

SOVEREIGNTY AND SPEECH IN AN INTERNET ERA

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Abstract

In a democracy, where the people are deemed to be sovereign, and have the right to control government through the democratic process, it is generally inappropriate for governmental officials to try to control and censor public discussions. Nevertheless, the trial court decision in Missouri v. Biden reveals how the Biden Administration not only encouraged social media platforms to censor speech, but also pressured and threatened them. Obviously, the government can act when the speech involved is illegal (e.g., child pornography), but the Biden Administration targeted public discussions that did not involve illegal speech, and that involved legitimate issues of public concern (e.g., climate change, the Hunter Biden laptop story, Covid, and Covid vaccines). While some of the suppressed discussions arguably involved “disinformation,” the Biden Administration also sought to suppress truthful information. The Biden Administration’s goal was to enforce its preferred view on the issues in question. The U.S. Supreme Court refused to weigh in on Biden’s actions, dismissing the McMurthy case on standing grounds. This article discusses the McMurthy decision, and examines why and how the courts should protect the people’s sovereignty and their speech.

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When the United States was established as a nation in the late eighteenth century, monarchy was the dominant form of government in Europe.¹ At one point, some believed that kings ruled by “Divine Right.”² In other words, kings were viewed as having been placed on their thrones by God, as carrying out God’s will, and therefore as sovereign in the sense that “the King could do no wrong.”³ Sovereignty was clearly vested in the monarch.

The U.S. Declaration of Independence marked a major divergence. In that document, early Americans implicitly repudiated Divine Right, and affirmed several fundamental propositions: “that all Men are created equal,” “that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness,” and that “to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”⁴ The Declaration then articulated a proposition that would have been unthinkable to proponents of divine right—that the people have the right to revolt against the King:

Whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to affect their Safety and Happiness.⁵

The Declaration then sets forth an extensive list of grievances against King George which the signatories viewed as justifying their decision to declare independence.⁶

If the power to govern derives from the consent of the governed, then it places ultimate authority in the hands of the people themselves. James Madison made this very point when he denounced a congressional resolution criticizing “self-created societies” that some believed had “misrepresent[ed] the conduct of the Government.”⁷ Madison’s view was that, in a Republic, “the censorial power is in the people over the Government, and not in the

1. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 95–96 (1996) (Stevens, J., dissenting) (citing John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. L. REV. 1121, 1124–25 (1993)).

2. *Id.* (citing Stevens, *supra* note 1, at 1124–25).

3. *Id.* (Stevens, J., dissenting).

4. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

5. *Id.*

6. See *id.* (“Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.”).

7. See *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 480 (2022) (alteration in original) (quoting 4 ANNALS OF CONG. 899 (1794)).

Government over the people.”⁸ But, in recent years, the U.S. government has taken a very different view of the role and the power of the citizenry. As more and more speech is funneled through social media networks, the Biden Administration pressured and threatened those platforms in an effort to stifle and suppress discussion of public issues.⁹ This article examines these governmental efforts.

I. THE U.S. SYSTEM AND FREE EXPRESSION

Another interesting aspect of the U.S. system is that the founding generation was generally distrustful of government. Many who came to the Americas in the seventeenth and eighteenth centuries did so fleeing religious persecution in Europe.¹⁰ In the British colonies, they were met with other forms of governmental harassment. For example, British colonial authorities used Writs of Assistance and general warrants to conduct searches of people and their homes;¹¹ searches which created high levels of anger and resentment among the colonists.¹²

British colonial officials also tried to suppress and control freedom of expression.¹³ In particular, the British created a censorial system with the

8. *Id.* (first quoting 4 ANNALS OF CONG. 934 (1794); and then citing Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1560–66 (2004)).

9. *See* Missouri v. Biden Jr., No. 22-01213, 2023 WL 5841935, at *2 (W.D. La July 4, 2023) *vacated*, 114 F.4th 406 (5th Cir. 2024) (mem.; per curiam).

10. *See* Everson v. Board of Educ., 330 U.S. 1, 8–9 (1947) (“A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.”).

11. *See* Boyd v. United States, 116 U.S. 616, 625 (1886) (noting “the famous debate” in the American colonies about the arbitrary use of these writs of assistance by the English which “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country . . . [and was] fresh in the memories of those who achieved our independence and established our form of government”).

12. *See id.*

13. *See* RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 6–7 (2006) [hereinafter THE RIGHT TO SPEAK ILL] (discussing crime of “seditious libel” which “made it a crime to criticize the government or government officials” this restricting freedom of speech (first citing Judith Schenk Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 825 (1984); then citing Jeffrey K. Walker, *A Poisen in Ye Commonwealth: Seditious Libel in Hanoverian London*, 25 ANGLO-AM. L. REV. 341, (1996); then citing William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 98 (1984); then citing *The Case de Libellis Famosis, or of Scandalous Libels* [1605] 77 Eng. Rep. 250 (Eng.); then citing *R v. Chief Metropolitan Stipendiary Magistrate, ex parte*

power to control the content of newspapers;¹⁴ a practice that offended the colonists.¹⁵ British authorities also prosecuted colonists for their speech. Perhaps the most famous seditious libel prosecution in the colonies involved John Peter Zenger.¹⁶ When Zenger, a New York publisher, published stories mocking the royal Governor and his administration, he was prosecuted for seditious libel.¹⁷ While Zenger languished in jail for eight months awaiting trial, the Royal Governor arranged for the disbarment of his lawyers for stating exceptions on Zenger's behalf.¹⁸ When the case was finally tried, Zenger's lawyer admitted that Zenger had published the allegedly libelous statements, and offered to concede the libel if the prosecution could prove that the allegations were false.¹⁹ When the prosecution declined, the lawyer offered to prove that the statements were true.²⁰ Although the court disallowed the evidence on the then valid basis that truth was immaterial, Zenger was acquitted in what is viewed as an illustration of jury nullification.²¹

Also in the colonies, James Franklin (Benjamin Franklin's brother), who published *The Courant*, was jailed at one point for showing "disrespect" to governmental officials.²² Because James had a tendency "to mock religion and bring it into disrespect," a court ordered that "'James Franklyn, the printer and publisher [of the Courant], be strictly forbidden by this court to print or publish the New England Courant' unless he submitted each issue of

Choudhury [1991] 1 QB 429 (Eng.); and then citing William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. St. B. J. 48 (1996)).

14. See H.W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN* 31 (2000) ("Declaring that the tendency of the *Courant* was 'to mock religion and bring it into disrespect,' the General Court ordered that 'James Franklyn, the printer and publisher thereof, be strictly forbidden by this court to print or publish the New England Courant' unless he submitted each issue of the paper to the censor for prior approval.").

15. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002) (first citing William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Publishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982); then citing FRED SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS* 240 (1952); and then citing WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 152 (1769)).

16. See Elizabeth I. Haynes, *United States v. Thomas: Pulling the Jury Apart*, 30 CONN. L. REV. 731, 744 (1998) (citing JOHN GUNTHER, *THE JURY IN AMERICA* 27 (1988)).

17. See *id.* (citing GUNTHER, *supra* note 16, at 27).

18. See *THE RIGHT TO SPEAK ILL*, *supra* note 13, at 7 (citing *Cohen v. Hurley*, 366 U.S. 117, 140 (1961) (Black J., dissenting)).

19. *Id.* (citing William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. STATE BAR J. 48, 50 (1996)).

20. *Id.* (citing Glendon, *supra* note 19, at 50).

21. See Haynes, *supra* note 16, at 744-45 (citing GUNTHER, *supra* note 20, at 27-30).

22. See BRANDS, *supra* note 14, at 30 (noting that James was ultimately imprisoned for about 30 days).

the paper to the censor for prior approval.”²³ James was also prosecuted for printing a fake letter to the editor (fake in the sense that James was the real author, but he attributed the letter to someone else) that implied that the authorities were not pursuing pirates (operating off the New England coast) with sufficient vigor.²⁴ In that letter, James reported (sarcastically) that the captain, who was heading up the expedition against the pirates, “will sail sometime this month, if wind and weather permit.”²⁵ James was jailed for publishing this letter, and Benjamin Franklin was questioned, but ultimately released.²⁶ Many believed that the arrest was politically motivated, and was designed simply to silence James for his stinging political commentaries.²⁷ While his brother was in prison, Benjamin Franklin continued publishing the newspaper.²⁸ When Benjamin left Boston for New York, he was motivated in part by a fear of prosecution by Boston’s elite.²⁹ Subsequently, well aware of what had happened to his brother, Benjamin Franklin was sometimes cautious about using his newspaper to provoke the authorities.³⁰

Because of the colonial abuse, when the early Americans achieved independence from England in the late eighteenth century, the Framers of the U.S. Constitution retained a healthy skepticism of governmental authority which led them to attempt to restrict the scope of federal authority.³¹ One way they sought to achieve that objective was by providing the federal government with only limited and enumerated powers.³² In addition, the

23. *Id.* at 31.

