robots, and Dictators*, *GUARDIAN* (Jan. 3, 2017, 1:04 PM), <https://www.theguardian.com/commentisfree/2017/jan/03/ive-left-twitter-unusable-anyone-but-trolls-robots-dictators-lindy-west> [https://perma.cc/DA3Y-A8VT].

115. See Cade Metz, *At 15, Wikipedia Is Finally Finding Its Way to the Truth*, *WIRED* (Jan. 15, 2016, 7:00 AM), <https://www.wired.com/2016/01/at-15-wikipedia-is-finally-finding-its-way-to-the-truth/> [https://perma.cc/4HB2-AT7F].

116. See Wu, *supra* note 15, at 292.

117. See *Web Avengers: Michael Fertik*, ABC NEWS (June 20, 2011), [https://abcnews.go.com/2020/We\\_Find\\_Them/michael-fertik/story?id=13570273](https://abcnews.go.com/2020/We_Find_Them/michael-fertik/story?id=13570273) [https://perma.cc/X2QN-JQNF].

118. Paris Martineau, *Twitter Bots Are Now Trying to Tip The Scales in Local Elections*, *OUTLINE* (Mar. 12, 2018, 1:53 PM), <https://theoutline.com/post/3713/political-propaganda-bots-flood-twitter-to-influence-upcoming-elections> [https://perma.cc/LS9P-B5NA].

119. Jonah Shepp, *How U.S. Foreign Policy Is Being Shaped by Trump’s Tweets*, N.Y. MAG.: DAILY INTELLIGENCER (Jan. 19, 2018, 11:41 AM), <https://nymag.com/daily/intelligencer/2018/01/how-u-s-foreign-policy-is-being-shaped-by-trumps-tweets.html> [https://perma.cc/4BER-DJVN].

collective self-determination.”<sup>120</sup> For as much as the Constitution creates negative rights for individuals, the commitment to open public debate, along with the a commitment to a Republican form of government, has also been understood to impose duties to protect some of the basic processes of governance, including protections for the principal channels of political speech.<sup>121</sup> This implies something as simple as suggesting the police must, for instance, protect even an unpopular newspaper from arsonists.

The clearest expression of the First Amendment’s creation of duties to protect the channels of speech comes from a series of cases featuring unpopular speakers, the police, and angry mobs. Beginning in the civil rights era, the Supreme Court suggested that the police had a duty, consistent with the First Amendment, to protect the speakers, not to arrest them.<sup>122</sup> This was a point emphasized by Justice Black, who wrote that, given an unpopular speaker, the police “first must make all reasonable efforts to protect him” and that it is the duty of law enforcement “to protect petitioner’s constitutional right to talk.”<sup>123</sup> In recent years, courts have reaffirmed that police officers have, within limits, a “duty to protect the plaintiffs’ right to speak”<sup>124</sup> that “an officer [cannot] sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule . . . .”<sup>125</sup>

It is this duty that law enforcement need take seriously in the age of current online threats. The police officer whose duty it is to protect speakers from harassment and attack needs to turn his or her efforts to protecting online speech. And it is important to understand that this protection is different in kind than broader measures to promote higher-quality debate by,

120. Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986); Shepp, *supra* note 119.

121. Whether such duties would be judicially enforceable—and if so, how—is a question that is separate from whether the duties exist. For the debate over methods of enforcing constitutional duties, see CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 225–27 (2001); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 190 (2012) (suggesting that enforcement of constitutional duties is practical but tends to benefit the middle and upper classes); Mark Tushnet, *Dialogue and Constitutional Duty* (Harv. L. Sch., Working Paper No. 12-10, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2026555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026555) [<https://perma.cc/7X4N-EJAQ>].

122. There is more to the debate over the heckler’s veto, which is also framed as asking when a speaker can reasonably be shut down by government based on the possibility of a violent or disruptive reaction. For a recent take on the topic, see Timothy E.D. Horley, *Rethinking the Heckler’s Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8 (2018). See also *Feiner v. New York*, 340 U.S. 315, 326–27 (1951) (Black, J., dissenting).

123. *Feiner*, 340 U.S. at 326–27 (Black, J., dissenting); see also *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (“protection” of the expression of unpopular views may “necessitate police protection”).

