Catholic University Law Review

Volume 73
Issue 2 *Spring 2024*

Article 6

4-1-2024

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Cover Page Footnote

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THE ANTIDOTE OF FREE SPEECH: CENSORSHIP DURING THE PANDEMIC

Christopher Keleher[+]

Free speech in America stands at a precipice. The nation must decide if the First Amendment protects controversial, unconventional, and unpopular speech, or only that which is mainstream, fashionable, and government-approved. This debate is one of many legal battles brought to the fore during Covid-19. But the fallout of the free speech question will transcend Covid-19.

During the pandemic, the federal government took unprecedented steps to pressure private entities to push messages it approved and squelch those it did not. The Supreme Court will soon grapple with the issue of censorship during the pandemic. This article examines this litigation, along with the speech restrictions enacted by social media platforms at the behest of federal officials. It does so through a historical lens as it applies to free speech and prior restraint. Tracing this lineage is vital to understanding the importance of the right to think freely in the Covid era and how to apply historical concepts of free speech to contemporary challenges.

I conclude the solution to the problem of misinformation is more speech, not suppression. Unconventional speech thus warrants constitutional protection. The First Amendment is designed to preserve an uninhibited marketplace of ideas where truth will ultimately prevail. That process is difficult, time consuming, and not without error. However, it is the most prudent alternative to reliance on the government intrusion of prior restraint and viewpoint discrimination.

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INTRODUCTION

The freedom to speak one's mind is a human right. It is also the lifeblood of American democracy. Holding authorities accountable and persuading fellow citizens are the chief virtues of free speech.[1] Dialogue on issues of public importance should thus flow uninhibited and without fear of government reprisal. This ideal is enshrined in the First Amendment, which forbids officials from restricting messages due to their viewpoint.[2] The United States Supreme Court has interpreted First Amendment protections to include speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[3] The First Amendment also transcends the self-expression of individuals to prohibit the state "from limiting the stock of information" the public can access.[4] Given the government's historic hostility to free expression, such aims are not merely aspirational. A robust approach to First Amendment freedoms is imperative as authoritarianism thrives on repression, and because censorship occurs gradually, and then suddenly, its creep must be guarded against.[5]

Recent events have necessitated such vigilance. The COVID-19 pandemic transformed American society. Previously unimaginable, lockdowns, masks, and vaccine passports became commonplace. The First Amendment did not escape unscathed as COVID restrictions erased traditional notions of freedom of assembly, religion, and speech. The latter is the focus of this Article.

The First Amendment is resilient yet fragile. It guarantees free speech until the government, and by extension, the people, decide it does not. Besieged before, the First Amendment has survived because courts emphasized the right to speak over the tumult of the time. Free speech is again on the brink as those seeking to control the discourse exploited the fear and uncertainty of COVID. Bound to generate controversy, theories on the origins of the virus, the wisdom of lockdowns, and the efficacy of vaccines proliferated. Some views slightly deviated from government positions while others flatly rejected them. After pressure from high-ranking federal officials, social media platforms parroted state-sanctioned messages and buried those straying from the narrative. Dissent was discouraged as contrarian social media accounts were muzzled. Conformity became the touchstone.

Although axiomatic that the government cannot silence speakers based on their viewpoint, using intermediaries to do so is equally impermissible. Yet defiance of the medical establishment prompted officials and their corporate

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1. Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U.L. REV. 1053, 1068 (2016).

2. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536–37 (1980).

3. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

4. First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978).

5. *See* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1058 (2018).

proxies to collude. Along with the enforced paradigm on social media, United States Senator Elizabeth Warren accused Amazon and other booksellers of "potentially unlawful" conduct by selling certain books that questioned COVID regulations.[6] Writing to booksellers, she asserted the targeted titles "led to untold . . . deaths," which the companies contributed to by offering the works.[7] Warren further rebuked Amazon for using algorithms that promoted the books and demanded their alteration.[8] In a press release, Warren insisted Amazon stamp out the books denounced in her letter.[9] Within 48 hours Amazon and other sellers duly distanced themselves from the heresy.[10] As this obedience reflects, authorities dictated the discourse on all things COVID and a climate of censorship took root. Those challenging COVID policies were accused of sowing misinformation and sabotaging the government's ability to mitigate the crisis. Free speech became expendable because it prevented the state from ensuring compliance with its edicts.

A dangerous precedent has been set. Censoring "misinformation," however that nebulous term is defined, will enable political leaders to throttle dissent. Whether on foreign policy or domestic issues, challenging authority is inherently misinformation because, from the state's perspective, it undermines official positions. While COVID and its medical concerns differ from past First Amendment debates, the underlying question remains unchanged—can the state stifle speech it disagrees with? To ask is to answer. The ability to express oneself is a cherished right anchored in the Constitution. To be sure, American history is rife with turmoil testing the limits of free speech. For example, the fog of war has been fertile ground for censorship as every major conflict since the Civil War was accompanied by battles on the free speech front. Similarly, issues tearing at the social fabric like slavery, the Red Scare, the civil rights movements, and abortion posed serious challenges to free expression. But despite concerted efforts to suppress, free speech survived such strife intact. Although the initial results were mixed, history has frowned on the censors. The elevation of individual rights over the last century renders the censorious ways of the past as overreaching at best and tyrannical at worst. Tracing this lineage is vital to understanding the importance of the right to think freely in the COVID era and how to apply historical concepts of free speech to contemporary challenges.

The premise of this Article is simple: the adage that those who ignore history are doomed to repeat its mistakes embodies the curtailing of COVID-related

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6. Compl. at 11, Kennedy v. Warren, No. 2:21-cv-01508-BJR, 2022 U.S. Dist. LEXIS 83683 (W.D. Wash. May 9, 2022); Press Release, Elizabeth Warren, U.S. Sen., Mass., Warren Investigation Finds Amazon Provides Consumers with COVID-19 Vaccine Misinformation in Search Results (Sept. 8, 2021), [hereinafter Warren Press Release].

7. Compl. at 11, Kennedy v. Warren, 2022 U.S. Dist. LEXIS 83683.

8. Warren Press Release, *supra* note 6.

9. *Id.*

10. Compl. at 4, 14, Kennedy v. Warren, 2022 U.S. Dist. LEXIS 83683.

speech. This Article neither endorses nor refutes the opposition to COVID decrees but does condemn its suppression. Part II of this Article details past censorship efforts and the Supreme Court's pivotal role in forging the right to free expression. This jurisprudence confirms the First Amendment protects not only controversial but also mistaken views, a principle flouted during the pandemic. While an article of faith for some that misinformation can be suppressed, this is not the law. The Supreme Court regards "erroneous statement[s]," "falsehood[s]," and "immoderate and vicious invective" as protected speech.[11] Indeed, this theme resounds over the last 70 years of case law. Speech thus need not be verified, accurate, or fact-checked to earn constitutional shelter. Considering this expansive approach to expression, Part III explores prior restraint, which the Supreme Court labels the "most serious" speech infringement.[12] Prior restraint encompasses threats of government investigation—whether express or implied and whether carried out or not. Such informal censorship allows the state to wield an invisible hand free of consequence or critique. Prior restraint imperils more constitutional rights than formal regulations because it affords speakers no substantive or procedural protections. These safeguards include the government's burden to demonstrate that its actions serve a compelling interest using the least restrictive means of speech available.[13] Authorities used prior restraint with great vigor during the COVID pandemic, the focus of Part IV. White House officials coerced social media platforms to censor messages deemed detrimental to COVID regulations. Worse, this collaboration was often shrouded in secrecy, evading constitutional speech protections. Meanwhile, Senator Warren instructed booksellers to curb their "potentially unlawful" business practices.[14] Such use of intermediaries to stop third-party content is textbook prior restraint. When the government induces or assists in conduct that the Constitution proscribes, the government is liable as if it had performed the conduct itself. Politicians retain First Amendment rights as private individuals but not when acting under official duties.[15] During COVID, that line was not merely crossed but trampled.

This Article seeks to regain perspective on free speech and reaffirm the manifest importance of speaking one's mind, even amid a global pandemic. In fact, this unrest highlights the malignant nature of censorship, for as Albert Einstein remarked, "science can flourish only in an atmosphere of free

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11. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Bond v. Floyd, 385 U.S. 116, 136 (1966); Hartzel v. United States, 322 U.S. 680, 689 (1944).

12. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); *see also* Near v. Minnesota *ex rel*. Olson, 283 U.S. 697, 713 (1931).

13. *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000); *see also* Reno v. ACLU, 521 U.S. 844, 871–74 (1997).

14. Compl. at 2, Kennedy v. Warren, 2022 U.S. Dist. LEXIS 83683.

15. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

speech."[16] Uniformity on medical matters is unfeasible. Health and science are forever in flux and suppressing theories because they clash with establishment standards hinders innovation. Science is a process, not a conclusion, and the current hypothesis may be the future fact. When the government grants scriptural status to specific doctrines, it creates a template to censor. Further, viewpoint discrimination is antithetical to the Constitution.[17] Prohibiting certain messages while encouraging those in opposition spawns an arbitrariness that represents nothing less than the breakdown of constitutional governance. Asymmetry in accountability breeds contempt for the law, creating a downward spiral. The state maintains no monopoly on the truth, especially in the medical and scientific realms. In the COVID context, where every perspective is politicized, the need for dialogue is paramount. Doctors, scientists, and citizens alike may question the status quo and those who espouse unconventional views should be debated, not silenced. The government thus got it catastrophically wrong; efforts to improve COVID treatments, test alternative therapies, and probe the efficacy of state strategies should have been praised, not pilloried.

In sum, the pandemic represents an existential threat to free speech. This precarious position is due to officials manipulating the corporate clout of tech companies in direct defiance of Supreme Court precedent and constitutional norms. Instead of a neutral position towards unorthodox theories, the government felt compelled to seek out and censor them. Disagreement was an unacceptable political position as diversity of opinion was shunned and the spigot through which information could flow tightened. Whatever the merits of COVID policy criticism, it is political expression nestled on the "highest rung" of First Amendment hierarchy.[18] Systematically silencing such speech under the guise of misinformation jeopardizes constitutional freedoms, and if unchecked, will be the fulcrum for totalitarianism. The COVID censorship is especially egregious because it combines three aggressive forms of government action: viewpoint discrimination, suppression of core political speech, and prior restraint. This convergence left the state as the absolute authority on COVID speech. Those applauding such an outcome should be cautious, for this increasing encroachment on fundamental liberties will not be isolated to COVID. Ultimately, the First Amendment is designed not for the mainstream, but for the fringe. Not for times of calm, but those of chaos. If the First Amendment cannot protect speech challenging the state, it is a dead letter.

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16. Albert Einstein, *Science and Dictatorship*, *in* DICTATORSHIP ON ITS TRIAL 107 (Otto Forst de Battaglia ed., Huntley Patterson trans., 1930).

17. Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 767–68 (1988) (holding that government does not have discretion to penalize speech it disfavors); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980) (holding that the First Amendment precludes quelling public discussion of an entire topic).

18. Connick v. Myers, 461 U.S. 138, 145 (1983).

I. A CAUTIONARY TALE: THE HISTORY OF SUPPRESSING SPEECH

A. The Early Years

The right to speak openly has always sparked controversy. Before the Constitution was ratified, the absence of a free speech guarantee was a flashpoint as states sought a Bill of Rights memorializing it.[19] When James Madison proposed amendments to the Constitution, he qualified some liberties, but not free speech: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[20] Madison noted the public's dismay about the lack of protection for "the great rights" in the Constitution and stated that freedom of conscience was the "choicest privilege[]."[21] The Framers of the Constitution eventually coalesced around the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22] While protecting free expression, the First Amendment includes no limits or exceptions and its incomplete legislative history provides little guidance.[23] For these reasons, a consensus on what free speech entails remains elusive.[24]

The parameters of free speech were first tested when Congress passed the Sedition Act of 1798. This law criminalized "malicious writings against the government, either House of Congress, or the President, if published with intent to defame . . . or to stir up sedition or to excite resistance of law. . . ."[25] To say the Sedition Act was oppressive is an understatement, as it outlawed sacred speech—criticism of the government. Some commentators cite the Sedition Act as evidence the Framers embraced the more stringent English common law notions of free speech. The seminal authority on common law, William Blackstone, observed that under the common law, the government could not enact prior restraints on speech, but once a message was disseminated, it could be regulated.[26] As Stephen M. Feldman notes in his history of free speech, a nineteenth-century American "was free to speak or write so long as he remained

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19. O. JOHN ROGGE, THE FIRST & THE FIFTH 12 (1960).

20. JAMES MADISON, THE WRITINGS OF JAMES MADISON 377 (Gillard Hunt, ed. 1904).

21. *Id.* at 380.

22. U.S. CONST. amend. I; *see also* MADISON, *supra* note 20, at 380.

23. DANIEL A. FARBER, THE FIRST AMENDMENT 9–10 (1998).

24. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT 1–2 (1994).

25. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 27 (1969); *see also* JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT AND INDIVIDUAL RIGHTS 24 (3d ed. 1997).

26. SMOLLA, *supra* note 24, at 1–7; *see also* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 249–309 (1960) (asserting such "debates are unreliable as evidence of the Framers' original understanding of freedom of speech.").

roughly within the broad mainstream of culture and opinion, but social penalties were severe for those who ventured outside those borders."[27] Other scholars claim the Sedition Act did not define the First Amendment's scope.[28] Rather, the words "no law" in the First Amendment mean just that. Regardless, the Act's ignominious end is instructive, as it lasted less than four years.[29] When Thomas Jefferson became President in 1801, he pardoned the ten people convicted under the Act and Congress reimbursed their fines with interest.[30] As the Supreme Court noted in 1964, condemnation of the Act "has carried the day in the court of history."[31] Following the Act's expiration, the First Amendment fell to the periphery between 1801 and the 1850s.[32]

B. The Civil War

This fallow period for free speech ended when fissures between the North and South emerged.[33] Slavery supporters worked fervently to defuse their opposition as courts, mobs, and law enforcement muted abolitionists.[34] Slave states made it a felony to utter anything that could ignite discontent among slaves.[35] For example, Louisiana barred language in "public discourse" that might cause "insubordination among the slaves."[36] Georgia issued a bounty on the editor of the abolitionist newspaper, *The Boston Liberator*.[37] The government would reward his arrest with $5,000, an exorbitant sum in the 1850s.[38] Censorship crossed borders as Northern states also silenced abolitionists.[39] Grand juries hounded newspaper publishers, clergy, and anyone

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27. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 119–20 (2008).

28. SMOLLA, *supra* note 24, at 1–4; *see, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 792 (2001) ("[I]f it means anything, the First Amendment means that Congress may not censor or apply seditious libel laws to political dissent even where such dissent could genuinely lead to violence, as was obviously the case in late eighteenth-century America.").

29. BISKUPIC, *supra* note 25, at 24.

30. *Id.*

31. N.Y. York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

32. *See* FARBER, *supra* note 23, at 10–11.

33. *Id.*

34. Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U.L. REV. 785, 798 (1995); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from The Abolitionists*, 62 ALB. L. REV. 853, 922–24 (1999); Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185, 185–86 (1998).

35. Curtis, *supra* note 34, at 798.

36. Kenneth M. Stampp, *Chattels Personal*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 203, 209 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

37. WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY; A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERE: WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES 410 (Negro Univ. Press 1968) (1852).

38. *Id.*

39. *Id.*

else protesting slavery.[40] An Alabama grand jury indicted the publisher of the New York newspaper, *The Emancipator*.[41] A Maryland grand jury indicted a Methodist minister for railing against slavery in a sermon.[42]

Censorship escalated during the Civil War. President Abraham Lincoln closed dozens of newspapers whose editorials opposed the war and imprisoned their editors.[43] Lincoln also ordered officials to censor mail and wire communications.[44] The silencing of anti-war sentiment was extensive with over 13,000 citizens caged in military prisons.[45] In 1862, Lincoln discarded the writ of habeas corpus and declared martial law for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to Rebels . . . ."[46] Lincoln did so despite admitting it was constitutionally suspect and spurned the Supreme Court's decision of *Ex parte Merryman*, which held that the executive branch could not suspend habeas corpus.[47] Press reaction to Lincoln's oppression was mixed. The *Chicago Tribune* opined that although free speech was a "harmless right" in times of peace, it was not during "times of war and revolution."[48] In contrast, the *New York Daily Tribune* contended the Constitution did not "recognize perverse opinions, nor unpatriotic speeches, as grounds of infliction."[49] The *Bedford Standard* argued that we must "have faith in the power of truth, and oppose those we believe to be in error with the weapon of truth."[50] While these First Amendment violations were widespread, the United States Supreme Court avoided the fray.[51] This inaction was at least in part due to judicial restraint; the First Amendment did not apply to state and local governments.[52] After the

40. Wardle, *supra* note 34, 916–19.

41. Curtis, *supra* note 34, at 805.

42. DWIGHT LOWELL DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 142 (1961).

43. THOMAS J. DI LORENZO, THE REAL LINCOLN 145–46 (2002).

44. *Id.* at 145.

45. *Id.* at 140.

46. Abraham Lincoln, *Proclamation Suspending The Writ of Habeas Corpus*, TEACHING AMERICAN HISTORY (Sept. 24, 1862), https://teachingamericanhistory.org/document/proclamation-suspending-the-writ-of-habeas-corpus/; *see also* DI LORENZO, *supra* note 43, at 134–38.

47. Ex parte Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861); Legal Information Institute, *Emergency Powers*, CORNELL L. SCH., https://www.law.cornell.edu/wex/emergency_powers; Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (January 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/

48. Michael Kent Curtis, *Lincoln, Vallandigham and Anti-war Speech in the Civil War* 7 WM & MARY BILL RTS. J. 154 (1998).

49. *Id*. at 146.