24. *Id.* at 29.

25. *Id.*

26. *Id.* at 30.

27. *Id.* (“A commonly accepted explanation was that ever since the smallpox scuffles [in which James Franklin had opposed Cotton Mather], the court had been seeking an excuse to silence the turbulent pressman; this was simply the excuse that fell to hand.”).

28. *Id.*

29. *Id.* at 34 (“Consequently Ben saw no recourse but flight—which recommended itself on other grounds as well. To a curious boy, Boston had been an exciting place; to an independent-minded young man, it was starting to stifle. The Mathers did not say such threatening things about Ben as about James, but it was clear they and their supporters had doubts about the younger Franklin too . . . Now might be a good time to leave, before the clerics and judges came after him as they had come after James. ‘It was likely I might if I stayed soon bring myself into scrapes.’”).

30. *Id.* at 114 (“Some journalists enter their profession from a zeal to right wrong and oppose entrenched authority; this was what had motivated Franklin’s brother James—and landed James in jail. Ben Franklin certainly learned from James’s experience and from his own experience on James’s paper. He had no desire to publish from prison, and even less desire to *not* publish from prison or anywhere else. Journalism for him was a business rather than a calling, or perhaps it was a calling that could call only so long as the business beneath it flourished. Unlike James, Ben Franklin would not provoke the authorities into closing him down. If nothing else, such rashness would lose him his primary contract with the provincial government.”).

31. See U.S. CONST. art. I, § 8.

32. See *id.*

Framers embraced the ideas of Baron de Montesquieu, who is credited with articulating the doctrine of separation of powers,³³ and incorporated that doctrine throughout the Constitution.³⁴ Having gone to great lengths to restrain the scope of federal authority in the U.S. Constitution, the Framers decided that a bill of rights was unnecessary, believing that they had sufficiently protected the people against federal governmental authority.³⁵ That decision was met with vigorous dissent by those who believed that they needed explicit protections for various rights.³⁶ These objections nearly derailed the ratification process,³⁷ and ultimately led to a compromise: the Constitution would be adopted “as is,” but the first Congress would create what would become the Bill of Rights.³⁸ As a result, the Bill of Rights entered the Constitution as the first ten amendments to the U.S. Constitution.³⁹

33. See CHARLES BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 152 (Thomas Nugent trans., Cosimo Classics 2011) (1914) (“[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”).

34. See U.S. CONST. art. I, § 7 (“Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.”).

35. See *Wallace v. Jaffree*, 472 U.S. 38, 92–93 (1985) (Rehnquist, J., dissenting) (“During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.”).

36. See *id.* at 93 (Rehnquist, J., dissenting).

37. See *id.*

38. See *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (“But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.” (first citing *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot 2d ed. 1836); then citing LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 26–34 (1999); and then citing 1 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS & DEVELOPMENT* 110, 118 (7th ed. 1991)).

39. See *id.* (first citing *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 38; then citing LEVY *supra* note 38; and then citing KELLY ET AL., *supra* note 38); see *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.” (first citing 1 *ANNALS OF CONG.* 431–33, 662, 730 (1789); then citing *Barron v. Baltimore*, 32 U.S. 243 (1833); then citing EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 10–34 (1957); and then citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 697–980, 983–84 (1971)).

One of the rights insisted upon by the objectors was the right to freedom of expression, and it was protected in the very first amendment.⁴⁰ Given the history of speech suppression, the new Americans were determined to enshrine explicit protections for speech and press.⁴¹ This solution was not perfect. Following the adoption of the First Amendment, the new government sought to prosecute dissenters through the Alien and Sedition Act.⁴² However, that Act was later repealed, the convictions repudiated, and the fines repaid.⁴³

But the legacy of the colonial period, and the limits on governmental authority, were solidly entrenched in the soul of the American people. Over the centuries, the U.S. Supreme Court has reaffirmed the right of the people to express their opinions on matters of public interest,⁴⁴ and have generally rejected governmental attempts to regulate or control public discourse.⁴⁵

Of course, the Court has recognized that there are certain discrete categories of speech that the government may regulate or control.⁴⁶ These categories include such things as child pornography,⁴⁷ obscenity,⁴⁸ fighting words,⁴⁹ and true threats.⁵⁰ Otherwise, the people remain free to speak their mind on matters of public interest,⁵¹ and the government may not generally impose “content-based” or “viewpoint-based” restrictions on speech⁵² and cannot censor speech simply because the government holds a different view.

40. See U.S. CONST. amend. I.

41. See *id.*

42. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 273-74 (1964).

43. See *id.* at 276.

44. See *N.Y. Times*, 376 U.S. at 269; *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339, 341 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office . . . [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” (first citing *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (*per curiam*); and then citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“[P]olitical speech [is] at the core of what the First Amendment is designed to protect.”)).

45. See *United States v. Alvarez*, 567 U.S. 709 (2012).

46. See U.S. CONST., *supra* note 40.

47. See *New York v. Ferber*, 458 U.S. 747 (1982).

48. See *Miller v. California*, 413 U.S. 15 (1973).

49. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

50. See *Virginia v. Black*, 538 U.S. 343, 344 (2003).

51. See U.S. CONST., *supra* note 40.

52. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 (1986)).

In other words, in the U.S. Constitution, as well as in the First Amendment, the American people essentially rejected the types of governmental repression that was imposed following Gutenberg's invention of the printing press. Today, although the government has the power to require individuals to hold a federal license in order to use the broadcast waves,⁵³ and also has the power to impose content-based restrictions on that medium,⁵⁴ most other speech is free of governmental restrictions of that nature.⁵⁵ Indeed, licensing schemes (outside the broadcast area) are regarded as prior restraints and are presumptively unconstitutional.⁵⁶ Courts treat broadcast communication differently because there is a scarcity of broadcast waves, signals would conflict if everyone were allowed to use the air waves without regulation⁵⁷ and those that are able to obtain licenses essentially serve as fiduciaries in their use of those waves.⁵⁸ By contrast, "printing" can now be done with personal computers and home printers, technologies that are essentially accessible by everyone.⁵⁹ Likewise, in an internet and social media era, there is no scarcity problem and no inherent limits on the number of people who can communicate.⁶⁰ In addition, content censorship—requiring individuals to submit their manuscripts to censors in order to obtain permission to publish—are essentially forbidden.⁶¹ Licensing systems are regarded as "prior restraints" on speech and are presumptively unconstitutional.⁶² Similarly, the crime of seditious libel has been abolished.⁶³

The U.S. Constitution and the Declaration of Independence envision a governmental system which vests sovereignty in the people.⁶⁴ Not only does the government exist through the "consent of the governed,"⁶⁵ but major components of the government (in particular, the President and Congress) are elected by the people through a popular vote (albeit, in the case of the President, a popular vote that is filtered through the Electoral College on a

53. See *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

54. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

55. See e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

56. See *id.*

57. See *Red Lion Broad.*, 395 U.S. at 390.

58. See *id.* at 389.

59. See generally RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 63–65 (2nd ed. 2019).

60. See generally *id.*; see also *Reno v. American Civ. Liberties Union*, 521 U.S. 844 (1997).

61. See *Lovell*, 303 U.S. at 444.

62. See *id.* at 451–52.

63. See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

64. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

65. *Id.*

state-by-state basis).⁶⁶ To the extent that the people must make decisions regarding candidates or issues, freedom of expression is one of the essential building blocks in American democracy.⁶⁷ Indeed, the U.S. Supreme Court has emphatically stated that “speech concerning public affairs is more than self-expression; it is the essence of self-government”⁶⁸ and “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” so that “changes may be obtained by lawful means.”⁶⁹

Going hand in hand with the right of free expression is the corresponding right to be free of governmental censorship.⁷⁰ While the U.S. government might have the authority to prohibit a few limited categories of unprotected speech (e.g., child pornography),⁷¹ it does not generally have the power to censor and control citizen debates on matters of public interest.⁷² The U.S. Supreme Court expressed a similar idea in *Matal v. Tam*, a case in which the Court emphasized the importance of having government act with viewpoint neutrality, because “the right to create and present arguments for particular

66. See U.S. CONST., Art. II, § 1.

67. See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245 (1961); U.S. CONST. amend. I.

68. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)) (cleaned up); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., White, J., Blackmun, J., concurring) (“Core political speech occupies the highest, most protected position”); see also *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

69. *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (first quoting *Roth*, 354 U.S. at 484; and then quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office . . . [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” (cleaned up) (first citing *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); and then citing *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“Political speech [of course, is] at the core of what the First Amendment is designed to protect.”).

70. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

71. See generally RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, MATERIALS & PROBLEMS* 69–178 (Carolina Academic Press, 7th ed. 2023) [hereinafter *THE FIRST AMENDMENT*] (describing content-based speech restrictions).

