

SOVEREIGNTY AND SPEECH IN AN INTERNET ERA

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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 Independence⁴ marked a major divergence. In that document, the early Americans implicitly repudiated Divine Right, and affirmed several fundamental propositions:⁵ “that all men are created equal,”⁶ “that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness,”⁷ and that “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”⁸ 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 effect their safety and happiness.”⁹ The Declaration then sets forth an extensive list of grievances against King George which the signatories viewed as justifying their decision to declare their independence.¹⁰

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.”¹¹ Madison’s view was that, in a Republic,

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¹ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95-96 (1996).

² *Id.*

³ *Id.*

⁴ U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *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.”).

¹¹ See *Houston Community College System v. Wilson*, 395 U.S. 468, 480 (2022) (quoting 4 Annals of

Id.

“the censorial power is in the people over the Government, and not in the Government over the people.”¹² But, in recent years, the U.S. government has taken a very different view of the role and of 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.¹³ 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 had done so fleeing religious persecution in Europe.¹⁴ 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;¹⁵ searches which created a high level of anger and resentment among the colonists.¹⁶

British colonial officials also tried to suppress and control freedom of expression.¹⁷ In particular, the British created a censorial system and gave it the power to control the content of newspapers;¹⁸ a practice that offended the colonists.¹⁹ British authorities also prosecuted colonists for their speech. Perhaps the most famous seditious libel prosecution in the colonies involved John Peter Zenger.²⁰ When Zenger, a New York publisher, published stories mocking the royal Governor and his administration, he was prosecuted for seditious libel.²¹ While Zenger languished in jail for 10 months awaiting trial, the Royal Governor arranged for the disbarment

Cong. 899 (1794)).

¹² *Id.*, at 481 (quoting 4 Annals of Cong., at 934).

¹³ See *Biden v. Missouri*, 2023 WL 5841935.

¹⁴ See *Everson v. Board of Education*, 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.

¹⁵ See *Boyd v. United States*, 116 U.S. 616, 625 (1886) (“The debate (and the anger) in the American colonies about the arbitrary use of these writs of assistance by the English was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country,” and “were fresh in the memories of those who achieved our independence and established our form of government.”).

¹⁶ *Id.*

¹⁷ See RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH* 6-7 (2006). [Hereafter “THE RIGHT TO SPEAK ILL”].

¹⁸ 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.”).

¹⁹ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

²⁰ *Id.*

²¹ See Elizabeth I. Haynes, *United States v. Thomas: Pulling the Jury Apart*, 30 CONN. L. REV. 731 (1998).

of his lawyers for stating exceptions on Zenger's behalf.²² 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. When the prosecution declined, the lawyer offered to prove that the statements were true. 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.²³

Also in the colonies, James Franklin (Benjamin's brother), who published *The Courant*, was jailed at one point for showing "disrespect" to governmental officials.²⁴ 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 the paper to the censor for prior approval."²⁵ 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.²⁶ In that letter, James reported (sarcastically) that the captain (heading up the expedition against the pirates) "will sail sometime this month, if wind and weather permit."²⁷ James was jailed for publishing this letter, and Ben was questioned, but ultimately released.²⁸ Many believed that the arrest was politically motivated, and was designed simply to silence James for his stinging political commentaries.²⁹ While his brother was in prison, Benjamin Franklin continued publishing the newspaper.³⁰ When Benjamin Franklin left Boston for New York and (ultimately) Philadelphia, he was motivated in part by a fear of prosecution by Boston's elite.³¹ Subsequently, well aware of what had happened to his brother, Benjamin Franklin was sometimes cautious about using his newspaper to provoke the authorities.³²

²² See *Cohen v. Hurley*, 366 U.S. 117, 140 (1961) (Black, J., dissenting).

²³ See Haynes, *supra* note 19, at 731.

²⁴ See THE LIFE AND TIMES OF BENJAMIN FRANKLIN, *supra* note 16, at 30 (he was ultimately imprisoned for about 30 days).

²⁵ *Id.*, at 31.

²⁶ *Id.*, at 29-30.

²⁷ *Id.*

²⁸ *Id.*, at 30.

²⁹ *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.")

³⁰ *Id.*

³¹ *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."

³² *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

Because of the colonial abuses, 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.³³ One way they sought to achieve that objective was by providing the federal government with only limited and enumerated powers.³⁴ In addition, the Framers embraced the ideas of Baron de Montesquieu, who is credited with articulating the doctrine of separation of powers,³⁵ and incorporated that doctrine throughout the Constitution.³⁶

Having gone to great lengths to constrain 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.³⁷ That decision was met with vigorous dissent by those who believed that they needed explicit protections for various rights.³⁸ These objections nearly derailed the ratification process,³⁹ 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.⁴⁰ As a result, the Bill of Rights entered the Constitution as the first ten amendments to the U.S. Constitution.⁴¹

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 with 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.

³³ See U.S. CONST., Art. I, § 8.

³⁴ *Id.*

³⁵ BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151-152 (Cosimo Edition 2011):

[There] 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.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

³⁶ U.S. CONST., Art. I, Sec. 7 [3] (“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.”).

³⁷ See *Wallace v. Jaffree*, 472 U.S. 78, 92 (1985) (White, 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.”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *McDonald v. City of Chicago*, 561 U.S. 742 (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.”).