50. *Id.*

51. BISKUPIC, *supra* note 25, at 24.

52. FARBER, *supra* note 23, at 62.

Civil War, the frenzy to censor subsided and free speech lay dormant until 1917.[53]

C. World War I

As the beating of war drums intensified, free speech was the first casualty.[54] Entering the throes of war, President Woodrow Wilson signed the Espionage Act of 1917 to ensure military and social cohesion.[55] This statute coincided with a growing number of state sedition laws.[56] The Espionage Act of 1917 marked the first federal foray, outlawing speech causing disloyalty, mutiny, or insubordination in the armed forces and punishing offenders with twenty years in jail.[57] Unlike the rarely used Sedition Act of 1798, the Espionage Act of 1917 tallied 2,000 arrests and 1,000 convictions.[58] An emboldened Wilson went further with the Sedition Act of 1918, which criminalized any denouncement of the federal government, Constitution, or American flag.[59] "Challenges to these two laws reached the Supreme Court . . . in 1919 and 1920," during which time, six cases provided the Court with its initial opportunity to measure the First Amendment's reach.[60] Free speech was routed. In *Schenck v. United States*, the Court affirmed the conviction of a Socialist Party leader for printing leaflets opposing the military draft.[61] A newspaper publisher met a similar fate for articles fomenting disloyalty among the armed forces in *Frohwerk v. United States*.[62] Authorities convicted another newspaper employee for articles hindering the war effort in *Schaefer v. United States*.[63] Even presidential candidates were jailed for controversial views. In *Debs v. United States*, the candidate Eugene Debs repudiated the war and draft, famously declaring: "you need to know that you are fit for something better than slavery and cannon

53. *Id.* at 12; *see also* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 522 (1981).

54. FARBER, *supra* note 23, at 12.

55. NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 108–09 (1980).

56. *Id.*

57. *Id.* at 109; BISKUPIC, *supra* note 25, at 24.

58. *See Freedom of the Press for the Masses*, NATIONAL ARCHIVES (Apr. 9, 2019), https://education.blogs.archives.gov/2019/04/09/freedom- of-press-masses/.

59. The Sedition Act of 1918 Enacted, ZINN EDUCATION PROJECT, https://www.zinnedproject.org/news/tdih/sedition-act-1918/#:~:text=The%20Sedition%20Act%20of%201918%20was%20enacted%20on%20May%2016,the%20sale%20of%20 government%20bonds; *see generally* HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES: 1917–1921 (1960) (cataloging the civil liberties endemic during the Wilson era).

60. BISKUPIC, *supra* note 25, at 24–27, 30.

61. Schenck v. United States, 249 U.S. 47, 49 (1919).

62. Frohwerk v. United States, 249 U.S. 204, 205 (1919).

63. Schaefer v. United States, 251 U.S. 466, 468 (1920).

fodder."[64] For federal officials, such blasphemy violated the Espionage Act of 1917 and the Supreme Court upheld Debs' conviction.[65] Rank-and-file advocates fared no better. In *Abrams v. United States*, the Court affirmed the convictions of five Russian immigrants for pamphlets criticizing the federal government.[66] Finally, the Court upheld the conviction of a Socialist Party cadre in *Pierce v. United States*.[67] Its crime? Distributing pamphlets opposing World War I.[68]

For the Supreme Court, free speech succumbed to national unity. This stance reflected the zeitgeist as chaos gripped the country during World War I and dissent became synonymous with disloyalty. Caught in the hysteria were thousands of German Americans interned by the federal government at Fort Oglethorpe and Fort McPherson in Georgia and Fort Douglas in Utah.[69] This ransacking of civil liberties aside, censorship devolved into the farcical. Rose Pastor Stokes was prosecuted for writing to a newspaper: "I am for the people and the government is for the profiteers."[70] Authorities banned music by German composers.[71] The Los Angeles Board of Education prohibited discussions about peace.[72] In endorsing suppression, the Supreme Court implemented the "clear and present danger" test, which considered whether messages created "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[73] While Justice Oliver Wendell Holmes devised the "clear and present danger" test, he soon backtracked because the test outlawed more speech than he envisioned.[74] Justice Holmes, along with Justice Louis Brandeis, became disenchanted with the Court's direction and gravitated to a more expansive view of the First Amendment.[75] In a concurring opinion, Justice Brandies warned that the remedy for controversial speech was "more speech, not enforced silence."[76] The shift was further captured by Justice Holmes' dissent in *Abrams v. United States*, which advised against "attempts to check the expression of opinions . . . unless they so imminently threaten immediate interference with the lawful and pressing

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

65. *Id.* at 216–17.

66. Abrams v. United States, 250 U.S. 616, 623–24 (1919).

67. Pierce v. United States, 252 U.S. 239, 252–53 (1920).

68. *Id.* at 241–42.

69. Jacob L. Wasserman, *Internal Affairs: Untold Case Studies of World War I German Internment*, 3, 10 (2016) (B.A. thesis, Yale University).

70. Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 337 (2011).

71. Wasserman, *supra* note 69, at 3.

72. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES 128 (1979).

73. Schenck v. United States, 249 U.S. 47, 52 (1919).

74. *Id.*

75. BISKUPIC, *supra* note 25, at 25.

76. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

purpose of the law that an immediate check is required to save the country."[77] Holmes thus renounced the standard of a "clear and present danger" and proposed an "imminent" one. But Holmes' interpretation was unconvincing, and the Court used the clear and present danger test through the early 1950s.

Justice Holmes' failure to sway the Court notwithstanding, the stature of the First Amendment gradually grew. In the 1925 case of *Gitlow v. New York*, the publisher of *The Left Wing Manifesto*, a book advocating revolutionary mass action, was convicted under a New York anarchy law.[78] While upholding the conviction, the Court recognized for the first time that the First Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[79] The Court adopted a more nuanced approach to speech during the 1930s, issuing pro-First Amendment decisions.[80] Still, progress was minimal. In *Cantwell v. Connecticut*, a Jehovah's Witness played an anti-Catholic record to two men on the street.[81] His conviction for breaching the peace was reversed by the Supreme Court.[82] Communicating an offensive message was acceptable because the First Amendment provides a shield under which "many types of life, character, opinion and belief can develop unmolested and unobstructed."[83] However, the state could restrict expressions if they involved "intentional discourtesy," "personal abuse," a "threat of bodily harm," or a "clear and present menace to public peace and order."[84] Shortly thereafter, the Court in *Chaplinsky v. New Hampshire* invoked *Cantwell* to conclude that "fighting words" were outside the First Amendment purview.[85] "Fighting words" were defined as utterances that "inflict injury or tend to incite an immediate breach of the peace."[86] Other socially deviant messages could also be suppressed. In *Giboney v. Empire Storage & Ice Co.*, the Court rejected the notion that protected speech includes that which is an "integral part" of criminal conduct.[87] Finally, the Court declared obscenity unworthy of First Amendment protection in *Roth v. United States*.[88]

77. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
78. Gitlow v. New York, 268 U.S. 652, 654–55 (1925).
79. *Id.* at 666.
80. FARBER, *supra* note 23, at 62.
81. Cantwell v. Connecticut, 310 U.S. 296, 300–01 (1940).
82. *Id.*
83. *Id.* at 310.
84. *Id.* at 310–11.
85. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
86. *Id.* at 572; *see, e.g.*, CHAFEE, *supra* note 25, at 357–493 (discussing the right of free speech in the 1930s); *see also* David Yassky, *Eras of First Amendment*, 91 COLUM. L. REV. 1699, 1730–32 (1991).
87. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).
88. Roth v. United States, 354 U.S. 476, 485 (1957).

D. World War II

With storm clouds again looming over Europe, Congress in 1938 created the House Un-American Activities Committee "to investigate [] the extent, character, and objects of un-American propaganda activities in the United States."[89] Congress also passed the Alien Registration Act of 1940, which criminalized advocating the "overthrowing or destroying any government in the United States by force or violence" and the publishing of such material.[90] Government intrusion intensified after the Japanese bombing of Hawaii in 1941.[91] As Pearl Harbor smoldered, President Franklin D. Roosevelt authorized the FBI to censor the news and control all communications in and out of the country.[92] Wartime zeal prompted Roosevelt and California Attorney General Earl Warren to herd 110,000 Americans of Japanese descent into California concentration camps.[93] The Supreme Court upheld the internment in *Korematsu v. United States*, citing the ongoing wartime emergency.[94]

The travesty of *Korematsu* aside, the Supreme Court took a more enlightened approach to free speech during World War II. In the 1941 decision of *Bridges v. California*, the Court, summarizing the World War I era cases, stated the government could not proscribe speech unless it was a "clear and present danger" to a substantial interest of the State.[95] Through this lens, the Court considered prosecutions only for subversive advocacy.[96] In *Taylor v. Mississippi*, authorities arrested the defendant for claiming that sacrificing one's life in the war was a futile gesture.[97] The Court held that even in wartime, such statements, permissible in times of peace, could not be the basis for conviction.[98] Finally, in *Hartzel v. United States*, the defendant was convicted under the

89. Investigation of Un-American Activities and Propaganda Activities in the United States: Hearings Before a Special Committee on Un-American Activities, H. Res. 282, 75th Cong. (1938).

90. Alien Registration Act of 1940, Pub. L. No. 76-670, § 2, 54 Stat. 670, 671 (*repealed by* 8 U.S.C. § 1302).

91. David L. Hudson, Jr., *Free Speech During Wartime*, FREE SPEECH CTR. AT MIDDLE TENN. STATE (Aug. 12, 2023), https://www.mtsu.edu/first-amendment/article/1597/free-speech-during-wartime.

92. *Id.*

93. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 279 (2004). Along with Japanese Americans, Jehovah's Witnesses were harassed for vigilantism due to their opposition to the war. During World War II, approximately 500 Jehovah's Witnesses "were beaten by mobs, tarred and feathered, tortured, castrated, or killed in more than forty states." *Id.*

94. Korematsu v. United States, 323 U.S. 214, 223–24 (1944); *see also* Legal Information Institute, *Emergency Powers*, CORNELL L. SCH.,
https://www.law.cornell.edu/wex/emergency_powers (last visited Sept. 29, 2023).

95. Bridges v. California, 314 U.S. 252, 262–63 (1941).

96. *Id.*

97. Taylor v. Mississippi, 319 U.S. 583, 586 (1943).

98. *Id.* at 589–90.

Espionage Act for distributing anti-government pamphlets.[99] Reversing his conviction, the Court stressed that "immoderate and vicious invective" had First Amendment protection.[100]

The Court's embrace of free speech receded in the early 1950s. Communism and the concomitant Red Scare permeated the American psyche and led to political witch-hunts, loyalty oaths, and other restrictions on expression.[101] In *Dennis v. United States*, the Court affirmed the convictions of Communist Party leaders who advocated the overthrow of the government.[102] Similarly, in *Garner v. Board of Public Works of Los Angeles*, the Court upheld loyalty oaths for government employees.[103] Cases during the Red Scare revived the free speech debate.[104] Two sides emerged, one seeking a balancing test, the other pressing for an absolutist approach whereby the rights of expression superseded any countervailing interests.[105] The two most prominent absolutists were Supreme Court Justices Hugo Black and William Douglas.[106] Justice Black maintained the First Amendment's "no law" verbiage be given its plain meaning.[107] He submitted the First Amendment excluded any "censorship over views as distinguished from conduct."[108] Justice Douglas agreed: "Whatever may be the reach of the power to regulate *conduct* . . . the First Amendment leaves no power in government over *expression of ideas*."[109] The two justices rejected the clear and present danger test as inimical to expression.[110] This strident approach was

99. Hartzel v. United States, 322 U.S. 680, 681 (1944).

100. *Id.* at 689.

101. FARBER, *supra* note 23, at 63; HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIC RIGHTS AND LIBERTIES IN THE UNITED STATES 190–92 (7th ed. 1998). For further reading on the suppression of rights during this time, *see generally* BURT HIRSCHFELD, FREEDOM IN JEOPARDY: THE STORY OF THE MCCARTHY YEARS (1969); R. CONRAD STEIN, THE GREAT RED SCARE (1998).

102. Dennis v. United States, 341 U.S. 494, 516 (1951).

103. Garner v. Bd. of Pub. Works, 341 U.S. 716, 720–21 (1951).

104. FARBER, *supra* note 23, at 66–68; *see generally* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998) (asserting the Red Scare era is one of the "most widespread episodes of political repression" in American history).

105. FARBER, *supra* note 23, at 66–68; *see generally* Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 910, 936–37 (2000) (considering the fringe protection theory in light of the absolutist view of free speech).

106. FARBER, *supra* note 23, at 66–68; *see generally* TINLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988) (discussing Justice Black's judicial and constitutional philosophy).

107. Everette E. Dennis & Donald M. Gillmor, *Hugo L. Black: "'no law' means no law," in* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 3 (The Iowa State Univ. Press 1st ed. 1978); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867, 874–875 (1960); Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962).

108. Ginzburg v. United States, 383 U.S. 463, 481 (1966) (Black, J., dissenting).

109. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 433 (1966) (Douglas, J., concurring).

110. FARBER, *supra* note 23, at 66–68.

embodied by *Yates v. United States*, where a dissenting Justice Black contended, "The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us."[111] But like the Holmes and Brandeis dissents of the 1920s, those of Black and Douglas in the 1950s would eventually carry the day.[112]

E. The Warren Court

Change was again on the horizon as Chief Justice Earl Warren took the helm in 1956. Renowned for expanding rights in the criminal procedure realm, the Warren Court also issued many decisions defending speech. The Warren Court's seminal decision was *New York Times v. Sullivan*, which observed that the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[113] In *Brandenburg v. Ohio*, the Court unanimously reversed the conviction of a Ku Klux Klan leader under an Ohio criminal syndicalism statute.[114] Speech could be precluded only when "inciting or producing imminent lawless action and is likely to incite or produce such action."[115] Because the Ohio statute penalized the advocacy of violence, it infringed the First Amendment.[116] Justices Holmes and Brandeis were thus vindicated as the imminent lawless action test replaced the clear and present danger test, and the six World War I era cases were overruled. The Warren Court upheld the speech rights of students in *Tinker v. Des Moines Independent School District* by permitting them to wear black armbands to protest the Vietnam War.[117] The "apprehension of disturbance" was not enough to restrict expression as the students did not "shed their constitutional rights . . . at the schoolhouse gate."[118] Finally, the Court solidified its protection of messages challenging the government in *Bond v. Floyd*.[119] Georgia legislator Julian Bond was ousted from his state legislative seat for criticizing the Vietnam War. The Supreme Court ruled that Georgia officials could not expel Bond as legislators had "the widest latitude" to speak.[120] More importantly, even statements considered erroneous

111. Yates v. United States, 354 U.S. 298, 344 (1957) (Black, J., concurring in part and dissenting in part).

112. FARBER, *supra* note 23, at 13; Beauharnais v. Illinois, 343 U.S. 250, 267–68 (1952); Dennis v. United States, 341 U.S. 494, 579–91 (1951).

113. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

114. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

115. *Id.*

116. *Id.* at 449.

117. Tinker v. Des Moines Indep. Cmty. Sch. Distr., 393 U.S. 503, 514 (1969).

118. *Id.* at 506, 508.

119. Bond v. Floyd, 385 U.S. 116, 132–35 (1966).

120. *Id.* at 136.

"must be protected to give freedom of expression the breathing space it needs to survive."[121]

F. The Burger Court

Warren Burger replaced Earl Warren as Chief Justice in 1969 and the transition for the First Amendment was seamless. But unlike the Warren Court, the Burger Court developed a more practical approach to free speech.[122] This was marked by the Court's distinction between content-based and content-neutral regulations. As their namesakes suggest, content-neutral restrictions limit communication regardless of the message and content-based restrictions limit communication because of the message.[123]

The high-water mark of the Burger Court's First Amendment jurisprudence was *NAACP v. Claiborne Hardware Co.*[124] During a boycott of stores in Mississippi, an NAACP official warned that any "uncle toms" who did not honor the boycott would "'have their necks broken' by their own people."[125] Violence ensued as those who ignored the boycotts were shot and beaten.[126] The merchants impacted by the boycott sought injunctive relief and monetary damages.[127] The NAACP's free speech defense failed and the organization was held liable for malicious interference. A unanimous Supreme Court reversed, finding that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[128] Further, pursuing social and economic change was protected expression, and because the merchants did not show their losses resulted from violence, the NAACP was not liable for the consequences of their protected speech.[129]

The Court upheld the protesting of residential areas in *Carey v. Brown*.[130] An Illinois statute barred residential picketing except for union-related protests.[131] The Court invalidated the law because it was an "impermissible content-based restriction on protected expression."[132] Once the government opens a forum to some groups, i.e., a union, it may not refuse others from speaking based on the message. Moreover, speaking on issues of public importance "has always

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121. *Id.*

122. David A. Strauss, *Why the Burger Court Mattered*, 116 MICH. L. REV. 1067, 1069–1070 (2018) (discussing the developments of the First Amendment doctrine in the Burger era).

123. Erznoznik v. Jacksonville, 422 U.S. 205, 215 (1975).

124. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982).

125. *Id.* at 901 n. 28.

126. *Id.* at 904.

127. *Id.* at 890.

128. *Id.* at 910.

129. *Id.* at 911, 915.

130. Carey v. Brown, 447 U.S. 455, 471 (1980).

131. *Id.* at 457.

132. *Id.* at 458, 471.

rested on the highest rung of the hierarchy of First Amendment values . . . ."[133] A public concern relates to a social or cultural matter of the community.[134] The Burger Court reiterated this point in *Connick v. Myers* by declaring that speech on public concerns needs "special protection."[135] Such messages deserve the "broadest protection" because unfettered discussion on political issues protects the nation's survival.[136]

G. The Rehnquist Court

The elevation of William Rehnquist to Chief Justice in 1986 did not represent a significant retreat on the free speech front. The Rehnquist Court protected expression but slowed the rights-expanding approach of the Warren and Burger Courts.[137] In *Hustler Magazine v. Falwell*, the Court unanimously ruled that pornographer Larry Flynt had a First Amendment right to parody evangelist Jerry Falwell.[138] The court stated, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[139] Expressing such opinions was imperative and "even though falsehoods have little value in and of themselves, they are 'nevertheless inevitable in free debate . . . .'"[140] In *Boos v. Barry*, the Court invalidated a District of Columbia ordinance banning demonstrations outside foreign embassies.[141] Because the ordinance regulated political speech in a public forum, it was given "the most exacting scrutiny."[142] The Court noted that "our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment" and found no reason to treat foreign officials differently.[143] In *Texas v. Johnson*, the defendant burned an American flag during a political protest.[144] The Court viewed flag burning as expressive conduct since it sought to convey a message likely to be understood by others.[145] As for the offending nature of that message, the Court was clear: the government may not censor

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133. *Id.* at 466–67.