124. *Deferio v. City of Syracuse*, No. 5:16-CV-0361 (LEK/TWD), 2018 WL 671251, at \*12 (N.D.N.Y. Jan. 31, 2018), *appeal filed*, *Deferio v. City of Syracuse*, No. 18-514, (2d Cir. Feb. 22, 2018).

125. *Bible Believers v. Wayne County*, 805 F.3d 228, 238 (6th Cir. 2015).

for instance, regulating how a media outlet presents controversial issues (as in the “fairness doctrine” of the midcentury). There is a difference, in other words, between protecting channels of public debate from deliberate attack and trying to control the quality of debate. Hence, before engaging in a debate over any fairness rules, we should first recognize how much government already does offline and how much more it should do online through the commonplace of protecting listeners and speakers from actual attacks; threats; and from fraud, deception, and harassment. In other words, we already live in a world where government is acting—inconsistently, to be sure—in ways that help preserve the quality of public debate. What I am arguing is that law enforcement has a duty to do far more, given the new threats to speech, and that the First Amendment should not stand in the way.

Before going further, it would be useful to be more concrete about some of the ways that government should act, both under existing laws and through the enactment and enforcement of new laws. They include the following:

- The enforcement of existing federal or state antithreat, antiharassment, anticyberstalking laws to protect speakers, including journalists, from online threats and harassment.
- The enforcement of laws governing fraud, deception, and identity theft to fight deceptive propaganda campaigns, malicious usage of propaganda robots, and other mass deception campaigns.
- The introduction of antitrolling laws designed to better combat the specific problem of “troll army”-style mob attacks on journalists or other public figures.
- The enactment of statutory or regulatory restrictions on the ability of major media and internet speech platforms to knowingly accept money from foreign governments attempting to influence American elections.
- The enactment of new laws or regulations to police the problem of human impersonation and propaganda robots.

Such an enforcement program, coupled with new laws, would, I think, begin to fulfill the State’s duty to face some of the most serious speech threats in our time. Many of these laws can be justified by the government’s interest in protecting individuals from harm or deception, or the protection of procedures, like laws that protect the integrity of the electoral process.<sup>126</sup> Yet they can also be justified as a means of protecting the channels of speech themselves and promoting the integrity of the speech environment. This is an approach that has been used to justify other regulation of speech—as ac-

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126. See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 58–62 (2014).

complished by the copyright law, campaign finance laws, or communications regulation.<sup>127</sup>

Yet even as I've suggested that government may have some duty to enforce such laws, it is nonetheless clear that the enactment and vigorous enforcement of these laws would yield (and already has yielded) First Amendment challenges. The arguments go like this: so-called trolls are speakers too; robots can be understood as a means of amplification; lying is protected speech; and the right to speak anonymously, even in hateful ways, is important and need be protected. What I am calling harassment might be termed criticism of speakers and hence part of an "interactive understanding of free speech values."<sup>128</sup>

The First Amendment arguments against antiharassment and antideception laws gain some support from First Amendment cases that have protected lying as a form of speech, in certain contexts at least,<sup>129</sup> and by cases suggesting there can be a right to speak anonymously, or at least a right not to be forced by government to reveal your identity.<sup>130</sup> These decisions and the spirit of the First Amendment certainly demand room be left for anonymous blogging and tweeting; overclaiming or even lying for political effect; robust criticism of speakers; and other means of discourse which enliven debate and in the process also annoy and upset the speaker. But there remains a line—one which courts have not, so far, had great difficulty discerning—between lively online speech and criticism and the serious attacks that threaten harm to speakers or listeners, or harm to the integrity of speech channels themselves. There are, to be sure, hard cases in this area, but there are also easy ones as well. This is a point best illustrated by examples.

We might begin with the prosecution of troll armies and their organizers, whose typical method is the vicious, threatening attacks on targeted speakers. Despite the protections for anonymous speech, the cases so far have been receptive to the prosecution of threat-issuing trolls.<sup>131</sup> Trolls frequently target speakers by describing horrific acts, and not in a manner suggesting humor or artistic self-expression.<sup>132</sup> In the Supreme Court's most re-

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127. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring).

128. Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes* (NYU Sch. of L., Working Paper No. 17-42, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3054555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054555) [<https://perma.cc/5EVG-F5C8>] (emphasis omitted).

129. *United States v. Alvarez*, 567 U.S. 709 (2012) (holding unconstitutional, in a divided opinion, the statute used to indict Xavier Alvarez for claiming to be the recipient of the Congressional Medal of Honor).

130. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). But see *Doe v. Reed*, 561 U.S. 186 (2010).

131. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (describing the true threat doctrine).

132. See *Watts v. United States*, 394 U.S. 705 (1969) (barring the prosecution of a defendant when a threat was obviously made in jest); see also *Elonis v. United States*, 135 S. Ct. 2001

cent statement on the matter, it advised that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>133</sup> The fact that threats are often not carried out is immaterial; the intent to create a fear of violence is sufficient.<sup>134</sup> Given this doctrinal backdrop, there is reason to believe that the First Amendment would accommodate increased prosecution of those who try to intimidate journalists or other critics.

This belief is supported by the outcome of *United States v. Moreland*, the first lower-court decision to consider the use of the federal cyberstalking statute to protect a journalist from an aggressive troll.<sup>135</sup> Jason Moreland, the defendant, directed hundreds of aggressive emails, social-media comments, and physical mailings at a journalist living and reporting in Washington, D.C. Many of his messages referenced violence and “a fight to the death.” In the face of a multifaceted First Amendment challenge, the court wrote:

His communications directly referenced violence, indicated frustration that CP would not respond to his hundreds of emails, reflected concern that CP or someone on her behalf wanted to kill Moreland, stated that it was time to “eliminate things” and “fight to the death,” informed plaintiff that he knew where her brother was, and repeatedly conveyed that he expected a confrontation with CP or others on her behalf. . . . [T]he Court concludes that the statute is not unconstitutional as applied, as the words are in the nature of a true threat and speech integral to criminal conduct.<sup>136</sup>

Cases like *Moreland* suggest that while efforts to reduce trolling might present a serious enforcement challenge, the Constitution will not stand in the way so long as the trolling at issue looks more like threats and not just strongly expressed political views.

Another set of cases surround the protection of the electoral process from those employing the techniques of speech control described here—especially impersonation, generation of fake news, and the usage of propaganda bots for the specific purpose of manipulating elections. Here the leading example is Special Counsel Robert Mueller’s indictment of thirteen Russians citizens for efforts to manipulate and influence the 2016 election.<sup>137</sup> As the detailed indictment suggested, the means included the impersonation of American citizens, the creation of fictitious persons, and the creation of fake online activist groups designed to either foment dissent in general or support

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(2015) (reversing a conviction where the defendant maintained that his threats were self-expressive rap lyrics).

133. *Black*, 538 U.S. at 360.

134. *Id.*

135. 207 F. Supp. 3d 1222 (N.D. Okla. 2016).

136. *Moreland*, 207 F. Supp. 3d at 1230–31.

137. Indictment, *United States v. Internet Research Agency*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018).

for candidates Bernie Sanders and Donald Trump.<sup>138</sup> In Mueller's indictment, the targets were indicted under federal criminal law for conspiracy to defraud the United States, conspiracy to commit wire and bank fraud, and aggravated identity theft.<sup>139</sup>

Given that Mueller's targets are overseas, any First Amendment defenses to these charges are unlikely to be litigated. But if challenged as unconstitutional, prosecution could be justified by the state's compelling interest in defending the electoral process and the "national political community." These are justifications that government has relied on in the defense of laws banning foreign campaign contributions. As a three-judge panel of the D.C. district court explained in a recent ruling on foreign campaign contributions: "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."<sup>140</sup> It should not be any great step to assert that the United States may also have a compelling interest in preventing the deliberate manipulation of American elections through propaganda campaigns conducted through social-media platforms. The case is surely easier when foreign powers act, but the principle extends to domestic actors as well.