⁴¹ See *id.* (“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.”); *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“The first 10

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.⁴² Given the history of speech suppression, the new Americans were determined to enshrine explicit protections for speech and press.⁴³ This solution was not perfect. Following adoption of the First Amendment, the new government sought to prosecute dissenters through the Alien and Sedition Act.⁴⁴ However, that Act was later repealed, the convictions repudiated, and the fines repaid.⁴⁵

But the legacy of the colonial period, and the limits on governmental authority, were solidly entrenched in the soul of the American people.⁴⁶ Over the centuries, the U.S. Supreme Court has reaffirmed the right of the people to express their opinions on matters of public interest,⁴⁷ and have generally rejected governmental attempts to regulate or control public discourse.⁴⁸

Of course, the Court has recognized that there are certain discrete categories of speech that the government may regulate or control.⁴⁹ These categories include such things as child pornography,⁵⁰ obscenity⁵¹ fighting words,⁵² and true threats.⁵³ But, otherwise, the people remain free to speak their mind on matters of public interest,⁵⁴ and government may not generally impose “content-based” or “viewpoint-based” restrictions on speech⁵⁵ and cannot censor speech simply because the government prefers that it go in a different direction.

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.”).

⁴² See U.S. CONSTITUTION, AMDT. 1.

⁴³ See *id.*, at 5-6.

⁴⁴ See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 276 (1964).

⁴⁵ *Id.*

⁴⁶ See RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, MATERIALS & PROBLEMS* 7 (7th ed., Carolina Academic Press, 2023) (hereafter “THE FIRST AMENDMENT”).

⁴⁷ See *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359); see also *Citizens United v. Federal Election Commission*, 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 pre-condition 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.’ It 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.”); *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.’”).

⁴⁸ See *United States v. Alvarez*, 567 U.S. 709 (2012).

⁴⁹ See THE FIRST AMENDMENT, *supra* note 43, at 21-331.

⁵⁰ See *Ferber v. New York*, 458 U.S. 747 (1982).

⁵¹ See *Miller v. California*, 413 U.S. 15 (1973).

⁵² See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁵³ See *Virginia v. Black*, 538 U.S. 343 (2003).

⁵⁴ See THE FIRST AMENDMENT, *supra* note 43, at ch. 1-4.

⁵⁵ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

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 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,⁵⁶ and also has the power to impose content-based restrictions on that medium,⁵⁷ most other speech is free of governmental restrictions of that nature.⁵⁸ Indeed, licensing schemes (outside the broadcast area) are regarded as prior restraints and are presumptively unconstitutional.⁵⁹ The Court treats broadcast communication differently on the basis of scarcity (there are only a limited number of broadcast waves and the signals would conflict if everyone were allowed to use the air waves without regulation),⁶⁰ and those that are able to obtain licenses effectively serve as fiduciaries in their use of those waves.⁶¹ By contrast, since actual "printing" can be done with personal computers and home printers, a technology that is essentially accessible to everyone.⁶² 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.⁶³ In addition, content censorship, in the sense of requiring individuals to submit their manuscripts to censors and obtain permission to public, are essentially forbidden.⁶⁴ Licensing systems are regarded as "prior restraints" on speech and are presumptively unconstitutional.⁶⁵ Likewise, the crime of seditious libel has been abolished.⁶⁶

The Declaration envisions a governmental system which vests sovereignty in the people.⁶⁷ Not only does the government exist through the "consent of the governed,"⁶⁸ 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 state-by-state basis⁶⁹). To the extent that the people must make decisions regarding candidates or issues, freedom of expression is one of the essential building blocks:⁷⁰ Indeed, the U.S. Supreme Court has emphatically stated that "Speech

⁵⁶ See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

⁵⁷ See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁵⁸ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁵⁹ *Id.*

⁶⁰ See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

⁶¹ *Id.*

⁶² See RUSSELL L. WEAVER, *FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY* 63-65 (2nd ed, Carolina Academic Press, 2025) (hereafter *From GUTENBERG TO THE INTERNET*).

⁶³ *Id.*; see also *Reno v. American Civil Liberties Union*, 521 U.S.844 (1997).

⁶⁴ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁶⁵ *Id.*

⁶⁶ See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁶⁷ U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

⁶⁸ *Id.*

⁶⁹ U.S. CONST., Art. 2, Sec. 2, cl. 1.

⁷⁰ See 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; THE FIRST AMENDMENT: CASES, *supra* note 43.

concerning public affairs is more than self-expression; it is the essence of self-government”⁷¹ 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.”⁷²

Going hand in hand with the right of free expression is a corresponding right to be free of governmental censorship.⁷³ While the U.S. government might have the authority to prohibit a few limited categories of unprotected speech (e.g., child pornography),⁷⁴ it does not generally have the power to censor and control citizen debates on matters of public interest. The U.S. Supreme Court expressed a similar idea in *Matal v. Tam*,⁷⁵ 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 positions in particular ways, as the speaker chooses” is necessary to prevent government from silencing dissent and distorting the public debate.

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 the 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,⁷⁶ thereby enabling printers to type set a page and relatively quickly create multiple copies of books and other documents.⁷⁷ The printing press was transformative because, although it did not increase the

⁷¹ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 423 (1992) (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.”).

⁷² *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359). See also *Citizens United v. Federal Election Commission*, 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 pre-condition 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.’ It 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.”); *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.’”).

⁷³ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁷⁴ See THE FIRST AMENDMENT, *supra* note 43, at 69-178.

⁷⁵ 582 U.S. 218, 249 (2017).

⁷⁶ 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 C.E. This was printing from wood blocks into which reverse images of written ideographs were carved. . . . It is something like using a large rubber stamp.”).

⁷⁷ See FROM GUTENBERG TO THE INTERNET, *supra* note 62, at 9-11.

speed at which information moved, the printing press made it possible to create and disseminate multiple copies of documents, and allowed information to spread more broadly. The printing press led to a flowering of knowledge, information and ideas,⁷⁸ and also led to the Protestant Reformation⁷⁹ and to changes in governmental systems.⁸⁰

Because the printing press was a transformative technology, governments actively sought to limit and control its use.⁸¹ Perhaps Kings correctly perceived that the printing press would ultimately lead (as it ultimately did) to the demise of monarchy as a governing institution in Europe.⁸² To control printing, the English imposed an array of licensing schemes.⁸³ For one thing, the government limited the total number of printing presses that could exist,⁸⁴ 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.⁸⁵ 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,⁸⁶ and prohibiting the publication of any book or pamphlet without a license specifically authorizing publication.⁸⁷ 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.⁸⁸

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.⁸⁹ The British Crown aggressively used seditious libel prosecutions as a way to intimidate and silence governmental critics.⁹⁰ Moreover, truth was not a defense. Indeed, proof of truth was as 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

⁷⁸ *Id.*, at 12-13.