134. Snyder v. Phelps, 562 U.S. 443, 453 (2011).

135. Connick v. Myers, 461 U.S. 138, 145 (1983); *see also Snyder*, 562 U.S. at 452 (acknowledging "the hierarchy of First Amendment values"); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982).

136. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

137. Nadine Strossen, *The Free Speech Jurisprudence of the Rehnquist Court*, FREE SPEECH YEARBOOK 83, 83 (1991).

138. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988).

139. *Id.* at 50.

140. *Id.* at 52 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

141. Boos v. Barry, 485 U.S. 312, 315, 334 (1988).

142. *Id.* at 321.

143. *Id.* at 322 (quoting *Hustler Magazine*, 485 U.S. at 56).

144. Texas v. Johnson, 491 U.S. 397, 399 (1989).

145. *Id.* at 406, 411–12.

speech "simply because society finds the idea itself offensive or disagreeable."[146] The First Amendment is designed to "invite dispute" and "stir[] people to anger."[147]

Further testing the Rehnquist Court's commitment to the First Amendment was abortion. Demonstrations outside abortion clinics were prevalent in the 1980s and 1990s, prompting state and local governments to enact limitations.[148] A flood of First Amendment challenges followed, with three cases reaching the Supreme Court. First, in *Madsen v. Women's Health Center*, the Court upheld a buffer zone near the immediate clinic entrance, but a 300-foot buffer zone around the clinic and a ban on "images observable" from the clinic violated the First Amendment.[149] The prohibition on observable images "burden[ed] more speech than necessary to achieve the purpose of limiting threats to clinic patients."[150] Next, in *Schenck v. Pro-Choice Network of Western New York*, the Court upheld a 15-foot fixed buffer zone around the doorways and driveways of the clinic because protesters had blocked the entrances.[151] However, the 15-foot floating buffer zone was unconstitutional because "commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment . . . ."[152] Finally, the Colorado statute challenged in *Hill v. Colorado* prohibited anyone within 100 feet of an abortion clinic's entrance to approach within 8 feet of another person.[153] The Court found the law content-neutral because it regulated the area where speech could occur and thus applied to all protesters. Still, abortion protestors seeking to persuade clinic patients must have an "opportunity to win their attention" and the Colorado law enabled them to do so through signs, pictures, and speech, which could be disseminated from 8 feet.[154]

H. The Roberts Court

The onset of the Roberts Court in 2005 signaled a new era for free speech. The dissents of free speech stalwarts such as Justices Holmes, Brandeis, Black, and Douglas morphed into majority opinions during the Roberts era. The Roberts Court's protection of controversial, and in many instances, socially

146. *Id.* at 414.

147. *Id.* at 408–09 (quoting Terminiello v. Chicago, 349 U.S. 1, 4 (1949)).

148. *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Hill v. Colorado, 530 U.S. 703 (2000).

149. Madsen v. Women's Health Ctr., 512 U.S. 753, 773 (1994).

150. *Id.*

151. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 381 (1997).

152. *Id.* at 377.

153. Hill v. Colorado, 530 U.S. 703, 707–08 (2000).

154. *Id.* at 728 (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

worthless speech, has been decried.[155] Still, the Court has defied the critics and remains firm that free speech strictures cannot be reduced to a popularity contest.

Four cases exemplify this point. In *United States v. Stevens*, the Court rejected Congress' efforts to bar "crush videos" that depicted acts of animal cruelty.[156] While the underlying conduct could be criminalized, the speech depicting those acts could not. Similarly, the Court struck down a California restriction on the sale of violent video games in *Brown v. Entertainment Merchants Association*.[157] In doing so, the Court refused to create a new free speech exception for violent content, even for minors. In *United States v. Alvarez*, the Court addressed the Stolen Valor Act, which outlawed counterfeit claims of military commendations.[158] The Court struck the statute, holding that false speech is unavoidable, as the First Amendment "protects the speech we detest as well as the speech we embrace."[159] Perhaps most controversial was *Snyder v. Phelps*, where the Court upheld the right to protest military funerals.[160] The demonstrations involved speech on a subject of public concern which could not be penalized "simply because it is upsetting or arouses contempt."[161] The Court thus rejected a "hate speech" carve-out to the First Amendment.[162] Woven into these four rulings is the principle that the individual, not the state, should decide the worth of messages. Protecting such vile forms of speech, the Roberts Court has ensured the core of the First Amendment remains intact.

In sum, this overview illustrates that free speech occupies an important place in the pantheon of civil rights. More so in modern times. Proving the Warren Court's embrace of free expression was not a transitional phase, every subsequent era of the Supreme Court has treated speech reverently. And while the path of First Amendment jurisprudence has meandered at times, the trajectory has been conclusively toward freedom, not repression. With this backdrop, the doctrine of prior restraint is examined.

II. CENSORING THROUGH SURROGATES: BYPASSING THE FIRST AMENDMENT

Given the Supreme Court's staunch support of speech, authorities must be cautious when devising policies that might limit expression. Recognizing that

155. *See* generally LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION (2014); Steven Shiffrin, *The Dark Side of the First Amendment*, 61 U.C.L.A. L. REV. 1480, 1488–90 (2014); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. 165, 169–70, 173 (2015); Lee Epstein, et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

156. United States v. Stevens, 559 U.S. 460, 482 (2010).

157. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011).

158. United States v. Alvarez, 567 U.S. 709, 713, 715–16 (2012).

159. *Id.* at 729–30.

160. Snyder v. Phelps, 562 U.S. 443, 455, 458 (2011).

161. *Id.* at 458.

162. *Id.*

direct censorship is a nonstarter, officials often use subtler tactics such as requesting third parties to suffocate messages. This strategy can be effective because the First Amendment is unenforceable against private parties. Additionally, an entity's refusal to facilitate speakers it disagrees with is itself a form of protected expression. But when the state pulls the strings, this is prior restraint. The state may not enlist private individuals to do its bidding to avoid First Amendment obligations, as insulating itself through a proxy is the "most serious" free speech infringement, according to the Supreme Court.[163] This informal censorship evades the checks and balances of the legislative and judiciary branches essential to a representative government. Officials thus violate the First Amendment when they induce a third party to stop disseminating another's message, which as Section III will show, was a mainstay of COVID censorship. Social media's vise-like grip on private speech enabled government agencies to streamline their censorship. To grasp the pernicious nature of that relationship, the mechanics of prior restraint are analyzed.

A. The Government's Onerous Burden of Proof in Restricting Expression

In any case alleging a free speech violation, the government bears the burden of proof.[164] The First Amendment requires courts to presume speech is protected unless the government shows it is not.[165] If the speech restriction is content-based, it must satisfy strict scrutiny and be narrowly tailored to a compelling government interest.[166] Similar to content-based laws is viewpoint discrimination, which is presumptively unconstitutional.[167] The distinction between a content-based regulation and viewpoint discrimination "is not a precise one."[168] The Supreme Court defines viewpoint discrimination as "an egregious form of content discrimination" that is "a subset or particular instance of the more general phenomenon of content discrimination."[169] Viewpoint-based regulations are particularly detestable because they enable officials to "drive certain ideas or viewpoints from the marketplace."[170] Courts are thus

163. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

164. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000); Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989).

165. Ashcroft v. Free Speech Coal., 535 U.S. 234, 255–56 (2002).

166. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

167. Int'l Women's Day March Plan. Comm. v. San Antonio, 619 F.3d 346, 359 (5th Cir. 2010).

168. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830–31 (1995).

169. *Id.* at 829, 831.

170. R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

more skeptical of viewpoint-based restrictions than content-based restrictions.[171] As the Supreme Court warns, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[172] Finally, when prior restraint is at issue, the government must overcome the "heavy presumption" of its invalidity.[173] Courts permit prior restraints only in exigent circumstances.[174] Specifically, the government must establish that procedural safeguards reduce the possibility of repressing speech.[175] To wit: (1) "the burden of instituting judicial proceedings, and of proving that material is unprotected" rests with the censor; (2) "any restraint prior to judicial review [may] be imposed" for a limited period and only to "preserv[e] the status quo"; and (3) "prompt . . . judicial determination."[176] These principles underscore the difficult defense facing officials sued for First Amendment violations.

B. Distinguishing Between Public and Private Censorship

The government does not possess constitutional rights. Rather, it exercises powers limited by the Constitution. Although authorities can articulate views in carrying out their functions, when those directives impinge on free speech, the First Amendment is implicated.[177] Similarly, government employees have a First Amendment right to express their thoughts as private individuals, but not when speaking pursuant to official duties.[178] Such duties include asking an entity to cease and desist or asking intermediaries to cooperate with authorities.[179]

While officials cannot use a third party to subvert constitutional rights, the line between private and state action can be blurry. The question is whether a private entity's conduct is "fairly attributable to the State."[180] The Constitution is violated when a private actor's conduct is done by dint of state involvement.[181] Although necessarily a fact-bound inquiry, the Supreme Court has identified circumstances in which private parties are treated as government actors via the state action doctrine, which requires a nexus between the government and

171. *Int'l Women's Day March Plan. Comm.*, 619 F.3d at 359 ("[C]ontent-based burdens on speech in a public forum are subject to strict scrutiny, while viewpoint-based burdens are [absolutely] unconstitutional.").

172. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

173. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975).

174. ACLU v. Pittsburgh, 586 F. Supp. 417, 423 (W.D. Pa. 1984).

175. *Se. Promotions*, 420 U.S. at 559–60.

176. *Id.* at 560.

177. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015).

178. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

179. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).

180. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

181. *Id.*

private party's conduct.[182] State action exists if the government exercises "coercive power[,] . . . provides significant encouragement, either overt or covert, or when a private actor operates as a 'willful participant in joint activity with the state . . . .'"[183] The state may not induce private persons to accomplish what it is constitutionally forbidden to do.[184] The Constitution also bars governmental urging even when the private parties are amenable.[185] This can occur in the First Amendment realm when a social media platform closes accounts critical of state policies at the government's request. Professor Yochai Benkler argues this public-private partnership circumvents the First Amendment by employing private-sector censors.[186] Similarly, commentator Michael Meyerson describes it as "collateral censorship."[187] Such suppression is troubling because an unaccountable agency lurks in the shadows while pitting private parties against each other.

C. The Soft Target of Intermediaries

Individuals using social media platforms to speak rely on a series of third parties. The ability to express oneself online depends not only on a user's access to technological intermediaries but also on those entities' ability to use electronic payment systems. This complex web of intermediaries thus encompasses the platforms themselves, Internet service providers, telecommunications carriers, and if remuneration is involved, financial institutions and online payment systems. But technology is the arsonist and fire department, as the tech and financial companies that enable and facilitate expression can also stymie it. Intermediaries therefore function as gatekeepers for online speech. Such speech hangs on a tenuous thread—when prodded by the government, "risk-averse" businesses often cut their associations with the embattled speakers, leaving them financially and technologically adrift.[188]

In 1996, Congress had the foresight to mitigate this issue. Wary of the problem posed by holding intermediaries liable for third-party speech, Congress passed 47 U.S.C. § 230 of the Communications Decency Act. This provision encourages access to various Internet services and preserves intermediaries'

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182. Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 294–96 (2001); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

183. *Brentwood Acad.*, 531 U.S. at 296 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); then quoting *Lugar*, 457 U.S. at 941).

184. Norwood v. Harrison, 413 U.S. 455, 465 (1973).

185. Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967).

186. Benkler, *supra* note 70, at 330–31.

187. Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 118 (1995); *see also* J.M. Balkin, *Essay: Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298–299 (1999); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2303–11 (2014) (discussing collateral censorship resulting from formal and informal government action).

188. Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28–29 (2006).

independence. Specifically, § 230's protections for "interactive computer service[s]" bar vicarious liability in state prosecutions, and shield intermediaries from the "heckler's veto" of private litigation.[189] Although § 230 immunizes websites from liability for user-generated content, such websites have little incentive to protect the rights of their users as the First Amendment does not apply to online platforms.[190] Intermediaries facing subpoenas or reputational injury often prefer to end a third party's financial or online access than incur regulatory wrath.[191] Simultaneously, speakers may be unaware of the surreptitious state activity aimed at intermediaries, leaving First Amendment remedies to languish.[192] As social media platforms have become the public square, the existential role intermediaries play is one authorities increasingly exploit.

This tactic is not new. In the 1940s, law enforcement harassed telephone and telegraph companies.[193] The New York Supreme Court ordered a telephone company to reinstall customers' service after it canceled them at the behest of police.[194] Another New York court barred authorities from requesting phone companies to suspend accounts based on a "mere suspicion or mere belief that they may be or are being used for an illegitimate end . . . ."[195] The Alabama Supreme Court cautioned that public utilities were not the censors of public or private morals, otherwise, the "extrajudicial enlargement of coercive governmental power" would ensue.[196] The independence of telephone companies was indispensable for customers' ability to communicate.[197] Permitting a contrary policy would be a "frightening" development in a constitutional democracy and a dangerous threat to the "body politic."[198] This warning would prove prophetic.

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189. Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014).

190. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 402 (2017); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1439 (2011).

191. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) ("The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights."); Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 101–02 (2015).

192. *Bantam Books*, 372 U.S. at 66 ("It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.").

193. Whyte v. N.Y. Tel. Co., 73 N.Y.S. 2d 138, 139 (Sup. Ct. N.Y. Cnty. 1947).

194. Dees Cigarette & Automatic Music Co. v. N.Y. Tel. Co., 53 N.Y.S.2d 651, 652–54 (Sup. Ct. Richmond Cnty. 1945).

195. Shillitani v. Valentine, 53 N.Y.S.2d 127, 131 (Sup. Ct. N.Y. Cnty. 1945).

196. Pike v. S. Bell Tel. & Tel. Co., 81 So. 2d 254, 258 (Ala. 1955).

197. Shillitani v. Valentine, 296 N.Y. 161, 164 (1947); People v. Brophy, 120 P.2d 946, 955–56 (Cal. App. 1942).

198. *Pike*, 81 So. 2d at 258.

D. The Prior Restraint Doctrine in The Supreme Court

The prior restraint doctrine was first addressed in the 1931 Supreme Court decision of *Near v. Minnesota ex rel. Olson*.[199] A Minnesota law permitted prosecutors to enjoin the publication of "malicious, scandalous and defamatory . . . periodical[s]."[200] However, publishers could avoid injunctions by showing a court "the truth was published with good motives and for justifiable ends . . ."[201] The Supreme Court called the law the "essence of censorship" and struck it.[202] The Court would later explain that prior restraint is harmful because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[203] Or as Professor Alexander Bickel frames it, "A criminal statute chills, prior restraint freezes.[204]

The quintessential prior restraint is a law requiring government approval prior to publication.[205] However, prior restraint can take other forms. One line of cases applies the doctrine to injunctions against speech and publication.[206] This is represented by *New York Times Co. v. United States*.[207] In its most dramatic use of the doctrine, the Court, invoking *Near v. Minnesota ex rel. Olson*, rejected the federal government's efforts to enjoin the *New York Times*' publication of the Pentagon Papers, an exposé of Washington D.C.'s machinations in the Vietnam War.[208] A prior restraint was presumptively unconstitutional and the Court unanimously found this prior restraint did, in fact, violate the First Amendment.[209]

A second line of case law involves government licensing. In a series of decisions in the 1940s and 1950s, the Supreme Court cited the dangers of press

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199. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955).

200. *Near*, 283 U.S. at 701.

201. *Id.* at 702.

202. *Id.* at 713.

203. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 599 (1975).

204. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975).

205. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 86 (J.W. Jones trans., Lonang Institute 2003) (1769).

206. *See generally* 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 (1982); *see generally* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

207. N.Y. Times Co. v. United States, 403 U.S. 713 (1971); *see also* Okla. Publ'g Co. v. Dist. Court of Okla., 430 U.S. 308 (1977) (setting aside order enjoining publication of name of 11-year-old boy charged with delinquency by murder); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 617 (1976) (invalidating order against publication of confessions until impaneling of jury in controversial murder prosecution); Org. for a Better Austin v. Keefe, 402 U.S. 415, 415, 420 (1971) (invalidating order prohibiting distribution of leaflets by citizens' group).

208. N.Y. Times Co., 403 U.S. at 714.

209. *Id.*

licensing in repeatedly invalidating permit requirements.[210] Prior restraint was imposed by conditioning the right to speak on an official's advance approval; failure to obtain the required permit was criminally punished. This was incompatible with the First Amendment.

Finally, and most relevant to COVID-era censorship, the prohibition on prior restraints has been implicated in cases without formal permit requirements or injunctions. The most decisive case finding an informal mechanism constitutes prior restraint is the 1963 decision of *Bantam Books, Inc. v. Sullivan*.[211] There, the Rhode Island legislature created a commission to monitor obscenity in books.[212] After the commission identified objectionable works, it notified its distributors.[213] The notices provided, in part:

> This agency was established by legislative order in 1956 with the immediate charge to prevent the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.
>
> The Commissions have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths and eighteen years of age.
>
> . . . .
>
> The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.
>
> The Attorney General will act for us in case of non-compliance.
>
> The Commissioners trust that you will cooperate with this agency in their work . . . .[214]

While the commission could investigate obscenity violations, it could not prosecute them.[215] Regardless, the Supreme Court held the threat of legal sanctions to push booksellers into removing obscene works bypassed the safeguards of the criminal process.[216] The commission served as an

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210. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (holding unconstitutional statute outlawing unlicensed showing of movies and authorizing denial of license for any sacrilegious film); Kunz v. New York, 340 U.S. 290 (1951) (invalidating permit requirement for public worship on city streets); Niemotko v. Maryland, 340 U.S. 268 (1951) (overturning disorderly conduct conviction for holding religious meeting without permission of park commission); Saia v. New York, 334 U.S. 558 (1948) (striking ordinance against use of sound amplification equipment not approved by Chief of Police); Cantwell v. Connecticut, 310 U.S. 296 (1940) (voiding licensing requirement for religious solicitation); Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down municipal ordinance forbidding distribution of literature without permission of city manager).

211. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 n.8 (1963).

212. *Id.* at 59–61.

213. *Id.* at 61.

214. *Id.* at 62, n. 5.

215. *Id.* at 66–67.

216. *Id.* at 67–70.

unconstitutional "system of informal censorship."[217] This system bore "a heavy presumption against its constitutional validity."[218] That book distributors could disregard the commission's request was of no import because the letter implied threats of criminal liability.[219] It was also immaterial that the commission could not censor works.[220] Eluding due process removed all free speech protections, thus creating an unconstitutional prior restraint.[221]

E. How Federal Courts Construe Bantam Books

Bantam Books' command of a "heavy presumption" against prior restraints has been met with predictable results in lower federal courts.[222] Instructive is the United States Court of Appeals for the Second Circuit's reversal in *Okwedy v. Molinari*.[223] A billboard owner leased two signs to a pastor who used them to display a biblical passage invoked as a prohibition against homosexuality.[224] A New York City borough president wrote a letter to the billboard owner, PNE Media:

> Both you and the sponsor of this message should be aware that many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.
>
> P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force . . . to discuss further the issues I have raised in this letter.[225]

The district court dismissed the pastor's lawsuit, finding no First Amendment violation as the defendant-official "did not have direct regulatory or decision-making authority over PNE."[226] The district court found the defendant's letter was also "not reasonably susceptible to [threatening] interpretation."[227] The Second Circuit reversed.[228] Although the defendant "lacked direct regulatory control over billboards, PNE could reasonably have feared that [the defendant]

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217. *Id.* at 71.
218. *Id.* at 70–71.
219. *Id.* at 68.
220. *Id.* at 66–70.
221. *Id.* at 71–72.
222. *Id.* at 70–71.
223. Okwedy v. Molinari, 333 F.3d 339, 340–41 (2d Cir. 2003).
224. *Id.* at 341.
225. *Id.* at 341–42.
226. *Id.* at 343.
227. *Id.* at 344.
228. *Id.*

would use whatever authority he does have, as Borough President, to interfere with the 'substantial economic benefits' PNE derived from its billboards in Staten Island."[229] Moreover, the official's observation could be interpreted to retaliate against PNE "if it did not respond positively to his entreaties."[230] Such adverse actions qualified as prior restraint.[231]

The Second Circuit reached a similar conclusion in *Rattner v. Netburn*.[232] An official wrote a letter on personal stationery to a local chamber of commerce criticizing an ad in the chamber's newsletter:

> Myself and my neighbors wish to express our concern about the negative and political nature of the *Pleasantville Gazette*. First, we were surprised by the anonymous back-page paid article, which appeared to be a *Gazette* reporter's interview with Mr. Rattner. This "article" directly attacks the intentions and purposes of the Village as a whole, and its volunteer citizens who have tried to do what is right for our community. It involves The Chamber of Commerce in a difficult, ongoing legal situation. We believe that its inclusion in a Chamber paper was and is inappropriate and a disservice to those of us who live here and have been strong supporters of our local businesses.[233]

The district court dismissed the case because the defendant had no authority to impose criminal or other sanctions on the Chamber of Commerce.[234] Nor were the letters followed up with police visits.[235] The Second Circuit held otherwise. While the message lacked reprisal language, it was problematic enough for the Second Circuit that it could be interpreted as conveying adverse action.[236] The court thus reinstated the lawsuit.[237]

An even less threatening letter constituted prior restraint in *Playboy v. Meese*.[238] The United States Attorney General Edwin Meese created a Comission on Pornography to combat obscenity and child pornography.[239] The agency notified companies that they were identified as pornography purveyors and invited them to comment before it issued a report.[240] The letter provided:

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229. *Id.*
230. *Id.*
231. *Id.* at 342–43.
232. Rattner v. Netburn, 930 F.2d 204, 210–11 (2d Cir. 1991).
233. *Id.* at 205–06.
234. *Id.* at 209.
235. *Id.*
236. *Id.* at 210; *see also* Drive In Theatres, Inc. v. Huskey, 435 F.2d 228, 230 (4th Cir. 1970) (upholding injunction against a sheriff who threatened theatre owners for showing pornographic movies).
237. *Rattner*, 930 F.2d at 210.
238. Playboy Enters., Inc. v. Meese, 639 F. Supp. 581, 587 (D.D.C. 1986).
239. *Id.* at 583.
240. *Id.* at 585–86.

> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.[241]

The District Court for the District of Columbia found these words could discourage distributors from selling their constitutionally protected pornography.[242] The distributors were thus granted injunctive relief as they were likely to prevail on the merits in establishing prior restraint.[243]

A more aggressive prior restraint occurred in an Illinois sheriff's fight against prostitution. Sheriff Thomas Dart used a multifaceted campaign to stop classified advertising websites from running thinly disguised ads for prostitution.[244] Dart first pursued Craigslist.org, the largest classified ad website.[245] He sued Craigslist in 2009 to eliminate its "erotic services" category, claiming it violated laws against prostitution.[246] The District Court for the Northern District of Illinois found Craigslist immune from liability because § 230 of the Communications Decency Act dictated that websites "are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts."[247] The lawsuit was thus dismissed, and while Craigslist won the battle, it lost the war. The New York Attorney General shortly thereafter warned Craigslist of an impending prostitution lawsuit and, facing another prolonged public relations nightmare, Craigslist replaced its "erotic services" section with a restricted "adult services" page.[248] Unimpressed with Craigslist's efforts to monitor its new page, "17 attorneys general" then insisted

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241. *Id.* at 588.

242. *Id.* at 587.

243. *Id.; see also* ACLU v. City of Pittsburgh, 586 F. Supp. 417, 425 (W.D. Pa. 1984) (enjoining mayor who sent a letter asking magazine vendors to not sell a pornographic magazine he believed was offensive).

244. Dart v. Craigslist, 665 F. Supp. 2d 961, 963 (N.D. Ill. 2009); Backpage.com, LLC v. Dart, 127 F. Supp. 3d 919, 923 (N.D. Ill. 2015).

245. *Dart*, 665 F. Supp. 2d at 961.

246. *Id.*

247. *Id.* at 967–69.

248. Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES (May 13, 2009), http://www.nytimes.com/2009/05/14/technology/companies/14craig-slist.html?_r=0.

Craigslist scrub all adult content.[249] Caving to public pressure, it did so in 2010.[250]

As the curtain fell on Craigslist, Sheriff Dart pivoted to Backpage.com, the second largest classified advertising website. Dart took a different tack, asking Visa and MasterCard to stop the use of their credit cards on Backpage.[251] Seeking to starve the website of revenues earned through sex-themed ads, Dart told the companies that Backpage fostered prostitution and sex trafficking.[252] On official stationery, Dart stated:

> As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com. . . . [I]t has become increasingly indefensible for any corporation to continue to willfully play a central role in an industry that reaps its cash from the victimization of women and girls across the world. . . . Financial institutions . . . have the legal duty to file 'Suspicious Activity Reports' to authorities in cases of human trafficking and sexual exploitation of minors. . . . Your [credit] cards have and will continue to be used to buy ads that sell children for sex on sites like Backpage.com. . . .[253]

Visa and MasterCard acceded to Dart's wishes and the website's sole source of revenue dried up, provoking Backpage to sue for First Amendment violations.[254] The District Court for the Northern District of Illinois found Dart's letters conveyed threats to Visa and MasterCard but it was unclear whether they ended their services because of the letters.[255] Still, it held Backpage failed to establish the companies feared reprisal and ruled for Dart.[256] The United States Court of Appeals for the Seventh Circuit reversed, finding Dart used state action against the credit card companies because they facilitated the website's speech.[257] Sheriff Dart's cease and desist letters, invoking legal and reputational risk for Visa and MasterCard, were threats intended to cause the companies to censor Backpage. Dart's suggestion of future penalties was classic prior restraint and the court enjoined him from intimidating "credit card companies, processors, financial institutions, or other third parties with sanctions intended

249. Chris Matyszczyk, *Craigslist censored: Adult section removed*, CNET (Sept. 4, 2010), http://www.cnet.com/news/craigslist-censored-adult-section-removed/.

250. *Id.*

251. Backpage.com, LLC v. Dart, 127 F. Supp. 3d 919, 921, 924 (N.D. Ill. 2015).

252. *Id.* at 924.

253. Backpage.com, LLC v. Dart, 807 F.3d 229, 231–32 (7th Cir. 2015).

254. *Backpage.com, LLC*, 127 F. Supp. at 926–27.

255. *Id.* at 928–29.

256. *Id.* at 929–30.

257. *Backpage.com, LLC*, 807 F.3d at 239.

to ban credit card or other financial services from being provided to Backpage.com."[258]

While not case law, two final examples reflect the dire damage intermediary pressure poses. In 2012, WikiLeaks published classified diplomatic cables and documents concerning the Afghanistan and Iraq Wars.[259] After WikiLeaks released the embassy cables, criticism from political leaders was scathing. Senator Joseph Lieberman excoriated the website as a terrorist organization that jeopardized national security.[260] As Chairman of the Senate Homeland Security Committee, Lieberman asked intermediary Tableau Software to stop providing visualization services to WikiLeaks.[261] He also pushed Amazon to end its hosting services for WikiLeaks.[262] The threats worked, as banks and other intermediaries scurried for cover, forcing WikiLeaks offline for months.[263]

Finally, the United States Department of Justice ("DOJ") used a similar tactic with Operation Choke Point in 2013. In the DOJ's crosshairs were politically disfavored businesses such as firearms dealers, pornographers, and payday lenders.[264] The DOJ sought to slash their access to financial institutions.[265] Citing the ostensible reason of policing fraudulent transactions, the DOJ used "secret actions" to compel financial institutions to sever ties with such entities.[266]

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258. *Id.* After surviving Sheriff Dart, the website found itself the focus of state legislatures. Washington, Tennessee, and New Jersey passed criminal laws targeting Backpage.com, but federal courts enjoined them as unconstitutional and preempted by Section 230. *See* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1265 (W.D. Wash. 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 812 (M.D. Tenn. 2013); Backpage.com, LLC v. Hoffman, No. 13-cv-03952 (DMC) (JAD), 2013 U.S. Dist. LEXIS 119811, at *35 (D.N.J. Aug. 20, 2013).

259. Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. TIMES (Dec. 7, 2010), http://www.nytimes.com/2010/12/08/world/08leak.html?_r=0.

260. Kathryn Jean Lopez, *On This Sunday Outrage*, NATIONAL REVIEW (Nov. 29, 2010), https://www.nationalreview.com/corner/sunday-outrage-kathryn-jean-lopez/.

261. Charles Arthur & Josh Halliday, *WikiLeaks fights to stay online after US company withdraws domain name*, THE GUARDIAN (Dec. 3, 2010),

https://www.theguardian.com/media/blog/2010/dec/03/wikileaks-knocked-off-net-dns-everydns.

262. Ewen MacAskill, *WikiLeaks website pulled by Amazon after US political pressure*, THE GUARDIAN (Dec. 1, 2010), http://www.guardian.co.uk/media/2010/dec/01/wikileaks-website-cables-servers-amazon.

263. John P. Mello, Jr., *WikiLeaks Suspends Publication Because of Financial Boycott*, PCWORLD (Oct. 4, 2011),

http://www.pcworld.com/article/242470/wikileaks_suspends_publication_because_of_financial_boycott.html.

264. Darrell Issa, Staff Report of H.R. Comm. On Oversight and Government Reform, *The Department of Justice's "Operation Chokepoint": Illegally Choking Off Legitimate Businesses?* Staff Report 113th Congress at 7–8 (May 29, 2014), http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf (stating the entire list of besieged industries as promulgated by the FDIC).

265. Alan Zibel & Brent Kendall, *Probe Turns Up Heat on Banks*, WALL ST. J. (Aug. 7, 2013, 10:27 PM), http://www.wsj.com/articles/SB10001424127887323838204578654411043000772.

266. Todd Zywicki, *Operation Choke Point*, WASH. POST: THE VOLOKH CONSPIRACY (May 24, 2014, 2:17 AM),

Meanwhile, the Federal Deposit Insurance Corporation ("FDIC") demanded banks stop servicing these industries to choke off the air they needed to function.[267] Without the ability to clear checks, the businesses would collapse.[268] The government issued its instructions without evidence of illegalities.[269] Further, the FDIC lacked jurisdiction over these industries and the DOJ could not outlaw them. The situation became serious enough that Congress intervened. It ordered the FDIC to delete its list of targeted industries and formally bury Operation Choke Point.[270]

F. Prior Restraint Is the Essence of Censorship

These examples highlight the potency of prior restraints. They also reveal courts' disapproval of even tacit government encouragement. The First Amendment is a check on government powers, not a license to coerce. Authorities' use of intermediaries raises special constitutional concerns because it thrives on secrecy and removes due process.[271] It also destroys dissent, as the next section shows.

III. EXTINGUISHING FREE SPEECH DURING THE PANDEMIC

The Constitution governs at all times and circumstances.[272] And while it protects individual rights, "it is not a suicide pact."[273] As one commentator contends, "[t]here isn't one fundamental liberty that is absolute. It's a balancing

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https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point/.

267. *See* Letter from M. Anthony Lowe, Director, FDIC Chicago Regional Office to Board of Directors of [Redacted] Bank (Feb. 15, 2013) (stating that providing banking services to payday lending companies "carries a high degree of risk to the institution, including third-party, reputational, compliance, and legal risk" and that as a result "activities related to payday lending are unacceptable for an insured depository institution").

268. Frank Minter, *FDIC Admits to Strangling Legal Gun Stores Banking Relationships*, FORBES (Jan. 30, 2015, 11:39 AM), http://www.forbes.com/sites/frankminiter/2015/01/30/fdic-admits-to-strangling-legal-gun-stores-banking-relationships/.

269. Jeri Leigh McDowell, *Insidious Design or Instrument of Progress: The Multi-Agency Initiative to Choke Off Undesirable Businesses' Access to the Financial World*, 47 TEX. TECH L. REV. 803, 807–08 (2015); Norbert Michel, *Newly Unsealed Documents Show Top FDIC Officials Running Operation Choke Point*, FORBES (Nov. 5, 2018),

https://www.forbes.com/sites/norbertmichel/2018/11/05/newly-unsealed-documents-show-top-fdic-officials running-operation-choke-point/#640a8f721191.

270. *See* Kent Hoover, *FDIC removes Operation Choke Point's 'hit list,' clarifies guidance to banks*, THE BUSINESS JOURNALS (July 29, 2014, 1:03 PM),

http://www.bizjournals.com/bizjournals/washingtonbureau/2014/07/fdic-removes-operation-choke-points- hit-list.html.

271. *See, e.g.*, Adickes v. S. H. Kress & Co., 398 U.S. 144, 169 (1970).

272. Ex Parte Milligan, 71 U.S. 2, 124 (1866).

273. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

test, it has to be."[274] Individual rights are often at their nadir during the tempests of war and natural disaster.[275] Such justification was invoked during the COVID pandemic when the United States government declared a national emergency for the COVID-19 virus in March 2020.[276] But unlike prior crises, the pandemic "is fluid, presenting issues that evolve and change with each day that passes."[277] Such fluidity deepened the tension between personal rights and societal order.[278] Free speech was not spared as a pattern of repression emerged from the outset and persisted for years. Medical professionals who disagreed with the government, and worse, had the temerity to say so, were suppressed at the White House's request. Believing the case for censorship unassailable, authorities used multiple channels to silence messages disputing the government narrative. The government's public and private threats to third-party intermediaries epitomize prior restraint and viewpoint discrimination. Indeed, most COVID speech restrictions were viewpoint-based as officials did not seek to muzzle all COVID messages, just those challenging the government. The pandemic revealed the pervasive nature of selective censorship by social media platforms.[279] As commentator Alan Dershowitz notes, social media censorship "is almost never content-neutral."[280] Platforms designated content as COVID "misinformation" pursuant to pressure by top federal officials who placed their mandates above criticism. This gutting of the First Amendment rejected seven decades of precedent as the chronicle of cases in Sections I and II demonstrates the Supreme Court's unmistakable position on free speech and prior restraint. Section III addresses that disconnect. It first examines how the government and social media worked to strictly ration COVID information. The depth of this collusion

274. Christopher Conover, *Where the Constitution and COVID-19 intersect*, ARIZ. PUB. MEDIA (Aug. 3, 2020), https://news.azpm.org/p/coronavirus/2020/8/3/177702-where-the-constitution-and-covid-19-intersect/.

275. *See* Christina Farr, *The Covid-19 response must balance civil liberties and public health—experts explain how*, CNBC (Apr. 18, 2020, 10:15 AM), https://www.cnbc.com/2020/04/18/covid-19-response-vs-civil-liberties-striking-the-right-balance.html; *see also* Korematsu v. United States, 323 U.S. 214, 223–24 (1944); Smith v. Avino, 91 F.3d 105, 109–10 (11th Cir. 1996); Elhady v. Kable, 391 F. Supp. 3d 562, 577–79 (E.D. Va. 2019).

276. Press Release, FEMA, COVID-19 Emergency Declaration (Mar. 14, 2020), https://www.fema.gov/press-release/20210318/covid-19-emergency-declaration.

277. Anthony F. DellaPelle, *Constitutional Implications of COVID-19 and Its Impact on Property Rights and Personal Liberties*, AM. BAR ASS'N (July 27, 2020), https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2020/covid-19-constitutional-impact-property-rights-personal-liberties/.