72. See generally *id.*

positions in particular ways, as the speaker chooses,” is necessary to prevent government from silencing dissent and distorting the public debate.⁷³

II. FREEDOM OF EXPRESSION IN A CHANGING COMMUNICATIONS LANDSCAPE

The Biden Administration’s actions arose in the context of the internet and the proliferation of social media platforms. As we shall see, since most speech now goes through those platforms, governments have a unique ability to pressure the platforms to suppress speech.

Of course, governmental attempts to suppress speech are nothing new. Johannes Gutenberg introduced movable type into Europe in the fifteenth century,⁷⁴ thereby enabling printers to type set a page and relatively quickly create multiple copies of that page, and eventually create books and other documents.⁷⁵ The printing press was transformative because although it did not increase the speed at which information moved, it made it possible to create and disseminate multiple copies of documents, allowing information to spread more broadly. The printing press led to a flowering of knowledge, information and ideas,⁷⁶ as well as to the Protestant Reformation⁷⁷ and to changes in governmental systems.⁷⁸

Because the printing press was a transformative technology, governments actively sought to limit and control its use.⁷⁹ Perhaps Kings correctly perceived that the printing press would ultimately lead (as it did) to the demise of monarchy as a governing institution in Europe.⁸⁰ To control printing, the English imposed an array of licensing schemes.⁸¹ For one, the government limited the total number of printing presses that could exist,⁸²

73. *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring).

74. See CHARLES T. MEADOW, *MAKING CONNECTIONS: COMMUNICATION THROUGH THE AGES 64–65* (2002) (“Johannes Gutenberg did not invent the printing press. Nor was he the first to use movable type but he brought the movable-type printing press into existence in the western world. Printing of a sort, was known in China as far back as the seventh century CE. This was printing from wood blocks into which reverse images of written ideographs were carved It is something like using a large rubber stamp.”).

75. See WEAVER, *supra* note 59, at 9–11.

76. See *id.* at 12–13.

77. See *id.* at 13–14.

78. See *id.* at 14–18.

79. See *id.* at 115.

80. See *id.*

81. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002) (citing William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982)).

82. See Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1072 (2009)

and it did so with the objective of controlling the flow of information by limiting the number of people who could print material, and by choosing who received those licenses.⁸³ The English government also enacted the Printing Act of 1662 which imposed a licensing requirement, allowing the government to withhold licenses from those whose views it found objectionable,⁸⁴ and prohibiting the publication of any book or pamphlet without a license specifically authorizing its publication.⁸⁵ Those who wished to publish a document were required to submit it for review and a license could be denied if a governmental censor deemed it to contain objectionable content.⁸⁶

The English even went so far as to impose the crime of seditious libel, which allowed them to prosecute those who criticized the Crown and certain high-level religious officials.⁸⁷ The British Crown aggressively used seditious libel prosecutions as a way to intimidate and silence governmental critics.⁸⁸ Moreover, truth was not a defense.⁸⁹ Indeed, proof of truth was an aggravating factor that could draw a more severe sentence: "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood . . . [and] was eliminated as a defense."⁹⁰

Similar restrictions were imposed in other countries. Prior to the French Revolution, the French government imposed licensing restrictions and censorship.⁹¹ A 1563 edict required that all books be licensed prior to

(first citing Edward Lee, *Freedom of the Press 2.0*, 42 Ga. L. Rev. 309 (2008); then citing HIS MAJESTY'S STATIONARY OFFICE, ACTS AND ORDINANCES OF THE INTERREGNUM 1642–1660 (C. H. Firth & R. S. Rait eds., 1911); then citing Star Chamber Decree for Orders in Printing, 1586; and then citing Raymond Asbury, *the Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 LIBR. 195, 195 (1978)).

83. See *Thomas*, 534 U.S. at 320 (quoting Mayton, *supra* note 81, at 248).

84. See *id.* (first citing Mayton, *supra* note 81; then citing FRED SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476–1776* (1952); and then citing BLACKSTONE, *supra* note 15, at 86); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

85. See *Thomas*, 534 U.S. at 320 (quoting Mayton, *supra* note 81, at 248); see also SIEBERT, *supra* note 84, at 239–41.

86. See *Lovell*, 303 U.S. at 451; see also *City of Lakewood v. Plain Dealer Publ'g, Co.*, 486 U.S. 750, 757 (1988); *Lowe v. SEC*, 472 U.S. 181, 205 (1985) (citing *Lovell*, 303 U.S. at 444).

87. The crime of seditious libel was based on the holding *De Libellis Famosis*, [1606] 77 Eng. Rep. 250 (Star Chamber).

88. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) (first citing WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 341 (1922); and then citing LEONARD WILLIAMS LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 10 (1960)).

89. See *id.* at 103 (citing *De Libellis Famosis*, 77 Eng. Rep. at 251).

90. *Id.* (citing *De Libellis Famosis*, 77 Eng. Rep. at 251).

91. See John B. Thompson, *The Trade in News*, in *COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY* 113, 116 (Karon Bowers ed., 2007) ("In France, a centralized

publication, and gave governmental authorities discretionary power to censor material.⁹² In Germany, governmental authority was intertwined with church authority and gave the Catholic Church the power to censor publications that were regarded as “heretical” works.⁹³ In response to Martin Luther’s attack on indulgences, Emperor Charles V commanded that all of Luther’s writings be burned.⁹⁴

Despite these governmental efforts, attempts to suppress speech were not always effective. Charles V’s edict against Luther’s writings spurred great interest and almost “desperate eagerness” to read everything that Luther wrote.⁹⁵ Thus, even though Luther’s attack on indulgences was banned, thousands of copies were printed, some of which ridiculed the Pope.⁹⁶ Four thousand copies of one pamphlet were distributed within three weeks, and the pamphlet ultimately went through thirteen to twenty-five editions.⁹⁷ Reformation works were printed even in cities that were primarily Catholic.⁹⁸ Although the Catholic Church tried to suppress these “heretical” writings, secular officials did not always cooperate.⁹⁹

During the fifteenth to the eighteenth centuries, governmental repression led to the creation of an underground book trade.¹⁰⁰ Banned books were highly sought after, commanding high prices,¹⁰¹ and the sale of contraband literature was “an everyday feature of the city scene at that time.”¹⁰² In the sixteenth century, a royal decree only allowed a small number of Parisian printers to publish books.¹⁰³ However, the decree was never enforced and more books were published in the year after the decree than the year before.¹⁰⁴ A 1547 decree prohibited the sale of any book that had not previously been submitted to governmental censors.¹⁰⁵

and highly restrictive system of licensing, supervision and censorship existed until the Revolution . . .”).

92. See LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800* 246 (1976).

93. See *id.* at 244.

94. See *id.* at 290.

95. See *id.* at 291–92.

96. *Id.* at 291 (“To ridicule the Pope and the monks, pamphlets entitled *Pope Donkey* and *Cow Monk* were produced.”).

97. See *id.* at 291–92.

98. See *id.* at 292.

99. See *id.* at 245.

100. See *id.* at 244.

101. See *id.* at 238.

102. *Id.*

103. See *id.* at 310.

104. See *id.*

105. See *id.* at 310–11.

In the sixteenth century, the book trade flourished even though “many street vendors were burned at the stake because they were caught selling heretical books,”¹⁰⁶ and even though the French king forbade the printing of banned books “on pain of death by hanging.”¹⁰⁷ In the seventeenth and eighteenth centuries, “many [Frenchmen] were sent to the Bastille for having sold pamphlets hostile to the royal authority.”¹⁰⁸ Despite the persecutions, “banned books continued to circulate more or less everywhere with the same ease.”¹⁰⁹ For book sellers, the banned books attracted considerable interest and substantial profits.¹¹⁰ However, some publishers, fearful of prosecution, set up operations just outside of France and shipped banned publications into the country.¹¹¹ Imported books easily moved past governmental officials, even into monasteries and seminaries,¹¹² and French publishers frequently omitted their addresses from banned books that they published.¹¹³

But the printing press, like the more advanced technologies that came later (e.g., radio, television, satellite and cable) was under the control of “gatekeepers” who controlled the use of that technology.¹¹⁴ The Gutenberg printing press was relatively expensive to obtain, requiring not only the purchase of a printing press, but also the purchase of lead type, ink and other essential components, meaning that only a few individuals could afford to own and operate a printing press, and those few could exercise “gatekeeper” power over the technology.¹¹⁵ In other words, they had the power to decide

106. *Id.* at 238, 309–10 (“November 1534 saw the first series of spectacular executions. On the 10th it was a printer who was burned, for having printed and bound the ‘false works’ of Luther, and on the 19th, it was the turn of a bookseller.”).

107. *Id.* at 310.

108. *Id.* at 238–39.

109. *Id.* at 246.

110. *Id.* at 304–05.

111. *See id.* at 298–99 (noting that Reformation French-language publications were created in Germany and Belgium and smuggled into France: “Such books printed just beyond the borders of France, often at the instigation of Frenchmen, entered France in large numbers and with ease”—indeed, an underground network developed).