⁷⁹ *Id.*, at 13-14.

⁸⁰ *Id.*, at 14-18.

⁸¹ *Id.*, at 115.

⁸² *Id.*

⁸³ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

⁸⁴ See Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RIGHTS J. 1037, 1072 (2009).

⁸⁵ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002) (quoting 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).

⁸⁶ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁸⁷ See *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002); see also F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776* 240 (1952).

⁸⁸ See *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); see also *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, 757 (1988); *Lowe v. Securities & Exchange Commission*, 472 U.S. 181, 205 (1985).

⁸⁹ The crime of seditious libel was based on the holding in *de Libellis Famosis*, 77 Eng. Rep. 250 (Star Chamber 1606).

⁹⁰ See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

as falsehood and was eliminated as a defense."⁹¹

Similar restrictions were imposed in other countries. Prior to the French Revolution, the French government imposed licensing restrictions and censorship.⁹² A 1563 edict required that all books be licensed prior to publication, and gave governmental authorities discretionary power to censor material.⁹³ 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.⁹⁴ In response to Martin Luther's attack on indulgences, Emperor Charles V commanded that all of Luther's writings be burned.⁹⁵

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.⁹⁶ Thus, even though Luther's attack on indulgences was banned, thousands of copies were printed, some of which ridiculed the Pope.⁹⁷ 4,000 copies of one pamphlet were distributed within three weeks, and the pamphlet ultimately went through thirteen to twenty-five editions.⁹⁸ Reformation works were printed even in cities that were primarily Catholic.⁹⁹ Although the Catholic Church tried to suppress these "heretical" writings, secular officials did not always cooperate.¹⁰⁰

During the fifteenth to the eighteenth centuries, governmental repression led to the creation of an underground book trade.¹⁰¹ Banned books were highly sought after, commanding high prices,¹⁰² and the sale of contraband literature was "an everyday feature of the city scene at that time."¹⁰³ In the sixteenth century, a royal decree only allowed a small number of Parisian printers to publish books.¹⁰⁴ However, the decree was never enforced and more books were published in the year after the decree than the year before.¹⁰⁵ A 1547 decree prohibited the sale of any book that had not previously been submitted to governmental censors.¹⁰⁶

⁹¹ *Id.*

⁹² See John B. Thompson, *The Trade in News*, in DAVID CROWLEY & PAUL HEYER, COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY 116 (5th ed. 2007) ("In France, a centralized and highly restrictive system of licensing, supervision and censorship existed until the Revolution").

⁹³ See LUCIEN FEBVRE & HENRI-JEAN MARTIN, THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800 246 (1976)

⁹⁴ See *id.*, at 244.

⁹⁵ *Id.* at 290.

⁹⁶ *Id.*

⁹⁷ *Id.* at 291 ("To ridicule the Pope and the monks, pamphlets entitled *Pope Donkey* and *Cow Monk* were produced.").

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 245.

¹⁰¹ See *id.*, at 240.

¹⁰² *Id.* at 238.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 310.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 311.

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,¹⁰⁷ and even though the French king forbade the printing of banned books “on pain of death by hanging.”¹⁰⁸ In the seventeenth and eighteenth centuries, “many [Frenchmen] were sent to the Bastille for having sold pamphlets hostile to the royal authority.”¹⁰⁹ Despite the persecutions “banned books continued to circulate more or less everywhere with the same ease.”¹¹⁰ For book sellers, the banned books attracted considerable interest and substantial profits.¹¹¹ However, some publishers, fearful of prosecution, set up operations just outside of France and shipped banned publications into the country.¹¹² Imported books easily moved past governmental officials, even into monasteries and seminaries,¹¹³ and French publishers frequently omitted their addresses from banned books that they published.¹¹⁴

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” that controlled the use of that technology.¹¹⁵ The Gutenberg printing press was relatively expensive to obtain, requiring as it did 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 press, and those few could exercise “gatekeeper” power over the technology. In other words, they had the power to decide who could use print technology and what they could say.¹¹⁶ Subsequent technologies, including radio,¹¹⁷ television¹¹⁸ and satellite communications,¹¹⁹ all

¹⁰⁷ *Id.* at 238-239 & 309 (“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.”).

¹⁰⁸ *Id.* at 310.

¹⁰⁹ *Id.* at 238-239.

¹¹⁰ *Id.* at 238-246.

¹¹¹ *Id.* at 304.

¹¹² *Id.* at 247 & 298-299 (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.).

¹¹³ *Id.* at 316 (noting that “heretical books poured into France. Not simply in a few isolated cases, 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?”).

¹¹⁴ *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.”).

¹¹⁵ FROM GUTENBERG TO THE INTERNET, *supra* note 62., at 21-38.

¹¹⁶ *Id.*

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

¹¹⁸ *Id.*, at 243.

¹¹⁹ See Rush Schwartz, *The Social Shape of Electronics*, in COMMUNICATIONS IN HISTORY, *supra* note 19,

came with their own gatekeepers.¹²⁰ They required substantial technological investments, and some (e.g., broadcast communications like radio and television also required an operating license) which meant that only a small number of people (or corporations) could own and operate them. Those who controlled those communications technologies could exercise similar gatekeeper control.¹²¹ Thus, these technologies did not enable ordinary people to mass disseminate their own ideas absent the assent of gatekeepers.