This brief discussion certainly does not exhaust the topic. Closer and harder questions surround law enforcement that targets fraudulent and deceptive speech, and there may be First Amendment challenges to new laws that seek to limit the use or sale of human-impersonating robots. Courts have generally supported the policing of deception, especially commercial deception, but within limits.<sup>141</sup> As in every First Amendment matter, much depends on how such laws are written or cases are brought, but the long tradition of First Amendment cases allowing prosecution of fraud and identity theft seems to suggest that a well-written law would survive scrutiny. For it would seem an odd thing for the First Amendment to serve as a blanket license to confuse, defraud, and deceive the listeners whose interests are supposedly "paramount."<sup>142</sup>

Before leaving this topic we might return to a point mentioned earlier. We have already discussed laws, criminal and civil, designed not merely to protect listeners or speakers. As a constitutional matter, such laws can be jus-

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138. *See id.*

139. *See id.*

140. *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). A related interest—protecting elections—has been called on to justify "campaign-free zones" near polling stations. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992).

141. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."); *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499–500 (D.C. Cir. 2015).

142. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

tified by the harms they are intended to prevent as well as the protection of the channels of speech. But what about a law that goes further, that seeks to guarantee a higher equality and fairly balanced political debate in social media sphere? Such laws would be inspired by the indelible dictum of Alexander Meiklejohn: “What is essential is not that everyone shall speak, but that everything worth saying shall be said”<sup>143</sup>—and, to some meaningful degree, heard. Imagine, for instance, a law that makes any social-media platform with significant market power a kind of trustee operating in the public interest and requires that it actively take steps to promote a healthy political-speech environment. This result would be a “fairness doctrine” for social media.

For decades the fairness doctrine obligated radio and television broadcasters to improve the conditions of political speech in the United States.<sup>144</sup> It required that broadcasters cover matters of public concern and do so in a “fair” manner.<sup>145</sup> Furthermore, it created a right for impugned parties to demand the opportunity to respond to opposing views using the broadcaster’s facilities.<sup>146</sup> At the time of the doctrine’s first adoption in 1949, the First Amendment remained largely inert; by the 1960s, a constitutional challenge to the regulations became inevitable. In the 1969 *Red Lion* decision, the Supreme Court upheld the doctrine and in doing so described the First Amendment’s goals as follows:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.<sup>147</sup>

While *Red Lion* has never been explicitly overruled, it has been limited by subsequent cases, and it is now usually said to be dependent on the scarcity of spectrum suitable for broadcasting.<sup>148</sup> The FCC withdrew the fairness doctrine in 1987, opining that it was unconstitutional,<sup>149</sup> and *Red Lion* has been presumed dead or overruled by a variety of government officials and scholars.<sup>150</sup> Nonetheless, in the law, no doctrine is ever truly dead. All things have their season, and the major changes in our media environment may

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143. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

144. See FCC, *Editorializing by Broadcast Licensees*, 15 F.C.C. ANN. REP. 33 (1949).

145. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,416, app. B. at 10,426 (July 25, 1964).

146. See *id.*

147. *Red Lion*, 395 U.S. at 390.

148. See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a state “right of reply” statute as applied to a newspaper).

149. Syracuse Peace Council, 2 FCC RCD. 5043, 5047 (1987).

150. Cf. Thomas W. Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).



have strengthened the constitutional case for laws explicitly intended to improve how outlets conduct political discourse.

To make my own preferences clear, I personally would not favor the creation of a fairness doctrine for social media or other parts of the web. That kind of law, I think, would be too hard to administer, too prone to manipulation, and if it did work too apt to flatten what has made the internet interesting and innovative and therefore counterproductive. But my own preferences are something different than the question of whether Congress has the power to pass such a law under the Constitution. Given the problems discussed in this Essay, and presuming, say, that a firm like Facebook continued to exercise a dominant role over what the population sees and hears, surely Congress has the power to impose some duties designed to safeguard or improve the nation's system of collective self-government, whether for the First Amendment or perhaps for the survival of the republic. I just think it seems implausible that the First Amendment stands for the proposition that Congress, a state, or a city cannot try to cultivate more bipartisanship or nonpartisanship online. The justification for such a law would turn on the trends described above: the increasing scarcity of human attention, the rise to dominance of a few major platforms, and the pervasive evidence of negative effects on our democratic life.

### C. *Judicial Enforcement of the First Amendment*

We have described the importance of law enforcement in acting to protect the free speech guarantees of the First Amendment. But could the amendment itself, in suitable litigation, be used to face some of new challenges described here? I think the answer is yes.