112. *See id.* at 316 (“[H]eretical books poured into France. Not simply in a few isolated copies, but in hundreds at a time in packing cases, in the baggage of a merchant or the wagon of a colporteur. As there was no effective police force the risks of being caught on the road were few, except perhaps by watchmen at the city gates. But how were watchmen to find the crate or crates of books among all the other crates of legitimate merchandise, especially if, as a further precaution, the books were concealed under other goods?”).

113. *See id.* at 307 (“The truth is that French booksellers were able in many cases to go on selling and printing heterodox literature in response to the demands of their eager clients without running any serious risk, so long as they acted prudently and adopted a few elementary subterfuges Thus editions of doubtful orthodoxy multiplied despite all the condemnations.”).

114. *See* WEAVER, *supra* note 59, at 5.

115. *See id.* at 7.

who could use print technology and what they could say.¹¹⁶ Subsequent technologies, including radio,¹¹⁷ television¹¹⁸ and satellite communications,¹¹⁹ all came with their own gatekeepers.¹²⁰ They required substantial technological investments, and some broadcast communications like radio and television also required an operating license, and this combination of factors meant that only a small number of people (or corporations) could own and operate them.¹²¹ Those who controlled those communications technologies could exercise gatekeeper control.¹²² Thus, these new technologies did not enable ordinary people to mass disseminate their own ideas absent the assent of gatekeepers.

The internet was a transformative technology because it was the first technology that enabled ordinary individuals to communicate on a mass scale,¹²³ as well as to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information.¹²⁴ This broadening of communicative capacity had a profound impact on modern societies, propelling new social movements and societal changes.¹²⁵ However, the great strength of the internet—the enabling of mass communication by ordinary individuals—has also proven to be its greatest weakness.¹²⁶ As the internet enabled mass communication by virtually everyone, it created the potential for mischief. Using devices such as Twitter (now X), WhatsApp, Facebook, and other social media platforms, individuals could easily distribute political arguments, truthful information and disinformation.¹²⁷ As a result, there has been a dramatic rise in the quantity of disinformation. As one commentator noted, “digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings.”¹²⁸ In 2018, there “were doctored photos . . . of Latin

116. *See id.* at 3.

117. *See* DAVID CROWLEY & PAUL HEYER, *COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY* 204 (5th ed. 2007).

118. *See id.* at 243.

119. *See* RUTH SCHWARTZ COWAN, *A SOCIAL HISTORY OF AMERICAN TECHNOLOGY* 313 (1997).

120. *See* WEAVER, *supra* note 59, at 3.

121. *See id.* at 3, 15.

122. *See id.* at 3.

123. *See id.* at 37.

124. *See id.* at 39.

125. *See generally id.* at 79–142.

126. *See generally id.* at 73–74.

127. *See* Kevin Roose, *Facebook Had a Good Election, But It Can't Let Up on Vigilance*, N.Y. TIMES, Nov. 8, 2018, at B1.

128. *Id.*

American migrants headed towards the United States border,”¹²⁹ and “easily disprovable lies about the woman who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad-faith agendas.”¹³⁰ Indeed, “[e]very time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger.”¹³¹

In recent years, as public discourse has shifted to social media platforms such as X and Facebook, those platforms have increasingly become the new “gatekeepers” of communication in the sense that they have the ability to control what people say, and have exercised that authority by removing, demoting, or taking down social media posts. Thus, just as the publishers of newspapers could control what was published in their papers, those who own and control social media platforms can regulate and control what is posted on their platforms.

Historically, social media platforms were viewed as private entities and therefore regarded as exempt from First Amendment protection (which only restricts governmental action).¹³² Freed from the constraints of the First Amendment, social media platforms seemingly possessed broad authority to censor content. Their authority was reinforced by Section 230 of the Communications Decency Act of 1996 (CDA) which gave social media platforms broad protection against civil liability for information posted on their platforms by others,¹³³ and contained a “Good Samaritan” defense which explicitly gave them the power to censor posts on their platforms without the risk of civil liability.¹³⁴ That defense reads as follows:

No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹³⁵

Section 230 is unique. If the government had tried to restrict the type of speech that Section 230 allows social media companies to prohibit, the

129. *Id.*

130. *Id.*

131. *Id.*

132. See Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 127 (2022).

133. See Communications Decency Act of 1996, 47 U.S.C. § 230.

134. See *id.* § 230(c).

135. *Id.*

governmental restrictions would undoubtedly have been struck down as unconstitutional. Indeed, Section 230 allows social media companies to remove material that is “excessively violent, harassing, or otherwise objectionable.”¹³⁶ Undoubtedly, such language suffers from an unconstitutional level of vagueness¹³⁷ and overbreadth.¹³⁸ Moreover, it is doubtful whether speech that is regarded as “lascivious” or “filthy” or “otherwise unobjectionable” would be treated as “unprotected speech” unless it is obscene or involves child pornography.¹³⁹ That is presumably why the CDA explicitly gives social media companies the authority to censor speech “whether or not such material is constitutionally protected.”¹⁴⁰

The nature of social media platforms gives the government a unique opportunity to repress speech.¹⁴¹ Since social media platforms are the “gatekeepers” of speech on their platforms, and can easily control or remove posts, the government can easily pressure them to engage in content moderation,¹⁴² and can thereby affect and control how people discuss the issues of the moment. Moreover, government may not merely attempt to influence how the public talks about current issues, it can attempt to persuade (or sometimes coerce) social media platforms into censoring the speech of users by removing it from their platforms. Even worse, the government can take these actions surreptitiously by interacting directly with social media platforms.¹⁴³ Thus, while individuals may realize that their posts are being removed from social media platforms, they might not know that the government is behind the take down.

In some respects, social media platforms are uniquely vulnerable to governmental persuasion. For one thing, social media platforms are “critically dependent on the protection provided by [Section] 230 of the CDA of 1996,¹⁴⁴ . . . which shields them from civil liability for content” posted by others on their platforms, and the government has the power to remove that protection.¹⁴⁵ In addition, social media platforms can be subjected to antitrust

136. *Id.*

137. *See generally* THE FIRST AMENDMENT, *supra* note 71, at 427–41, (discussing of the vagueness doctrine).

138. *See id.* (discussing the overbreadth doctrine).

139. *See generally* *Brown v. Entertainment Merch. Assoc.*, 564 U.S. 786 (2011).

140. 47 U.S.C. § 230(c)(2).

141. *See* *Murthy v. Missouri*, 603 U.S. 43, 80 (2024) (Alito, J., dissenting) (“[I]nternet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources.”).

142. *See id.*

143. *See id.* at 80–90 (describing actions the government took with Facebook in regards to speech posted on the social media platform).

144. 47 U.S.C. § 230.

145. *Murthy*, 603 U.S. at 80 (Alito, J., dissenting).

prosecutions.¹⁴⁶ In the case of social media platforms, as we shall see, the Biden Administration routinely threatened the platforms with antitrust actions, something which Facebook CEO Mark Zuckerberg described as an “existential” threat to his company.¹⁴⁷ Finally, since the major social media platforms operate all over the world, including Europe, they depend on the U.S. government to provide diplomatic cover and protection.¹⁴⁸

III. THE BIDEN ADMINISTRATION AND SPEECH REPRESSION

The evidence shows that the Biden Administration engaged in an aggressive surreptitious effort to control speech on the various social media platforms. To achieve its objectives, the Administration clandestinely encouraged, pressured, and even threatened social media platforms in an effort to get them to censor material with which the government disagreed or objected. In order to facilitate its efforts, the Administration promulgated a regulation requiring social media platforms to provide the Administration with information about their censorship decisions.¹⁴⁹ The Administration also pressured social media platforms to curb what it regarded as disinformation, flagging information that it wished to have censored, and even going as far as encouraging platforms to suspend and de-platform users.¹⁵⁰ The Administration’s actions may have been justifiable had they involved an imminent health emergency and the dissemination of disinformation that may have had a critical impact on that emergency. But the government sought censorship on both health-related and non-health-related issues, including a range of hot button issues such as Hunter Biden’s laptop (which will be

146. *See id.* at 85 (quoting Press Briefing by Press Secretary Jen Psaki and Secretary of Agriculture Tom Vilsack (May 5, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/press-briefings/2021/05/05/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-agriculture-tom-vilsack-may-5-2021/>).

147. *Id.* at 80 (quoting Casey Newton, *Read the Full Transcript of Mark Zuckerberg’s Leaked Internal Facebook Meetings*, THE VERGE (Oct. 1, 2019, 5:04 AM), <https://www.theverge.com/2019/10/1/20892354/mark-zuckerberg-full-transcript-leaked-facebook-meetings>).

148. *See id.* at 80–81.