The internet was a transformative technology. But the internet was different than prior technologies because it was the first technology that enabled ordinary individuals to communicate on a mass scale,¹²² as well as to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information.¹²³ This broadening of communicative capacity had a profound impact on modern societies, propelling new social movements and societal changes.¹²⁴ However, the great strength of the internet—the enabling of mass communication by ordinary individuals—has also proven to be its greatest weakness.¹²⁵ As the internet enabled mass communication by virtually everyone, it created the potential for mischief. Using devices such as Twitter (now X), WhatsApp, and Facebook (now Meta) and other social media platforms, individuals could easily distribute information,” both truthful information as well as disinformation.¹²⁶ 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.”¹²⁷ In 2018, there “were doctored photos of Latin American migrants headed towards the United States border. There were easily disprovable lies about the woman who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad faith agendas.”¹²⁸ Indeed, “every 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.”¹²⁹

In recent years, as much public discourse has shifted to social media platforms such as X and Meta, those platforms have increasingly become the new “gatekeepers” of communication in the sense that they have the ability to control what people say, and the platforms 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.

at 313.

¹²⁰ See FROM GUTENBERG TO THE INTERNET, *supra* note 62, at 47-60.

¹²¹ *Id.* at 47-60.

¹²² *Id.* at 67-70.

¹²³ *Id.* at 67.

¹²⁴ *Id.* at 67-114.

¹²⁵ *Id.* at 139-170.

¹²⁶ See Kevin Roose, *Facebook Had a Good Election, But It Can't Let Up on Vigilance*, *The New York Times*, The Shift B1 (Nov. 8, 2018).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

Historically, social media platforms were viewed as private entities and therefore regarded as exempt from First Amendment (which only restricts governmental action).¹³⁰ 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)¹³¹ which gave social media platforms broad protection against civil liability for information posted on their platforms by others,¹³² and contained a “Good Samaritan” defense which explicitly gave them the power to censor posts on their platforms without the risk of civil liability.¹³³ 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).

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 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.” Undoubtedly, such language suffers from an unconstitutional level of vagueness¹³⁴ and overbreadth.¹³⁵ 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.¹³⁶ That is presumably why the CDA explicitly gives social media companies the authority to censor speech “whether or not such material is constitutionally protected.”¹³⁷

Unquestionably, the nature of social media platforms gives the government a greater opportunity to repress speech.¹³⁸ Since social media platforms are the “gatekeepers” of speech on their platforms, and can easily control or remove posts, the government can pressure them to engage in content moderation.¹³⁹ In the case of social media platforms, the government is trying to affect and control how the people themselves talk about the issues of the moment. Moreover,

¹³⁰ See Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH LAW 127 (2022).

¹³¹ 47 U.S.C. § 230.

¹³² *Id.*

¹³³ *Id.*, at § 230 ©.

¹³⁴ See THE FIRST AMENDMENT, *supra* note 43, at 427-441, for a discussion of the vagueness doctrine.

¹³⁵ See *id.*, for a discussion of the overbreadth doctrine.

¹³⁶ See *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

¹³⁷ *Id.*

¹³⁸ See *Murthy*, 144 S.Ct. at 1999 (Alito, J., dissenting) (“internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources.”).

¹³⁹ See *Murthy*, 144 S.Ct. at 1999 (Alito, J., dissenting) (“internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources.”).

the government is not merely attempting to influence how the public talks about those issues, it is trying to control that discussion by trying to persuade (or sometimes coerce) social media platforms into censoring the speech of others by removing it from their platforms. Even worse, the government was taking these actions surreptitiously. While individuals may realize that their posts have been removed from social media platforms, they might not know that the government was 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 § 230 of the Communications Decency Act of 1996,¹⁴⁰ “which shields them from civil liability for content posted by others on their platforms,” and the government has the power to remove that protection.¹⁴¹ In addition, social media platforms can be subjected to antitrust prosecutions. 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.¹⁴² Finally, since the major social media platforms operate all over the world, including Europe, they depended on the U.S. government to provide diplomatic cover and protection.¹⁴³

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. In order to achieve its objectives, the Administration sought to clandestinely encourage, pressure, and even threaten social media platforms in an effort to obtain censorship of material with which the government disagreed or objected. For example, it promulgated a regulation requiring social media platforms to provide the Administration with information about their censorship decisions.¹⁴⁴ 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 so far as to encourage platforms to suspend and de-platform users.¹⁴⁵ The government’s actions might have been justifiable had they involved an imminent health emergency and the dissemination of critical disinformation that might have had a critical impact on that emergency. But the government sought censorship on

¹⁴⁰ 47 U. S. C. § 230.

¹⁴¹ See *Murthy*, 144 S.Ct. at 1999 (Alito, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*, at 18:

On March 3, 2022, the Office of the Surgeon General issued a formal Request for Information (“RFI”), published in the Federal Register, seeking information from social-media platforms and others about the spread of misinformation. The RFI indicated that the Office of the Surgeon General was expanding attempts to control the spread of misinformation on social media and other technology platforms. The RFI also sought information about censorship policies, how they were enforced, and information about disfavored speakers. The RFI was sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft by Max Lesko (“Lesko”), Murthy’s Chief of Staff, requesting responses from these social-media platforms. Murthy again restated social-media platforms’ responsibility to reduce the spread of misinformation in an interview with GQ Magazine. Murthy also specifically called upon Spotify to censor health information.

¹⁴⁵ *Id.*

both health-related and non health-related issues, including a range of hot button issues such as Hunter Biden’s laptop (which will be discussed more fully below),¹⁴⁶ Covid-19,¹⁴⁷ Covid vaccines,¹⁴⁸ Covid lockdowns,¹⁴⁹ climate change,¹⁵⁰ abortion,¹⁵¹ and gender discussions,¹⁵² as well as health,¹⁵³ and economic policy.¹⁵⁴ Moreover, even the discussions of Covid or health issues did not necessarily involve disinformation (e.g., the Biden Administration sought to squelch a medical doctor’s discussion of acknowledged health risks regarding the Johnson & Johnson Covid vaccine).