278. Matthew Richardson & Scott Smith, *The Clash Between Emergency Powers and Individual Rights During COVID-19 Pandemic*, JD SUPRA (May 16, 2020), https://www.jdsupra.com/legalnews/the-clash-between-emergency-powers-and-88205/.

279. ALAN DERSHOWITZ, THE CASE AGAINST THE NEW CENSORSHIP: PROTECTING FREE SPEECH FROM BIG TECH, PROGRESSIVES, AND UNIVERSITIES, 34–35 (2021).

280. *Id.* at 35.

was largely uncovered through *Missouri v. Biden*,[281] a First Amendment lawsuit filed by the States of Missouri and Louisiana against the federal government, along with the so-called "Twitter Files," which shed light on the inner workings of Twitter (now "X").[282] Section III then considers the catalyst for COVID censorship and misinformation. Finally, the First Amendment lawsuit by book authors against Senator Elizabeth Warren is scrutinized.

A. The Government-Corporate Forces Arrayed Against Dissent

1. The States Sue the Feds

In May 2022, the attorneys general of Louisiana and Missouri alleged President Joseph Biden and other federal agencies colluded with social media companies to violate the First Amendment. This case is the latest in a series of court challenges against government jawboning, a term that describes informal efforts by officials to pressure private entities, to stop speech. Jawboning can include an express or implied threat of regulation or other adverse consequences if the entity does not accede to the government's demands. The complaint against President Biden alleged the "suppression of speech of disfavored speakers, content, and viewpoint[s]" constituted government action.[283] In July 2022, the attorneys general were permitted to obtain discovery from the Biden Administration and social media companies.[284] Missouri and Louisiana then deposed top-ranking officials, including Dr. Anthony Fauci, FBI Special Agent Elvis Chan, Eric Waldo of the Surgeon General's Office, Carol Crawford of the Center for Disease Controls ("CDC"), Brian Scully of the Cybersecurity and Infrastructure Security Agency, and Daniel Kimmage of the State Department.[285]

After obtaining thousands of internal documents, the attorneys general asked the District Court for the Western District of Louisiana to block federal officials from colluding with social media companies.[286] The support for their motion for preliminary injunction cited 1,432 facts alleging federal officials pressured social media companies to censor speech.[287] Specifically, the FBI and various federal officials held hundreds of meetings with tech companies about

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281. Pls.' Second Am. Compl. at 7–8, Missouri v. Biden, No. 3:22-cv-01213-TAD-KDM (W.D. La. Oct. 6, 2022), ECF No. 84 [hereinafter Pls.' Second Am. Compl., ECF No. 84].

282. Alec Schemmel, *Are the 'Twitter Files' just the tip of the censorship iceberg? One media watchdog thinks so*, CBS AUSTIN (Dec. 12, 2022), https://katv.com/news/nation-world/-are-the-twitter-files-just-the-tip-of-the-censorship-iceberg-one-media-watchdog-thinks-so-twitter-ceo-jack-dorsey-elon-musk-curtis-houck-media-research-center.

283. Pls.' Second Am. Compl., ECF No. 84, *supra* note 281, at 7–8.

284. *Id.* at 101–02.

285. *Id.* at 16, 19–21.

286. *Id.* at 133, 141.

287. *See* Pls.' Proposed Findings of Fact in Supp. of Their Mot. for Prelim. Inj, Missouri v. Biden, No. 3:22-cv-01213 (W.D. La. Oct. 6, 2022), ECF No. 212-3 [hereinafter Pls.' Proposed Findings, ECF No. 2121-3].

misinformation, and authorities repeatedly flagged protected speech for platforms to remove.[288] The CDC similarly arranged meetings with platforms about what content should be censored and served as the fact-checker for social media.[289] Additionally, officials in the Surgeon General's Office and the CDC collaborated on Stanford University's Virality Project, a cross-platform effort to procure the censorship of significant swathes of protected speech.[290] The Virality Project describes itself as "a global study aimed at understanding the disinformation dynamics specific to the COVID-19 crisis."[291] Disconcertingly, the Virality Project aimed to stop even accurate reports. For example, it warned Twitter (now "X") that "true stories . . . could fuel hesitancy" over getting the vaccine or implementing other COVID precautions.[292]

Declaring COVID mandates infallible, the government and tech companies proved a formidable duo. Overseeing this collusion was Rob Flaherty, the Deputy Assistant to the President and Director of Digital Strategy at the White House.[293] His email exchanges with Facebook and Google executives capture the incestuous arrangement, leaving no doubt that state action exists.[294] Seeking to curb vaccine hesitancy, Flaherty was relentless in his campaign to stop vaccine naysayers as he inundated platforms with calls to censor.[295] White House officials also instructed Facebook to monitor private events and de-platform the "Disinformation Dozen," twelve individuals, including Dr. Joseph Mercola, the author suing Senator Elizabeth Warren, who produced 65% of the share of vaccine criticism on social media.[296] Flaherty asked platforms for "a 24 hour report-back" on misinformation about the Johnson & Johnson vaccine.[297] Flaherty brusquely told a Facebook executive in April 2021 that he "couldn't care less about products unless they're having measurable impact" on suppressing dissent.[298] Insufficient help from Facebook prompted

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288. *Id.* at 238, 271.

289. *Id.*

290. Id. at 317.

291. *Launching the SIO Virality Project*, STANFORD INTERNET OBSERVATORY, https://cyber.fsi.stanford.edu/io/content/virality-project (last visited Oct. 4, 2023).

292. Christian Britschgi, *Researchers Pressured Twitter To Treat COVID-19 Facts as 'Misinformation,'* REASON (Mar. 17, 2023, 4:55 PM), https://reason.com/2023/03/17/researchers-pressured-twitter-to-treat-covid-19-facts-as-misinformation/.

293. Pls.' Proposed Findings, ECF No. 212-3, *supra* note 287, at 11–12.

294. *Id.* at 99.

295. *Id.* at 31, 44–46.

296. *Id.* at 41–42, 382; Shanon Bond, *Just 12 People Are Behind Most Vaccine Hoaxes On Social Media, Research Shows*, NPR (May 14, 2021, 11:48 AM), https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes.

297. Pl.'s Proposed Findings, ECF No. 212-3, *supra* note 287, at 30.

298. *Id.* at 27.

Flaherty to fume: "Are you guys f**king serious? I want an answer on what happened here and I want it today."[299]

Flaherty was not the only puppeteer. Throughout the pandemic, CDC officials communicated with Twitter, Facebook, and Google about vaccine misinformation.[300] Surgeon General Dr. Vivek Murthy also ordered platforms to censor. At a July 15, 2021 press conference, Dr. Murthy announced a Health Advisory seeking greater assistance from social media.[301] He asked platforms to stifle disfavored views on health and to divulge internal data with the government.[302] Finally, White House Press Secretary Jennifer Psaki and White House Communications Director Kate Bedingfield dangled the repeal of Section 230 (the law protects websites from liability for third-party speech) and the albatross of antitrust unless more content was removed.[303] Psaki also clamored for the de-platforming of the "Disinformation Dozen."[304]

Cowed tech companies obeyed. They reassured officials of their suppression policies and updated the White House on the latest enforcement actions.[305] When federal officials requested the removal of specific posts and accounts, platforms complied.[306] Targets included Tucker Carlson and Tomi Lahren of Fox News,[307] former *New York Times* science reporter Alex Berenson,[308] and the "Disinformation Dozen."[309] Facebook further provided the CDC with "CrowdTangle" reports about misinformation.[310] The CDC then used CrowdTangle and other social media listening tools to monitor content.[311] Such mechanisms allowed the CDC to flag disfavored messages for censorship.[312] Facebook eventually gave the CDC direct access to CrowdTangle to review content, including private speech such as personal group posts.[313]

Authorities also tracked Twitter. Flaherty told the platform that "if your product is appending misinformation to our tweets that seems like a pretty fundamental issue."[314] When Twitter lagged in the face of White House

299. *Id.* at 47.
300. *Id.* at 147, 149, 205, 209.
301. *Id.* at 79, 81–82.
302. *Id.* at 66–67.
303. *Id.* at 42–43, 48–52, 59–61.
304. *Id.* at 53.
305. *Id.* at 14–16, 22–23, 26, 44–45, 55–56, 58.
306. *Id.* at 12–13.
307. *Id.* at 28.
308. *Id.* at 36.
309. *Id.* at 42, 44.
310. *Id.* at 113–15.
311. *Id.* at 114–15.
312. *Id.* at 124.
313. *Id.* at 114–15, 120–21.
314. Press Release, Andrew Bailey, Mo. Att'y Gen., Missouri Attorney General Releases More Documents Exposing White House's Social Media Censorship Scheme (Jan. 9, 2023),

demands, Flaherty accused it of "bending over backwards" to permit speech.[315] The White House also asked Twitter to restrain Robert Kennedy, Jr., a frequent critic of COVID regulations and a plaintiff in the Elizabeth Warren litigation.[316] Dr. Robert Malone, an mRNA vaccine researcher who argued vaccines were ineffective, was banned from Twitter for violating its COVID misinformation policies.[317] Soon after, YouTube removed videos of his interview with Spotify podcast host Joe Rogan.[318] Twitter suspended Alex Berenson for citing the results from Pfizer's clinical trial and questioning vaccine mandates after White House pressure.[319]

Browbeat by the government, social media platforms insisted that COVID polices were not debatable. Facebook assured the White House and Surgeon General, "We hear your call for us to do more . . . ."[320] And with the government's imprimatur, the platforms' policies had an aura of invincibility. Facebook deleted pages, groups, and accounts with views considered COVID misinformation.[321] Twitter forbade users from sharing purportedly misleading information about COVID-19, which might inflict harm.[322] Messages sowing discontent about vaccines, masks, or lockdowns were branded as misinformation and banned. Authorities instructed citizens to follow the experts, but only those endorsed by the government. Meanwhile, scientists and medical experts with significant experience but divergent views became pariahs. The battle lines were thus irreversibly drawn; following the medical bureaucracy's pronouncements was praised while independence was ostracized.

Despite the onslaught of evidence, the federal government moved to dismiss the case, arguing that the plaintiffs did not have standing to bring the lawsuit. It further argued the plaintiffs' state action theory, that jawboning, *i.e.*, using a position of authority to persuade, transformed the social media platforms'

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https://ago.mo.gov/home/news/2023/01/09/missouri-attorney-general-releases-more-documents-exposing-white-house%27s-social-media-censorship-scheme.

315. *Id.*

316. Pls.' Proposed Findings, ECF No. 212-3, *supra* note 287, at 12–13.

317. Hillary Brueck, *The rise of Robert Malone, the mRNA scientist turned vaccine skeptic who shot to fame on Joe Rogan's podcast*, BUSINESS INSIDER (Feb. 27, 2022, 8:00 AM), https://www.businessinsider.com/dr-robert-malone-mrna-scientist-vaccine-skeptic-2022-2.

318. Brian Niemietz, *Joe Rogan video taken down by YouTube for anti-vax content*, NEW YORK DAILY NEWS (last updated Jan. 3, 2022, 10:33 PM), https://www.nydailynews.com/snyde/ny-joe-rogan-youtube-covid-vaccine-20220103-d5yqeqkzfbadppkefp4m3rnkbi-story.html.

319. Pls.' Proposed Findings, *supra* note 287, at 211–14.

320. *Id.* at 94.

321. Shannon Bond, *Facebook Widens Ban On COVID-19 Vaccine Misinformation In Push To Boost Confidence*, NPR (Feb. 8, 2021 1:07 PM), https://www.npr.org/2021/02/08/965390755/facebook-widens-ban-on-covid-19-vaccine-misinformation-in-push-to-boost-confiden.

322. *Twitter will no longer enforce its COVID misinformation policy*, THE ASSOCIATED PRESS (Nov. 29, 2022, 9:40 PM), https://www.npr.org/2022/11/29/1139822833/twitter-covid-misinformation-policy-not-enforced.

removal of COVID-19 misinformation into the government's own actions, was without merit. In March 2023, the district court rejected this view, finding that the plaintiffs sufficiently "allege[d] significant encouragement and coercion that converts the otherwise private conduct of censorship on social-media platforms into state action . . . ."[323] The court found a chronological chain of causation between the government's actions and disciplinary measures from social media platforms. In fact, there was "a cohesive and coercive campaign by the Biden Administration . . . to threaten and persuade social media companies to more avidly censor so-called 'misinformation.'"[324]

In July 2023, the court doubled down on its position, issuing a preliminary injunction against the Biden Administration. The court prevented it from "urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms . . . ."[325] The injunction also prevented the government from "threatening, pressuring, or coercing social-media companies in any manner to remove, delete, suppress, or reduce posted content of postings containing protected free speech . . . ."[326] According to the court, the evidence "depicts an almost dystopian scenario," in which the federal government "seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'"[327] The 155-page opinion details, *inter alia*, the government's efforts to silence epidemiologists who disagreed with Dr. Fauci, parents concerned with mask mandates, and even parody accounts mocking Dr. Fauci.[328] The court found that plaintiffs such as Jay Battacharya, Martin Kulldorff, Aaron Kheriaty, and Jill Hines, had their rights to speak and to hear others speak abridged by the federal government.[329] Still, it was not a complete gag order on the government. The court permitted "informing social-media companies of postings involving criminal activity or criminal conspiracies."[330] The injunction also allowed the government to alert social media companies to threats to national security or attempts to subvert voting.[331] The government immediately appealed the decision, and a panel of the Fifth Circuit issued a temporary stay of the

323. Order Granting in Part and Den. in Part Def.'s Mot. to Dismiss at 62, Missouri v. Biden, No. 3:22-CV-01213 (W.D. La. Mar. 20, 2023), ECF No. 224 [hereinafter Order Granting in Part and Den. in Part Def.'s Mot. to Dismiss, ECF No. 224].

324. *Id.* at 42–43.

325. Order Granting in Part and Den. in Part Pl.'s Mot. for Prelim. Inj. at 4, Missouri v. Biden, No. 3:22-CV-01213 (W.D. La. July 4, 2023), ECF No. 294 [hereinafter Order Granting in Part and Den. in Part Pl.'s Mot. for Prelim. Inj., ECF No. 294].

326. *Id.*

327. *Id.* at 154.

328. Order Granting in Part and Den. in Part Pl.'s Mot. for Prelim. Inj., ECF No. 294 at 4, 55–56.

329. *Id.* at 153–55.

330. *Id.* at 5.

331. *Id.* at 5–6.

injunction while the appeal proceeds.[332] While this case will likely continue to meander through the legal system for years, the exposure of how far the government wormed its way into social media may be the lasting legacy of this litigation.

2. The Twitter Files Confirm the Collusion

Echoing the discovery unearthed in *Missouri v. Biden*, the public-private conspiracy was further exposed by the "Twitter Files." This trove of internal company emails and chats was made public in December 2022 by newly minted Twitter CEO Elon Musk.[333] After surveying the Twitter Files, journalist and former *Rolling Stone* editor Matt Taibbi concluded "the government was in the censorship business in a huge way," encompassing "every conceivable wing" of federal enforcement agencies.[334] Journalist Michael Shellenberger, along with Taibbi, appeared before the Congressional Subcommittee on the Weaponization of the Federal Government in March 2023 to comment on the Twitter Files.[335] Shellenberger warned, "I've never worked on an issue where so frequently, while doing it, I just had chills going up my spine because of what I was seeing happening."[336] He asserted the federal government built "mechanisms to proliferate a Censorship-Industrial Complex around the country to censor on a whole range of issues."[337] Taibbi concurred that the federal government was spearheading internet censorship and social control. Taibbi explained that along with government agencies scanning Twitter, there were "20 quasi-private

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332. Def.'s Notice of Appeal of Den. of Prelim. Inj. at 1, Missouri v. Biden, No. 3:22-CV-01213 (W.D. La. July 5, 2023), ECF No. 296 [hereinafter Def.'s Notice of Appeal of Den. of Prlim. Inj., ECF No. 296]; Order Granting Temp. Stay of Prelim. Inj. at 1, Missouri v. Biden, No. 23-30445 (5th Cir. July 14, 2023), ECF No. 34 [hereinafter Order Granting Temp. Stay of Prelim. Inj., ECF No. 34].

333. Aimee Picchi, *Twitter Files: What they are and why they matter*, CBS (Dec. 14, 2022, 6:46 PM),
https://www.cbsnews.com/news/twitter-files-matt-taibbi-bari-weiss-michael-shellenberger-elon-musk/.

334. *Id.*; *see also* Charles Creitz, *Twitter files publisher says government was in the censorship business 'in a huge way,'* FOX NEWS (Jan. 5, 2023 6:00 AM),
https://www.foxnews.com/media/twitter-files-publisher-government-in-censorship-business-huge-way.

335. *The Twitter Files*, Hearing Before the H. Select Subcomm. on the Weaponization of the Fed. Gov't, H. Comm. on the Judiciary, 118th Cong. (2023) (testimony of Matt Taibbi, Journalist and Michael Shellenberger, Author, Co-founder, Breakthrough Inst. and the Cal. Peace Coal.); Emily Brooks & Rebecca Klar, *'Weaponization' subcommittee members spar over 'Twitter Files,'* THE HILL (March 9, 2023, 2:21 PM), https://thehill.com/homenews/3892219-weaponization-subcommittee-members-spar-over-twitter-files/.

336. Christopher Bertman, *Shellenberger: Censorship-Industrial Complex Is 'Terrifying Mechanism' Only Seen In 'Totalitarian Societies,'* TIMCAST (March 29, 2023),
https://timcast.com/news/shellenberger-censorship-industrial-complex-is-terrifying-mechanism-only-seen-in-totalitarian-societies/.