149. *See Missouri v. Biden Jr.*, 680 F. Supp. 3d 630, 661 (W.D. La. 2023), *rev’d*, 603 U.S. 43 (2024), and *vacated*, 80 F.4th 641 (5th Cir. 2024) (describing a March 3, 2022, Request for Information (“RFI”) issued by the Office of the Surgeon General, “published in the Federal Register, seeking data from social media platforms about misinformation”). The RFI expanded the government’s efforts to control misinformation and requested details on censorship policies, enforcement, and disfavored speakers. *See id.* The RFI, sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft by Murthy’s Chief of Staff, Max Lesko, sought platform responses. Murthy later reiterated social media’s responsibility to reduce misinformation in a GQ interview and called on Spotify to censor health information. *See id.*

150. *See id.* at 641.

discussed more fully below),¹⁵¹ Covid-19,¹⁵² Covid vaccines,¹⁵³ Covid lockdowns,¹⁵⁴ climate change,¹⁵⁵ abortion,¹⁵⁶ gender discussions,¹⁵⁷ as well as health,¹⁵⁸ and economic policy.¹⁵⁹ Moreover, even regarding Covid or health issues the Administration sought to suppress even truthful information.¹⁶⁰

The evidence shows that Biden administration officials constantly interacted with social media platforms through emails, private portals, and meetings.¹⁶¹ During these interactions, White House officials “made it very clear to social-media companies what they wanted suppressed and what they wanted amplified.”¹⁶² For example, the day after the White House Press Secretary made remarks about removing the antitrust exemption from social media companies, White House officials followed up with emails demanding to know what the social media platforms were doing about alleged disinformation.¹⁶³

Although a few of the communications were aggressive and hostile,¹⁶⁴ the Biden Administration and the social media platforms began to refer to themselves as “partners” and as being “on the same team.”¹⁶⁵ Indeed, Twitter created a “partner portal” for governmental communications.¹⁶⁶ These communications led social media platforms to aggressively suppress information, even information that did not violate the platforms’ terms of use

151. *See id.* at 642.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 655.

156. *Id.*

157. *Id.* at 653.

158. *Id.*

159. *Id.* at 655.

160. *See id.* at 649 (e.g., the Biden administration sought to squelch a medical doctor’s discussion of acknowledged health risks regarding the Johnson & Johnson Covid vaccine).

161. *Id.* at 708.

162. *Id.* at 698.

163. *Id.* at 652 (describing an email from Flaherty to Facebook, in which he “chastised” the platform for failing to address COVID-19 misinformation, demanded data on content demotion, and criticized its handling of the “Disinformation Dozen,” stating: “Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach, and how quickly?”).

164. *Id.* at 653 (discussing how “[t]hings apparently became tense between the White House and Facebook . . . culminating in Flaherty’s July 15, 2021 email to Facebook, in which Flaherty stated: “Are you guys fucking serious? I want an answer on what happened here and I want it today”).

165. *Id.* at 697 (“The White House Defendants used emails, private portals, meetings, and other means to involve itself as “partners” with social-media platforms.”).

166. *Id.*

policies, but which the government simply wanted suppressed.¹⁶⁷ Governmental officials routinely “flagged” for Facebook and other social-media platforms posts the White House Defendants considered “misinformation.”¹⁶⁸ The White House followed up by demanding updates and reports from the platforms regarding their handling of the alleged disinformation, and the social-media companies usually complied with these demands for updates.¹⁶⁹

In addition to communicating with social media platforms, the Biden Administration threatened social media platforms in order to ensure compliance with the Administration’s wishes. For example, officials threatened to remove Section 230 liability protections from the platforms if they did not do more to censor “misinformation” and “disinformation.”¹⁷⁰ These threats were reinforced by “emails, meetings, press conferences, and intense pressure by the White House, as well as by the Surgeon General Defendants.”¹⁷¹ While threats were made under the Trump administration, the level of threats increased significantly under the Biden administration.¹⁷² The Biden administration’s efforts “paired with the public threats and tense relations between the Biden administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies.”¹⁷³ The threats were reinforced by public statements made by the President’s press secretary regarding potential antitrust actions against the major social media platforms if they did not act to curb disinformation.¹⁷⁴ Mark Zuckerberg (of Facebook which is owned by Meta) flatly declared that he regarded “the threat of antitrust enforcement [as]

167. *See id.* at 697–98.

168. *Id.* at 664.

169. *See id.* at 665.

170. *See id.* at 644, 697.

171. *Id.* at 697.

172. *Id.* at 715 (“Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct.”).

173. *Id.*

174. *Id.* at 652 (“At a White House Press Conference, Psaki publicly reminded Facebook and other social-media platforms of the threat of ‘legal consequences’ if they do not censor misinformation more aggressively. Psaki further stated: ‘The President’s view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19 vaccinations and elections.’ Psaki linked the threat of a ‘robust anti-trust program’ with the White House’s censorship demand. ‘He also supports better privacy protections and a robust anti-trust program. So, his view is that there’s more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public.’” (quoting Press Briefing, Press Secretary and Secretary of Agriculture Tom Vilsack, *supra* note 146)).

‘an existential threat to his platform.’”¹⁷⁵ Also, “the White House National Climate Advisor Gina McCarthy . . . blamed social-media companies for allowing misinformation and disinformation about climate change to spread and explicitly tied these censorship demands with threats of adverse legislation regarding the Communications Decency Act.”¹⁷⁶ Finally, the White House issued a memorandum about disinformation which specifically threatened the platforms with sanctions if they did not do enough to curb disinformation.¹⁷⁷ Thus, the U.S. government’s efforts were backed by implied and explicit threats to take action against social media platforms that were not in compliance with its wishes.

In the vast majority of instances, the Biden administration’s requests related to protected speech. The U.S. government was not seeking to censor unprotected speech such as obscenity, child pornography, or fraudulent commercial speech. As previously discussed, none of that speech is entitled to First Amendment protection,¹⁷⁸ can be prohibited, and the disseminator might even be subject to criminal prosecution.¹⁷⁹ However, the speech involved in the *Biden* case did not necessarily involve prohibited speech.¹⁸⁰ On the contrary, it involved topics like climate change,¹⁸¹ Covid-19,¹⁸² the efficacy and safety of Covid-19 vaccines,¹⁸³ and the Hunter Biden laptop story.¹⁸⁴ While some of the statements on those topics might be regarded as “inaccurate” or “disinformation,” none of the topics fell within one of the categories of unprotected speech. Thus, the statements were not otherwise prohibitible.

175. *Id.* at 644.

176. *Id.* at 655.

177. *Id.* (“On June 16, 2022, the White House announced a new task force to target ‘general misinformation’ and disinformation campaigns targeted at women and LGBTQI individuals who are public and political figures, government and civic leaders, activists, and journalists. The June 16, 2022, Memorandum discussed the creation of a task force to reel in ‘online harassment and abuse’ and to develop programs targeting such disinformation campaigns. The Memorandum also called for the Task Force to confer with technology experts and again threatened social-media platforms with adverse legal consequences if the platforms did not censor aggressively enough.”).

178. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (stating that First Amendment does not protect child pornography and obscene speech); *Miller v. California*, 413 U.S. 15 (stating the First Amendment does not protect obscene speech); *Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985) (stating that First Amendment does not protect commercial speech which is false (citing *Friedman v. Rogers*, 440 U.S. 1 (1979))).

179. See *Ferber*, 458 U.S. at 749; *Miller*, 413 U.S. at 19.

180. See *Missouri v. Biden*, 680 F. Supp. 3d, 630, 641 (W.D. La. 2023).

181. See *id.* at 655.

182. See *id.* at 642.

183. See *id.*

184. See *id.*

Regarding disinformation, the U.S. Supreme Court has made it clear that false speech is not necessarily prohibitible under the First Amendment.¹⁸⁵ *United States v. Alvarez* involved an individual's false assertion that he had won the Congressional Medal of Honor.¹⁸⁶ While *Alvarez* recognized that individuals could be prosecuted for false speech in limited and defined circumstances (e.g., perjury in a judicial proceeding or making false statements to a governmental official or agency),¹⁸⁷ the Court held that *Alvarez* could not be convicted for making a false statement to the effect that he won the medal.¹⁸⁸ Of course, if an individual disseminates false and defamatory information about another person, it might be possible to recover for defamation.¹⁸⁹ However, it is extremely difficult for public officials¹⁹⁰ and public figures¹⁹¹ to recover for defamation, and until recently, defamation litigation was relatively uncommon in the United States.¹⁹² In addition, courts are rarely permitted to enjoin false speech except for false commercial speech.¹⁹³ As such, the First Amendment generally prohibits the government from censoring speech simply because it regards that speech as disinformation. Indeed, the U.S. does not have "truth commissions" or "censorship boards" that are allowed to dictate which ideas and which facts are correct, and which are not. On the contrary, the U.S. Supreme Court has been wary of governmental attempts to control the flow of information, and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.¹⁹⁴ Ultimately, it is not for the government to dictate what people should believe, but rather for the people to decide for themselves. If the legitimacy of our governmental system

185. See *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (citing *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964)).