The evidence shows that Biden Administration officials constantly interacted with social media platforms through emails, private portals, and meetings.¹⁵⁵ During these interactions, White House officials “made it very clear to social-media companies what they wanted suppressed and what they wanted amplified.”¹⁵⁶ 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.¹⁵⁷

Although a few of the communications were aggressive and hostile,¹⁵⁸ the Biden Administration and the social media platforms began to refer to themselves as “partners” and as being “on the same team.”¹⁵⁹ Indeed, Twitter created a “partner portal” for governmental communications.¹⁶⁰ These communications led social media platforms to aggressively suppress information, even information that did not violate the platforms’ terms of use policies, but which

¹⁴⁶ *Biden*, 2023 WL 5841935, at 5.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, at 36.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, at 12-19.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, at 31-32:

The next day, Flaherty followed up with another email to Facebook and chastised Facebook for not catching various COVID-19 misinformation. Flaherty demanded more information about Facebook's efforts to demote borderline content, 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?” Flaherty also criticized Facebook's efforts to censor the “Disinformation Dozen”: “Seems like your ‘dedicated vaccine hesitancy policy isn't stopping the disinfo-dozen – they're being deemed as not dedicated – so it feels like that problem likely coming over to groups.”

¹⁵⁸ *Id.*, at 32 (“Things apparently became tense between the White House and Facebook after that, 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.’”).

¹⁵⁹ *Id.*, at 31 (“The White House Defendants used emails, private portals, meetings, and other means to involve itself as “partners” with social-media platforms.”).

¹⁶⁰ *Id.* (referring to “emails, private portals, meetings”).

the government simply wanted suppressed.¹⁶¹ Governmental officials routinely “‘flagged’ for Facebook and other social-media platforms posts the White House Defendants considered misinformation.”¹⁶² 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.¹⁶³

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.”¹⁶⁴ These threats were reinforced by “emails, meetings, press conferences, and intense pressure by the White House, as well as the Surgeon General Defendants.”¹⁶⁵ While threats were made under the Trump administration, the level of threats increased significantly under the Biden administration.¹⁶⁶ The Biden Administration’s efforts worked: “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.”¹⁶⁷ 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.¹⁶⁸ Mark Zuckerberg (of Meta) flatly declared that he regarded “the threat of antitrust enforcement is ‘an existential threat’ to his platform.”¹⁶⁹ Also, “the White House National Climate Advisor Gina McCarthy (“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.”¹⁷⁰ Finally, the White House issued a memorandum about disinformation which

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*, at 12.

¹⁶⁵ *Id.*, at 130.

¹⁶⁶ *Id.*, at 176 (“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.”).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*, at 31:

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.”

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*, at 13.

specifically threatened the platforms with sanctions if they did not do enough to curb disinformation.¹⁷¹ The U.S. government's efforts were back up by implied and explicit threats to take action against social media platforms that were not compliant with its wishes.

In the vast majority of instances, the Biden Administration's requests did not relate to It would be one thing if the U.S. government were seeking to censor unprotected speech, such as obscenity or child pornography, or to censor fraudulent commercial speech. As previously discussed, none of that speech is entitled to First Amendment protection,¹⁷² and can be prohibited and the disseminator might even be subjected to criminal prosecution.¹⁷³ However, the speech involved in the *Biden* case did not necessarily involve prohibited speech. On the contrary, it involved such topics as climate change,¹⁷⁴ Covid-19,¹⁷⁵ the efficacy and safety of Covid-19 vaccines,¹⁷⁶ and the Hunter Biden laptop story.¹⁷⁷ 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 prohibitable.

Regarding disinformation, the U.S. Supreme Court has made it clear that false speech is not necessarily prohibitable under the First Amendment.¹⁷⁸ *United States v. Alvarez*¹⁷⁹ involved an individual's false assertion that he won the Congressional Medal of Honor. While the *Alvarez* decision recognized that individuals can 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),¹⁸⁰ the Court held that Alvarez could not be convicted for making a false statement to the effect that he won the medal. Of course, if an individual disseminates false and defamatory information about another person, it is theoretically possible to recover for defamation.¹⁸¹ However, it is extremely difficult for public officials to recover for defamation,¹⁸² as well as for public figures to do so,¹⁸³ and (until recently) defamation litigation

¹⁷¹ *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.

¹⁷² See *New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973).

¹⁷³ *Id.*

¹⁷⁴ See *Biden*, 2023 WL 5841935, at 36.

¹⁷⁵ See *id.*, at 5.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *United States v. Alvarez*, 567 U.S. 709 (2012).

¹⁷⁹ 567 U.S. 709 (2012).

¹⁸⁰ *Id.*

¹⁸¹ See THE RIGHT TO SPEAK II, *supra* note 17,.

¹⁸² See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁸³ See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

was relatively uncommon in the United States.¹⁸⁴ In addition, courts are rarely permitted to enjoin false speech except false commercial speech.¹⁸⁵ So, generally, the First Amendment prohibits government from censoring speech simply because it regards that speech as disinformation.¹⁸⁶ Indeed, the U.S. does not have “truth commissions” or “censorship boards” which are allowed to dictate which ideas and which facts are permissible, 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.¹⁸⁷ Ultimately, it is not for government to dictate what people should believe, but rather for the people to decide for themselves. If the legitimacy of our governmental system depends on the consent of the governed, it is inconsistent with that system to give government the power to control, limit and suppress the range of ideas that the people can hear or consider.¹⁸⁸

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. Before the story broke, White House officials warned social media platforms that Russia was about to disseminate disinformation.¹⁸⁹ After the laptop story broke, 51 former intelligence officials came forward to brand the story as “Russian disinformation.”¹⁹⁰ “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, it suggested that the story was false.¹⁹¹ Worse, “the FBI was included in Industry meetings and bilateral meetings, and it received and forwarded alleged misinformation to social-media companies, and actually misled social-media companies regarding the story.”¹⁹²

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

¹⁸⁴ See THE RIGHT TO SPEAK ILL, *supra* note 17, at 85.