337. *Id.*

entities" assisting them.[338] He warned this public-private cabal was creating "lists of people whose opinions, beliefs, associations, or sympathies are deemed to be misinformation, disinformation, or malinformation."[339] Taibbi was rewarded for his troubles with a visit by IRS agents to his home the same day as his Congressional testimony.[340]

The Twitter Files, along with *Missouri v. Biden*, has confirmed the plotting of federal officials and their obsession with controlling the COVID conversation. Down to the last wayward post, the government scoured social media platforms to ensure the only speech allowed was that aligned with the state's script. Never before has the government taken such a proactive, intrusive, and incessant pursuit of speech it disfavored. The grave constitutional concerns of this unprecedented approach aside, this stranglehold has real-life implications. Free-flowing scientific inquiry is vital as unorthodox views spur innovation. In the midst of a global health crisis, professionals from diverse disciplines attempted to decipher the origins of the COVID-19 virus and explore the efficacy of various COVID-19 treatments.[341] Hardly subversive. Yet such curiosity became anathema as the government and tech companies regarded free thought as hazardous to one's health.

Worse, as the battle against COVID-19 raged, White House officials tried to parlay their success in censoring COVID-19 speech into a blanket assault on the First Amendment. In April 2022, they floated the idea of the "Disinformation Governance Board," an advisory segment of the Department of Homeland Security.[342] Further flirting with tyranny, the Board would assist social media platforms to monitor and censor content.[343] Amid significant outcry, the Board and its working groups were halted a few weeks after its announcement, and public backlash forced Board head Nina Jankowicz to resign.[344] Department of Homeland Security Secretary Alejandro Mayorkas disbanded the Board a few

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338. *Hearing on the Weaponization of the Federal Government on the Twitter Files: Hearing Before the H. Select Subcomm. on the Weaponization of the Fed. Gov't, H. Comm. on the Judiciary*, 118th Cong. 2 (2023) (statement of Matt Taibbi, Journalist).

339. *Id.* at 3.

340. Alec Schemmel, *GOP wants answers after IRS agent allegedly shows up at Twitter Files journalist's house*, CBS Austin (Mar. 28, 2023, 2:46 PM), https://cbsaustin.com/news/nation-world/gop-wants-answers-after-irs-agent-allegedly-shows-up-at-twitter-files-journalists-house-matt-taibbi-jim-jordan-house-judiciary-committee.

341. *Physicians Declaration–Updated Global COVID Summit*, INT'L ALL. OF PHYSICIANS AND MED. SCIENTISTS (Oct. 29, 2021), https://doctorsandscientistsdeclaration.org.

342. Associated Press, *DHS Disinformation Board's Work, Plans Remain a Mystery*, U.S. NEWS & WORLD REPORT (May 5, 2022, 7:36 AM),
https://www.usnews.com/news/politics/articles/2022-05-04/dhs-disinformation-boards-work-plans-remain-a-mystery.

343. *Id.*

344. Geneva Sands, *DHS shuts down disinformation board months after its efforts were paused*, CNN (Aug. 24, 2022, 10:46 PM), https://www.cnn.com/2022/08/24/politics/dhs-disinformation-board-shut-down/index.html.

months later.[345] Author and activist Ayaan Hirsi saw parallels to the Sedition Act of 1918, where critics of the federal government were jailed.[346] Kevin Goldberg, a First Amendment scholar at the non-partisan Freedom Forum, warned it was "wrong and concerning" that a government agency with enforcement powers created in the aftermath of the September 11, 2001 attacks would make decisions about speech.[347] The Supreme Court, invoking George Orwell's *1984*, would likely concur: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[348] The ominous overtones of a censorship bureau notwithstanding, the Board should not have been a surprise. After all, it was a natural outgrowth of the COVID censorship efforts. Officials simply pivoted from squelching COVID-19 dissent to all government criticism. While the censorship movement suffered a setback when the Board was disbanded, the fact such a strategy was even unveiled bodes ill for civil liberties.

All told, federal officials are inducing the censorship of COVID-19 policy criticism via significant encouragement, coercion, collusion, and pervasive entwinement with private actors. Such flagrantly unconstitutional behavior might be permissible in an exigent circumstance for an exceedingly brief period. Indeed, while the initial fervor of the pandemic meant some First Amendment freedoms, such as the right to assembly, might be briefly circumscribed, authorities continued to act reflexively and not reflectively long after the initial "two weeks to flatten the curve" expired.[349] Nor did time dim the devotion to suppression. Censoring voices concerned about public health mandates for two years was an overwrought reaction which stopped legitimate discourse on a topic of tremendous significance. The state can express views in carrying out its functions but cannot violate individual rights in the process.[350] Nor can officials target speech they consider wrong.[351] Despite such axioms, officials applied a one-size-fits-all approach to COVID-19 that was intolerant of dissent. Most troubling, this approach rested on a fundamental misreading of free speech doctrine: that misinformation can be censored.

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345. *Id.*

346. Ayaan Hirsi Ali, *The desperation of Biden's Disinformation Board*, UNHERD (May 10, 2022), https://unherd.com/2022/05/the-desperation-of-bidens-disinformation-board/.

347. Rob Garver, *US Homeland Security's "Disinformation Governance Board" Assailed by Lawmakers*, VOICE OF AMERICA, (May 5, 2022, 2:55 AM),
https://www.voanews.com/a/homeland-security-s-disinformation-governance-board-assailed-by-lawmakers-/6557453.html.

348. United States v. Alvarez, 567 U.S. 709, 723 (2012) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003) (1949)).

349. *See generally* Missouri v. Biden, No. 3:22-cv-01213-TAD-KDM (W.D. La. Oct. 6, 2022).

350. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015).

351. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770–71 (1988).

B. Misinformation Is Protected Speech as a Matter of Law

During the pandemic, the misinformation charge was slung early and often, marking the demise of many social media accounts. In a social media-obsessed culture, the significance of such a penalty cannot be overstated. The Supreme Court acknowledges that social media "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[352] Courts have thus found that liking, commenting on, and reposting Facebook posts are First Amendment-protected activities.[353] Yet such protected expression was silenced during COVID-19 based on the flawed notion of misinformation.

The notion of misinformation has been both oversimplified and misunderstood. The media and government's fixation with COVID misinformation appears to have established that such expression can be silenced. That appearance is an illusion. First, the Constitution protects misinformation as both the initial message constituting misinformation and the accusation of misinformation are opinion-based. Although a statement of fact is not shielded from liability by being prefaced with the words "in my opinion," if the speaker states a subjective view, theory, or even conjecture, such opinions are constitutionally protected.[354] Second, the subject underlying the misinformation accusation—COVID—personifies public and political concerns. Messages on public matters "are classic forms of speech that lie at the heart of the First Amendment."[355] The overlapping category of political speech similarly sits at the "highest rung" of First Amendment hierarchy.[356] Scholars support this approach. Laurence Tribe argues that political advocacy is "the very kind of speech that the First Amendment is meant to protect most vigorously."[357] Cass Sunstein also stresses that "political speech belongs in the top tier . . . ."[358] Third, as Section I makes abundantly clear, while speech may be illogical, offensive, or wrong, such characteristics do not strip its First Amendment protections. The Supreme Court cautions that although "falsehoods have little value" they are

352. Packingham v. North Carolina, 582 U.S. 98, 107 (2017).

353. Robinson v. Hunt Cnty., 921 F.3d 440, 447–48 (5th Cir. 2019) (commenting on a Facebook page is First Amendment-protected activity); Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) ("liking" a web page is First Amendment-protected speech); *see also* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019), *cert. granted, vacated as moot sub nom*. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Mem.) ("Replying, retweeting, and liking are all expressive conduct that blocking inhibits. Replying and retweeting are messages that a user broadcasts, and, as such, undeniably are speech.").

354. Milkovich v. Lorain J. Co., 497 U.S. 1, 17–21 (1990).

355. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377 (1997).

356. Connick v. Myers, 461 U.S. 138, 145 (1983).

357. Laurence H. Tribe, *Dividing Citizens United: The Case v. The Controversy*, 30 CONST. COMMENT. 463, 467 (2015).

358. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 132 (1993).

inevitable in a free society.[359] It rejects the argument "that false statements, as a general rule, are beyond constitutional protection."[360] Further, quixotic views are also entitled to protection to ensure the debate on public issues remains robust.[361] Speech may not be constrained simply because the idea is disagreeable.[362] The First Amendment is designed to "invite dispute" and "stir people to anger."[363] Speech described as misinformation often does just that. Those attributes thus make misinformation constitutionally protected, not censorable. Yet criticism of COVID policies was identified as misinformation and quashed as authorities ignored this precedent.

The blatant disregard for controlling Supreme Court law aside, the suppression of misinformation has significant structural problems. It is inevitably confronted with the question of who decides what is misinformation. The fatal flaw in repressing misinformation is that like beauty, misinformation lies in the eye of the beholder. A view that is novel or unusual does not make it misinformed, and blithely slapping that label on criticism of government mandates overshadows the underlying issue. Further, officials will capitalize on the nebulous nature of misinformation just as they did with what constituted "terrorist" content in the early 2000s.[364] The arbiter of the true-false dichotomy cannot be politicians. It should instead continue to be the marketplace of ideas. Indeed, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[365] What is more, bestowing officials with the task of truth is untenable given government's propensity to lie. Examples such as the Gulf of Tonkin Incident sparking the Vietnam War,[366] the Nayirah testimony propelling the first Gulf War,[367] and the weapons of mass destruction

359. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

360. United States v. Alvarez, 567 U.S. 709, 718 (2012).

361. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

362. Texas v. Johnson, 491 U.S. 397, 414 (1989).

363. *Id.* at 408–09.

364. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 555–56 (2004).

365. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

366. Elizabeth Becker, *The Secrets and Lies of the Vietnam War, Exposed in One Epic Document*, N.Y. TIMES, (last updated Aug. 1, 2021),
https://www.nytimes.com/2021/06/09/us/pentagon-papers-vietnam-war.html

367. The Nayirah testimony was false testimony given before the United States Congress on October 10, 1990, by a 15-year-old Kuwaiti girl, Nayirah al-Sabah. The testimony was cited by U.S. senators and President George H. W. Bush in their rationale to support Kuwait in the Gulf War. *See* Joseph Darda, *Kicking the Vietnam Syndrome Narractive: Human Rights, the Nayirah Testimony, and the Gulf War*, 69 AMERICAN QUARTERLY 71, 80 (2017). According to the Los Angeles Times in 1992, the girl's testimony was orchestrated by the public relations firm Hill & Knowlton on behalf of its client, the Kuwaiti-sponsored Citizens for a Free Kuwait. Nick B. Williams Jr., *MIDEAST: Kuwait Story of Babies Removed From Incubators Refuses to Die*, LOS ANGELES TIMES (Mar. 6, 1992), https://www.latimes.com/archives/la-xpm-1992-03-06-mn-3337-story.html.

justifying the invasion of Iraq,[368] to name just three, prove the United States government propagates misinformation and manipulates the people to further its narrow agenda. Social media platforms requiring information to be stamped with a state seal of approval instead of flowing freely thus entrusts authorities with an impartiality that history shows they have not only failed to earn, but routinely betrayed. It also demonstrates a dim view of the populace—incapable of considering different views and drawing conclusions themselves.

Outlawing misinformation also disregards the obvious conflict of interest as an official magisterially deciding what is truth smacks of totalitarianism. Such power gives the state the ability to ban speech it dislikes. The consequences of eliminating challenges to government policies are ruinous but certainly foreseeable. Impervious to criticism, officials will act with impunity—the hallmark of despots. Because free speech was included in the Bill of Rights as a bulwark against dictatorship, it cannot be dependent on the whims of officials. That a significant swath of expression now occurs online further facilitates such a power grab.

The practicality of proscribing misinformation also presents problems. Misinformation is inherently amorphous, especially in the 24-hour news cycle where issues constantly evolve. When additional details emerge, prior charges of misinformation can themselves become misinformation. Today's misinformation can thus become tomorrow's truth. A static approach to misinformation is simply not feasible in the modern informational ecosystem, as the pandemic shows. The federal government fervently proclaimed masks, lockdowns, and vaccines were effective, the virology lab in Wuhan, China was not the early epicenter of COVID, and the government did not fund COVID "gain-of-function" research. Views veering off such scripts triggered a torrent of opposition by social media platforms at the government's urging. Any discussions on medical treatments that contradicted the echo chamber of the CDC, the World Health Organization, and Dr. Anthony Fauci were silenced. Yet many of these "wrong" assertions were later considered accepted or at least grounded in some evidence. The lab-leak theory of COVID-19's origin is a quintessential example.[369] Facebook initially accepted Dr. Fauci's initiative to debunk the lab-leak theory, and it mounted an aggressive campaign to censor speech advocating for the lab-leak theory as misinformation.[370] But by 2021, "the circumstantial evidence" of the lab-leak theory was finally acknowledged,

368. Martin Chulov & Helen Pidd, *Defector admits to WMD lies that triggered Iraq war*, THE GUARDIAN (Feb. 15, 2011, 7:58 PM), https://www.theguardian.com/world/2011/feb/15/defector-admits-wmd-lies-iraq-war

369. *See, e.g.*, Richard Muller & Steven Quay, *Science Closes In on Covid's Origins: Four studies—including two from WHO—provide powerful evidence favoring the lab-leak theory*, WALL ST. J. (Oct. 5, 2021, 6:19 PM), https://www.wsj.com/articles/covid-19-coronavirus-lab-leak-virology-origins-pandemic-11633462827.

370. Editorial Board, *Facebook's Lab-Leak About-Face*, WALL ST. J. (May 27, 2021), https://www.wsj.com/articles/facebooks-lab-leak-about-face-11622154198.

and Dr. Fauci and other Biden Administration officials admitted the theory's plausibility.[371] After a long period of censorship, in May 2021, Facebook and other platforms announced they would stop suppressing speech supporting the lab-leak theory. Similarly, scientific support for masks has wavered as the January 2023 Cochrane review of physical interventions to slow viral transmission clarified that the evidence for masking is underwhelming.[372] Hindsight has also raised questions about vaccines. A February 2023 *Lancet* article concluded the "SARS-CoV-2 vaccines are insufficiently efficacious in preventing infections."[373] It is also undeniable that vaccinated people can catch and transmit COVID. These examples confirm that the only constant in science and medicine is change. They also suggest there was room for debate on these issues. While some platforms have since modified their policies to signify these shifts, such views previously fell within the ambit of misinformation, and their advocates censored across the social media spectrum.

In sum, censoring misinformation disavows nearly a century of Supreme Court precedent and endangers freedom of thought. Open dialogue is a feature, not a flaw, of a free society, and an unfettered exchange of ideas will discredit a misguided message far better than suppression. A true democracy needs dissent, controversy, and opposition. Anything less would defy a multitude of Supreme Court opinions and reduce cases like *Texas v. Johnson*, *NAACP v. Claiborne Hardware Company*, *Bond v. Floyd*, and *Bantam Books, Inc. v. Sullivan* to little more than weathered gravestones dotting the legal landscape.

C. Senator Warren Censors the COVID Contrarians

1. The Facts

Further emblematic of the efforts to depict unison on COVID matters is United States Senator Elizabeth Warren. While garnering less fanfare than the White House officials' pressure on social media platforms, Warren's public pronouncements present a more nuanced question of what constitutes an adverse action under *Bantam Books*. On September 7, 2021, Warren wrote a letter to Amazon requesting a review of its algorithms that emphasized works with "vaccine misinformation."[374] She singled out *The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal*,

371. Pl.'s Second Am. Compl., ECF No. 84, *supra* note 281.

372. Tom Jefferson et al., *Physical interventions to interrupt or reduce the respiratory viruses*, COCHRANE LIBR. (Jan. 30, 2023), https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD006207.pub6/full; s*ee generally* IAN MILLER, UNMASKED: THE GLOBAL FAILURE OF COVID MASK MANDATES (2022).

373. Zhi-Rong Yang et al., *Efficacy of SARS-CoV-2 vaccines and the dose-response relationship with three major antibodies: a systematic review and meta-analysis of randomised controlled trials*, THE LANCET MICROBE (Feb. 28, 2023), https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(22)00390-1/fulltext.

374. Compl., *supra* note 6, at 3.

by Dr. Joseph Mercola and Ronnie Cummins, as a highly ranked book based on "misinformation about COVID-19 vaccines and treatments."[375] A screenshot of the book appeared in her letter.[376] The letter provides:

> I write regarding concerns that Amazon is peddling misinformation about COVID-19 vaccines and treatments through its search and "Best Seller" algorithms. This is the second time in six months that I have identified Amazon practices that mislead consumers about COVID-19 prevention or treatment: earlier this year, I wrote regarding concerns that the company is providing consumers with false and misleading information about FDA-authorized KN95 masks. This pattern and practice of misbehavior suggests that Amazon is either unwilling or unable to modify its business practices to prevent the spread of falsehoods or the sale of inappropriate products—an unethical, unacceptable, and potentially unlawful course of action from one of the nation's largest retailers.
>
> . . .
>
> Conspiracy theories about COVID-19 abound; some insist that the virus is a hoax, others promote false cures to COVID-19, and many have led to untold illnesses and deaths.
>
> . . .
>
> Given the seriousness of this issue, I ask that you perform an immediate review of Amazon's algorithms and, within 14 days, provide both a public report on the extent to which Amazon's algorithms are directing consumers to books and other products containing COVID-19 misinformation and a plan to modify these algorithms so that they no longer do so.[377]

Released on May 16, 2021, *The Truth About COVID-19* is a Wall Street Journal and USA Today bestseller.[378] The work criticizes government COVID policies and delves into the origins of the virus, the safety of COVID-19 vaccines, and the denouncement of alternative treatments.[379] Warren castigated Amazon for promoting the book, as searches on Amazon for "COVID-19" and "vaccine" yielded *The Truth About COVID-19* as the top result.[380] Amazon also described the book as a "Best Seller" and ranked it as the "#1 Best Seller" in the "Political Freedom" category.[381] Displaying the title in Amazon's COVID

375. *Id.* at 3, 11.

376. *Id.* at 11.

377. Letter from Elizabeth Warren, U.S. Sen., Mass., to Andy Jassy, Chief Exec. Officer of Amazon.com, Inc. (Sept. 7, 2021) [hereinafter Letter from Elizabeth Warren].

378. Mot. for Prelim. Inj. at 7, Kennedy v. Warren, No. 2:21-cv-01508, 2021 U.S. Dist. Ct. Motions LEXIS 91158 (W.D. Wa. 2021), ECF No. 7 [hereinafter Mot. for Prelim. Inj., ECF No. 7].