186. See *id.* at 713.

187. See *id.* at 734–35.

188. See *id.* at 729–30.

189. See generally *THE RIGHT TO SPEAK ILL*, *supra* note 13.

190. See *New York Times*, 376 U.S. at 283 (requiring actual malice in actions for "libel . . . brought by public officials against critics for their official conduct").

191. See *Curtis Publ'n v. Butts*, 388 U.S. 130, 155 (1967) (stating that a "'public figure' who is not a public official may also recover damages for a defamatory falsehood . . . on a showing of highly unreasonable conduct").

192. See Thad Lankiewicz, *Defamation: Think before Speaking, or Filing Suit*, 69 Boston Bar J. 24, 24 (2025).

193. See *Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985) (stating that First Amendment does not protect commercial speech which is false (citing *Friedman v. Rogers*, 440 U.S. 1 (1979))).

194. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (first citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (Kennedy, J., concurring in judgment); then citing *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); and then citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

depends on the consent of the governed, it is inconsistent with that system to give the government the power to control, limit, and suppress the range of ideas that the people can hear or consider.¹⁹⁵

The Biden administration's actions are particularly disturbing because the government's efforts to squelch disinformation sometimes resulted in the dissemination of disinformation, and the Biden administration effectively coerced social media platforms into collaborating with its efforts to disseminate disinformation. Consider, for example, the Hunter Biden laptop story.¹⁹⁶ Before the story broke, White House officials warned social media platforms that Russia was about to disseminate disinformation.¹⁹⁷ After the laptop story broke, fifty-one former intelligence officials came forward to brand the story as "Russian disinformation."¹⁹⁸ "The FBI additionally likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation" because, even though it had control of the laptop and knew that the allegations were true, the FBI failed to counteract the narrative that the story was false.¹⁹⁹ Even worse, "the FBI was included in Industry meetings and bilateral meetings, [and it] received and forwarded alleged misinformation to social-media companies, and actually mislead social-media companies . . . regard[ing] the . . . story."²⁰⁰

The governmental efforts were successful. After the story was released, most reputable news organizations denounced the allegations as "fake news," and refused to report the story even though there were allegations of corruption by the Bidens.²⁰¹ For example, National Public Radio (NPR), in a segment issued just a couple of weeks before the presidential election,

195. See *Ashcroft v. American Civ. Liberties Union*, 535 U.S. 564, 573 (2002) (first quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989); and then quoting *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 65 (1983)).

196. See *Missouri v. Biden Jr.*, 680 F. Supp. 3d 630, 642 (W.D. La. 2023).

197. See *id.* at 675 ("Before the Hunter Biden Laptop story breaking prior to the 2020 election on October 14, 2020, the FBI and other federal officials repeatedly warned industry participants to be alert for 'hack and dump' or 'hack and leak' operations.").

198. Luke Broadwater, *Officials Who Cast Doubt on Hunter Biden Laptop Face Questions*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/us/politics/republicans-hunter-biden-laptop.html>; see Weekend Edition Saturday, *More Details Emerge in Federal Investigation into Hunter Biden*, NPR (Apr. 9, 2022, 8:25 AM), <https://www.npr.org/2022/04/09/1091859822/more-details-emerge-in-federal-investigation-into-hunter-biden> ("And then there was this cohort of paid pundits - 50 former national security officials, many of them appearing frequently in mainstream media outlets - who came together for a statement saying that this surfacing of the laptop bore all the hallmarks of a Russian misinformation campaign." (quoting David Folkenflik)).

199. *Biden Jr.*, 680 F. Supp. 3d at 702.

200. *Id.* at 701.

201. See Robby Soave, *The Mainstream Media is Still in Denial About Hunter Biden's Laptop*, REASON (June 13, 2024), <https://reason.com/2024/06/13/the-mainstream-media-is-still-in-denial-about-hunter-bidens-laptop/>.

dismissed the laptop story as “questionable,”²⁰² and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies.²⁰³ The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting that Trump’s allies were pushing “Russian disinformation,”²⁰⁴ and the New York Times suggested that Trump was colluding with the Russians and dismissed the story stating that “Giuliani’s dirty tricks are the scandal, not Hunter Biden’s hard drive.”²⁰⁵

On social media networks, including Facebook and Twitter, the story was essentially squelched due, in large part, to the government’s suppression efforts.²⁰⁶ Not only did Twitter squelch the story,²⁰⁷ it blocked users from sharing links to the New York Post story and prevented users who had previously sent tweets sharing the story from sending new tweets until they deleted their prior tweets.²⁰⁸ Further, Facebook began reducing the story’s distribution on its platform pending a third-party fact-check.²⁰⁹

Today, reputable news organizations recognize that the Hunter Biden laptop story was not “disinformation,” “fake news,” or “Russian propaganda.” A New York Times article, citing reporting by a staff member at Politico, stated that “the most explosive emails from Hunter Biden’s purported laptop were entirely genuine” and were not simply Russian-planted disinformation.²¹⁰ Even NPR has recognized that there was some validity to the allegations regarding the laptop: “much of the mainstream

202. See David Folkenflik, *Analysis: Questionable ‘N.Y. Post’ Scoop Driven by Ex-Hannity Producer and Giuliani*, N.P.R. (Oct. 17, 2020, 7:00 AM), <https://www.npr.org/2020/10/17/924506867/analysis-questionable-n-y-post-scoop-driven-by-ex-hannity-producer-giuliani>.

203. See *id.* (“The story fits snugly into a narrative from President Trump and his allies that Hunter Biden’s zealous pursuit of business ties abroad also compromised the former vice president.”).

204. See *Are Trump Allies Sharing Russian Disinformation About Biden?* (PBS News Hour Clip Oct. 16, 2020), <https://www.pbs.org/video/warning-signs-1602880956/>.

205. See Michelle Goldberg, *Is the Trump Campaign Colluding with Russia Again?*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/19/opinion/trump-campaign-rudy-giuliani.html>.

206. See *More Details Emerge in Federal Investigation into Hunter Biden*, *supra* note 198 (stating that platforms “tamped down on sharing of the . . . story” by Twitter suspending the publisher’s Twitter account and blocking the sharing of the story).

207. See *id.* (“First, let’s acknowledge social media’s role. A number of platforms tamped down on sharing of the Post’s story. In the case of Twitter, not only did they try to block sharing of it, they suspended The New York Post’s actual Twitter account for sharing its own article. That was a wild overreach, and even Twitter had to acknowledge that.” (quoting David Folkenflik)).

208. See *id.*

209. See *id.*; David Molloy, *Zuckerberg Tells Rogan FBI Warning Prompted Biden Laptop Story Censorship*, BBC (Aug. 26, 2022), <https://www.bbc.com/news/world-us-canada-62688532>.

210. See Bret Stephens, *An Ethically Challenged Presidency*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/opinion/biden-ethics-son.html>.

media dismissed a story about Hunter Biden's business dealings[,] [n]ow emails supporting the story have been authenticated,"²¹¹ and the Boston Globe questioned its decision to suppress the story.²¹²

IV. COMPARISONS TO SPEECH REPRESSION IN CHINA AND RUSSIA

Considering what the Biden administration has done, it is appropriate to inquire whether there are meaningful distinctions to be made between what the Biden administration did, and the speech repression imposed by more authoritarian regimes.

One distinction that might be made is that the Biden administration's actions were more surreptitious whereas speech repression in China and Russia is more blatant and open. China has developed "the world's most sophisticated and brutal internet censorship system, called the Great Firewall."²¹³ Under the Chinese system, many social platforms are completely blocked, including Google, Twitter, Facebook, and "thousands of other foreign websites."²¹⁴ Indeed, even the New York Times is blocked on the Chinese internet.²¹⁵ Likewise, Russia banned Apple and Google from providing the LinkedIn app.²¹⁶ For China, the goal of internet regulation is to create a "harmonious society," including "stability above all," as well as to prevent social unrest.²¹⁷ As part of this effort, China has created the Golden

211. See *More Details Emerge in Federal Investigation into Hunter Biden*, *supra* note 198.

212. See Hiawatha Bray, *We Ignore Musk's 'Twitter Files' At Our Peril*, BOSTON GLOBE (Jan. 19, 2023), <https://www.bostonglobe.com/2023/01/19/business/we-ignore-musks-twitter-files-our-peril/> ("Another discovery: There's no evidence of any "deep state" conspiracy behind Twitter's decision to suppress the New York Post's October 2020 story about the contents of a laptop belonging to President Biden's son Hunter. Twitter executives screwed up that decision all by themselves. They chose to believe a false allegation that the data had been stolen by hackers.").