¹⁸⁵ See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁸⁶ See *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

¹⁸⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁸⁸ See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

¹⁸⁹ *Biden, supra*, at 28 (“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.”).

¹⁹⁰ See Luke Broadwater, Officials Who Cast Doubt on Hunter Biden Laptop Face Questions, *The New York Times* (); Scott Simon, *More Details Emerge in Federal Investigation into Hunter Biden*, Weekend Edition Saturday (Apr. 9, 2022), <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).

¹⁹¹ *Biden, supra*, at 144.

¹⁹² *Id.*, at 142.

even though there were allegations of corruption by the Bidens,¹⁹³ For example, NPR, in a segment issued just a couple of weeks before the presidential election, dismissed the laptop story as “questionable,”¹⁹⁴ and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies.¹⁹⁵ The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting that Trump’s allies were pushing “Russian disinformation,”¹⁹⁶ 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.”¹⁹⁷

On social media networks, including Facebook and Twitter, the story was essentially squelched due, in large part, to the government’s suppression efforts.¹⁹⁸ Not only did Twitter squelch the story,¹⁹⁹ 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 the prior tweets.²⁰⁰ Further, Facebook began reducing the story’s distribution on its platform pending a third-party fact-check.²⁰¹

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.²⁰² Even National Public Radio has recognized that there was some validity to the allegations regarding the laptop: “much of the mainstream media dismissed a story about Hunter Biden’s business dealings. Now emails supporting the story have been authenticated,”²⁰³ and the *Boston Globe* questioned the decision to suppress the story.²⁰⁴ If the government had tried to

¹⁹³ *Id.*

¹⁹⁴ See David Folkenflik, *Analysis: Questionable 'N.Y. Post' Scoop Driven By Ex-Hannity Producer And Giuliani*, National Public Radio (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924506867/analysis-questionable-n-y-post-scoop-driven-by-ex-hannity-producer-giuliani>

¹⁹⁵ *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.”).

¹⁹⁶ See Judy Woodruff, *Are Trump Allies Sharing Russian Disinformation About Biden?*, PBS NewsHour (Oct. 16, 2020), <https://www.pbs.org/video/warning-signs-1602880956/>

¹⁹⁷ See Michelle Goldberg, *Is the Trump Campaign Colluding with Russia Again?*, *International New York Times* 26 (Oct. 21, 2020).

¹⁹⁸ See Simon, *supra* note 190.

¹⁹⁹ 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).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See Bret Stephens, *An Ethically Challenged Presidency*, *International New York Times* 21 (Oct. 7, 2021).

²⁰³ See Simon, *supra* note 129.

²⁰⁴ See Hiawatha Bray, *We ignore Musk’s ‘Twitter Files’ at our peril*, *Boston Globe* B (Jan. 20, 2023) (“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.

suppress the story, it would have been regarded as imposing an unconstitutional “prior restraint” on speech.

IV. COMPARISONS TO SPEECH REPRESSION IN CHINA AND RUSSIA

In light of 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 obvious. China has developed “the world’s most sophisticated and brutal internet censorship system, called the Great Firewall.”²⁰⁵ Under the Chinese system, many social platforms are completely blocked, including Google, Twitter, and Facebook and “thousands of other foreign websites.”²⁰⁶ Indeed, even *The New York Times* is blocked on the Chinese internet.²⁰⁷ Likewise, Russia banned Apple and Google from providing the LinkedIn app.²⁰⁸ In China, the goal of internet regulation is to create a “harmonious society,” including “stability above all,” as well as to prevent social unrest.²⁰⁹ As part of this effort, China has created the “Golden Shield Project” which involves a national filtering system,²¹⁰ and it uses that system to preclude citizens from accessing certain foreign news sources,²¹¹ as well as to block Gmail.²¹² China has placed restrictions on Web access,²¹³ blog postings,²¹⁴ and internet use,²¹⁵ including restrictions on political speech,²¹⁶ as well as on

Twitter executives screwed up that decision all by themselves. They chose to believe a false allegation that the data had been stolen by hackers.”), 2023 WLNR 2287522.

²⁰⁵ See Li Yuan, *The Infowars Hubbub, And China’s Chokehold*, *The New York Times* B3 (Aug. 13, 2018).

²⁰⁶ *Id.*

²⁰⁷ See Paul Mozur, *He Was Chained to a Chair in China. What Was His Offense? Posting on Twitter*, *The New York Times* A1 (Jan. 11, 2019); Yuan, *supra* note 205.

²⁰⁸ See Brook Larmer, *In China, an Internet Joke is Not Just a Joke. It’s a Form of Defiance and the Government is Not Amused*, *The New York Times Magazine*, at 34-39 (Oct. 30, 2011).

²⁰⁹ See Andrew Jacobs & Jonathan Aniseld, *For China, “Stability Above All”: State Pours Resources Into Monitoring Critics and Quelling Dissent*, *The International Herald Tribune*, at 6 (Dec. 10, 2010).

²¹⁰ See James Glanz, *Egypt Autocracy Found Internet’s “Off” Switch*, *The New York Times*, at A1 (Feb. 16, 2011)

²¹¹ See Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, *The New York Times* 34-39 (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html?scp=1&sq=egypt%20cuts%20off%20most%20internet&st=Search>

²¹² See David Barboza & Claire Cain Miller, *Google Accuses Chinese of Blocking Gmail Service*, *The New York Times*, at B6 (Mar. 21, 2011).