379. Compl., *supra* note 6, at 3.

380. Letter from Elizabeth Warren, *supra* note 377, at 2.

381. *Id.* at 3.

search results and mentioning its bestseller status was, for Warren, "unethical, unacceptable, and potentially unlawful."[382] Amazon thus had to tell Congress how it would modify its algorithms.[383]

On September 8, 2021, the day after sending her letter, Warren issued a press release on her senatorial webpage republishing her letter, linking the letter, and emphasizing that Amazon had contributed to COVID-19 deaths by selling the works.[384] Her press release implored Amazon to "take aggressive action to stamp out COVID-19 misinformation" and reiterated that Amazon's "peddling of . . . misinformation" was "potentially unlawful."[385] The national media touted Warren's letter, amplifying her stance on *The Truth About COVID-19* and its authors.[386] The reaction was swift. Barnes & Noble emailed the book's publisher two days after the letter: "Please note that we have made the editorial decision to remove *The Truth About COVID-19* . . . eBook from sale on our platform."[387] Meanwhile, Amazon demoted the work by not advertising it to users whose purchase history would suggest an interest in it.[388] Amazon also apprised the book's publisher that it would not display ads for the book.[389] Barnes & Noble refused to sell *The Truth About COVID-19* in its stores.[390]

2. The District Court Proceedings

Authors Mercola and Cummins, along with Robert F. Kennedy Jr., who penned the book's foreword, sued Warren for First Amendment violations in *Kennedy v. Warren*.[391] The federal complaint alleged that "'vaccine misinformation' as Senator Warren uses it is propagandistic and false, . . . [and] refer[s] to any speech challenging the safety and efficacy of the COVID vaccines, even when that speech consists of factually accurate information or reasonable and protected opinion."[392] As for vaccines, the plaintiffs argued their utility was "wildly exaggerated" and that safety concerns persist.[393] The

382. Compl., *supra* note 6, at 11.

383. Letter from Elizabeth Warren, *supra* note 377, at 5.

384. Compl., *supra* note 6, at 3–4; *see also* Warren Press Release, *supra* note 6.

385. Mot. for Prelim. Inj., ECF No. 7, *supra* note 378, at 7.

386. *See, e.g.*, Shannon Bond, *An Anti-Vaccine Book Tops Amazon's COVID Search Results. Lawmakers Call Foul*, NPR (Sept. 9, 2021, 4:44 PM), https://www.npr.org/2021/09/09/1035559330/democrats-slam-amazon-for-promoting-false-covid-cures-and-anti-vaccine-claims; *see also* Annie Palmer, *Sen. Elizabeth Warren asks Amazon CEO Andy Jassy to explain why the company's algorithms recommend Covid misinformation*, CNBC (Sept. 8, 2021, 8:43 PM), https://www.cnbc.com/2021/09/08/elizabeth-warren-asks-amazon-ceo-to-crack-down-on-covid-misinformation.html.

387. Compl., *supra* note 6, at 14.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 14–15.

392. *Id.* at 3.

393. *Id.* at 8.

plaintiffs further averred Warren injured them because she stated those selling the work engaged in "potentially unlawful" conduct.[394]

The District Court for the Western District of Washington denied the plaintiffs injunctive relief.[395] The court found the plaintiffs were unlikely to succeed on their First Amendment claim because Warren had no "power to legally punish booksellers for continuing to sell *The Truth About COVID-19*."[396] The district court also found that Warren's letter could not reasonably be construed as accusing booksellers of involvement in criminal activity. Warren's statements "that the circulation of *The Truth About COVID-19* was 'potentially unlawful' and that COVID-19 misinformation has 'led to untold illnesses and death[s]' . . . are not in the same paragraph and, even if they were, equating them to an accusation of homicide requires a vivid imagination."[397]

3. The Appellate Court Proceedings

The U.S. Court of Appeals for the Ninth Circuit affirmed.[398] It first noted the overarching dichotomy of its analysis: "an attempt to persuade is permissible government speech, while an attempt to coerce is unlawful government censorship."[399] Diverging from *Bantam Books* and analogous circuit cases such as *Okwedy*, *Rattner*, and *Backpage.com*, the Ninth Circuit employed a four-factor framework from a Second Circuit decision, *National Rifle Association of America v. Vullo*.[400] There, the Second Circuit found the free speech rights of the National Rifle Association were not violated when a state official investigated three insurance companies that had partnered with the organization to provide coverage for losses resulting from gun use, and the official encouraged insurance companies to discontinue their relationships with Second Amendment groups.[401] In so finding, the Second Circuit examined: "(1) the government official's word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the recipient perceived the message as a threat; and (4) whether the communication refers to any adverse consequences if the recipient refuses to comply."[402] The Second Circuit in *Vullo* dodged the binding *Okwedy* and *Rattner*, making only a few

394. *Id.* at 3.

395. Order Den. Mot. for Prelim. Inj. at 12, Kennedy v. Warren, No. 2:21-cv-01508-BJR, 2022 U.S. Dist. LEXIS 83683 (W.D. Wash. May 9, 2022), ECF No. 49 [hereinafter Order Den. Mot. for Prelim. Inj., ECF No. 49].

396. *Id.* at 9.

397. *Id.*

398. Kennedy v. Warren, 66 F.4th 1199, 1204 (9th Cir. 2023).

399. *Id.* at 1207.

400. *Id.* (citing NRA of Am. v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022)); *see generally* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); *see generally* Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003) (per curiam); *see generally* Rattner v. Netburn, 930 F.2d 204 (2d Cir. 1991); *see generally* Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015).

401. *Vullo*, 49 F.4th at 715–16.

402. *Kennedy*, 66 F.4th at 1207 (citing *Vullo*, 49 F.4th at 715).

passing references to the decisions which found First Amendment violations on far meeker government messages. Even more troubling, *Bantam Books* was pushed to the periphery, cited thrice in *Vullo* and for only general propositions of law.[403]

Vullo is thus a shaky foundation to apply a government speech test, as it is largely unmoored from the restrictions of *Bantam Books*. Indeed, two of the four *Vullo* elements have been expressly dismissed by courts—notably the Second Circuit—as inconsequential to the government speech inquiry: whether the official has regulatory authority over the conduct at issue, and whether the communication refers to any adverse consequences. For example, the *Okwedy* official's lack of regulatory authority over the conduct at issue was not dispositive.[404] Similarly, the message in *Rattner* contained no reprisal language, yet was found to be problematic enough for the Second Circuit to possibly convey adverse action.[405] Unfortunately, the failings of *Vullo* enabled the Ninth Circuit's pro-censorship stance in *Kennedy*. The Ninth Circuit found each of the four factors favored Warren, as discussed next.

D. The Ninth Circuit Circumvents Bantam Books

Applying the four factors of *Vullo*, and not the prior restraint test from *Bantam Books*, the Ninth Circuit first found Warren's "strong words" were no obstacle because the Constitution requires that "elected officials be able to express their views and rally support for their positions."[406] The court thus advocated a seemingly pro-First Amendment position while squelching speech in the process. Mercola's lawsuit was never about Warren's ability to speak as an individual, but rather in her official capacity as a Senator, and using that mantle to thwart the ability of common citizens to speak. Directly confronting booksellers and demanding how they would stop speech is a far cry from "rallying support." Indeed, Warren's press release referred to her letter as a "demand," rather than a request, the letter described Amazon's conduct as "potentially unlawful," and this was the second letter she sent to Amazon in 2021.[407] Still, the Ninth Circuit found the letter's tone and vocabulary constituted lawful persuasion.[408] The court also highlighted that Warren did not follow up on the letter. If she had, her tone might have been more suspect. This is a dangerous rationale. Granting officials the power to dispense a "one-off" threatening message cannot be compatible with *Bantam Books* or the First Amendment. The Ninth Circuit's reasoning is further disengaged from the well-

403. *Vullo*, 49 F.4th at 715, 717, n. 15.

404. *Okwedy*, 333 F.3d at 344.

405. *Rattner*, 930 F.2d at 209–10 (reversing summary judgment on plaintiffs' freedom of speech claim).

406. *Kennedy*, 66 F.4th at 1208.

407. Warren Press Release, *supra* note 6, at 1, 2.

408. *Id.* at 1208–09.

established notion of the chilling effect government pronouncements, even one, can have on freedom of thought.[409]

Second, the Ninth Circuit found that because Warren was only one of 538 federal legislators, it would be unreasonable for Amazon to think that she alone "could bring to bear coercive government power against it for promoting books on its platform."[410] No authority is cited for such a proposition. This is not surprising, as none exists. It also defies decisions such as *Okwedy*, *Rattner*, *Backpage.com*, *Playboy v. Meese*, and *ACLU v. City of Pittsburgh*. The court further swatted away any concern that Warren had a track record of targeting Amazon. The court did not see how her prior attacks "make it any more likely that she could cajole the relevant authorities to punish Amazon if it did not limit the spread of COVID-19 misinformation."[411] Such conduct is the height of relevance. It is also the common theme traversing through most of the prior restraint case law. The fear is that officials can use their authority, whether direct or indirect, to silence speech they do not like. The abuse of such authority, including via back channels, is a real threat that courts throughout the decades have been quick to smother. The Ninth Circuit's ruling gives officials permission to exploit such abuses. Worse, under *Kennedy*, public statements by executive officials could be considered as lacking the "threat of enforcement" unless they come directly from law enforcement or someone with decision-making authority in an enforcement agency.[412] This would give politicians *carte blanche* to attack speech it disfavors through official channels.

Even if Warren is bluffing, there is the potential that authorities could seize on an unrelated transgression to penalize booksellers for furthering the plaintiffs' message. The specter of sanctions can exert a chilling effect on a speaker or intermediary, foreclosing critical constitutional and statutory frameworks that have enabled the Internet to serve as a platform for content that "is as diverse as human thought."[413] Censorship creep creates serious risks for freedom of expression as information may be removed even though it is necessary for meaningful public debate.[414] In *Backpage.com*, the website had a legitimate basis to fear that the sheriff might try to induce other governmental actors who could regulate the company to exercise their powers.[415] Similarly, booksellers

409. Reno v. ACLU, 521 U.S. 844, 870–72 (1997).

410. *Id.* at 1210.

411. *Id.* at 1210, n.1.

412. *Kennedy*, 66 F.4th at 1209.

413. *Id.* at 870 (quoting Reno v. ACLU, 929 F. Supp. 824, 842 (E.D. Pa. 1996).

414. Balkin, *supra* note 1, at 1068; *see also* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009); Courtney C. Radsch, *Privatizing Censorship in Fight Against Extremism Is Risk to Press Freedom*, COMM. TO PROTECT JOURNALISTS (Oct. 16, 2015, 10:17 AM), https://cpj.org/blog/2015/10/privatizing-censorship-in-fight-against-extremism-.php.

415. Backpage.com, LLC v. Dart, 807 F.3d 229, 233 (7th Cir. 2015).

could reasonably respond to Warren's announcements accusing them of "misbehavior" and "potentially unlawful conduct" in the manner outlined in *Backpage.com*: "[Sh]e is in effect calling me an accomplice . . . and I'm afraid [s]he might pull strings to get me investigated and even prosecuted by any one of several federal or state agencies?"[416] For Amazon, the potential for such reprisal is real. Warren has criticized the company for years.[417] She insisted the federal government levy billions of dollars in taxes against it.[418] She attempted to foil its purchase of media entity MGM.[419] She scolded Amazon for "bullying" the Federal Trade Commission.[420] Finally, she attacked the company's monopoly power and again, called for its disintegration in late 2021.[421] Beset by this condemnation, it is conceivable that Amazon would sacrifice the First Amendment rights of third-party authors at the altar of corporate convenience to placate Warren. Yet the Ninth Circuit buried its summary dismissal of these concerns in a footnote.

Third, the Ninth Circuit found that unlike *Bantam Books*, where the book distributors removed the targeted books after the commission's threat, there was no evidence that Amazon changed its algorithms because of Warren's letter.[422] That Barnes & Noble, two days after the letter, removed the eBook from its platform, and Amazon apprised the book's publisher that it would not display ads for the book a couple of weeks later was of no concern to the court.[423] For even if Warren's letter did motivate the companies, their decisions "more plausibly reflected the company's concern over reputational risks in the court of public opinion rather than fears of liability in a court of law."[424] This determination strains credulity as the temporal proximity is blatant. The court further splits hairs by claiming that Barnes & Noble perhaps "reassessed its policies . . . because it was persuaded by Senator Warren's critique."[425] That

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416. *Id.* (outlining a hypothetical dialogue to illustrate a possible alternative response from a third-party filing affidavit).

417. *See* Compl., *supra* note 6; Elizabeth Warren, *Break Up Big Tech*, ELIZABETH WARREN, https://2020.elizabeth warren.com/toolkit/break-up-big-tech (last visited Sept. 28, 2023).

418. *See* The Late Show with Stephen Colbert, *Amazon, I'm Looking at You – Sen. Warren on Her Plan to Make Corporations Pay Their Fair Share*, YOUTUBE (May 13, 2021), https://www.youtube.com/watch?v=zb7O9GkMy54.

419. Letter from Elizabeth Warren, U.S. Sen., to Hon. Lina Khan (Jun. 29, 2021).

420. Letter from Elizabeth Warren, U.S. Sen., Richard Blumenthal, U.S. Sen., Corey A. Booker, U.S. Sen., & Pramila Jayapal, U.S. Rep., to Andy Jassy, Chief Exec. Officer of Amazon.com Inc., and Mark Zuckerberg, Chief Exec. Officer of Facebook, Inc. (Aug. 4, 2021).

421. Elizabeth Warren (@SenWarren), TWITTER, Oct. 13, 2021, https://twitter.com/SenWarren/status/1448397325047566341?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1448397325047566341%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fthehill.com%2Fpolicy%2Ftechnology%2F576692-warren-calls-for-amazon-breakup.

422. Kennedy v. Warren, 66 F.4th 1199, 1211 (9th Cir. 2023).

423. *Id.*; Compl., *supra* note 6, at 14.

424. Kennedy v. Warren, 66 F.4th at 1211.

425. *Id.*

free speech rights teeter on such semantics does a disservice to the near century of developing a First Amendment jurisprudence that protects the individual right to think freely. What is more, simply labeling an official's message as a "critique" does nothing to change the underlying prior restraint test under *Bantam Books*. Again, Warren made it clear that book distributors were engaged in "potentially unlawful conduct" by "promot[ing] false cures" causing "untold illnesses and deaths."[426] Amazon and Barnes & Noble thus undoubtedly (and understandably) sought to free themselves from the very public and very caustic accusation of a government official that it was complicit in killing people. The Ninth Circuit's finding to the contrary is simply disconnected from that reality.

Finally, the Ninth Circuit noted that Warren's letter provided no adverse consequences for Amazon if they disregarded the letter's demands. Specifically, Warren "never hinted" about any action she would take.[427] And Warren's use of the phrase "potentially unlawful" did not alter the analysis because she never stated that there would be any adverse consequences if Amazon failed to comply with her request.[428] To reach this conclusion, the Ninth Circuit took the easy route. It discussed the Seventh Circuit's decision in *Backpage.com*, where Sheriff Dart deployed a scorched earth approach to shutting down the website and its prostitution ads.[429] Pointing out the divergence with Warren's conduct—that she did not go as far as Dart—everything is thus copacetic. Dart's conduct is an outlier and thus instructive but not dispositive. As set forth below, closer to *Kennedy*'s facts are cases like *Okwedy*, *Rattner*, *Backpage.com*, *Playboy v. Meese*, and *ACLU v. City of Pittsburgh*. But the Ninth Circuit refused to confront them. And for good reason. The holdings of those decisions and their interpretations of *Bantam Books*, although not binding on the Ninth Circuit, simply cannot be reconciled with *Kennedy*. A more honest assessment by the Ninth Circuit would have at least tried to distinguish those cases.

E. Mercola and Cummins' Political Speech Is Constitutionally Protected

The First Amendment principles overlooked by both the district court and Ninth Circuit in *Kennedy* are legion. To begin, not all speech is created equal. The Supreme Court recognizes "a rough hierarchy" with communications about politics or public concerns at the top.[430] Speech asserting government impropriety is also on the highest rung of First Amendment protection.[431] It is undeniable that Warren targets the expression of political and public concerns, as *The Truth About COVID-19* authors attack COVID mandates throughout their book. The book is not only a paean to alternative medicines but also a polemic

426. Warren Press Release, *supra* note 6, at 2.
427. Kennedy v. Warren, 66 F.4th at 1212.
428. *Id.*
429. *See* Backpage.com, LLC v. Dart, 807 F.3d 229, 233 (7th Cir. 2015).
430. R.A.V. v. St. Paul, 505 U.S. 377, 422 (1992) (White, J., concurring).
431. Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004).

against government edicts. Next, viewpoint discrimination is presumptively impermissible.[432] And if a restriction is content-based on its face, a court applies strict scrutiny review regardless of the government's benign motive.[433] Warren's conduct succumbs to such unfavorable standards along with the "heavy presumption" against prior restraint.

Under the proper purview of *Bantam Books*, and not *Vullo*, Warren's actions exemplify prior restraint and viewpoint discrimination. Inexplicably, the Ninth Circuit never considered the issue of viewpoint discrimination. Nor did it apply the test from *Bantam Books*. Applying that test reveals a First Amendment violation. The first inquiry in the prior restraint analysis is whether the official tried to foreclose speech she deemed objectionable.[434] Like the officials in *Bantam Books*, Warren did.[435] She accused the sellers of a "pattern and practice of misbehavior."[436] And given the tenor of her proclamations—distributors engaged in "potentially unlawful" conduct by "peddling misinformation" causing "untold illnesses and deaths"—there can be no doubt she aimed to stop speech she loathed.[437] In fact, Warren telegraphed it: she ordered Amazon to "take aggressive action to stamp out" the beleaguered works.[438] Such clarity is the catalyst for liability. The second prior restraint inquiry is whether one could reasonably construe the government communication as a veiled threat of liability.[439] This includes implied threats, as people do not lightly disregard an official's pronouncements.[440] The *Bantam Books* defendant warned booksellers that selling certain works was potentially unlawful, as did Warren.[441] A letter from a United States Senator that the "potentially unlawful" peddling of a specific work causing "untold illnesses and death" is not an implied threat but an explicit one. Warren's "potentially unlawful" language is simply impossible to mend. Her intense interest crossed the line from impassioned advocacy to active suppression. Exposed to liability and possible prosecution for a "pattern and practice of misbehavior" that "alarmingly . . . contributed" to deaths, a reasonable person would consider this a warning and cease such conduct.[442] Which is what subsequently happened. Barnes & Noble's de-platforming of the book came two days after Warren published the letter on her website and one

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432. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995).

433. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993).

434. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61–62 (1963).

435. *Id.* at 67.

436. Warren Press Release, *supra* note 6, at 1.

437. *Id.* at 1–2.

438. Warren Press Release, *supra* note 6, at 1.

439. Hammerhead Enters. v. Brezenoff, 707 F.2d 33, 39 (2d. Cir. 1983); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66–69 (1963).

440. *Bantam Books*, 372 U.S. at 68; Brodheim v. Cry, 584 F.3d 1262, 1270 (9th Cir. 2009).

441. *Bantam Books*, 372 U.S. at 63.

442. Letter from Elizabeth Warren, *supra* note 380, at 1, 2.

day after it went viral.[443] The causality is obvious, as causation "can be inferred from timing alone" when the proximity between the two events is close.[444]

In denying the plaintiffs injunctive relief, the district court (and Ninth Circuit) cited Warren's inability "to legally punish booksellers for continuing to sell *The Truth About COVID-19*."[445] True, but irrelevant. It made no difference in *Bantam Books* that the agents issuing the warnings could not employ formal sanctions.[446] Other federal courts illustrate this point. Both the Second and Seventh Circuit Courts of Appeals observed that an official lacking authority over a plaintiff or third party "is not necessarily dispositive . . . . What matters is the distinction between attempts to convince and attempts to coerce."[447] Further, it is of no import that the official's statements are a mere exhortation that sellers can shrug off.[448] Regardless, Warren's letter and press release are not exhortations. Amazon and other booksellers could reasonably perceive Warren's calls to action as foreshadowing prosecution for their "pattern and practice of misbehavior." Although Warren never identifies the laws at issue, she asserts the books spread "false" medical information about COVID treatments, thereby causing "untold illnesses and deaths." This, of course, is a crime as any "unlawfulness" would put booksellers at risk for investigation. Still, Warren's vagueness is not a virtue. As one district court notes, a government's communication "is more threatening for the absence of particularity . . . . No one enjoys living under a cloud of threatened, or intimated, legal action."[449] A vague speech restriction can thus foreclose even more dialogue. Uncertain meanings in the First Amendment context "lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[450] Vague restrictions also foster arbitrary enforcement, which heightens the risk of targeting unpopular or underrepresented groups.[451] Such concerns are magnified in the political speech realm.[452] Vague or not, Warren's accusations of "potentially unlawful" conduct, abetting the crime of wrongful death, cannot be casually dismissed. The punishment for wrongful death is stark. Along with civil liability, sending "hazardous material through the mails, or material that may kill or injure

443. Compl., *supra* note 6, at 14.

444. Thomas v. City of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004).

445. Order Den. Mot. for Prelim. Inj., ECF No. 49, *supra* note 395, at 9.

446. *Bantam Books*, 372 U.S. at 68.

447. Backpage.com, LLC v. Dart, 807 F.3d 229, 230 (7th Cir. 2015) (quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)).

448. *Bantam Books*, 372 U.S. at 66.

449. Penguin Books USA, Inc. v. Walsh, 756 F. Supp. 770, 779 (S.D.N.Y. 1991) *vacated as moot*, 929 F.2d 69 (2d Cir. 1991).

450. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

451. NAACP v. Button, 371 U.S. 415, 435–36 (1963).

452. Snyder v. Phelps, 562 U.S. 443, 452 (2011).

another" is unlawful under 18 U.S.C. § 1716. That statute punishes offenders with the death penalty or life imprisonment.[453]

If Warren's restrictions are not considered viewpoint discrimination, they are decidedly content-based. Yet the Ninth Circuit ignored the content-based nature of the restrictions. Insulating Warren's threats with First Amendment protection, the court thus permitted extralegal government tactics to suppress speech based on its message. A prior restraint requires extra safeguards to guarantee meaningful judicial review.[454] Such safeguards were nonexistent here. Moreover, permitting a public official to single out works she dislikes and warn bookstores that selling them is "potentially unlawful" would open the censorship floodgates. Equally unconvincing is the district court's emphasis that Warren's statements that selling Mercola's book "was potentially unlawful" and COVID misinformation caused "untold illnesses and death[s]" were in different paragraphs.[455] Such a hyper-technical and narrow reading of *Bantam Books* bleeds the case and its progeny of all meaning. Precedent does not require such precision. Indeed, such an interpretation would enable officials to simply mask their message, leaving intermediaries to mull the punishment-by-implication theme. Although outright commands are the most obvious form of government inducement, the government acts unconstitutionally even when it "can be charged with only encouraging, rather than commanding" improper conduct.[456] Subtler forms of encouragement are sufficient when designed to induce specific action.[457] Regardless, Warren's message is unmistakable, especially in conjunction with her demand that sellers "take aggressive action to stamp out COVID-19 misinformation."[458] The district court and Ninth Circuit ignored the plain language and context of Warren's two communications.

Parsing the merits of *The Truth About COVID-19* is beyond the scope of this Article. However, Warren's assertion that the work contains misinformation is questionable, as Warren identified no inaccurate statements of fact. It is also telling that Warren sought to strangle the book's message instead of refuting it.[459] Presciently, Robert Kennedy's foreword suggested the book would be met with an "Orwellian censorship," which aimed to "abolish all forms of creative thinking and self-expression."[460] Mercola and Cummins arguably present viable challenges to the medical bureaucracy, as the pandemic postscript has undermined what was previously considered conventional wisdom. Similarly, the notion that vaccine criticism should be removed from the debate overlooks

453. 18 U.S.C. § 1716(a), (j)(3).
454. Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).
455. Order Den. Mot. for Prelim. Inj., ECF No. 49, *supra* note 395, at 9.
456. Reitman v. Mulkey, 387 U.S. 369, 375 (1967).
457. Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 615 (1989).
458. Warren Press Release, *supra* note 6.
459. *See generally* Letter from Elizabeth Warren, *supra* note 377.
460. Mot. for Prelim. Inj., ECF No. 7, *supra* note 378, at 16.

that many experts had questions from the vaccine's outset.[461] It also flouts the principle that the state cannot limit "the stock of information" available to the public.[462] Indeed, the right to receive information is an "inherent corollary" of the right of free speech.[463] Finally, the countless medical malpractice lawsuits and class actions against pharmaceutical companies should eviscerate the blind faith placed in either industry.[464]

F. Warren's Letter Is More Threatening Than Those Previously Found Illegal

Warren has maintained her letter never stated that bookstores become criminal accomplices by selling *The Truth About COVID-19*. To be sure, it does not. But as the Seventh Circuit warned in *Backpage.com*, "the letter implies that they are," which is illegal.[465] Further foreboding for Warren is the communications courts deemed threats in *Okwedy*, *Rattner*, and *Playboy*.[466] While not binding in the Ninth Circuit, the difference between the district court's approach in *Kennedy v. Warren* and other lower federal courts is not a gap, but a chasm. The Second Circuit Court of Appeals in *Okwedy* encountered a far more prosaic letter; the official did not assert the billboard's messages were potentially unlawful or that the billboard company could be responsible for killing people.[467] Yet the Second Circuit reversed because "PNE could reasonably have feared that [the official] would use whatever authority he does have, as Borough President, to interfere with the 'substantial economic benefits' PNE derived from its billboards in Staten Island."[468] Amazon could also fear that Warren would use whatever authority she has as Senator to interfere with Amazon's business. Warren's missive is far more intimidating than the letter in *Okwedy* because Amazon is Warren's *bête noire*.

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461. *Physicians Declaration – Updated Global Covid Summit*, INTERNATIONAL ALLIANCE OF PHYSICIANS AND MEDICAL SCIENTISTS, (Oct. 29, 2021), https://doctorsandscientistsdeclaration.org/.

462. First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978).

463. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

464. *See generally* GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA (2020).

465. Backpage.com, LLC v. Dart, 807 F.3d 229, 234 (7th Cir. 2015).

466. Additional cases supporting this proposition include Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987) (finding a threat to a telephone company that carries a particular message service was potentially unlawful); Penthouse Int'l., Ltd. v. McAuliffe, 610 F.2d 1353, 1362 (5th Cir. 1980) (asserting a system allowing law enforcement to determine what constituted obscenity and stop the sale of materials constituted a prior restraint); Council for Periodical Distribs. Ass'n v. Evans, 642 F. Supp. 552, 558 (M.D. Ala. 1986) (granting declaratory and injunctive relief granted against illegal prior restraint, noting substantial "risks of freewheeling censorship"), aff'd in pertinent part, 827 F.2d 1483 (11th Cir. 1987).

467. *See generally* Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam).

468. *Id.* at 344.

Similarly, the letter in *Rattner* merely "wish[ed] to express . . . concern" with a chamber of commerce newsletter.[469] The placidity of *Rattner* pales in comparison to Warren's. Moreover, the district court's errors prompting the Second Circuit reversal in *Rattner* mirrors Warren's assertions: the defendant "had no authority to impose criminal or other sanctions," the defendant's letter was "not followed up with" police visits, and the letter had no "indicia of a prosecutorial instrument."[470] These findings by the district court were irrelevant to the Second Circuit because the proper test was whether a reasonable factfinder could interpret the defendant's letter as "intimating" a threat.[471] Further, the district court's emphasis that the letter was "precatory rather than threatening," was misplaced.[472]

Most instructive is *Playboy v. Meese*, where federal officials simply apprised retailers of upcoming obscenity hearings.[473] The district court found that "the only purpose served by that letter" could be to discourage distributors from selling the publications.[474] It applied *Bantam Books* to find this "form of pressure amounting to an administrative restraint of the plaintiffs' First Amendment rights."[475] Warren's letter is infinitely more threatening as it alerts booksellers that "peddling" the plaintiffs' book is "potentially unlawful," and causes "untold illnesses and deaths."[476] The letter in *Playboy* made no mention that the sellers might be liable or had to alter their business model to appease authorities. Nor did *Playboy* involve a critique of the companies or pornography itself. The informational message in *Playboy* abridged free speech because it might have discouraged distributors from selling pornography.[477] The absence of force in *Playboy*, along with *Okwedy* and *Rattner*, bears no resemblance to the intimidations encountered by sellers of *The Truth About COVID-19*. A finding for Warren would thus create an irreconcilable split with *Okwedy*, *Rattner*, and *Playboy*, and simultaneously raise the bar for what constitutes an adverse government action, giving the government more latitude to suppress speech.

At bottom, *Kennedy* represents a significant setback for the First Amendment. It imposes an unreasonably high bar for plaintiffs who seek relief when authorities censor speech. It also employs an exceedingly narrow reading of *Bantam Books* that will be manna for unscrupulous authorities who will use the weight of the government to stifle speech they dislike.

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469. Rattner v. Netburn, 930 F.2d 204, 206 (2d Cir. 1991)
470. *Id.* at 209.
471. *Id.*
472. *Id.* at 210.
473. Playboy Enters, Inc. v. Meese, 639 F. Supp. 581, 587 (1986).
474. *Id.*
475. *Id.*
476. Compl., *supra* note 6, at 11.
477. Playboy Enters, Inc. v. Meese, 639 F. Supp. 581, 587 (1986).

G. Additional Defenses Against Prior Restraint Falter

Defenses typically invoked against prior restraint are also out of Warren's reach. First, state action exists. If the government exercises "coercive power" or provides "significant encouragement," the state action doctrine is established.[478] Both dynamics are present here, as Warren provided not only "significant encouragement" to booksellers, but also a hard shove. Overnight, the chastened companies disavowed Mercola due to pressure from the high-ranking Senator and concomitant media spotlight—the very outcome Warren sought in her press release when she demanded sellers "take aggressive action to stamp out COVID-19 misinformation."[479] The "coercive power" and "significant encouragement" standards are thus satisfied as a matter of law. And even if Amazon declares it acted independently, Warren is still liable, as cooperation between government officials and private actors can constitute joint participation when the private actors exercise independent judgment.[480]

Second, Warren's status as a United States Senator cannot save her. The Constitution applies to all forms of government investigation.[481] The congressional power of inquiry is not a license to tread on the rights of investigative targets.[482] Abuses of the investigation process violate protected freedoms, and the fact that is "the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."[483] Courts do not grant a committee or individual Senator "the power to do indirectly what it cannot do directly" by ignoring civil rights.[484] Even if the Senate assigned a committee to probe Amazon's algorithms and bookselling policies, the Constitution requires courts to construe that delegation narrowly: "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."[485]

Third, the government-speech doctrine is inapplicable. That doctrine permits the government to express its own opinion without violating the First Amendment.[486] But Warren did not opine about disputed policy questions. She instead contacted booksellers, and with the imprimatur of her United States Senate Office, commanded they alter their policies and "stamp out" specific books.

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478. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

479. Warren Press Release, *supra* note 6.

480. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1454 (10th Cir. 1995) (indicating that a "substantial degree of cooperative action" can constitute "joint action").

481. Watkins v. United States, 354 U.S. 178, 188 (1957).

482. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020).

483. *Watkins*, 354 U.S. at 198.

484. Civ. Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961).

485. *Watkins*, 354 U.S. at 198.

486. Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

Fourth, Warren cannot rely on the Constitution's Speech or Debate Clause.[487] That provision protects senators and representatives from arrest "for any Speech or Debate in either House," and stipulates that "they shall not be questioned in any other Place."[488] The Speech or Debate Clause enables congressional representatives to fulfill their legislative duties. But senators engage in activities other than the legislative activities protected by the Speech or Debate Clause. These include "news releases, and speeches delivered outside of Congress."[489] A statement immunized by the Speech or Debate Clause becomes actionable if republished outside of Congress, as "republishing a [statement] . . . is not an essential part of the legislative process."[490] The Supreme Court has thus excluded "news releases" from such immunity.[491] Warren's press release of September 8, 2021, republished her letter to Amazon. Thus, both the press release and letter fall outside the Speech or Debate Clause domain. Calling on booksellers in a public letter to "stamp out" disfavored content is also not legislative fact-finding.[492] The Speech and Debate Clause is thus inapplicable.

Finally, even if some of Warren's communications qualify as protected speech, liability still exists. Where an official conveys her opinion in the same message to the same recipients where she issued a threat, such opinion becomes indistinguishable from the threat. The First Amendment bars government action if unconstitutional and constitutional speech restrictions are "intertwined."[493] It is thus illegal to combine attempts to convince with attempts to coerce.[494] The reason is simple: failing to reign in such conduct would embolden officials to compel intermediaries as long as they cloak their threats in the garb of advocacy. While Warren retains First Amendment rights, she does not when speaking for the government. Nor does the state's power to speak include the ability to silence others. In representing the government, Warren did what the Supreme Court condemned in *Bantam Books*—warn distributors that selling certain materials is unlawful.[495] Yesterday's obscenity has become today's misinformation, and while the target has changed, the government's desire to control remains.

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487. U.S. CONST. art. I, § 6, cl. 1.

488. *Id.*

489. Hutchinson v. Proxmire, 443 U.S. 111, 131 (1979).

490. *Id.* at 130; Gravel v. United States, 408 U.S. 606, 622–24 (1972).

491. *Hutchinson*, 443 U.S. at 131.

492. *See* Bastien v. Office of Campbell, 390 F.3d 1301, 1316 (10th Cir. 2004) (stating "[n]o Supreme Court opinion indicates that Speech or Debate Clause immunity extends to informal information gathering by individual members of Congress.").

493. Street v. New York, 394 U.S. 576, 587–88 (1969).

494. Backpage.com, LLC v. Dart, 807 F.3d 229, 230–31 (7th Cir. 2015).

495. Bantam Books, 372 U.S. at 70–71.

CONCLUSION

Controversial issues will spark differences of opinion, and such entrenched differences often cannot be bridged. With an intensely personal issue like COVID, friction was inevitable. More so in America's fractured society. Conversation, not condemnation, should have been the lodestar. Instead, political and tech leaders permitted only state-sanctioned views, and those in opposition were singled out for censure. Free thinking cannot survive such a controlled-information dystopia. What is more, such suppression will not be limited to the medical milieu. The government's massive and well-entrenched mechanism of suppression could be deftly redirected to other subject matters. Censorship is rooted in the resistance to competing ideas, and permitting the silencing of COVID misinformation provides authorities with the blueprint to quell any dissent. Misinformation is the inescapable byproduct of a free society and the ability to speak one's mind should not be left to the mercy of government officials. The idea that misinformation is unprotected speech is itself misinformation, designed to instill government speech controls. COVID censorship is thus the first step on the road to perdition.

At its core, the free speech debate is about the willingness to tolerate opposing views. Living in a free and diverse society means hearing disagreeable messages. The First Amendment is not about the ability to speak about mundane matters like food, weather, or sports but instead intended for the provocative subjects that rile. An open environment with exposure to divergent beliefs expands one's worldview and prevents fragility, while a sheltered environment breeds insularity and rigidity. Adversity is thus necessary for individuals, as well as society, to evolve. The solution to the problem of mistaken or misinformed speech is more speech, not suppression. The First Amendment preserves "an uninhibited marketplace of ideas in which truth will ultimately prevail."[496] That process is difficult, time-consuming, and not without error. However, it is the most prudent alternative to reliance on the government intrusion of prior restraint and viewpoint discrimination. And make no mistake, the stakes are high. Bestowing a select few with the power to dictate how society can speak will be the nation's death knell.

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