213. See Li Yuan, *The Infowards Hubbub, and China's Chokehold*, N.Y. TIMES (Aug. 13, 2018), at B3.

214. *Id.*

215. See Keith Bradsher, *China Blocks Web Access to Times After Article*, N.Y. TIMES (Oct. 25, 2012), <https://www.nytimes.com/2012/10/26/world/asia/china-blocks-web-access-to-new-york-times.html>.

216. See Cecilia Kang & Katie Benner, *Russia Requires Apple and Google to Remove LinkedIn from Local App Stores*, N.Y. TIMES (Jan. 6, 2017), [https://www.nytimes.com/2017/01/06/technology/linkedin-blocked-in-russia.html#:~:text=Russia%20Requires%20Apple%20and%20Google%20to%20Remove%20LinkedIn%20From%20Local%20App%20Stores,Share%20full%20article&text=WASHINGTON%20%E2%80%94Smartphone%20users%20in%20Russia,York%20Times%20app%20on%20iPhones](https://www.nytimes.com/2017/01/06/technology/linkedin-blocked-in-russia.html#:~:text=Russia%20Requires%20Apple%20and%20Google%20to%20Remove%20LinkedIn%20From%20Local%20App%20Stores,Share%20full%20article&text=WASHINGTON%20%E2%80%94Smartphone%20users%20in%20Russia,York%20Times%20app%20on%20iPhones.).

217. See Andrew Jacobs & Jonathan Ansfield, *For China, "Stability Above All"; State Pours Resources Into Monitoring Critics and Quelling Dissent*, INT. HERALD TRIBUNE, Dec. 10, 2010, at News 6.

Shield Project which involves a national filtering system,²¹⁸ used to preclude citizens from accessing certain foreign news sources,²¹⁹ and to block Gmail (Google's electronic mail service).²²⁰ China has placed restrictions on web access,²²¹ blog postings,²²² and internet use,²²³ including restrictions on political speech,²²⁴ as well as on the websites of international news organizations such as CNN and the BBC.²²⁵ China also requires computer manufacturers to install internet filtering software, and China has shut down more than 700 internet websites, including Facebook, Twitter and YouTube.²²⁶ In addition, China prohibits Chinese journalists from reporting unverified information that they find on the internet.²²⁷ China has pressured Google to filter and limit information that it makes available over the internet in China.²²⁸ In response, Google moved its search engine out of mainland

218. See James Glanz & John Markoff, *Egypt Leaders Found 'Off' Switch for Internet*, N.Y. TIMES (Feb. 15, 2011), <https://www.nytimes.com/2011/02/16/technology/16internet.html>.

219. See Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES (Jan. 28, 2011), <https://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html>.

220. See David Barboza & Claire Cain Miller, *Google Accuses Chinese of Blocking Gmail Service*, N.Y. TIMES (Mar. 20, 2011), <https://www.nytimes.com/2011/03/21/technology/21google.html>.

221. See David Barboza, *China Moves to Block Foreign News on Nobel Prize*, N.Y. TIMES (Dec. 9, 2010), <https://www.nytimes.com/2010/12/10/world/asia/10china.html> (noting that Chinese censors have blocked access to the websites of the BBC, CNN and a Norwegian newscaster).

222. See Andrew Jacobs, *Internet Usage Rises in China*, N.Y. TIMES (Jan. 14, 2009), <https://www.nytimes.com/2009/01/15/world/asia/15iht-15beijing.19375212.html> (noting that, even though China has 298 million Internet users (roughly equivalent to the population of the United States), only 23% of the Chinese population uses the Internet, and noting that China regularly blocks Web sites and blog postings).

223. See Sharon LaFraniere, *China Imposes New Internet Controls*, N.Y. TIMES (Dec. 17, 2009), <https://www.nytimes.com/2009/12/18/world/asia/18china.html>.

224. See *id.* ("The authorities say the stricter controls are intended to protect children from pornography; to limit the piracy of films, music, and television shows; and to make it hard to perpetuate Internet scams. But the measures also appear devised to enhance the government's already strict control of any political opposition. In various pronouncements, top propaganda and security officials have stressed anew the need to police the Internet on ideological and security grounds.").

225. See Barboza, *supra* note 221; Jeremy Page, *Empty Chair Emphasizes Nobel Schism*, WALL ST. J., Dec. 11–12, 2010, at A11.

226. See LaFraniere, *supra* note 223.

227. See Michael Wines, *China Rolls Out Tighter Rules on Reporting*, N.Y. TIMES, Nov. 12, 2011, at A7.

228. See Michael Liedtke, *Google has Censorship Balancing Act Outside China*, CHICAGO DAILY HERALD, Apr. 3, 2010, at 2.

China.²²⁹ Russia has also tried to suppress internet content.²³⁰ For example, Russia banned dozens of websites related to the former (now deceased) dissident Alexei Navalny.²³¹ In addition, Russia pressured Apple and Google to suppress a Navalny related app that was designed to coordinate protest voting.²³² By contrast, the Biden administration did not block any platforms or newspapers, but did try to control the content and viewpoints expressed on social media platforms.

China also seems to censor more content. For example, in 2017, China issued a list of sixty-eight categories of material that should be censored, including information regarding excessive drinking or gambling, ridicule of China's revolutionary leaders, current members of the army, or police, and discussions of "the luxury life," prostitution, rape, masturbation, "unhealthy marital values," and partner swapping.²³³ In that respect, China functions like the Biden administration did in terms of censoring content and viewpoints. A distinction can perhaps be made in the sense that China seeks to censor a much broader array of categories.

One similarity between China and the Biden Administration is that both tried to use censorship to push their messages, and to control the public dialogue. For example, in 2024, China was aggressively trying to portray a rosy view of its economy, and to control critical commentary.²³⁴ Its censorship extended to economists, financial analysts, investment banks, and social media influencers, with critical news stories being removed.²³⁵ China's control even extended to mainstream economic commentary.²³⁶ Some believe that the Chinese effort has reduced confidence in the economy.²³⁷ Similarly, the Biden administration aggressively tried to control the public debate on a variety of issues, including climate change, Covid-19, Covid

229. See James Glanz & John Markoff, *Vast Hacking by a China Fearful of the Web: Cables Depict Google Shock, Censorship and Cyberattacks*, N.Y. TIMES, Dec. 5, 2010, at A1 ("The cables catalog the heavy pressure that was placed on Google to comply with local censorship laws, as well as Google's willingness to comply – up to a point.").

230. See Andrew E. Kramer, *How the Kremlin Works to 'Manage' Democracy While Holding Elections*, N.Y. TIMES, Sept. 18, 2021, at A9.

231. See *id.*

232. See Anton Troianovski & Adam Satariano, *Tech Giants Pull Navalny App After Kremlin Threatens Prosecution*, N.Y. TIMES, Sept. 18, 2021, at A9.

233. See Steven Lee Myers & Amy Cheng, *China Expands Its Internal Web of Online Censors and Forbidden Topics*, N.Y. TIMES, Sept. 25, 2017, at A7.

234. See Daisuke Wakabayashi & Claire Fu, *China's Censors Target Critics of Its Economy*, N.Y. TIMES, Jan. 31, 2024, at B1.

235. See *id.*

236. See *id.*

237. See *id.*

vaccines, the Hunter Biden laptop story and others.²³⁸ Thus, both China and the Biden administration were invoking governmental power for similar purposes.

Russia has also tried to control the public debate, but has sometimes been more brutal and overt than the Biden administration.²³⁹ When a Russian police officer exposed police corruption in a video, he was arrested and interrogated.²⁴⁰ Russian governmental officials have also tried to quell anti-government protests,²⁴¹ seized computers that dissident groups were using to communicate on the internet,²⁴² forced Microsoft to cooperate in investigating the computers of dissidents,²⁴³ shut down mobile internet access,²⁴⁴ and installed a monitoring system that allowed it to spy on internet communications.²⁴⁵ Similar actions have been taken in China. For example, China has permanently removed or disabled various blogs,²⁴⁶ and it monitors the movement of dissidents by cell phone tracking mechanisms.²⁴⁷ Dissidents have been taken into police custody, and one Twitter user was sentenced to a year in prison for a single three-word Tweet.²⁴⁸

In other instances, Russian actions simply involve censorship. In 2018, Russian leaders blocked the website of an opposition leader (Alexei Navalny) because it included a video accusing a high-ranking Russian official of accepting a bribe from a businessman.²⁴⁹ The video depicted a deputy prime

238. See Mark Sweney, *Mark Zuckerberg Says White House 'Pressured' Facebook to Censor Covid-19 Content*, GUARDIAN (Aug. 27, 2024), https://www.theguardian.com/technology/article/2024/aug/27/mark-zuckerberg-says-white-house-pressured-facebook-to-censor-covid-19-content?utm_source=chatgpt.com.