²¹³ See David Barboza, *Foreign News Sites Appear to be Blocked in China*, *The New York Times*, at A8 (Dec. 10, 2010) (noting that Chinese censors have blocked access to the websites of the BBC, CNN and a Norwegian newscaster).

²¹⁴ See Andrew Jacobs, *Internet Usage Rises in China*, *The New York Times* (Jan. 14, 2009), <http://www.nytimes.com/2009/01/15/world/asia/15beijing.html?gwh=D0EB55B0418441E2C096AA6054507E69> (noting that, even though China has 298 million Internet users (ly equivalent to the population of the United States), only 23% of the Chinese population uses the Internet. The article goes on to note that China regularly blocks Web sites and blog postings); *but see* Margaret Warner, *Growing Internet Use in China Reflects Changing Society*, PBS Newshour (May 30, 2008), http://www.pbs.org/newshour/bb/asia/jan-june08/youth_05-30.html (quoting a Chinese

the websites of international news organizations such as CNN and the BBC.²¹⁷ China also requires computer manufacturers to install internet filtering software, and China has shut down more than 700 internet Web sites, including Facebook, Twitter and YouTube.²¹⁸ In addition, China prohibits Chinese journalists from reporting unverified information that it finds on the internet.²¹⁹ China has pressured Google to filter and limit information that it makes available over the internet in China.²²⁰ In response, Google moved its search engine out of mainland China.²²¹ Russia has also tried to suppress internet content.²²² For example, Russia banned dozens of websites related to the former (now deceased) dissident Alexei Navalny.²²³ In addition, Russia pressured Apple and Google to suppress a Navalny related app that was designed to coordinate protest voting.²²⁴ By contrast, the Biden Administration did not block any of platforms or newspapers, but it 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 68 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, as well as discussions of "the luxury life," prostitution, rape, masturbation, "unhealthy marital values," and partner swapping.²²⁵ So, 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 a much broader array of categories.

blogger who stated that, "I think currently China is more and more open. Now I'm writing some things that I don't think I would write five years ago.") .

²¹⁵ See Sharon LaFraniere, *China Imposes New Internet Controls*, *The New York Times*, at A18 (Dec. 17, 2009).

²¹⁶ *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.") .

²¹⁷ See David Barboza, *Beijing Appears to Block News Sites: CNN and BBC Go Dark as Nobel Ceremony for Imprisoned Dissident*, *International Herald Tribune*, at 6 (Dec. 10, 2010); Jeremy Page, *China Steps Up Nobel Response*, *The Wall Street Journal*, at 10 (Dec. 10-12, 2010).

²¹⁸ See *China Imposes New Internet Controls*, *supra* note 215.

²¹⁹ See Michael Wines, *China Rolls Out Tighter Rules on Reporting*, *The New York Times*, at A7 (Nov. 12, 2011).

²²⁰ See Michael Liedtke, *Google Still Must Take on Censors: China Exit Won't Help It Elsewhere*, *The Courier-Journal*, at D1 (Apr. 4, 2010).

²²¹ See James Glanz & John Markoff, *Vast Hacking by a China Fearful of the Web: Cables Depict Google Shock, Censorship and Cyberattacks*, *The New York Times*, at A1 (Dec. 5, 2010) ("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.") .

²²² See Andrew E. Kramer, *How the Kremlin Works to 'Manage' Democracy While Holding Elections*, *The New York Times* A9 (Sept. 18, 2021).

²²³ *Id.*

²²⁴ See Anton Troianovski & Adam Satariano, *Tech Giants Pull Navalny App After Kremlin Level Threats*, *The New York Times* A1 (Sept. 18, 2021).

²²⁵ See Steven Lee Myers & Amy Cheng, *China Expands Its Internal Web of Online Censors and Forbidden Topics*, *The New York Times* A7 (Sept. 25, 2017).

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.²²⁶ Its censorship extended to economists, financial analysts, investment banks, and social media influencers, with critical news stories being removed.²²⁷ China's control even extended to mainstream economic commentary.²²⁸ Some believe that the Chinese effort has reduced confidence in the economy.²²⁹ Similarly, the Biden Administration aggressively tried to control the public debate on a variety of issues, including climate change, COVID, Covid vaccines, the Hunter Biden laptop story and others. 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 actions of the Biden Administration.²³⁰ When a Russian police officer exposed police corruption in a video, he was arrested and interrogated.²³¹ Russian governmental officials have also tried to quell anti-government protests,²³² seized the computers that dissident groups were using to communicate on the internet,²³³ forced Microsoft to cooperate in investigating the computers of dissidents,²³⁴ shut down mobile internet access,²³⁵ and installed a monitoring system that allowed it to spy on internet communications.²³⁶ Similar actions have been taken in China. For example, China has permanently removed or disabled various blogs,²³⁷ and it monitors the movement of dissidents by cell phone tracking mechanisms.²³⁸ Dissidents have been taken into police custody, and one Tweeter was sentenced to a year in prison for a single three word Tweet.²³⁹

In other instances, Russian actions simply involve censorship. In 2018, Russian leaders

²²⁶ See Daisuke Wakabayashi, *China's Censors Target Critics of Its Economy*, *The New York Times* B1 (Feb. 2, 2024).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Adam Satariano, *Kremlin Steps Up Online Censorship*, *The New York Times* B1 (Feb. 28, 2022).

²³¹ See Clifford J. Levy, *Videos Rouse Russian Anger Toward Police: Officer Stirs Debate on Rituals of Corruption*, *The New York Times*, at A1 (July 28, 2010).

²³² See Ellen Barry, *Russia Cracks Down on Antigovernment Protests: Allegations of Fraud Draw a New Generation Into Political Activism*, *The New York Times*, at A6 (Dec. 7, 2011).