The most basic stumbling block lies in the fact that the First Amendment, like other guarantees in the Bill of Rights, has been understood primarily as a negative right against coercive government action—not as a right against the conduct of nongovernmental actors, or as a right that obliges the government to ensure a pristine speech environment. Tactics such as flooding and purposeful generation of fake news are, by our current ways of thinking, either private action or perhaps government speech.

It is true that, over the years, there have been some scholars who have suggested that the First Amendment ought to forbid government propagandizing.<sup>151</sup> There have also been congressional bans on using foreign propaganda tools within the United States.<sup>152</sup> Nonetheless, the prospect of a jurisprudence seeking to put the judiciary in the position of banning state

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151. See, e.g., Van Alstyne, *supra* note 100, at 531–36; Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

152. See Weston R. Sager, Note, *Apple Pie Propaganda? The Smith-Mundt Act Before and After the Repeal of the Domestic Dissemination Ban*, 109 NW. U. L. REV. 511 (2015).

propaganda has always seemed a very challenging prospect. It puts judges in the uncomfortable position of adjudicating the differences between “propaganda” and “public relations,” “electioneering” and “use of the bully pulpit” and in that exercise risks making the judiciary into a Ministry of Truth.

Despite these challenges, I think the judicially enforced First Amendment may nonetheless have a role to play in policing some of the newer threats to speech. One way is through the First Amendment’s underdiscussed “accomplice liability” doctrine. If a private mob attacks and silences critics of the government, purely of its own volition, there may be a role for law enforcement; yet a basic theory of state action suggests no role for the Constitution. But what about when the mob is not quite as independent as it first appears? Based on accomplice principles, I suggest that the First Amendment should hold government officials accountable when they take a hand in encouraging, coordinating, or otherwise providing direction to what might seem like private parties.

As many have observed, the current American president has seemingly directed online mobs to go after his critics and opponents, particularly members of the press.<sup>153</sup> Even members of the president’s party have reportedly been nervous to speak their minds, not based on threats of ordinary political reactions but for fear of attack by online mobs.<sup>154</sup> And while the directed-mob technique may have been pioneered by Russia and employed by Trump, it is not hard to imagine a future in which other presidents and powerful leaders sic their loyal mobs on critics, confident that in so doing they may avoid the limits imposed by the First Amendment.

But the state action doctrine may not be as much of a hindrance as this end-run supposes. The First Amendment already has a nascent accomplice liability doctrine that makes state actors, under some circumstances, “liable for the actions of private parties.”<sup>155</sup> In *Blum v. Yaretsky*, the Supreme Court explained that the state can be held responsible for private action “when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>156</sup> The *Blum* formulation echoes common-law accomplice liability principles: a principal is ordinarily liable for the illegal actions of another party when it both shares the underlying mens rea, or purpose, and when it acts to encourage, command, support, or otherwise provide aid to

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153. See, e.g., Martin Pengelly & Joanna Walters, *Trump Accused of Encouraging Attacks on Journalists with CNN Body-Slam Tweet*, *GUARDIAN* (July 2, 2017, 2:21 PM), <https://www.theguardian.com/us-news/2017/jul/02/trump-body-slam-cnn-tweet-violence-reporters-wrestlemania> [<https://perma.cc/JF6W-RTLD>].

154. See French, *supra* note 79.

155. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982).

156. *Id.* at 1004. The Fourth Circuit puts it slightly differently: the state is acting when it “has coerced the private actor,” or when it “has sought to evade a clear constitutional duty through delegation to a private actor.” *German v. Fox*, 267 F. App’x 231, 233 n.\* (4th Cir. 2008).

that party.<sup>157</sup> *Blum* itself was not a First Amendment case, and it left open the question of what might constitute “significant encouragement” in various settings.<sup>158</sup> But in subsequent cases, the lower courts have provided a greater sense of what factual scenarios might suffice for state accomplice liability in the First Amendment context.