239. See Adam Satariano, *Kremlin Steps Up Online Censorship*, N.Y. TIMES, Feb. 26, 2022, at B1.

240. See Clifford J. Levy, *Videos Rouse Russian Anger Toward Police*, N.Y. TIMES, July 28, 2010, at A1.

241. See Ellen Barry, *Russia Cracks Down on Antigovernment Protests*, N.Y. TIMES, Dec. 7, 2011, at A6.

242. See Clifford J. Levy, *Using Microsoft, Russia Suppresses Dissent*, N.Y. TIMES, Sept. 12, 2010, at A1.

243. See *id.*

244. See Alan Cullison, *Web Problems Plague Russia Critics*, WALL ST. J. (Dec. 12, 2011), <https://www.wsj.com/articles/SB10001424052970204336104577092642660966970>.

245. See *id.*

246. See *China Appears to Tighten Internet Access Around Tiananmen Anniversary*, PBS: PBS NEWS HOUR (June 1, 2009, 4:30 PM), https://www.pbs.org/newshour/science/asia-jan-june09-china_06-01.

247. See Paul Mozur et al., *Beijing's Eye Always Trails Protesters*, N.Y. TIMES, Dec. 3, 2022, at B1.

248. See Brook Larmer, *In China, an Internet Joke is not Always Just a Joke. It's a Form of Defiance — and the Government is Not Amused*, N.Y. TIMES MAG., Oct. 30, 2011, at 34.

249. See Ivan Nechepurenko, *Russia Blocks Website of Dissident Who Accused Oligarch*, N.Y. TIMES, Feb. 16, 2018, at A7.

minister on the businessman's yacht with a "high class escort" and other alleged prostitutes.²⁵⁰ The order to remove the video extended to YouTube and Instagram, with government orders requiring them to remove some of the accuser's information from their websites.²⁵¹ Instagram complied with the request, but YouTube was slow to do so.²⁵²

China also seems to involve far more individuals in the censorship task. In the U.S., the Biden administration seemed to be use existing staff to try to pressure social media platforms rather than creating a separate censorship agency.²⁵³ It also used existing personnel at various administrative agencies.²⁵⁴ By contrast, China employs some 50,000 internet censors²⁵⁵ who are tasked with the job of monitoring and disrupting the actions of dissidents.²⁵⁶

Russian censorship increased dramatically following Russia's invasion of Ukraine.²⁵⁷ For one thing, it started blocking Instagram, and it referred to Instagram's parent company, Meta, as an "extremist" organization.²⁵⁸ A report by Citizen Lab at the University of Toronto, which monitors online censorship, analyzed court orders against Vkontakte (a Russian social media site) which documented the increase.²⁵⁹ Prior to the war, the Russian government issued a takedown order roughly once every fifty days.²⁶⁰ After the start of the war, it issued a takedown order almost every day.²⁶¹ Some of the more recent orders were directed at independent media sites.²⁶² The government also blocked key words such as "lesbian," "gay," "bisexual," "transgender" and "queer."²⁶³ In addition, it restricted search functions on international sites.²⁶⁴ The government also sought to block certain

250. *See id.*

251. *See id.*

252. *See id.*

253. *See Missouri v. Biden Jr.*, 680 F. Supp. 3d 630, 645 (W.D. La. 2023).

254. *See id.*

255. *See Larmer, supra* note 248.

256. *See Jacobs & Ansfield, supra* note 217.

257. *See Paul Mozur et al., Internet Censorship by Russia Has Soared 30-Fold During War*, N.Y. TIMES, July 27, 2023, at B5.

258. *See Kelvin Chan, Russia State Media Outlets Banned From Meta's Apps Over 'Foreign Interference Activity'*, PBS: PBS NEWS (Sept. 17, 2024), <https://www.pbs.org/newshour/world/russian-state-media-outlets-banned-from-metas-apps-over-foreigninterferenceactivity#:~:text=Meta%20and%20Facebook%20%E2%80%9Calready%20blocked,and%20blocking%20Facebook%20and%20Instagram.>

259. *See Mozur et al., supra* note 257.

260. *See id.*

261. *See id.*

262. *See id.*

263. *Id.*

264. *See id.*

community and personal accounts on the website, cracked down on independent media sites covering the war,²⁶⁵ and blocking access to international sites such as Facebook, Instagram and Twitter (now X), but not Telegram and YouTube.²⁶⁶ In some instances (such as the revolt by Yevgeny Prigozhin of the Wagner Group), the censors were slow to react so that there was significant discussion on social media before the government intervened.²⁶⁷ Despite the censorship, Citizen Lab concluded that there was less censorship than in other speech repressive nations.²⁶⁸

A final distinction is that, in both the U.S. and China, enterprising individuals have found ways to avoid censorship. After Donald Trump was banned by Twitter²⁶⁹ and Facebook,²⁷⁰ he decided to start his own social media platform, Truth Social.²⁷¹ Even before he established that platform, Trump continued to be present on Facebook and Twitter because his supporters would post his messages on their own accounts.²⁷² These who posted Trump's messages included some of his more prominent supporters such as Breitbart News, the President Donald Trump Fan Club (on Facebook), Fox News, and a lawyer who made regular appearances as Trump's representative.²⁷³ Regarding one Trump post, those four accounts had 159,500, 48,200, 42,000, and 36,700 likes and shares of the Trump reposts.²⁷⁴ There was a drop in online engagement (e.g., "likes") from a high of 272,000 to 36,000, but 11 of Trump's 89 statements "after the ban attracted as many likes or shares as the median post before the ban, if not more."²⁷⁵ In addition, following Trump's ban, while many of his supporters remained present on Facebook and Twitter, many also moved to other apps such as LBRY, Minds and Sessions.²⁷⁶ When YouTube removed videos created by

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. *See* Nathaniel Popper, *Social Networks Without the Power of Big Tech*, N.Y. TIMES, Jan. 27, 2021, at B1.

270. *See* Kate Conger & Mike Isaac, *Citing Risk of Violence, Twitter Permanently Suspends Trump*, N.Y. TIMES, Jan. 9, 2021, at A1.

271. *See* Matthew Goldstein et al., *A Musk Takeover of Twitter Could Endanger Trump's Truth Social*, N.Y. TIMES, Apr. 23, 2022, at B3.

272. *See* Davey Alba et al., *What Happened When Trump Was Banned on Social Media*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/interactive/2021/06/07/technology/trump-social-media-ban.html>.

273. *Id.*

274. *Id.*

275. *Id.*

276. *See* Popper, *supra* note 269.

Way of the World, those videos were moved to LBRY.²⁷⁷ In addition, some conservatives migrated to other platforms. After then President Trump was banned by certain social media platforms, two of Trump's followers used conservative websites (Trash Regan and Gateway Pundit) to criticize a Twitter executive for his tweets critical of the president and other republicans. The posts quickly spread to "dozens of Facebook groups, Reddit forums and YouTube videos." Interestingly, Facebook labels (questioning the veracity of the posts) reduced the public's belief in the veracity of those posts by only 13%. So, the Biden administration's attempted cure may have been worse than the disease.

As in the U.S., some Chinese citizens have found ways to avoid governmental blocking and to access banned information.²⁷⁸ However, unlike the U.S., if they are discovered, they can be held for questioning and detained.²⁷⁹

V. CONCLUSION

The Biden Administration engaged in an aggressive and surreptitious campaign to suppress internet content. The Administration's actions were inconsistent with the free speech tradition of the U.S. While resembling the actions of authoritarian regimes, in the sense that the Biden administration tried to control public debate on matters of public interest, the Biden administration did not block websites, social media platforms, or newspapers, nor did it jail or interrogate those with whom it disagreed. However, it did engage in surreptitious efforts to remove internet content and even to encourage social media platforms to "deplatform" (or preclude) certain individuals.

In light of the U.S. free speech tradition, the Biden administration's actions are very troubling. If the U.S. is going to function as a democracy, and the people are going to engage in debates regarding candidates and issues, they must be allowed to speak freely. As James Madison emphatically stated in challenging an attempted governmental restriction on speech—in a Republic like ours, "the censorial power is in the people over the Government, and not in the Government over the people."²⁸⁰

277. *See id.*

278. *See* Yuan, *supra* note 213 (referring to a family which has been "using tools to bypass the Great Firewall for years").

279. *See* Paul Mozur, *He Was Chained to a Chair in China. What Was His Offense? Posting on Twitter*, N.Y. TIMES, Jan. 11, 2019, at A1.

280. *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964) (citing 4 ANNALS OF CONG. 934 (1794)).

Since this article was written, President Biden left office, and President Trump replaced him. In theory, Trump's ascension brought an end to governmental attempts to suppress social media speech because he issued an Executive Order precluding the government from engaging in similar conduct.²⁸¹ Whether President Trump and his administration will comply with the order when push comes to shove, remains to be seen. In addition, there are questions regarding whether it is infringing free speech in other ways. But those topics are for discussion in later articles.

281. Exec. Order No. 14146, 90 Fed. Reg. 8109 (Jan. 19, 2025).