²³³ See Clifford J. Levy, *Using Microsoft, Russia Suppresses Dissent*, *The New York Times*, at A1 (Sept. 12, 2010).

²³⁴ *See Id.*

²³⁵ See Alan Cullison, *Web Issues Plague Critics in Russia*, *The New York Times*, *The Wall Street Journal*, at A6 (Dec. 12, 2011).

²³⁶ *Id.*

²³⁷ See Anne Stopper, *China Appears to Tighten Internet Access Around Tiananmen Anniversary*, *PBS News Hour* (June 1, 2009).

²³⁸ See Sharon LaFraniere, *Beijing to Stymie Protests By Spying on Mobile Phones*, *Sydney Morning Herald*, at 22 (Mar. 5-6, 2011).

²³⁹ *See In China, an Internet Joke is Not Just a Joke*, *supra* note 208, at 34-39.

blocked the website of an opposition leader (Aeolic A. Navalny) because it included a video accusing a high-ranking Russian official of accepting a bribe from a businessman.²⁴⁰ The video depicted a deputy prime minister on the businessman's yacht with a "high class escort" and other alleged prostitutes.²⁴¹ 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.²⁴² Instagram complied with the request, but YouTube was slow to do so.²⁴³

China also seems to engage far more individuals in the censorship task. In the U.S., the Biden Administration seemed to be using its existing staff to try to pressure social media platforms rather than creating a separate censorship agency.²⁴⁴ It also used existing personnel at various administrative agencies.²⁴⁵ By contrast, China employs some 50,000 internet censors²⁴⁶ who are tasked with the job of monitoring and disrupting the actions of dissidents.²⁴⁷

Russian censorship increased dramatically following Russia's invasion of Ukraine.²⁴⁸ For one thing, it started blocking Instagram, and it referred to Instagram's parent company, Meta, as an "extremist" organization.²⁴⁹ 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.²⁵⁰ Prior to the war, the Russian government issued a take down order roughly once every 50 days.²⁵¹ After the start of the war, it issued a take down order almost every day.²⁵² Some of the more recent orders were directed at independent media sites.²⁵³ The government also blocked key words such as lesbian, gay, bisexual, transgender and queer.²⁵⁴ In addition, it restricted search functions on international sites.²⁵⁵ The government also sought to block certain community and personal accounts on the website, and cracked down on independent media sites covering the war,²⁵⁶ and also blocked access to international sites such as Facebook (now Meta) Instagram and Twitter (now X), but not Telegram and YouTube.²⁵⁷ In

²⁴⁰ See Ivan Nечepurenko, *Russia Blocks Website of Dissident Who Accused Oligarch*, *The New York Times International* A7 (Feb. 16, 2018).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

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²⁴⁶ See *In China, an Internet Joke is Not Just a Joke*, *supra* note 208, at 34-39.

²⁴⁷ See *For China, "Stability Above All"*, *supra* note 209, at 6.

²⁴⁸ See Paul Mozur, Adam Satariano & Aaron Krolik, *Internet Censorship By Russia Has Soared 30-Fold During War*, *The New York Times* B4 (July 27, 2023).

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

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.²⁵⁸ Despite the censorship, Citizen Lab concluded that there was less censorship than in other speech repressive nations.²⁵⁹

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 Twitter²⁶⁰ and Facebook,²⁶¹ he decided to start his own social media platform, Truth Social.²⁶² 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.²⁶³ 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.²⁶⁴ Regarding one Trump post, those four had 159,500, 48,200, 42,000, and 36,700 likes and shares of the Trump reposts.²⁶⁵ 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."²⁶⁶ 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.²⁶⁷ When YouTube removed videos created by Way of the World, those videos were moved to LBRY.²⁶⁸ In addition, some conservatives decided to migrate 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.²⁶⁹ The posts quickly spread to "dozens of Facebook groups, Reddit forums and YouTube videos."²⁷⁰ 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 be worse than the disease. As in the U.S., some Chinese have found ways to avoid governmental blocking and to access banned information.²⁷¹ However,

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See Nathaniel Popper, *Social Networks Without The Power of Big Tech*, *The New York Times* B1 (Jan. 27, 2021)

²⁶¹ See Kate Conger & Mike Isaac, *Twitter Permanently Suspends Trump's Personal Account*, *The New York Times* A1 & A13 (Jan. 9, 2021).

²⁶² See Matthew Goldstein, Kenneth Vogel & Ryan Mac, *A Musk Takeover of Twitter Could Endanger Trump's Truth Social*, *The New York Times* B3 (Apr. 23, 2022).

²⁶³ See Davey Alba, Ella Koeze & Jacob Silver, *After Trump's Social Media Ban, His Supporters Stepped Up*, *The New York Times* B1 (June 10, 2021).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Popper, *supra* note 260.

²⁶⁸ *Id.*

²⁶⁹ See Nick Corasaniti & Shane Goldmacher, *Ban Hits Trump Where It Hurts: Messaging and Money*, *The New York Times* A20 (May 6, 2023).

²⁷⁰ *Id.*

²⁷¹ See Yuan, *supra* note 205 (referring to a family which has been "using tools to bypass the Great

unlike the U.S., if they are discovered, they can be held for questioning and detained.²⁷²

CONCLUSION

The Biden Administration engaged in an aggressive and surreptitious campaign to suppress internet content. In many respects, the Administration's actions were inconsistent with the U.S. free speech tradition. While resembling the actions of authoritarian regimes, in the sense that the Biden Administration tried to control the public debate on matters of public interest, the Biden Administration did not block websites, social media platforms, or newspapers, and it did not 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."²⁷³

Firewall for years.").

²⁷² See Paul Mozur, *He Was Chained to a Chair in China. What Was His Offense? Posting on Twitter*, *The New York Times* A1 (Jan. 11, 2019).

²⁷³ *Id.*, at 481 (quoting 4 *Annals of Cong.*, at 934).