For example, the Sixth Circuit has a line of First Amendment employment retaliation cases that suggested when public actors may be held liable for nominally private conduct. In the 2010 case *Paige v. Coyner*, the Sixth Circuit addressed the constitutional claims of a woman who was fired by her employer at the behest of a state official (Coyner) after she spoke out at a public meeting in opposition to a new highway development.<sup>159</sup> Unlike a typical retaliation-termination case, the plaintiff presented evidence that she was fired because the state official complained to her employer and sought to have her terminated.<sup>160</sup> The Sixth Circuit held that the lawsuit properly alleged state action because Coyner encouraged the firing, even though it was the employer who actually inflicted the punishment.<sup>161</sup> Moreover, the court suggested an even broader liability standard than *Blum*, holding that the private punishment of a speaker could be attributed to a state official “if that result was a reasonably foreseeable consequence.”<sup>162</sup> More recently, the Sixth Circuit reaffirmed *Coyner* where a police officer, after a dispute with a private individual, went to her workplace to complain about the individual with the “reasonably foreseeable” result of having her fired.<sup>163</sup> Similar cases can be found in other circuits.<sup>164</sup>

In the political “attack mob” context, it seems that some official encouragement of attacks on the press or other speakers should trigger First Amendment scrutiny. Naturally, those who attack critics of the state merely because they feel inspired to do so by an official’s example do not present a

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157. See, e.g., N.Y. PENAL LAW § 20.00 (McKinney 2018); MODEL PENAL CODE § 2.06 (AM. LAW INST. 2016).

158. In *Blum* itself, the Supreme Court stated that the medical decisions made by the nursing home were insufficiently directed by the state to be deemed state action. *Blum*, 457 U.S. at 1012.

159. 614 F.3d 273 (6th Cir. 2010).

160. *Paige*, 614 F.3d at 276–77.

161. *Id.* at 284.

162. *Id.* at 280.

163. *Wells ex rel. Bankr. Estate of Arnone-Doran v. City of Grosse Pointe Farms*, 581 F. App’x 469 (6th Cir. 2014).

164. In a district court case in New Jersey, the court refused to dismiss an action brought by a woman who was fired by her nonprofit after local government officials extensively criticized her for comments she made about law enforcement. *Downey v. Coal. Against Rape & Abuse, Inc.*, 143 F. Supp. 2d 423 (D.N.J. 2001); see also *Lynch v. Southampton Animal Shelter Found. Inc.*, 278 F.R.D. 55 (E.D.N.Y. 2011) (denying motion to dismiss where a privatized animal shelter that fired a volunteer who was an animal rights activist was alleged to be a state actor); *Ciacciarella v. Bronko*, 534 F. Supp. 2d 276 (D. Conn. 2008); *Pendleton v. St. Louis Cty.*, 178 F.3d 1007 (8th Cir. 1999).

case of state action. (If burdensome enough, however, the original attack might be a matter of First Amendment concern.) But more direct encouragement may yield a First Amendment constraint. Consider, for example, the following scenarios:

- If government officials name individual members of the press and suggest they should be punished, yielding a foreseeable attack.
- If government officials call upon media companies to fire or otherwise discipline their critics, and the companies do so.
- If the government is found to be directly funding third-party efforts to attack or flood critics of the government or organizing or coordinating with those who provide such funding.
- If officials order private individuals or organizations to attack or punish critics of the government.

Based on the standards enumerated in *Blum* and other cases, these scenarios might support a finding of state action and a First Amendment violation. In other words, an official who spurs private censorial mobs to attack a disfavored speaker might—in an appropriately brought lawsuit, contingent on the usual questions of standing and immunity—be subject to a court injunction or even damages, just as if she performed the attack herself.

#### CONCLUSION

Changes in communications technologies inevitably present new challenges for the First Amendment. For nearly twenty years now, scholars have been debating how the rise of the popular internet might unsettle what the First Amendment takes for granted. Yet the emerging threats to our political speech environment have turned out to be different from what many predicted—for few forecast that speech itself would become a weapon of state-sponsored censorship. In fact, some might say that celebrants of open and unfettered channels of internet expression (myself included) are being hoisted on their own petard, as those very same channels are today used as ammunition against disfavored speakers. As such, the emerging methods of speech control present a particularly difficult set of challenges for those who share the commitment to free speech articulated so powerfully in the founding—and increasingly obsolete—generation of First Amendment jurisprudence.